

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

a Renewal and Modification of a State Pollutant Discharge  
Elimination System ("SPDES") Permit Pursuant to Environmental  
Conservation Law ("ECL") Article 17 and Title 6 of the Official  
Compilation of Codes, Rules and Regulations of the State of New  
York ("6 NYCRR") Parts 704 and 750 *et seq.*

- by -

**ENTERGY NUCLEAR INDIAN POINT 2, LLC AND  
ENTERGY NUCLEAR INDIAN POINT 3, LLC,**

Permittees.

DEC Permit Application No. 3-5522-00011/00004  
SPDES No. NY-0004472

RULING OF THE REGIONAL DIRECTOR

November 28, 2012

## **RULING OF THE REGIONAL DIRECTOR<sup>1</sup>**

This ruling addresses a motion by Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC (collectively, "Entergy"), dated May 15, 2009 ("motion"). Entergy seeks reconsideration of the fourth step of the analysis, as modified in Matter of Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC, Interim Decision of the Assistant Commissioner, August 13, 2008 ("Interim Decision"), by which New York State determines best technology available ("BTA") for facilities with cooling water intake structures. In its motion, Entergy contends that a cost-benefit analysis should be "re-incorporate[d]" into the fourth step of the BTA analysis (see Motion, at 1).

For the reasons that follow, Entergy's motion for reconsideration is granted and, upon reconsideration, the fourth step of the BTA analysis to be applied in this proceeding is modified as provided below. Furthermore, as discussed, I decline to accept Entergy's arguments regarding the inclusion of a cost-benefit analysis into the fourth step and conclude that Department staff's position comports with administrative precedent and practice.

### **BACKGROUND**

In the underlying proceeding, Entergy seeks to renew a State Pollutant Discharge Elimination System ("SPDES") permit for the Indian Point nuclear powered steam electric generating stations 2 and 3 ("stations").<sup>2</sup> Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") proposed various modifications to the SPDES permit for the stations, including new conditions to implement measures to minimize impacts to aquatic organisms from the stations' cooling water intake systems in order to satisfy the State's requirement as set forth in 6 NYCRR 704.5.<sup>3</sup> Section 704.5 provides: "[t]he

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<sup>1</sup> By memorandum dated October 11, 2011, Commissioner Joseph Martens designated Eugene Kelly, Regional Director of DEC Region 4, to serve as decision maker in this proceeding.

<sup>2</sup> The relevant factual and procedural background in this matter is set forth in the February 3, 2006 Issues Ruling of Administrative Law Judge ("ALJ") Maria E. Villa and the Interim Decision.

<sup>3</sup> Section 704.5 of 6 NYCRR contains language that is similar to the language that appears in section 316(b) of the federal Clean Water Act (33 USCA 1326[b]), and implements that provision.

location, design, construction and capacity of cooling water intake structures, in connection with point source thermal discharges, shall reflect the best technology available for minimizing adverse environmental impact."

The Department developed, through administrative precedent, a four-step analysis to determine "best technology available" for purposes of 6 NYCRR 704.5. This analysis included the following components:

(1) whether the facility's cooling water intake structure may result in adverse environmental impact;

(2) if so, whether the location, design, construction, and capacity of the cooling water intake structure reflects best technology available for minimizing adverse environmental impact;

(3) whether practicable alternate technologies are available to minimize the adverse environmental effects; and

(4) whether the costs of practicable technologies are wholly disproportionate to the environmental benefits conferred by such measures. (See, e.g., Matter of Athens Generating Company, LP ["Athens"], Interim Decision of the Commissioner, June 2, 2000, at 9 [emphasis added]; Matter of Dynegy Northeast Generation, Inc., Decision of the Deputy Commissioner, May 24, 2006, at 20 [same].)

In reliance on a 2007 decision of the Second Circuit of the U.S. Court of Appeals (Riverkeeper, Inc. v United States Env'tl. Protection Agency, 475 F3d 83 [2d Cir 2007]) ("Second Circuit decision"), the fourth step of the BTA analysis was modified by the Interim Decision (see Interim Decision, at 10-14). The Second Circuit had held that BTA for minimizing environmental impacts under section 316(b) of the federal Clean Water Act was the technology that achieves the greatest reduction in adverse environmental impacts at a cost that can "reasonably be borne" by the industry (see Second Circuit decision, at 99).

