



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 20 2007

MEMORANDUM

OFFICE OF
WATER

SUBJECT: Implementation of the Decision in *Riverkeeper, Inc. v. EPA*, Remanding the Cooling Water Intake Structures Phase II Regulation

FROM: Benjamin Grumbles, Assistant Administrator

TO: Regional Administrators

The purpose of this memorandum is to provide guidance on the status of the Cooling Water Intake Structures Phase II regulation under section 316(b) of the Clean Water Act ("Phase II rule" or "Rule"). The Phase II rule set national standards for cooling water withdrawals by large, existing power producing facilities ("Phase II facilities"). See 40 C.F.R. Part 125 Subpart J; 69 Fed. Reg. 41576 (July 6, 2004). The Second U.S. Circuit Court of Appeals recently issued its decision in the litigation over the Phase II regulation. See *Riverkeeper, Inc., v. EPA*, No. 04-6692, (2d Cir. Jan. 25, 2007).

The court's decision remanded several provisions of the Rule on various grounds. The provisions remanded include:

- EPA's determination of the Best Technology Available under section 316(b);
- The Rule's performance standard ranges;
- The cost-cost and cost-benefit compliance alternatives;
- The Technology Installation and Operation Plan provision;
- The restoration provisions; and
- The "independent supplier" provision.

With so many provisions of the Phase II rule affected by the decision, the rule should be considered suspended. I anticipate issuing a Federal Register notice formally suspending the Rule in the near future.¹ In the meantime, all permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment basis. See 40 C.F.R. § 401.14.

If you have questions regarding the application of section 316(b) at Phase II facilities, please contact either Janet Goodwin with the Office of Science and Technology at 202-566-1060 (goodwin.janet@epa.gov) or Deborah Nagle with the Office of Wastewater Management at 202-564-1185 (nagle.deborah@epa.gov).

¹ In the event that the court's decision is overturned prior to publication of the Federal Register notice, then I will not proceed to effect the suspension; if the court's decision is overturned after publication of the notice, the Agency will take appropriate action in response.