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Entergy Corp. v. Riverkeeper, Inc., *129 S.Ct. 1498 (U.S. 2009).*

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I. Background

Environmental groups and various States challenged regulations promulgated by the Environmental Protection Agency pursuant to § 316(b) of the Clean Water Act, 33 U.S.C. §1326(b), that allowed individual power plants to deviate from national environmental standards. Entergy Corp. v. Riverkeeper, Inc., 129 S.Ct. 1498, 1502 (2009). The environmental groups and States sought review of the regulations that provided this deviation and claimed that the agency had unreasonably interpreted the language of the Clean Water Act when it determined that cost-benefit analysis was a tool that could be used to determine the "best technology available for minimizing adverse environmental impact" of cooling water intake structures used by power plants. *Id.* at 1502–03. In an opinion by then-Judge Sotomayor, the Second Circuit held, among other things, that the agency was not permitted to use cost-benefit analysis in determining the content of the regulations, Riverkeeper, Inc. v. EPA, 475 F.3d 83, 99–100 (2007), and the Supreme Court granted certiorari to review this single issue. *Entergy* at 1502.

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II. History of the Administrative Regulations at Issue

In 2005, the Environmental Protection Agency promulgated regulations concerning the water intake mechanisms used in the cooling systems of some power plants. *See* Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41576 (July 9, 2004) (codified at 40 CFR pts. 9, 122–125). The power plants at issue produce great deals of heat in their operation. In order to cool the plants, water intake structures extract millions of gallons of water from nearby water sources to cool the plant's facilities. *Entergy* at 1502. A great deal of marine wildlife is killed every year by being pressed and caught against the grates of these water intake mechanisms (known as "impingement") or by being sucked entirely into the mechanisms (known as "entrainment"), so the facilities are subject to regulation under § 316(b) of the Clean Water Act. *Id.* (citing 69 Fed. Reg. 41586).

The regulations at issue in this case were passed nearly 30 years after the Fourth Circuit had invalidated the agency's initial attempt to regulate the cooling structures at such power plants because the agency failed to comply with the publication requirements of the Administrative Procedure Act. *See* Appalachian Power Co. v. Train, 566 F.2d 451, 457 (1977). In 1995, the agency set a multiphase timetable to promulgate new regulations under § 316(b) of the act in order to finally establish national standards applicable to the water intake structures used in the cooling systems of power plants. *Entergy* at 1503. Under the timetable, the agency decided to announce rules regulating the environmental impact of water cooling intake structures according to the size and age of the power plant where they are used. *Id.* In 2001, the agency promulgated the first regulations under the timetable and dealt with the water cooling intake structures at certain new facilities that had water-flow greater than 2 million gallons per day. *Id.* These regulations required new facilities with a water-intake flow greater than 10 million gallons to reduce inflow to "a level commensurate with that which can be attained by a closed-cycle recirculating cooling water system." 40 CFR § 125.84(b)(1) (2003). Closed-cycle cooling systems recirculate the water used to cool the plant, which results in much less water taken from nearby water sources and reduces impingement and entrainment by as much as 98 percent. *Entergy* at 1503–04 (*citing* 69 Fed. Reg. 41601). These regulations were upheld by the Second Circuit. *Id.* at 1503 (*citing* Riverkeeper v. EPA, 358 F.3d 174 (2004)).

The EPA then adopted the regulations at issue in this case. These regulations applied to existing power plants that use more than 50 million

