



U.S. Supreme Court Rules on Once-Through Cooling Systems in Power Plants *Allows U.S. EPA to Decide Whether and How to Assess Costs of Preventing Impacts, Leaves Intact Decision Forbidding Use of Mitigation Rather than Prevention of Impacts*

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(Washington, D.C.) The U.S. Supreme Court today ruled that cost-benefit analysis is not categorically forbidden by the Clean Water Act Section 316(b), which governs cooling water intake structures, though U.S. EPA has the authority to decide not to engage in such an analysis. The Court left it to the **Obama-Jackson Environmental Protection Agency (EPA)** to decide whether and how to compare costs to benefits when it issues regulations for existing power plants. Current EPA administrator Lisa Jackson previously directed the New Jersey environmental protection agency; New Jersey was one of several states that challenged the EPA regulations at issue, along with CCKA and Surfrider Foundation. The decision left untouched a key lower court ruling that had not been appealed, which prohibited the use of mitigation techniques to address impacts, rather than preventing the impacts in the first instance.

Today's decision determined only that EPA's consideration of costs in relation to benefits is not statutorily prohibited. It did not decide for EPA how to address that calculation in new regulations. Importantly, the Court did not require that cost-benefit analysis be used, nor did the Court determine how or in which circumstances cost-benefit analysis may be used. The Court also stated that the plaintiffs' view that cost-benefit analysis is not to be used at all, with which the Second Circuit Court of Appeals agreed, is a reasonable interpretation of the law, and would pass legal muster if EPA adopted it. Finally, the Court's decision left undisturbed all of the other bases on which the lower court had rejected EPA's regulation after the Bush Administration issued it in 2004, including the prohibition on mitigation as a substitute for prevention of impacts. The current Administration will now issue new regulations that conform to the 2007 decision of the U.S. Court of Appeals for the Second Circuit, as modified in the one limited respect by today's Supreme Court ruling.

"We disagree with the majority's ruling and analysis that cost-benefit analysis should be prohibited, but agree with the Court's finding that EPA may decide on remand the extent, if any, to which cost-benefit analysis should be used in regulating cooling water intake structures," said Linda Sheehan, Executive Director of the California Coastkeeper Alliance (CCKA), a co-plaintiff in the lawsuit. "California has been a leader not only in calling for the phase-out of the devastating environmental impacts of once-through cooling, but also for increased use of smarter energy and water use alternatives, which these plants generally discourage. We look forward to advancing clean, sustainable energy in California through the continued phase-out of these antiquated systems."

“This decision only highlights the need for California to quickly draft strong regulations for cooling water intakes and follow past precedent for being a leader in protecting our coast and ocean,” said Joe Geever, California Policy Coordinator for the Surfrider Foundation, a co-plaintiff in the original action. “We also hope that the Obama EPA under Administrator Jackson will revise and strengthen EPA regulations to protect marine life nationwide.”

“It is a fact that once-through cooling systems kill fish that would support important commercial and sport fisheries. It is a fact fish losses cause economic losses and job losses for fishing communities. By minimizing the facts, the Supreme Court has said our fish and fishermen are expendable,” said Zeke Grader of the Pacific Coast Federation of Fishermen’s Associations. “They should mull over those facts the next time they sit down to a dish of soft shelled crab, broiled striped bass, or shad roe – if they can find one.”

“The California Ocean Protection Council has already conducted a thorough technical assessment on phasing out this devastating technology in California, and found that phase-out is feasible, and that it can and should be done expeditiously,” added Angela Haren, Program Director for CCKA. “We expect the State Water Board will uphold California’s long tradition of being a leader in coastal and ocean protection by moving forward swiftly with its proposed policy to phase out once-through cooling. We encourage the Obama Administration to do the same.”

