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Decades of Uncertainty End with Error

*Entergy Corp. v. Riverkeeper, Inc.*¹

I. INTRODUCTION

Congress first adopted the Clean Water Act (“CWA”) in 1972, mandating that cooling water intake structures reflect the use of “best technology available for minimizing adverse environmental impact.”² This Congressional mandate was followed by many years of unclear regulation by the United States Environmental Protection Agency (“EPA”).³ The trend of uncertainty seemed destined to continue after the Second Circuit struck down portions of the EPA regulations in *Riverkeeper v. EPA*.⁴ The Supreme Court’s decision in *Entergy Corp. v. Riverkeeper* reversed the Second Circuit decision, ending years of uncertainty regarding the regulation of cooling water intake structures.⁵ That decision seems to go against clear Congressional intent.

II. FACTS AND HOLDING

Congress enacted the CWA, 33 U.S.C. § 1251 *et seq.*, regulating large power plants that extract water from nearby sources for cooling purposes.⁶ The process of extracting these large amounts of water causes several threats to the environment.⁷ The most serious threat, “impingement,” occurs when the intake structures squash nearby aquatic organisms.⁸ These structures also create the risk of “entrainment,” occurring when the organisms are sucked into the cooling systems.⁹ To

¹ 129 S. Ct. 1498 (2009).

² 33 U.S.C. § 1326(b) (2006).

³ *Entergy Corp. v. Riverkeeper*, 129 S. Ct. 1498, 1503 (2009).

⁴ 475 F.3d 83, 89 (2d Cir. 2007).

⁵ *Entergy Corp.*, 129 S. Ct. at 1510.

⁶ *Id.* at 1502.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* See also National Pollutant Discharge Elimination System – Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing

reduce these threats, § 1326(b) of the CWA requires that these “. . . cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”¹⁰

The EPA promulgated regulations to set the national performance standards for these water intake structures.¹¹ The standard for existing facilities¹² requires the use of technologies that will reduce impingement mortality of fish and shellfish by 80 to 95 percent, and also requires certain facilities to reduce entrainment by 60 to 90 percent.¹³ The regulations list alternative ways for the facilities to meet this standard.¹⁴

Although the EPA did require the use of closed-cycle cooling systems¹⁵ for new facilities, it did not require this of the existing facilities. The EPA strayed away from this requirement due to the high cost of forcing existing facilities to convert to the closed-cycle cooling systems.¹⁶ Furthermore, forcing the conversion would cause the facilities to produce less electricity, which in turn would create the need for additional plant construction.¹⁷ By accounting for these factors, the EPA conducted a cost-benefit analysis when developing the national performance standards for water intake structures.¹⁸

Facilities, 69 Fed. Reg. 41,576, 41,586 (Jul. 9, 2004) (to be codified at 40 C.F.R. pts. 9, 124-25).

¹⁰ 33 U.S.C. § 1326(b) (2006).

¹¹ *Entergy Corp.*, 129 S. Ct. at 1504.

¹² Facilities affected are those with a daily water intake flow exceeding 50 million gallons, of which 25% is used for cooling purposes. Final Regulations to Establish Requirements for Cooling Water Intake Structures, 69 Fed. Reg. at 41,576. Furthermore, the EPA had previously promulgated rules for new facilities utilizing water intake structures. National Pollutant Discharge Elimination System: Regulations Addressing Cooling Water Intake Structure for New Facilities, 66 Fed. Reg. 65,256, 65,256 (Dec. 18, 2001) (to be codified at 40 C.F.R. pts. 9, 122-25).

¹³ *Entergy Corp.*, 129 S. Ct. at 1504.

¹⁴ 40 C.F.R. § 125.94 (2007).

¹⁵ Closed-cycle systems reduce the threat of impingement and entrainment. By recirculating water, the facility is not forced to extract as much water to satisfy its cooling needs. See *Entergy Corp.*, 129 S. Ct. at 1503.

¹⁶ *Id.* at 1504.