The Interim Decision incorporated the "reasonably be borne" language that was set forth in the Second Circuit decision into the fourth step of the BTA analysis, in place of the "wholly disproportionate" language. The Interim Decision reworded the fourth step of the BTA analysis as follows: "whether the cost of the technology can reasonably be borne by the industry and, upon making the determination that it can, whether considerations of

cost-effectiveness allow for selection of a less expensive but equally effective technology" (Interim Decision, at 13). The Interim Decision stated that the Second Circuit's construction would govern this proceeding unless "overturned or otherwise modified by the United States Supreme Court" (Interim Decision, at 12). The Second Circuit decision was subsequently reversed by the U.S. Supreme Court in 2009 (see Entergy Corp. v Riverkeeper, Inc., 556 US 208 [2009]).

Entergy, in its memorandum of law accompanying the motion ("Entergy memorandum of law"), contends that the fourth step of the BTA analysis should be reconsidered in light of the reversal of the Second Circuit decision by the United States Supreme Court. Entergy further contends that section 316(b) of the Clean Water Act, which as noted is the federal counterpart to 6 NYCRR 704.5, must be interpreted as including a cost-benefit analysis and, as such, a cost-benefit analysis should be incorporated as part of 6 NYCRR 704.5 (see Entergy memorandum of law, at 5-11).

Department staff submitted a memorandum of law dated June 10, 2009 ("Department staff memorandum") in opposition to the motion. Department staff rejected Entergy's contention that the decision of the United States Supreme Court holds that a cost-benefit analysis is a standard to which the Department must adhere when conducting a BTA analysis. According to Department staff, "[t]he Supreme Court's decision stands only for the proposition that a cost-benefit analysis is not a standard in and of itself, but is instead a tool that a decision-maker can use to *consider* costs in the implementation of the BTA standard" (Department Staff memorandum, at 2 [italics in original]). Staff maintains that the "wholly disproportionate" methodology is a "cost test, not a standard" (see id., at 3). Staff further notes that the Department has a statutory right, pursuant to section 510 of the federal Clean Water Act, to adopt or enforce a more stringent BTA approach than "simply" using a cost-benefit analysis (id. at 6).

Riverkeeper, Inc., Scenic Hudson, Inc., and Natural Resources Defense Council, Inc. (collectively, "Riverkeeper") submitted a memorandum of law dated June 25, 2009 ("Riverkeeper memorandum") in opposition to the motion and also to Department staff's interpretation of the fourth step of the BTA analysis. Riverkeeper contends that the fourth step of the BTA analysis, as stated in the Interim Decision, should govern this proceeding (see Riverkeeper memorandum, at 2). Riverkeeper argues that the United States Supreme Court decision does not require any

further modification to the fourth step. In addition, Riverkeeper contends that Department staff's position concerning what constitutes "wholly disproportionate" is inaccurate. Riverkeeper requests that Entergy's motion be denied, and Department staff's position rejected (see Riverkeeper memorandum, at 12).

Entergy submitted a reply brief dated July 14, 2009 in response to Department staff's and Riverkeeper's filings ("Entergy reply"). Entergy maintains that Department staff and Riverkeeper, in their submissions, each presented a new standard for implementing 6 NYCRR 704.5. According to Entergy, both of these proposed standards should be rejected.

Riverkeeper, by letter dated July 27, 2010, submitted a copy of a decision issued by the U.S. Court of Appeals for the Fifth Circuit in ConocoPhillips Co. v United States Env'tl. Protection Agency, 612 F3d 822 (5th Cir 2010) ("ConocoPhillips"). According to Riverkeeper, the ConocoPhillips decision provides, in part, that the EPA may, but is not required to, engage in cost-benefit analysis for cooling water intake structure rulemaking (citing 612 F3d, at 837). Entergy requested an opportunity to reply, which was granted by memorandum dated August 10, 2010. By letter dated August 20, 2010, Entergy contended that the Fifth Circuit decision does not support Riverkeeper's arguments, nor does it otherwise affect the arguments advanced in Entergy's motion.

