



Oyster Creek – Stop the Fish Kills

December 3, 2007

Commissioner Lisa Jackson
New Jersey Department of Environmental Protection
401 E. State St., 7th Floor, East Wing
P.O. Box 402
Trenton, NJ 08625-0402

Comment Re: Oyster Creek Nuclear Generating Station NJPDES permit

Dear Commissioner Jackson,

The Delaware Riverkeeper Network is very concerned about the precedent that is being set at the Oyster Creek Nuclear Generation Station with regards to application of section 316(b) of the Clean Water Act. Once again NJDEP is considering a proposal to allow mitigation (in this case a combination of wetlands mitigation and clam bed mitigation) to serve as fulfillment of the Best Technology Available (BTA) requirements of the Clean Water Act. This is the same illegal, and failing approach that was used at the Salem Nuclear Generating Station. We urge you not to repeat the mistakes of the past. Section 316(b) of the Clean Water Act clearly mandates a requirement of closed cycle cooling at Oyster Creek - and even more clearly it prohibits the use of mitigation to fulfill the 316(b) BTA requirements of the law.

The Second Circuit Court of Appeals ruling issued January 25, 2007 regarding EPA's 316(b) regulations for existing facilities - Riverkeeper Inc. et. al, including Delaware Riverkeeper Network v. US EPA - makes clear that mitigation cannot be used to fulfill the requirements of section 316(b). The Delaware Riverkeeper Network was a litigant in this legal action as well as the challenges to the Phase I and Phase III EPA 316(b) rules.

The Second Circuit ruling made very clear, restoration like that being proposed by AmerGen for the Oyster Creek Nuclear Generation Station is not an appropriate or legal way to come into compliance with the 316(b) requirements of the Clean Water Act. The court emphasized that section 316(b) requires a technological approach, and one that is associated with the location, design, construction or capacity of cooling water intake structures. Wetlands projects and clam bed projects do not fulfill this explicit legal requirement as written in the law and emphasized in the Second Circuit ruling - they are not technological solutions addressing location, design, construction or capacity of the facility's cooling water intake structure.

In addition, the court supported the EPA interpretation that the law requires minimization of the impingement and entrainment impacts of a facility. And while the court agreed that EPA could set performance standards setting forth ranges for compliance with the regulations as an acknowledgement that one cannot predict with absolute certainty the level of impingement and entrainment reduction that will result from any particular

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technological approach, it made clear that this did not in any way reduce or diminish the requirement that each facility "minimize the adverse environmental impacts attributable to their cooling water intake structures to the best degree they can." Mitigation on wetlands and clam beds do not minimize impingement and entrainment at Oyster Creek.

The Second Circuit supported the technology-forcing approach of the Clean Water Act and rebutted efforts to derail this approach to environmental protection through the use of cost considerations. In fact the Court made clear that while cost could play a limited role in identifying an array of technologies that may be available to meet 316(b) BTA, there was no obligation whatsoever for EPA to engage in a cost-effectiveness analysis. And considering the State's right to be more protective in its environmental protection efforts the State too is free to set cost arguments aside when considering BTA within their communities.

Closed cycle cooling is, by all accounts, the technology that will minimize the impingement and entrainment impacts of a cooling water intake structure. It is a proved and proven technology available to existing facilities. It is a technology that can be and should be mandated by New Jersey despite cost arguments that continue to be put forth by industry.

It is important to note that PSE&G's mitigation program for the Salem Nuclear Generating Station while also in violation of the clear letter of the law, has failed to provide the promised ecosystem benefits - it has not provided food or habitat of a greater quality that has resulted in improvement to the fish populations of the Delaware Bay, Estuary and River and it has not created a change in vegetation that is sustainable without annual application of herbicides and other damaging human manipulation. Most important, it has not reduced the level of impingement and entrainment inflicted on the Delaware Estuary ecosystem by Salem's cooling water intake structure. It is not a model that can be legally used again, for Oyster Creek or Salem, and it is not an approach that NJDEP should want to pursue again in light of its many failures - most significantly that it is not a legal application of 316(b) of the CWA.

In the absence of legally defensible, and court supported, EPA regulations NJDEP has an obligation to require the use of closed cycle cooling, or a technology that achieves the same level of impingement and entrainment minimization, on all facilities with cooling water intake structures where it is technologically achievable. To the extent the issue of cost has been raised, it can only be used to choose among technologies that provide equivalent impingement and entrainment reduction benefits to those of closed cycle cooling.

We urge you, Commissioner Jackson, to take the findings of the Second Circuit to heart and to take the needed, and scientifically and legally justifiable step of immediately issuing a Clean Water Act permit that requires closed cycle cooling at the Oyster Creek Nuclear Generating Station.

Yours sincerely,
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the Delaware Riverkeeper