¹⁷ *Id.*

¹⁸ *Id.*

The regulations also permit facilities to vary from the national standard.¹⁹ Section 125.94(a)(5)(i) allows a variance if the facility can demonstrate that the costs of complying with the standard would be “significantly greater than the costs considered” by the agency.²⁰ Similarly, § 125.94(a)(5)(ii) allows a variance if the costs of compliance “would be significantly greater than the benefits of complying with the applicable performance standards.”²¹

Various environmental groups and states petitioned for review of these regulations, arguing that Congress did not authorize the EPA to conduct a cost-benefit analysis when setting national performance standards and providing for site-specific variances.²² They argued that the phrase “minimizing adverse environmental impact” implies that facilities must reduce the impact to the smallest amount that is economically possible.²³ They also argued that silence with regards to instructing the EPA to consider a cost-benefit analysis shows Congressional intent to not allow a cost-benefit analysis.²⁴

The Second Circuit Court of Appeals held that the cost-benefit analysis conducted by the EPA was unlawful and remanded the case to the EPA to determine whether they had used a cost-benefit analysis when creating the national standards.²⁵ Justice (then Judge) Sotomayor of the Second Circuit concluded that the “best technology available” standard allowed the EPA to consider the cost of the technologies and only require the use of technology that the industry could reasonably bear.²⁶ Upon review, the U. S. Supreme Court held that the EPA’s interpretation that the “best technology available for minimizing adverse environmental impact” allowed a cost-benefit analysis when creating national performance standards was a reasonable interpretation of §1326(b), and therefore the

¹⁹ *Id.*

²⁰ 40 C.F.R. § 125.94(a)(5)(i) (2007).

²¹ *Id.* § 125.94(a)(5)(ii).

²² *Entergy Corp.*, 129 S. Ct. at 1505.

²³ *Id.* at 1506.

²⁴ *Id.* at 1508.

²⁵ *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 104-05 (2d Cir. 2007).

²⁶ *Id.* at 101.

EPA was permitted to conduct a cost-benefit analysis when setting the national standards and allowing variances from that standard.²⁷

III. LEGAL BACKGROUND

Congress passed the CWA²⁸ in order “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁹ There are two major ways the CWA tries to achieve these goals. One is the requirement that certain point sources³⁰ be subject to effluent limitations.³¹ In order to limit the discharge of effluents, the CWA set up different standards for the Agency to use in implementing limits upon the different point sources.³² Another way the CWA achieves its goals is by regulating cooling water intake structures in order to limit adverse environmental impact.³³

A. Effluent Limitations

The CWA first limited effluent discharges of point sources during its initial implementation period.³⁴ That section required existing point sources to have “the *best practicable control technology* currently available . . .,” which became known as the “BPT standard.”³⁵ After the initial period of implementation was completed, the CWA called for more stringent limitations to be imposed for toxic and nonconventional pollutants.³⁶ These limitations required the “application of the *best available technology economically achievable*...which will result in reasonable further progress toward the national goal of eliminating the

²⁷ *Entergy Corp.*, 129 S. Ct. at 1510.

²⁸ 33 U.S.C. § 1251 (2006)

²⁹ *Id.*

³⁰ Point sources are defined as “any discernible, confined and discrete conveyance...from which pollutants are or may be discharged.” *Id.* § 1362(14).

³¹ *Entergy Corp.*, 129 S. Ct. at 1506-07.

³² *See id.* at 1507.

³³ *See id.* at 1502.

³⁴ *Id.* at 1506. The initial limitations were to be imposed prior to July 1, 1977. 33 U.S.C. § 1311(b)(1)(A).

³⁵ 33 U.S.C. § 1311(b)(1)(A) (emphasis added).

³⁶ *Entergy Corp.*, 129 S. Ct. at 1507.

discharge of all pollutants,” which became known as the “BATEA standard.”³⁷ For the remaining pollutants (conventional pollutants)³⁸ the CWA required the “best conventional pollutant control technology,” also known as the “BCT standard.”³⁹ The last of the standards applies to special categories of new point sources,⁴⁰ and calls for a standard of performance that “reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the *best available demonstrated control technology*,” which is known as the “BADT standard.”⁴¹

Besides setting these standards for limiting effluent discharges, the CWA also mandates that the EPA consider certain factors when implementing the standards.⁴² When implementing the BPT standard, the EPA is instructed to consider “the total cost of application of technology in relation to the effluent reduction benefits to be achieved.”⁴³ Section 1314(b)(4)(B) requires the EPA to consider “the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived . . .” when implementing the BCT test.⁴⁴ When implementing the BATEA and BADT tests, Congress requires the EPA to consider, among other factors, “the cost of achieving such effluent reduction.”⁴⁵ Thus, while the BPT and BCT tests require a cost-benefit analysis, the BATEA and BADT tests only authorize the analysis of costs and remain silent on the analysis of benefits.