## **DISCUSSION**

As noted, prior to the Interim Decision, the Department, through administrative precedent, developed a four-step process to determine BTA pursuant to 6 NYCRR 704.5. The fourth step of the BTA analysis involved determining "whether the costs of practicable technologies are wholly disproportionate to the environmental benefits conferred by such measures" (see, e.g., Matter of Dynegy Northeast Generation, Inc., Interim Decision of the Deputy Commissioner, May 13, 2005, at 7-8, n 8; Matter of Mirant Bowline, LLC, Decision of the Commissioner, March 19, 2002, at 12; Athens, Interim Decision of the Commissioner, June 2, 2000, at 9) [emphasis added]. In light of the 2007 Second Circuit decision, the Interim Decision appropriately modified the fourth step of the BTA analysis by incorporating the "reasonably be borne" language of the Second Circuit decision in place of the prior "wholly disproportionate" phrasing.

Developments subsequent to the issuance of the Interim Decision, however, support reconsidering the Interim Decision's modification of the fourth step of the BTA analysis. As noted, the United States Supreme Court reversed the Second Circuit decision on which the Interim Decision relied for its rewording of the fourth step.

Entergy argues that it only seeks to return to the BTA analysis applied by the Department before the pre-Second Circuit decision (see, e.g., Entergy reply, at 1 ["Entergy now argues nothing more than that New York law should be . . . interpreted as it was prior to the Second Circuit's ill-advised attempt to reinterpret the [Clean Water Act]"). However, in its motion, it contends that the cost-benefit standard is the "preferred interpretation" of section 316(b) of the Clean Water Act, and that New York should revert to inclusion of a cost-benefit analysis in 6 NYCRR 704.5 (see Entergy memorandum of law, at 7-11). Although I am granting Entergy's motion for reconsideration, I decline to accept its formulation with respect to the fourth step of the BTA analysis.

Contrary to Entergy's arguments, the United States Supreme Court decision does not mandate that New York follow a "cost-benefit" approach. The court notes that section 316(b) of the Clean Water Act (33 USCA 1326[b]) is silent with respect to cost-benefit analysis, and concludes that "[i]t is eminently reasonable to conclude that § 1326(b)'s silence is meant to convey nothing more than a refusal to tie the [Environmental Protection Agency]'s hands as to whether cost-benefit analysis should be used, and if so to what degree" (Entergy Corp. v Riverkeeper, Inc., at 222).

Department staff contends that, although the Supreme Court indicated that costs could be considered, the Court did not state that a cost-benefit analysis was required or even preferred (see Department staff memorandum, at 2). According to Department staff, the "only relevant" environmental benefit to be considered in the BTA analysis is the protection of aquatic organisms, that is, the reduction in impingement and entrainment mortality, "afforded by the minimization alternative" (see id., at 4). Department staff also maintains that the Commissioner has a statutory right, pursuant to section 510 of the Clean Water Act, to adopt or enforce through its federally delegated SPDES permit program more stringent standards than simply a cost-benefit approach (see id. at 6).

Riverkeeper also disputes Entergy's characterization of the cost-benefit standard with respect to the fourth step. According to Riverkeeper, the Supreme Court decision "merely stands for the permissibility of cost-benefit analysis, and in no way creates a requirement, or undermines other options" (Riverkeeper memorandum, at 4).

Nothing in section 316(b) of the Clean Water Act or 6 NYCRR 704.5 requires a cost-benefit analysis (see, e.g., Interim Decision, at 22; Athens, Interim Decision of the Commissioner, June 2, 2000, at 14-16). Certainly, some consideration to costs should be given in determining the extent of minimization to be required. However, as the DEC Commissioner stated in Athens:

"Thus, in determining BTA, a lone finding that the costs outweigh the environmental benefits to be gained is insufficient; instead, a finding must be made that the costs are 'wholly disproportionate' to the environmental benefits to be gained. This more rigorous standard gives presumptive weight to the value of environmental benefits and places the burden on a permit applicant to demonstrate that the relative costs are unreasonable" (Athens, at 14-15; see also Athens, ALJ Ruling on Proposed Issues for Adjudication and Petitions for Party Status, April 26, 2000, at 23-28 [evaluating BTA in terms of applicable legal authority, and noting that the wholly disproportionate standard is not a mere cost-benefit analysis]).

This reasoning was applied in subsequent administrative proceedings up until the Interim Decision (see, e.g., Matter of Dynege Northeast Generation, Inc., ALJ Hearing Report, at 80-82, adopted by Decision of Deputy Commissioner, May 24, 2006).