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The California Coastkeeper Alliance provides a statewide voice for safeguarding California’s waters, and its world-renowned coast and ocean, for the benefit of all Californians. Member organizations are Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura County Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and its Inland Empire Waterkeeper chapter, and San Diego Coastkeeper. www.cacoastkeeper.org

The Surfrider Foundation is a non-profit environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through conservation, activism, research and education. www.surfrider.org

The Pacific Coast Federation of Fishermen’s Associations represents working men and women in the West Coast commercial fishing fleet. Through its 14 member groups, it is the largest fishermen’s organization on the U.S. Pacific Coast with offices in San Francisco and Eugene, Oregon. www.pcffa.org

Once-Through Cooling Facts in California

Impacts of Once-Through Cooling on California Ecosystems

- There are 19 power plants in California currently using once-through cooling. Combined these plants can withdraw up to 16 billion gallons of seawater every day.
- **The State Water Board estimates that these plants kill over 79 billion fish and other marine life annually, including threatened and endangered species**, through entrainment (which kills larvae and small fish pulled into the plant) and impingement (which injures and kills larger fish, sea turtles, and marine mammals trapped on the intake screens).
- Once-through cooling has a devastating impact on the San Francisco Bay-Delta Estuary where **all of the imperiled salmon species that migrate through the Sacramento and San Joaquin River watersheds must pass the intakes for two aging power plants**. Records for both of these plants show that they have killed threatened and endangered species, including the Delta smelt and the Chinook salmon, which are currently the subject of significant water distribution discussions in the state. The impacts on the Bay-Delta are so significant that a group of water districts filed a Notice of Intent to Sue against the plants for violating the Endangered Species Act by illegally killing fish and causing detrimental impacts on fish populations.
- According to the Department of Fish and Game, the San Onofre nuclear plant destroyed well over two hundred acres of kelp forest. This, in turn, caused the displacement or death of thousands of individuals from

numerous other species. In total, the kelp fish population in the area has declined by 80%, all due to that single plant.

- In bays such as Santa Monica, Monterey, and San Diego, and estuaries such as Elkhorn Slough, the impacts from once-through cooling can be more pronounced due to the high biological productivity of these areas and the concentration of the power plants' impacts in light of the area affected. The Moss Landing Plant alone cycles 1.224 billion gallons per day at maximum permitted capacity. **This represents over a quarter of Elkhorn Slough and Moss Landing Harbor, cycled through the plant each and every day.**

California State Action on Once-Through Cooling

- In 2006 the Ocean Protection Council passed a unanimous resolution calling for the expeditious phase-out of once-through cooling in California due to the environmental damages it causes and directed the State Water Board to implement a policy addressing once-through cooling.
- **The State Water Board has been developing a statewide policy to address once-through cooling for several years and is expected to finalize its policy by the end of 2009.**
- The California Legislature is currently considering action to address once-through cooling in a bill introduced by Senator Corbett (SB 42).

Once-Through Cooling and Energy

- The majority of the once-through cooled power plants have higher emission rates of greenhouse gases and other pollutants compared to new generation sources but continue to operate despite this fact, because the primary costs of their cooling systems are placed heavily on the environment and the public.
- Phasing out once-through cooling will encourage modernization of the coastal steam plants and will support California's overall progress toward reducing greenhouse gases.

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Background on *Riverkeeper et al v. U.S. EPA*

Section 316(b) of the Clean Water Act (CWA) requires power plants to employ the best technology available to protect fish and other aquatic life. **Every day, power plants in the United States withdraw over 214 billion gallons from U.S. water bodies to cool their facilities, and kill billions of fish and aquatic creatures in the process.** This is mostly due to the use of antiquated cooling systems, known as "once-through cooling," which are often employed by older power plants. In contrast, **closed-cycle cooling systems**, which the EPA considers the best technology available (BTA) for new plants, recirculate most of the water after dispersing heat in a cooling tower, reducing the amount of water withdrawn and the number of fish killed by over 95 percent. In 2004, EPA established national regulations for existing power plants as required by the CWA.

On July 26, 2004, Riverkeeper led a national coalition of environmental groups, including CCKA and Surfrider Foundation, and worked closely with a coalition of six states led by Rhode Island in a legal challenge to these regulations because they set weak standards and allowed power plants to seek variances to BTA. In 2007, the U.S. Court of Appeals for the Second Circuit struck down the regulations, and ruled that, in establishing BTA, the Clean Water Act prohibits EPA from comparing costs to benefits and requires EPA to mandate use of the technology whose costs can reasonably be borne by industry.

Several energy companies petitioned the court to review the decision. The question before the Court was: "Whether Section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b), authorizes the Environmental Protection Agency (EPA) to compare costs with benefits in determining the 'best technology available for minimizing adverse environmental impact' at cooling water intake structures." The Supreme Court did not accept for review the other questions decided by the Second Circuit in Riverkeeper's favor.