B. *Water Intake Structures*

Section 1326(b) contains the standard for regulating water intake structures.⁴⁶ That section of the CWA requires that “cooling water intake

³⁷ 33 U.S.C. § 1311(b)(2)(A) (emphasis added).

³⁸ The EPA decides which pollutants are considered conventional. *Id.* § 1314(a)(4).

³⁹ *Entergy Corp.*, 129 S. Ct. at 1507; *see also* 33 U.S.C. § 1311(b)(2)(E).

⁴⁰ *See* 33 U.S.C. § 1316(b)(1)(A) (setting out a preliminary list of new point sources).

⁴¹ *Id.* § 1316(a)(1) (emphasis added).

⁴² *Entergy Corp.*, 129 S. Ct. at 1507.

⁴³ 33 U.S.C. § 1314(b)(1)(B).

⁴⁴ *Id.* § 1314(b)(4)(B).

⁴⁵ *Id.* §§ 1314(b)(2)(B), 1316(b)(1)(B).

⁴⁶ *Id.* § 1326(b).

structures reflect the *best technology available* for minimizing adverse environmental impact,” which is known as the “BTA standard.”⁴⁷ Unlike the four tests regulating effluent discharges, the BTA test contains no factors to guide the EPA in implementing the test.⁴⁸

As a result, the EPA never had clear guidelines when implementing the BTA test prior to the current regulations at issue in *Entergy Corp.*⁴⁹ Originally, the EPA proceeded on a case-by-case basis without guidance from any regulations.⁵⁰ The EPA’s first set of regulations regarding water intake structures under § 1326(b) came in 1977.⁵¹ These regulations required “[t]he information contained in the Development Document [to] be considered in determining whether...water intake structure[s]...reflect the best technology available for minimizing adverse environmental impact.”⁵² These initial regulations were quickly ruled invalid in *Appalachian Power Co. v. Train*.⁵³ The Supreme Court held that the regulations were in violation of the Administrative Procedure Act because the regulations did not contain necessary information detailing the Development Document.⁵⁴

Following the court’s decision in *Appalachian Power*, the EPA withdrew 40 C.F.R. § 402.⁵⁵ The Agency then released a publication as a guide in enforcing § 1326(b)’s requirements.⁵⁶ Enforcement under these guidelines continued primarily on a case-by-case basis.⁵⁷ In 1995, the

⁴⁷ *Id.* (emphasis added).

⁴⁸ *Entergy Corp.*, 129 S. Ct. at 1507.

⁴⁹ *Id.* at 1503.

⁵⁰ *Id.*

⁵¹ Best Technology Available for Cooling Water Intake Structures, 41 Fed. Reg. 17,387 (Apr. 26, 1967) (to be codified at 40 C.F.R. §§ 402.10-12 (1977)).

⁵² 41 Fed. Reg. at 17,387; 40 C.F.R. § 402.12.

⁵³ 566 F.2d 451 (4th Cir. 1977).

⁵⁴ *Id.* at 457.

⁵⁵ National Pollutant Discharge Elimination System: Revision of Regulations, 44 Fed. Reg. 32956 (June 7, 1979) (to be codified at 40 C.F.R. pts. 6, 115, 121-25, 402-03).

⁵⁶ *Entergy Corp.*, 129 S. Ct. at 1503; see also OFFICE OF WATER ENFORCEMENT PERMITS, INDUSTRIAL PERMITS BRANCH, U.S. EPA, [DRAFT] GUIDANCE FOR EVALUATING THE ADVERSE IMPACT OF COOLING WATER INTAKE STRUCTURES ON THE AQUATIC ENVIRONMENT: SECTION 316(B) P.L. 92-500 (1977), available at <http://www.epa.gov/waterscience/316b/files/1977AEIguid.pdf>.

⁵⁷ *Entergy Corp.*, 129 S. Ct. at 1503.

EPA decided they would begin promulgating regulations under § 1326(b) in multiple phases.⁵⁸

Phase I regulations apply to new facilities using water intake structures.⁵⁹ New facilities that have a water intake flow greater than 10 million gallons per day are required to restrict flow equal to those flow restrictions attained by closed-cycle cooling systems.⁶⁰ Facilities with a daily intake flow between 2 million and 10 million gallons have alternate requirements.⁶¹

The Phase II regulations are the regulations being challenged in *Entergy Corp.* These apply to existing facilities with water intake structures.⁶² Under these regulations, the EPA set National Performance Standards for all Phase II facilities by conducting a cost-benefit analysis.⁶³ The regulations also allow for site-specific variances from the national standard if the cost of compliance would be “significantly greater” than either “the costs considered by the agency” or “the benefits of complying with the applicable performance standards.”⁶⁴ With this legal background, the Court addressed the issue of whether the EPA was allowed to conduct a cost-benefit analysis.

