No. 07-589

In the Supreme Court of the United States

PSEG FOSSIL LLC AND PSEG NUCLEAR LLC,
PETITIONERS,
v.
RIVERKEEPER INC, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

JOHN G. VALERI, JR.
PSEG SERVICES CORP.
OFFICE OF ENVIRONMENTAL COUNSEL
80 PARK PLAZA, T5C
NEWARK, NJ 07102-4194
(973) 430-6298

MAUREEN E. MAHONEY
Counsel of Record
PHILIP J. PERRY
J. SCOTT BALLENGER
CASSANDRA STURKIE
DREW C. ENSIGN
LATHAM & WATKINS LLP
555 11TH STREET, N.W., SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

KARL S. LYTZ
LATHAM & WATKINS LLP
505 MONTGOMERY STREET SUITE 2000
SAN FRANCISCO, CA 94111
(415) 391-0600

MARCH 18, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITY

ARGUMENT

The United States agrees that the Second Circuit's holdings on the cost-benefit and restoration issues are "incorrect," calls *Riverkeeper II* "undoubtedly important," recognizes that the decision "has great significance" and "unjustifiably constrains" EPA's decisionmaking, and warns that it "clear[ly] ... will be disruptive" to the Phase II facilities that produce "approximately 40% of our Nation's energy." U.S. Br. at 9-10, 14, 24-25. It explains that the Second Circuit is attempting "to micro-manage [EPA's] decisionmaking by establishing rules that cannot be found anywhere in the [Clean Water] Act," such as a newly-invented distinction between "cost-benefit" and "cost-effectiveness" review that apparently turns on the difference between saving "99-101 fish" and "102 fish" (App.24a-25a). *Id.* at 12. If this Court grants review, the Government would support petitioners on these issues. *Id.* at 25.

The Government stops short of full support, however, because the "full impact of the decision will not be clear until EPA completes proceedings on remand." *Id.* at 9. The other respondents echo this wait-and-see argument. Certainly we do not yet know that EPA will feel compelled to require every large, existing facility to retrofit to closed-cycle cooling at a cost of billions of dollars. But whatever form a new Phase II rule takes, it is at least clear that the Second Circuit has prohibited EPA from considering the costs of technologies in relation to their environmental benefits in determining "best technology available" ("BTA"). It has also foreclosed EPA from allowing site-specific BTA determinations based on a cost-benefit test, and from authorizing facilities to use

restoration measures to comply with §316(b)—thus eliminating the compliance value of the hundreds of millions of dollars invested in on-going restoration projects. Moreover, no respondent grapples with the fundamental problem that these issues will in all likelihood become effectively unreviewable if this Court does not review this case.

1. Environmental and state respondents have essentially no answer to arguments about national importance, and the Government concedes this point. U.S. Br. at 14 (*Riverkeeper II* is "undoubtedly important" and "clear[ly] ... will be disruptive"). After all, the Second Circuit prohibits two regulatory tools on which EPA has relied for decades—restoration measures and cost-benefit analysis for site-specific BTA determinations. App.40a-45a; 51a-55a. Respondents fail to address these concrete holdings, effectively conceding their fitness for review.

It is also beyond dispute that the Second Circuit bars EPA, on remand, from evaluating the costs of closed-cycle technology (or any technology) against its environmental benefits. Indeed, respondents tout the clarity of this prohibition. Enviro. Br. at 24 (*Riverkeeper II* "leaves no room for weighing of costs and benefits."); States Br. at 13 ("*Riverkeeper II* makes it clear that EPA cannot employ a cost-benefit analysis ....").

The Second Circuit's wrongful elimination of this "fundamental" tool (U.S. Br. at 18) creates a significant risk that EPA will be compelled to require closed-cycle

cooling for all 550 Phase II facilities.[1] Such a mandate would "have dramatic effects" on both the power grid and the national economy and threaten the "enormous investments" made by existing facilities in compliance with §316(b). U.S. Br. at 15; *see also* Pet. at 33-36; *Amicus* NEI Br. at 11-21.

Despite its frank admissions, the Government rests its "opposition" on the notion that "it is unclear *how* significant the decision ... will prove to be." U.S. Br. at 14 (emphasis added). But this Court does not require complete certainty about a decision's magnitude—only that it involve an "important question of federal law that ... should be[] settled." Sup. Ct. R. 12(c). Whatever additional clarity a new rule may offer, *Riverkeeper II* meets this standard now. The decision *already* creates massive uncertainty for facilities that must renew their permits—and BTA determinations—every five years, and that face up to a decade or more of permitting decisions before the new Phase II regulations are finalized. *See, e.g.*, Pet. at 15; U.S. Br. at 14-15 (disruptions to permitting decisions). The enormous economic consequences threatened by this decision may therefore become a *fait accompli* before EPA completes the remand proceedings.

