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Court Strikes Down EPA Regulations Regarding Cooling Water Fish Kills

January 25, 2007 the United States Court of Appeals for the Second Circuit struck down in part and remanded in part for further clarification Environmental Protection Agency regulations regulating the cooling water intake structures of facilities such as the Salem Nuclear Generating Station, Connecticut Edge Moor and Connecticut Deepwater facilities that operate in the Delaware Estuary.

Section 316(b) of the Clean Water Act requires "that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact". Cooling water intake structures kill trillions of fish a year nationally, and billions locally, as the result of impingement on intake screens and entrainment through the facility. EPA issued regulations applying 316(b) to existing facilities with cooling water intake structures. The regulations issued heavily factored in the costs and benefits in addressing this provision of the CWA and allowed for the use of mitigation measures such as PSE&G's estuary enhancement program designed to alter the vegetative make up of wetlands as a means for making amends for the over 3 billion fish killed at Salem ever year.

The regulations were challenged by a coalition of environmental organizations including the Delaware Riverkeeper Network, Hudson Riverkeeper, American Littoral Society and others.

The second circuit judges ruled:

- "...the language of section 316(b) itself plainly indicates that facilities must adopt the best technology available and that cost-benefit analysis cannot be justified ... EPA can consider cost in establishing BTA [best technology available] but only in a limited fashion and not as a primary consideration. ... Section 316(b) expressly requires a technology-driven result."
- "Although the EPA may, in the circumstances to be discussed, set performance standards as ranges, it must require facilities to minimize the adverse environmental impacts attributable to their cooling water intake structures to the best degree they can."
- ""Restoration measures are not part of the location, design, construction, or capacity of cooling water intake structures ... and a rule permitting compliance with the statute through restoration measures allows facilities to avoid adopting any cooling water intake structure technology at all, in contravention of the Act's clear language as well as its technology-forcing principle. ... the EPA impermissibly construed the statute by allowing compliance with section 316(b) via restoration measures...."
- And the court supported the EPA's interpretation that the adverse environmental impacts to be addressed via 316(b) were impingement and entrainment impacts as opposed to the population impacts PSE&G was arguing for.

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“This is a big win for our region, and one that will have major ramifications for local facilities such as the Salem Nuclear Plant. For years PSE&G has evaded its legal responsibility to minimize its fish kills at Salem and instead has gotten away with some ineffective wetlands mitigation – now they will finally be held accountable for minimizing the harm they inflict on our River every single day” states Maya van Rossum, the Delaware Riverkeeper. “Until today Salem has been the single largest predator in Delaware Bay, now they will have to stop!” states van Rossum.

“Our victory on this issue will protect the fish, the fishermen who depend on them and the ecology of the Delaware Bay, Barnegat Bay and other imperiled estuaries,” said Tim Dillingham, Executive Director of the American Littoral Society. “It will force power plant operators to face up to their responsibilities under the law, and to stop destroying important recreational and commercial fisheries,” states Dillingham.