IV. INSTANT DECISION

In *Entergy Corp.*, the Supreme Court held that it was permissible for the EPA to conduct a cost-benefit analysis when setting national standards and when allowing variances from those national standards.⁶⁵ The Court explained that the rule in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* applied to the EPA’s interpretation of the current statute, § 1326(b).⁶⁶ This rule states that the EPA’s interpretation

⁵⁸ *Id.*

⁵⁹ *Id.*; see also 40 C.F.R. § 125.81 (2008).

⁶⁰ *Entergy Corp.*, 129 S. Ct. at 1503; see also 40 C.F.R. § 125.84(b)(1).

⁶¹ *Entergy Corp.*, 129 S. Ct. at 1503; see also 40 C.F.R. § 125.84(c).

⁶² *Entergy Corp.*, 129 S. Ct. at 1504. For the complete definition of a Phase II facility see 40 C.F.R. §125.91 (2008).

⁶³ *Entergy Corp.*, 129 S. Ct. at 1504.

⁶⁴ 40 C.F.R. §§ 125.94(a)(5)(i)-(ii).

⁶⁵ *Entergy Corp.*, 129 S. Ct. at 1510.

⁶⁶ *Id.* at 1505.

will be valid if it is a reasonable interpretation of § 1326(b), even if the court believes there is a more reasonable interpretation.⁶⁷

The portion of the CWA at issue in *Entergy Corp.*, §1326(b), requires the national performance standard for cooling water intake structures to reflect "the best technology available for minimizing adverse environmental impact."⁶⁸ While acknowledging that one possible reasonable interpretation of § 1326(b) would be to require adoption of technology that reduces adverse environmental impacts to the greatest extent possible, the Court also found the EPA's interpretation to be reasonable.⁶⁹ The majority found that the statute could be reasonably interpreted to require the use of technology that "most efficiently" reduces adverse environmental impact.⁷⁰

The Court rejected the respondents' argument that the word "minimizing" means the power plants must reduce impact to the smallest amount that is economically possible, saying that the term "minimizing" is a term of degree that does not require the reduction to be the greatest possible.⁷¹

To support their finding that the EPA's interpretation is reasonable, the Court looked to other provisions in the CWA where Congress used clear instructions when it wished to reduce pollution to the greatest extent possible.⁷² For example, the Court looked to § 1311(b)(2)(A), where Congress required the EPA to set limits which would require the "elimination of discharges of all pollutants."⁷³ Similarly, § 1316(a)(1) mandated that the standard for new point sources permit "no discharge of pollutants."⁷⁴ The Court believed that the language "minimizing adverse environmental impact" was less clear than these other sections in the CWA which clearly stated the desire to reduce pollutants by the greatest amount possible.⁷⁵ This indicated, in the Court's view, that Congress

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1506.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*; see also 33 U.S.C. § 1311(b)(2)(A) (2006).

⁷⁴ *Entergy Corp.*, 129 S. Ct. at 1506; see also 33 U.S.C. § 1316(a)(1).

⁷⁵ *Entergy Corp.*, 129 S. Ct. at 1506.

wanted to leave the EPA some discretion when determining the extent of reducing adverse environmental impacts.⁷⁶ Thus, the Court concluded that the use of "minimizing adverse environmental impact" did not preclude the use of a cost-benefit analysis.⁷⁷

Next, the Court looked at the previous standards under the CWA used to set national performance standards for effluent discharge.⁷⁸ All four of these previous standards included statutory factors to guide the EPA in interpretation.⁷⁹ The first two standards, the BPT and the BCT standards, instructed the EPA to engage in some sort of a cost-benefit analysis.⁸⁰ In the next two standards, the BATEA and BADT standards, the EPA was instructed only to consider costs without any express language mandating the consideration of benefits.⁸¹

The respondents contended that the fact that Congress expressly allowed a cost-benefit analysis for the BPT and BCT tests, but not under § 1326(b), shows an intent to disallow the use of a cost-benefit analysis.⁸² The Court rejected this argument, explaining that all four of the previous tests required the EPA to at least consider costs when creating the national standard.⁸³ Thus, if the silence in § 1326(b) shows an intent to disallow the use of a cost-benefit analysis, as the respondents argue, then this silence would also have to mean that Congress intended to permit no consideration of costs.⁸⁴ This would indicate that the consideration of economic "feasibility" of the technology would not even be allowed.⁸⁵ If no costs were allowed to be considered, then companies may be required to spend large amounts of money for a very minor environmental benefit.⁸⁶ Justice Scalia argued that this would bring a result neither the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1507.