On July 10, 2011, Commissioner Joseph Martens issued Commissioner Policy 52 ("Best Technology Available [BTA] for Cooling Water Intake Structures") ("CP-52"). CP-52 sets forth the Department's BTA policy to address reductions in impingement and entrainment mortality that are required to minimize the adverse environmental impact caused by industrial facilities having a cooling water intake structure in connection with a point source thermal discharge.

CP-52 provides guidance for selecting the procedures to be followed in Department staff's selection of BTA for an industrial facility. In that process, the Department will consider the cost of feasible technologies, and will determine "whether or not the costs of the technologies are wholly

disproportionate to the environmental benefits to be gained from the technology" (see CP-52, at 6). As defined in CP-52, the "wholly disproportionate test" is "neither a traditional cost-benefit analysis nor an economic analysis" (CP-52, at 4). The test is "simply a comparison of the proportional reduction in impact (benefit) as compared to the proportional reduction in revenue (cost) of installing and operating BTA technology to mitigate adverse environmental impact" (id.). The resource is not monetized and presumptive weight is given "to the value of the environmental benefits to be gained" (id.). CP-52 further states:

"The Department will not undertake a formal cost-benefit analysis whereby the environmental benefits would be monetized. Such an analysis is neither desirable nor required by law. See Entergy Corp.[.] v Riverkeeper, Inc., et al., 556 U.S. [208], 129 S.Ct. 1498 (2009). For each site-specific BTA determination, the Department will select a feasible technology whose costs are not wholly disproportionate to the environmental benefits to be gained" (see id.).

CP-52, in its discussion of Department policy, is consistent with legal and administrative decisions and procedures that were followed by Department staff and approved by the Commissioner prior to the Second Circuit decision (see DEC Response to Public Comments, "Best Technology Available [BTA] for Cooling Water Intake Structures," June 1, 2011, at 1, [www.dec.ny.gov/docs/fish\\_marine\\_pdf/btapolicycom.pdf](http://www.dec.ny.gov/docs/fish_marine_pdf/btapolicycom.pdf) [noting in response to comment 2 that policy "merely synthesizes" decisions and procedures followed "for almost 10 years"]; see also Athens, Interim Decision of the Commissioner, at 14-16; Athens, ALJ Ruling on Proposed Issues for Adjudication and Petitions for Party Status, April 26, 2000, at 27-28).

Accordingly, in light of the United States Supreme Court decision in Entergy Corp. v Riverkeeper, Inc. (556 US 208 [2009]), and Department administrative precedent and policy guidance, the "wholly disproportionate" standard shall be reincorporated into the fourth step of the BTA analysis. This would reestablish the administrative precedent that was in effect prior to the "reasonably be borne" language of the (now reversed) Second Circuit decision.

The parties have proposed technologies (wedge-wire screens and closed cycle cooling) as BTA for the stations. In this proceeding, the proponent of a technology will be required to

show: (1) the increase in the protection of aquatic organisms that would be gained from installing and operating the proposed technology as compared to current operations; and (2) the increase in cost of the proposed technology at the stations (including but not limited to costs of installation, maintenance and operation) as compared to the costs of current maintenance and operation. Once the proportional increase in the protection of aquatic organisms and the proportional increase in costs of the proposed technology are known, a determination will be made whether the costs of the technology are wholly disproportionate to the environmental benefits to be gained from the technology.

In sum, the fourth step in the BTA analysis is hereby modified to require a determination "whether the costs of the feasible<sup>4</sup> technologies are wholly disproportionate to the environmental benefits to be gained from such technologies," and it is this construction that will be used in this proceeding. CP-52 and administrative precedent shall be used as guidance in the application of the fourth step.

For the New York State Department  
of Environmental Conservation

/s/

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By: Eugene Kelly  
Regional Director, Region 4

Dated: November 28, 2012  
Schenectady, New York

To: Attached Service List

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<sup>4</sup> CP-52 uses the word "feasible" in its discussion and defines it as "capable of being done; able to be installed and function efficiently within the operating constraints of the facility" (CP-52, at 3). The third and fourth step in the BTA analysis, as developed through prior administrative proceedings, used the word "practicable" (see page 2 of this ruling). In this context, there is no difference in meaning between "feasible" and "practicable" (see, e.g., Webster's Dictionary [International Edition, 1992] [defining "practicable" as "feasible"]; American Heritage Dictionary, Third Edition, 1992 [same]). In light of the definition and use of "feasible" in CP-52, "feasible" shall be used in place of "practicable" in the third and fourth steps of the BTA analysis.