In addition, respondents fail to address the likelihood that these issues may become unreviewable if the petitions are denied. The only way EPA could preserve these issues for review would be to defy the

---

[1] Although environmental respondents suggest that a closed-cycle cooling requirement would apply to "*only* ... the 51 largest plants" (Enviro. Br. at 12), nothing in the decision is so limited. At a cost of up to $1 billion *per facility*, with significant facility downtime and a sizeable energy penalty, an unwarranted retrofit of even one facility would be too much.

Second Circuit and implement cost-benefit analysis and/or restoration measures in any new Phase II rule. *See N.D. State Bd. Of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162-63 (1973) (treating decision as final because state board had no reasonable means "of preserving the [legal] question" other than to defy the court below).

All parties agree, and it is settled law, that §316(b) does not *require* EPA to consider costs and benefits in selecting BTA. Therefore, if EPA abides by the Second Circuit's mandate to adopt a new Phase II rule based on an erroneous statutory interpretation, it almost certainly will not be possible to challenge that rule on the ground that EPA "should have" analyzed costs and benefits.

Similarly, even though respondents (to varying degrees) deny the clarity or significance of the present circuit splits, they concede that a square, acknowledged split on the cost-benefit issue is imminent if the United States prevails in the Phase III litigation pending in the Fifth Circuit. Respondents pretend that this Court could wait to review that issue until such a victory occurs, but the decision whether to seek certiorari would be exclusively within the control of the environmental petitioners—the lead environmental respondents here.

When confronted with this point (Pet. at 17, 33), environmental respondents did not even suggest they would seek review if the Fifth Circuit rejects their challenge to cost-benefit analysis. *See* Enviro. Br. at 15-16. Indeed, if faced with the prospect of jeopardizing their victory below, there is every reason to believe they would forego review of the Fifth Circuit's decision to protect *Riverkeeper II*—

particularly in light of the Second Circuit's clear error and the Government's statements in its brief here.

This case and the Fifth Circuit case will present the only realistic vehicles for this Court to review these issues for many years, if ever. EPA promulgated the draft Phase II Rule almost six years ago, and it will take years for EPA to promulgate and defend a new rule. Likewise, the Phase III Rule represents the final culmination of the extensive agency review process for existing facilities not covered by the Phase II Rule. Permitting decisions for individual facilities are factbound, rarely litigated, and unlikely candidates for this Court's review.

The unavoidable consequence is that facilities will have to make permitting investments constrained or threatened by *Riverkeeper II* long before this Court has another chance to consider these issues. The electric power industry (and consumers of electric power) are thus in a far *worse* position than "before the Phase II rule was issued." States Br. at 13. To avoid this intractable situation, this Court should grant review or *at least* hold these petitions until the Fifth Circuit rules.[2] Otherwise, an undeniable, *unreviewable* circuit split is likely to emerge.

2. Respondents, like the Second Circuit, try to deny the existence of a conflict with *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306 (1st Cir. 1979), as well as with 30 years of agency practice and the Second Circuit's own decision in *Riverkeeper I*,[3] by positing that the prior decisions and regulation used only what they call "cost-effectiveness analysis" rather than cost-

---

[2] The parties completed briefing in late 2007.

[3] *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2d Cir. 2004).

benefit analysis. *See, e.g.*, Enviro. Br. at 17 (*Seacoast* "apparently based on *cost-effectiveness* ... rather than cost-benefit"). This is a semantic game with no grounding in the substance of what the law has been.

First, "cost-effectiveness" is the Second Circuit's invention and is plainly not the analysis used by EPA in *Seacoast*, or by permit writers relying on that decision since 1979. *See* UWAG Pet. at 21-22 (summarizing permitting decisions based on the "wholly disproportionate" test). EPA defended its decision in *Seacoast* on the *sole* basis of cost-benefit analysis, considering whether the costs of technology were "'wholly disproportionate to any environmental benefit.'" 597 F.2d at 311 (citation omitted). The First Circuit upheld this approach, without suggesting that EPA's decision could be affirmed as harmless error under a more limited "cost-effectiveness analysis," or otherwise expressing any reservation about EPA's analysis. *Id.* Here, EPA based its Phase II BTA determination on the same form of cost-benefit analysis affirmed by the First Circuit in *Seacoast*, but the Second Circuit reached a diametrically-opposite conclusion.

Contrary to the environmental and state respondents' soft-pedaling the importance of *Seacoast*, that decision was sufficiently definitive that the "wholly disproportionate" standard remained EPA's mode of analysis for more than 25 years. The Second Circuit's elimination of EPA's discretion to weigh costs and benefits threatens billions of dollars in investments made by facilities in reliance on EPA's longstanding *and correct* interpretation of §316(b). *See* Pet. at 17; U.S. Br. at 4. This conflict with EPA's longstanding practice underscores the need for review. *See* Eugene

Gressman et al., *Supreme Court Practice* 268 (9th ed. 2007) (collecting cases).