⁷⁹ *Id.*

⁸⁰ *Id.*; see also 33 U.S.C. § 1314(b)(1)(B) (2006).

⁸¹ *Entergy Corp.*, 129 S. Ct. at 1507; see also 33 U.S.C. §§ 1314(b)(2)(B), 1316(b)(1)(B).

⁸² *Entergy Corp.*, 129 S. Ct. at 1508.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 1510.

dissent nor the respondents would require.⁸⁷

Furthermore, the Court argued that if silence in § 1326(b) implies the prohibition of cost-benefit analysis, then that silence would also have to mean that the consideration of any factors in implementing the statute would also be prohibited, which is logically impossible.⁸⁸ Instead, the Court stated that "it is eminently reasonable to conclude that § 1326(b)'s silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."⁸⁹ Thus, the Court held that "it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden."⁹⁰

Justice Stevens dissented, arguing that Congress prohibited the use of a cost-benefit analysis unless the costs become so high that the technology becomes unavailable.⁹¹ Justice Stevens argued that if Congress specifically addresses an issue in one section of a statute, then silence with regards to that issue in another section of the same statute is decisive.⁹² Stevens also looked at the other standards Congress developed for effluent limitations and noticed that they were designed to get more stringent as time passed.⁹³ The silence in § 1326(b), Stevens argued, was intentional and reflected Congress's desire to preclude a cost-benefit analysis in order to meet the "ambitious environmental standards" imposed by the CWA.⁹⁴ Thus, the dissent argued that the majority skipped the first part of the *Chevron* analysis, which requires consideration of whether Congress specifically addressed the issue.⁹⁵ By

⁸⁷ *Id.*

⁸⁸ *Id.* at 1508.

⁸⁹ *Id.*

⁹⁰ *Id.* Justice Breyer concurred in part and dissented in part, arguing that the use of cost-benefit analysis should be restricted but not wholly forbidden. *Id.* at 1512 (Breyer, J., dissenting in part, concurring in part).

⁹¹ *Entergy Corp. v. Riverkeeper*, 129 S. Ct. 1498, 1516 (2009) (Stevens, J. dissenting).

⁹² *Id.* at 1517.

⁹³ *Id.* at 1520-21.

⁹⁴ *Id.* at 1521.

⁹⁵ *Id.* at 1518 n.5.

skipping that analysis, the majority ignored the possibility that Congress may have intended to preclude a cost-benefit analysis.⁹⁶

V. COMMENT

In deciding that a cost-benefit analysis was permitted when setting the national performance standard, the Supreme Court allowed the EPA to side with the power plants and industries pushing for more relaxed standards. Although the Supreme Court did not specifically require the use of a cost-benefit analysis,⁹⁷ this decision still goes against the interests of environmental groups who want to require the plants to use the best technology available to eliminate as much of the environmental destruction as possible without regards to the costs and benefits of such technology.⁹⁸ Indeed, a plain reading of the statute seems to support the environmental groups. By using the language “best technology available,” Congressional wishes seemed clear – to require water intake structures be made with the best technology that is currently available to reduce environmental destruction.

Despite this seemingly easy interpretation of Congressional intent, the Court relied on *Chevron*⁹⁹ to ignore the plain meaning of the statute and conclude that the EPA’s interpretation of permitting a cost-benefit analysis was reasonable. *Chevron* requires a two-step analysis in determining whether agency regulations are valid.¹⁰⁰ First, the court should look to see if Congressional intent is clear, and only if it is not should the court give deference to the agency in filling the gap that Congress left.¹⁰¹ Thus, the Court should only consider the reasonableness of the EPA’s interpretation if it is clear that Congress did not specifically speak to the issue of cost-benefit analysis.¹⁰² By immediately skipping to

⁹⁶ *Id.* (majority opinion).

⁹⁷ *Id.* at 1508.

⁹⁸ Brief for the Environmental Petitioners at *2, *Entergy Corp. v. Riverkeeper*, 129 S. Ct. 1498 (2009) (No. 02-4005).