gallons of water per day, at least 25 percent of which is used for cooling purposes. *Entergy* at 1504 (*citing* 69 Fed. Reg. 41576). Overall, the power plants subject to this regulation number over 500 and account for about 53 percent of the country's electric-power generating capacity. *Id*. The EPA has stated that these facilities are responsible for the impingement or entrainment of over 3.4 billion aquatic organisms each year. *Id*. (*citing* 69 Fed. Reg. 41586). By promulgating new regulations, the agency aimed to reduce the amount of aquatic organisms killed every year by these plants' water intake systems. 69 Fed. Reg. 41582. Under the Phase II regulations, the EPA declined to adopt a standard requiring plants to reduce environmental impact to levels commensurate with closed-cycle cooling systems, but the agency did require plants to conform to "national performance standards" that required facilities to reduce "impingement mortality for all life stages of fish and shellfish from 80 to 95 percent" from a calculation baseline and to reduce entrainment of aquatic organisms "60 to 90 percent from the calculation baseline." *Entergy* at 1504 (*quoting* 40 CFR § 125.94(b)(1)–(2) (2004)). The EPA believed these aims were achievable if power plants adopted the use of numerous remedial technologies that were "commercially available and economically practicable." *Id*. (*quoting* 69 Fed. Reg. 41599–41602).

The regulation that is of particular interest in the case allows the agency to grant individual facilities the right to vary from the national standards if the plant shows either that the costs of compliance "are significantly greater than" the costs considered by the agency in setting the standard, or that the costs of compliance "would be significantly greater than the benefits of complying with the applicable performance standards." *Entergy* at 1504–05 (*quoting* 40 CFR § 125.94(a)(5)(i)–(ii) (2004)). The environmental groups and states suggested that the agency unreasonably interpreted the statutory language of section 316(b) of the Clean Water Act, which requires "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact," when it determined that consideration of the "best technology available" permitted consideration of the technology's costs. *Entergy* at 1505.

III. Chevron Analysis: The "Best Technology Available" Standard

1. Did Congress Define the "Best Technology Available" Test?

In analyzing the environmental groups' claims that the agency unreasonably interpreted the act, the Supreme Court applied the test from Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837,

843-44 (1984) to determine whether the agency's interpretation of the statute was reasonable. *Entergy* at 1505. Under *Chevron*, the EPA's view will govern even if it is not the only possible interpretation of the statute or the most reasonable interpretation of the statute as long as it is a reasonable interpretation of the statute. *Id*. In a five-justice majority opinion written by Justice Scalia, the Court overturned the Second Circuit's holding, and held that Congress did not speak directly to whether or not cost-benefit analysis could be used in formulating standards under the "best technology available" test and that the EPA's interpretation of the statute allowing it to do so was reasonable. *Id*. at 1505–10. The case was remanded to the Second Circuit for further proceedings. *Id*. at 1510.

The Court reasoned that other tests from the act that may prohibit the EPA from conducting cost-benefit analysis in setting environmental standards do not show Congressional intent to prohibit such analysis under the "best technology available" test (the BTA test). *Id*. at 1507-08. While four tests were mentioned in the opinion, two tests received particular attention; one calling for the use of the "best available technology economically achievable" from 33 U.S.C. § 1312(b) (the BATEA test) and a test requiring the "best available demonstrated control technology" from 33 U.S.C. § 1316(a)(1) (the BADT test). *Id*. at 1507. The BATEA test was intended to be a strict test that would "further progress toward the national goal of *eliminating* the discharge of all pollutants." *Entergy* at 1507 (*quoting* 33 USC § 1311(b)(2)(A) (emphasis added)). The BADT test applied to new point sources of pollution and was intended to promote the adoption of, "where practicable, a standard permitting no discharge of pollutants." 33 USC § 1316(a)(1). The Court differentiated the BTA test from these other tests on the bases that its language was distinguishable from the other tests and that it appeared in a statutory section that did not provide specific factors to consider in applying the test as the sections containing the BADT and BATEA tests did. *Id*. at 1508. Furthermore, in the Court's view, the lack of statutory factors suggested that Congress intended to accord the agency greater discretion in determining the content of the test. *Id*.