Second, even what the Second Circuit calls "cost-effectiveness analysis" (App.23a) involves *some* comparison of costs to benefits. EPA may "choose between two (or more) technologies" that "have markedly different costs" but "produce essentially the same benefits." App.25a. The Second Circuit apparently just decided that the "wholly disproportionate" standard provided EPA *too much* flexibility in weighing costs and benefits. Rather than statutory interpretation, however, this is nothing more than the court's "preference[] imposed on the agency, in violation of *Chevron*." U.S. Br. at 13.

Third, the Second Circuit's clear error in restricting EPA to a supposed "cost-effectiveness analysis" is demonstrated by the court's own incoherence. According to environmental respondents[4] and the Second Circuit in *Riverkeeper II*,[5] EPA used "cost-effectiveness analysis" in the Phase I Rule, and therefore the court in *Riverkeeper I* applied this same analysis. But EPA rejected dry-cooling for Phase I facilities despite it being "95 percent more effective than closed-cycle cooling at eliminating entrainment." *Riverkeeper I*, 358 F.3d at 194 n.22. If dry-cooling and closed-cycle cooling had been compared under what *Riverkeeper II* calls "cost-effectiveness analysis," the Second Circuit would not have upheld EPA's rejection of dry-cooling because these two technologies plainly do *not* provide "essentially the same benefits." App.25a. Nonetheless, the *Riverkeeper I* court upheld

---

[4] Enviro. Br. at 20.

[5] App.22a-23a n.11

EPA's decision, calling its cost-benefit comparisons "*certainly*" and "*undeniably relevant.*" 358 F.3d at 195 n.22 (emphasis added).

The direct conflict between these two standards belies respondents' contentions that *Riverkeeper II* is compatible with existing precedents. The Second Circuit's "cost-effectiveness analysis" *either* restricts EPA to rejecting costly technologies only where other technologies "produce essentially the same benefits" (the *Riverkeeper II* formulation), *or* it allows EPA to reject costly technology on the basis of cost-benefit considerations even where that technology is "95 percent more effective" (the *Riverkeeper I* formulation). It cannot do both.

3. *All* parties agree that the Second Circuit presumed that cost-benefit analysis was prohibited in the absence of express congressional authorization. Environmental respondents contend that *Riverkeeper II* correctly held that "the absence of any such authority in section 316(b) is evidence that [Congress] did not intend such considerations to govern here." Enviro. Br. at 26; *see also id.* (*Riverkeeper II* correctly placed great "weight" on "Congress's conspicuous failure to authorize cost-benefit analysis"). The states even proclaim that this is nothing more than a "basic construction principle," involving "textbook application of ordinary *Chevron* step-one principles." States Br. at 16-17. But the Second Circuit's treatment of congressional silence is precisely *opposite Chevron*. *See* Pet. at 15-16, 25-27; U.S. Br. at 11-12. "'[S]ilence, after all, normally creates ambiguity. It does not resolve it.'" U.S. Br. at 11 (citation omitted).

In the 23 years since *Chevron*, no other circuit has interpreted silence in this manner. *See* Pet. at 26-27.

Indeed, the D.C. Circuit has described as "unexceptional" its view that "*preclusion* of cost consideration requires ... express congressional direction." *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (emphasis added); *see also Sierra Club v. EPA*, 314 F.3d 735, 744 (5th Cir. 2002) (applying *Michigan* and holding that "determinations based on a cost/benefit analysis are within the EPA's discretion *unless the statutory scheme precludes such a determination*") (emphasis added). Both of these circuits (and likely *all* others) would have applied an opposite presumption.

This error was crucial to the Second Circuit's decision, as nothing in the statute precludes cost-benefit analysis. Indeed, the cross-reference to §§301, 304, and 306 that the Second Circuit relied upon affirmatively *authorizes* EPA to consider cost-benefit analysis. *See* Pet. at 18-21; U.S. Br. at 10. EPA's authority was also supported by §316(b)'s legislative history—a fact respondents ignore. The Second Circuit's erroneous statutory presumption therefore must be given enormous weight to justify the outcome here. Its dramatic deviation from settled law merits this Court's review.

4. There is also now a square circuit conflict as to the permissibility of using cost-benefit analysis in setting "best available technology" ("BAT") under §§301 and 304. *Riverkeeper II* placed great weight on its erroneous interpretation of those provisions. *See* App.18a-21a. Indeed, the court analyzed the BAT provisions first, holding that "[i]n determining BAT" EPA was prohibited from considering "the relation between that technology's cost and the benefits." App.19a. Only *after* that unprecedented holding did

the Second Circuit conduct a perfunctory analysis of §316(b). Notably, state respondents admit to the court's heavy dependence on the BAT provisions, stating that "the court rejected the cost-benefit analysis because it was precluded ... by the plain language of the cross-referenced sections." States Br. at 8; *see also id.* at 15-16, 23-24; U.S. Br. at 10-11. This reliance on BAT standards significantly broadens the impact of the *Riverkeeper II* decision by extending its holding to the BAT *effluent* context.[6] *See, e.g.*, Cooling Water Amicus Br. at 15-20. It also creates additional circuit splits. *See* Pet. at 19-21.