⁹⁹ 467 U.S. 837 (1984).

¹⁰⁰ *Id.* at 842.

¹⁰¹ *Id.* at 842-43.

¹⁰² *Entergy Corp. v. Riverkeeper*, 129 S. Ct. 1498, 1518 n.5 (2009) (Stevens, J., dissenting).

an analysis of whether or not the EPA interpretation was reasonable, the majority seems to skip the analysis of whether Congress specifically addressed the issue of a cost-benefit analysis with regards to the standard for water intake structures.¹⁰³

A closer look at other provisions in the statute shows that Congress's silence regarding a cost-benefit analysis may be conclusive. Congress specifically gave factors for the EPA to consider while developing the national performance standards for effluent limitations. The BPT standard first mandated the use of a cost-benefit analysis.¹⁰⁴ This standard only applied to effluent discharges at existing point sources and was meant only as a temporary test until the more stringent BATEA standard took control in 1989.¹⁰⁵ Congress was clear that the EPA was to consider only costs when developing national standards for existing point sources under the BATEA standard.¹⁰⁶ Finally, Congress also adopted the BADT standard to govern effluent discharge at new point sources.¹⁰⁷ This standard was similar to the BATEA standard in that Congress only allowed consideration of costs (with no consideration of benefits) when the EPA developed national standards.¹⁰⁸ By looking at these standards, it seems as though Congress has intended that standards become increasingly stringent over time.¹⁰⁹ The standards regarding effluent discharges began with the BPT standard requiring cost-benefit analysis, but over time gave way to the BATEA standard and BADT standard. Both of these standards are more stringent in that they only allow

¹⁰³ *Id.*

¹⁰⁴ 33 U.S.C. § 1314(b)(1)(B) (2006).

¹⁰⁵ *Entergy Corp.*, 129 S. Ct. at 1507.

¹⁰⁶ *Id.* Congress later amended this provision, leaving the BATEA standard to only apply to nonconventional toxic pollutants. The remaining conventional pollutants were to be governed by the laxer BCT standard, which did require the use of cost-benefit analysis.

Id. See also *id.* at 1521 n.10 (Stevens, J., dissenting); 33 U.S.C. § 1311(b)(2)(E) (2006).

¹⁰⁷ *Entergy Corp.*, 129 S. Ct. at 1507 (majority opinion) (quoting 33 U.S.C.

§1316(b)(1)(B)).

¹⁰⁸ *Id.* (quoting 33 U.S.C. § 1316(b)(1)(B)).

¹⁰⁹ *Id.* Although the BCT standard took a step backwards, in that it allowed a cost-benefit analysis, it seems reasonable to conclude this more relaxed standard was only allowed because it applied to conventional pollutants. The more stringent BATEA standard remained in effect for the other existing effluent discharges and only required the consideration of costs with no corresponding consideration of benefits. *Id.*

consideration of costs with no corresponding consideration of benefits. Thus, under the more stringent BATEA and BADT standards, the best technology is determined without looking at the benefits that result in the use of better technology, regardless of whether or not the corresponding benefits are small.

The dissent argued that these effluent discharge standards showed Congress's intention that the CWA be regulated by more stringent standards in order to meet the CWA's "ambitious environmental standards."¹¹⁰ Indeed, the fact that the BTA standard for intake structures is silent regarding cost-benefit analysis, while other parts of the CWA clearly require it, makes it seem like Congress's silence was purposeful.¹¹¹ If this silence shows that Congress intended to preclude the use of a cost-benefit analysis in applying the BTA standard, as it seems, then the majority erred in skipping the first part of the *Chevron* analysis. The fact that Congress required a cost-benefit analysis when applying the BATEA and BADT standards shows that Congress was clear regarding the BTA test in section 1326(b). The silence shows obvious intent that Congress precluded a cost-benefit analysis in applying the BTA standard to water intake structures. Because of this clear intent, there was no need for the Court to reach the second step in the *Chevron* analysis and conclude that the EPA interpretation was reasonable.

This argument seems sound, but it too has problems. Justice Scalia, writing for the majority in *Entergy Corp.*, points out that if the above argument is correct then the silence in section 1326(b) must also preclude any consideration of costs.¹¹² Such an outcome would have the result of requiring the use of the best technology even if the cost of that technology would be overwhelming.

The dissent seems to recognize this problem, but avoids the issue by adopting the Second Circuit's approach – that Congress precluded a cost-benefit analysis but permitted "cost-effectiveness considerations" that

¹¹⁰ *Id.* at 1521 (Stevens, J., dissenting).