The sharpest split amongst the justices concerned whether Whitman v. American Trucking Assns., Inc., 531 U.S. 457 (2001) applied in this case. *Compare Entergy* at 1508 (majority opinion) *with Entergy* at 1518 (Stevens, J., dissenting). The majority ultimately determined that Congress' silence with regards to cost-benefit analysis in this section of the act was not intended to prohibit the agency's use of cost-benefit analysis. *Entergy* at 1508. In *American Trucking*, the Court found that Congress "unambiguously bar[red] cost considerations" in setting air quality standards under section 109 of the

Clean Air Act by remaining silent on the issue because it had expressly allowed for the consideration of costs in other provisions of the act. *American Trucking* at 471. However, in *Entergy*, the Court determined that when viewed in context, the statutory silence on the issue of cost-benefit analysis was not intended to limit the agency's discretion in considering the costs and benefits of compliance with national standards. *Entergy* at 1508.

2. Was the EPA's interpretation of "Best Technology Available" Reasonable?

After determining that Congress did not direct an interpretation of the "best technology available" language contained in the Clean Water Act, the next step for the Court was to determine whether the agency's interpretation of the language was reasonable. *Chevron* at 843–44. The Court reasoned that while the "best technology" may be the technology that produces the most of a particular good, it also may mean the technology that produces that good most efficiently. *Entergy* at 1506. The Court also determined that the phrase "for minimizing adverse environmental impact" does not require the use of the technology that achieves the greatest possible reduction of environmental harm. *Id.* The word "minimize" is one of degree, and when compared to other sections of the act which require the "elimination of discharges of pollutants" or the "drastic minimization of paperwork," the simple word "minimize" suggests a less ambitious goal, and the agency is allowed to use its discretion in determining the appropriate reduction. *Id.* Therefore, although the Court never stated that the agency's interpretation was the best or most reasonable interpretation, it did determine that the agency's interpretation was reasonable, and that the agency was thus justified in allowing site-specific variances from national environmental standards if a facility showed that the costs of compliance are significantly greater than the benefits. *Id.* at 1510.

VI. Justice Breyer's Concurring Opinion

Writing separately, Justice Breyer agreed with the Court that under the statute, the EPA was authorized to use cost-benefit analysis in determining appropriate standards for the water-intake systems. *Id.* at 1512 (Breyer, J., concurring). However, the justice wrote separately because he believed that the EPA changed the standard it applied in determining site-specific variances by allowing variances for a facility that demonstrates its cost of complying with the applicable regulation would be "significantly greater than the benefits of

complying." *Id*. at 1515 (*quoting* 40 CFR § 125.94(a)(5)(ii)). According to Justice Breyer, the EPA has traditionally only allowed variances when the costs were "wholly disproportionate" to the benefits of compliance, *Id*. (*quoting In Re* Public Service Co. of New Hampshire, 1 E. A. D. 332, 340 (1977), remanded on other grounds, Seacoast Anti-Pollution League v. Costle, 572 F. 2d 872 (1st Cir. 1978)), and, the agency should have to account for why it has adopted a new standard. *Id*. (*citing* Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 42–43 (1983)). Therefore, Justice Breyer concurred in the Court's opinion as it related to the Chevron analysis but would have remanded the case, so the EPA could explain if it had changed its position on when it is appropriate to grant a variance. *Id*. at 1512–15.

V. Dissent

In dissent, Justice Stevens, joined by Justices Souter and Ginsburg, came to the conclusion that by granting the EPA authority to use cost-benefit analysis in some contexts but not others, Congress intended to control, rather than delegate, when cost-benefit analysis should be used in setting environmental standards. *Id.* at 1518 (Breyer, J., dissenting). Thus, Justice Stevens found that through statutory silence, Congress did speak directly to whether the EPA could use cost-benefit analysis in setting environmental standards under the "best technology available" test, and its decision was that cost-benefit analysis should be forbidden under this provision. *Id.* at 1520. Because of the limited nature of the grant of certiorari, Justice Stevens did not go into the considerations which he believed the EPA could properly use in setting standards under the "best technology available" test. *Id.* at 1522.