



By Richard Lazarus

At Least It Was April Fool's Day

On April 1, the Supreme Court decided *Entergy v. Riverkeeper*, answering the question that the Court itself wrote in granting review 12 months earlier: Whether Section 316(b) of the Clean Water Act authorizes the Environmental Protection Agency to compare costs with benefits in determining the “best technology available for minimizing adverse environmental impact” at cooling water intake structures. The Second Circuit had held that EPA lacked authority to engage in cost benefit analysis under Section 316. (Disclosure: I served as co-counsel for the 16 environmental respondents, including Riverkeeper, before the Supreme Court.)

The Supreme Court reversed in an opinion written by Justice Antonin Scalia joined by the chief justice and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito. Justice Stephen Breyer filed an opinion concurring in part and dissenting in part. And Justice John Paul Stevens filed a dissenting opinion, which Justices David Souter and Ruth Bader Ginsburg joined.

Entergy was the second major environmental opinion for the Court written by Scalia this term. He wrote the opinion one month earlier in *Summers v. Earth Island Institute* for the same majority, ruling then that environmental plaintiffs lacked Article III standing to challenge Forest Service rules imple-

menting the Appeals Reform Act. Both cases were clearly losses for the environmental respondents because the High Court reversed lower court rulings that were very favorable to environmentalists. But in each case, there were aspects of the majority's reasoning that offered something to both sides: the precise rulings were deliberately narrow — probably designed to keep Kennedy firmly on board — yet there was also rhetoric likely intended to embolden commercial interests in future litigation.

In *Earth Island*, for instance, the Court held that the environmental plaintiffs lacked the “concrete injury” necessary for standing. Scalia's opinion for the Court seemed clearly crafted to return the Court to the kind of more demanding “particularized” injury requirement Scalia had sought to require in his 1992 opinion in *Lujan v. Defenders of Wildlife*, but from which the Court had since steered away in *Friends of the Earth v. Laidlaw* in 2000 and *Massachusetts v. EPA* in 2007. While Justice Kennedy declined in 1992 to join Scalia's *Lujan* opinion in full, because he plainly thought it was too sweeping, Kennedy this time expressly joined the majority “in full” precisely because Scalia wrote more narrowly. In particular, the *Earth Island* majority declined to endorse any of the more sweeping Administrative Procedure Act arguments advanced by the solicitor general for foreclosing judicial review or the demanding Article III redressability requirements that Scalia has made clear that he favors.

In *Entergy*, Scalia also took deliberate care in narrowing the Court's ruling that EPA had authority to engage in cost-benefit analysis in regulating cooling water intake structures under Section 316(b). His opinion for the Court described its ruling as deciding only that EPA was not “categorically forbidden” from engaging in cost-benefit analysis, but not that EPA was required to do so. The Court instead expressly ruled that EPA had discretion to construe the rel-

evant language to deny the agency such authority because such a construction, too, was “certainly a plausible” reading of the law.

The Court further acknowledged that there may be “other arguments” for why EPA was limited in the extent to which it could use cost benefit analysis, but that the Court was not in *Entergy* addressing that issue and this case involved only an instance where EPA sought to account for “extreme disparities” between costs and benefits. Because, moreover, the Court did not disturb the multiple other grounds upon which the Second Circuit had found EPA's Section 316(b) rulemaking invalid, it will now be up to EPA under President Obama to decide on remand how to exercise the discretionary authority the Court has ruled the agency possesses.

No doubt, however, what lawyers on both sides will be mostly debating in future years is the legal significance of the *Entergy* Court's discussion of the meaning of the word “best” in Section 316(b). To the extent that the majority stated that “best” could plausibly include consideration of

“efficiency” concerns, some businesses will no doubt claim that should be true not just for Section 316(b), but for all “best” technology-based pollution control provisions in all federal environmental laws. Environmentalists, on the other hand, will likely argue that the Court was referring only to the use of “best” in Section 316(b), which is why the majority took care in its opinion to distinguish the language and structure of Section 316(b) from that provided for in the Clean Water Act's pollution control provisions.

The Court's opinion left teasers for both sides. Perhaps that is the High Court's equivalent of an April Fool's Day joke.

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