¹¹¹ See *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) (stating that "where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.").

¹¹² *Entergy Corp.*, 129 S. Ct. at 1508 (majority opinion).

require the use of the best technology available that can reasonably be borne by the industry.¹¹³ Taking this approach would give “available” a different meaning. Rather than mandating the use of the best technology that is possible,¹¹⁴ this approach would only mandate the best technology that is economically available.¹¹⁵

At first glance, it seems like such an approach is inconsistent with the analysis the dissent offers. Any silence by Congress was intentional; and, therefore, even looking at which technology is economically available would be precluded since Congress did not specifically authorize this consideration. The dissent dismisses this problem by saying that Congress viewed a “cost-benefit” analysis with “special skepticism,” and thus wished to control the use of such an analysis while not necessarily controlling the use of other types of analyses, namely considerations of extreme costs that may come with implementing some technology.¹¹⁶ This explanation is hardly convincing, but the result is still convincing: if technology is so expensive that it cannot be adopted, then that technology is indeed not available.

Section 1326(b) plainly requires adoption of technology that further reduces adverse environmental impacts. Technology that reduces adverse impacts does not seem to be required if that technology is so expensive that it cannot be borne by the industry. The reason is that because the technology, even if it *could* reduce adverse impacts, will not *actually* reduce the impacts if it cannot be adopted by the industry due to its extreme cost. Thus, the dissents approach avoids Scalia’s concern that companies will be forced “to spend billions to save one more fish or plankton.”¹¹⁷

Such an approach appears to be consistent with the mandate of the CWA. Looking at the other provisions in the CWA relating to effluent discharge, it seems like Congress intended for the CWA to become increasingly stringent. Requiring the use of the best technology for

¹¹³ *Id.* at 1521 n.9 (Stevens, J., dissenting); *see also* *Riverkeeper v. EPA*, 475 F.3d 83, 101 (2d Cir. 2007).

¹¹⁴ Such as closed-cycle cooling systems.

¹¹⁵ *Entergy Corp.*, 129 S. Ct. at 1521 n.9 (Stevens, J. dissenting).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1510 (majority opinion).

reducing environmental impacts without regards to the costs and benefits of that technology is no doubt a much stricter requirement.

The approach that the dissent advocates may be the most beneficial approach and the one Congress truly intended. Requiring the industry to apply the best technology without regard to the costs or benefits has several advantages. First, such a test would be very stringent and would provide substantial environmental protection by ensuring that the best effort be undertaken to reach the intent of the CWA of “restor[ing] and maintain[ing] the...integrity of the Nation’s waters.”¹¹⁸ All economic considerations would be taken off the table and industries would not be able to ignore the environment and get away from their obligations by simply showing that the economic costs are “significantly greater than” the benefits.¹¹⁹ This would avoid a major downfall in cost-benefit analyses in environmental regulations. When conducting a cost-benefit analysis in environmental situations, it is often hard to determine the benefits that a particular technology could have on the environment. On the other hand, it is easy to determine the exact cost that a particular technology would impose on the industry.¹²⁰ This problem can result in agencies not requiring the use of a particular technology because they do not believe it would have much of a benefit; although in all actuality, more accurate results would show that the technology was well worth the cost.¹²¹ This problem would be avoided by requiring the use of the best technology without regards to how great of a benefit it provides for the environment.

A second benefit of requiring the industry to apply the best technology without regard to the costs or benefits is that such a standard would create company incentives to better the environment. By creating such a rigid standard, companies would have more of an incentive to create better technologies, which would bring an even better benefit to the environment. By requiring the best technology, the standard would give

¹¹⁸ 33 U.S.C. § 1251(a) (2006).

¹¹⁹ See 40 C.F.R. §§ 125.94(a)(5)(i)-(ii) (2009).

¹²⁰ See *Entergy Corp.*, 129 S. Ct. at 1516-17 (Stevens, J., dissenting).

¹²¹ See *id.*; see also Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576, 41,661 (July 9, 2004) (to be codified at 40 C.F.R. pts. 9, 124-25).

an incentive to companies to develop cheaper, better technologies for two reasons. First, the more efficient technology would result in a cheaper way to meet the EPA regulation. Rather than being complacent with current technology, companies would have an incentive to create more efficient ways of reducing environmental impacts. Second, being the first to create the better technology would put the company ahead of others, forcing others to play catch-up. This incentive to bring about innovations would create a cycle resulting in companies that are continually moving towards bettering the environment. Companies would have the incentive to make more efficient intake structures, which would continue to have a more positive environmental impact.¹²² Furthermore, third party developers would have more of an incentive to create better technologies because they would have an instant market for selling their new technology.