Contrary to respondents' repeated contentions, EPA has used cost-benefit analysis in setting BAT standards, and that authority has been upheld. In *BP Exploration & Oil, Inc. v. EPA*, EPA rejected an option "for BAT," based in part on its "unacceptably high economic [costs]." 66 F.3d 784, 796 (6th Cir. 1995). The Sixth Circuit affirmed this choice, stating "NRDC is wrong to contend that EPA is not permitted *to balance factors such as cost against effluent reduction benefits*." *Id.* (emphasis added). *Compare id. with* App.18a-21a.

Environmental and state respondents are further mistaken in arguing that the statutory language for BAT forbids cost-benefit analysis. As the Government correctly observes, BAT permits consideration of both "'the cost of achieving such effluent reduction'" and

---

[6] Environmental respondents mistakenly contend that the Second Circuit "interpreted only section 316(b) and did not purport to issue holdings concerning any other statutes." Enviro. Br. at 19. The Second Circuit's analysis and holding leave no question as to the breadth it intended, App.18a-21a, as state respondents and the Government acknowledge.

"'such other factors as [EPA] deems appropriate.'" U.S. Br. at 10 (quoting 33 U.S.C. §1314(b)(2)(B))—giving EPA wide latitude to consider costs in relation to benefits. *See also* Pet. at 18-21. The Second Circuit's attempt to "micro-manage" (U.S. Br. at 12) the precise manner in which EPA can consider costs in relationship to benefits also brings that court's analysis into direct conflict with the D.C. Circuit. The D.C. Circuit held that "Congress *did not mandate* any particular structure or weight for the many consideration factors. Rather, *it left EPA with discretion* ...." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978) (emphasis added). Indeed, the CWA "*on its face* lets EPA relate the various factors as it deems necessary." *Id.* at 1046 (emphasis added).

The D.C. Circuit's approach cannot be reconciled with the Second Circuit's public policy "freelancing." U.S. Br. at 12. The Second Circuit's mandate framed in terms of numbers of fish (*e.g.*, "100-105 fish," "at least 102 fish," App.24a-25a) is simply incompatible with the D.C. Circuit's emphatic recognition that the CWA "'cannot logically be interpreted to impose on EPA a specific structure of consideration.'" Pet. at 21 (citation omitted). In light of their vastly different and appropriately deferential review, the Sixth and D.C. Circuits clearly would have reached the opposite outcome here.

5. The Government agrees that the Second Circuit's holding on restoration is "wrong" and "has the potential to be disruptive." U.S. Br. at 16-17. It also raises questions of national importance. Thirteen *amici* states—representing a broad swath of the country—urged review of this issue so they do not lose

this environmentally-valuable permitting tool. Even state respondents concede "the importance of restoration" and suggest that EPA and States should continue to authorize the use of restoration measures—just not as a §316(b) compliance alternative. States Br. at 27. This assessment is not surprising given the immense resources that PSEG and other permittees have devoted to §316(b) restoration and the long-lasting environmental benefits achieved. But the states' apparent belief that these important programs will be unaffected by *Riverkeeper II* is extraordinarily naïve. In light of their obligations to shareholders and ratepayers, utilities are unlikely to make the same level of investment in restoration projects when the compliance value of those projects is eliminated.

The Second Circuit's interpretation is also in conflict with itself. Cooling towers and fish nets are no more part of an intake structure than restoration measures, yet the court concluded that §316(b)'s silence could mandate the former but may never encompass the latter. App.44a. And, as the Government rightly noted, restoration measures may be part of the intake's "design." That these legal defects constrain EPA's discretion and doom a decades-old policy tool demonstrates the need for review.

Respectfully submitted,

JOHN G. VALERI, JR.
PSEG SERVICES CORP.
OFFICE OF
ENVIRONMENTAL COUNSEL
80 PARK PLAZA, T5C
NEWARK, NJ 07102-4194
(973) 430-6298

MAUREEN E. MAHONEY
Counsel of Record
PHILIP J. PERRY
J. SCOTT BALLENGER
CASSANDRA STURKIE
DREW C. ENSIGN
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
KARL S. LYTZ
LATHAM & WATKINS LLP
505 MONTGOMERY STREET
SUITE 2000
SAN FRANCISCO, CA 94111
(415) 391-0600

MARCH 18, 2008