A third advantage of requiring the industry to apply the best technology without regard to the costs or benefits is that the requirement to use the best technology would provide consistency and clarity that has been lacking in this area since Congress first passed the CWA. There could be no better national uniform standard than mandating the use of the same technology across the board. This would ensure the same environmental protection across the nation while also easing the concern that some industries with close ties to the EPA could more easily get around the national standard.¹²³ If all industries were forced to have the same technology, the inconsistency over the “best technology available” that has plagued the EPA for decades would cease to exist. The strenuous case-by-case analysis of what is regarded as the best technology¹²⁴ would be replaced with a concise list of technologies the company must choose from.

Enforcement of the standard in this way would also have pragmatic benefits. With no more worrying about case-by-case analysis or specific

¹²² Michael C. Dorf, *Why the Supreme Court Decision Upholding Cost-Benefit Analysis Under the Clean Water Act Should Not be Used to Discredit Best-Practice Standards* (Apr. 6, 2009), <http://writ.news.findlaw.com/dorf/20090406.html>.

¹²³ *Id.* (explaining the concern that the EPA may be more favorable to some companies and allow them variances from the national standard).

¹²⁴ See OFFICE OF WATER ENFORCEMENT PERMITS, INDUSTRIAL PERMITS BRANCH, U.S. EPA, *supra* note 56, at 11.

on-site variances, the EPA could devote more of its time to ensuring that the “best technology available” is in fact the best technology. Litigation and other conflicts would also surely decrease, thus saving even more resources. As with any rigid and clear law, violations would be clear-cut, leaving little to no doubt when a company violates the regulations.

It remains to be seen what will happen to these regulations after the Court’s decision in *Entergy Corp. v. Riverkeeper*. The decision was no doubt a victory for the companies at the detriment to the environment and its advocates. By ignoring clear Congressional intent, the Court allowed the EPA to conduct a cost-benefit analysis. Such an analysis provides a way for companies to avoid truly using the best technology available. The disagreement between the majority and the dissent doubtlessly represents a split between the conservative majority and the liberal minority. The minority, pushing for stricter environmental protection, could receive a boost of support after this decision. Although the majority stated that the EPA could conduct a cost-benefit analysis, the decision does not require them to do so. It will be interesting to see if the more relaxed Bush-era regulations allowing a cost-benefit analysis will be replaced under the Obama administration’s promise for stricter enforcement of environmental regulations. Another boost could also come from a change on the Court. The entrance of Justices Sotomayor and Kagan to the Court may bring a new voice of support to strict environmental regulation.¹²⁵ Thus, although the EPA has finally promulgated regulations regarding water intake structures, the uncertainty may continue until clearer standards are created.

VI. CONCLUSION

After decades of uncertainty in regulating water intake structures, the Court in *Entergy Corp. v. Riverkeeper* finally upheld regulations of water intake structures under §1326(b). Although this decision finally

¹²⁵ Justice Sotomayor authored the Second Circuit opinion denying the use of cost-benefit analysis in *Riverkeeper v. EPA*, which was subsequently reversed by the Court in *Entergy Corp. v. Riverkeeper*. See *Riverkeeper v. EPA*, 475 F.3d 83, 101 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1498 (2009). However, it is doubtful that either new Justice’s presence on the Court will change its current view on environmental regulations since they replaced Justice Souter and Stevens who, in dissent, both agreed with Sotomayor’s Second Circuit opinion. See *Entergy Corp.*, 129 S. Ct. at 1516 (Stevens, J., dissenting).

brings some clarity and conclusiveness, the Court ignores clear congressional intent at the expense of the environment. By allowing the use of a cost-benefit analysis when determining the best technology available for water intake structures, the Court has allowed the EPA to ignore clear Congressional intent that precludes such an analysis. The better and more reasonable interpretation of §1326(b) would be to follow the result reached by the dissent, which would preclude a cost-benefit analysis and require the use of the best technology economically available. Although the decision brings some certainty, the Court was clear that the EPA is permitted, but not required, to use a cost-benefit analysis. This leaves the door open for yet more change regarding these regulations. With a recent administration change promising stricter regulations, that change could be just around the corner.

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