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Section: News

Page: 1A

Ruling protects fish in Hudson

Roger Witherspoon

Staff

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Federal panel says nuclear plants must use 'closed **cooling**'

Roger Witherspoon

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A federal rule allowing new power plants to kill fish while using river water in their **cooling** systems, as long as they also have restoration programs, was struck down yesterday by the U.S. Court of Appeals as a violation of the Clean Water Act. The three-judge panel in Albany ruled that the law requires power plants and factories drawing more than 2 million gallons of water a day to use "closed-cycle **cooling**" systems - which recycle water in a form of industrial radiator - because they are the "best technology available."

Operators can use only screens and other devices to keep fish and fish eggs from being pulled into the plants if those systems are 100 percent as effective as the closed-cycle systems, which use little water from the rivers, the court said.

While remediation programs are "beneficial to the environment," the judges found that such programs merely correct the environmental damage caused by the plants and "do not minimize those impacts in the first place." As a result, the court said, the U.S. Environmental Protection Agency had no authority to approve alternatives to preventing the killing of river fish.

"This effectively marks the end of **once-through cooling** at new facilities," said Alex Matthiessen, director of the environmental group Riverkeeper, which successfully challenged the EPA rule. "We are extremely pleased that the court prohibited the use of the restoration measures as a ruse to avoid installing state-of-the-art technology."

The case involves regulations issued in January 2002 governing the **cooling** systems to be used by new power plants and factories. A second EPA regulation governing existing plants is to be issued Feb. 16. The draft version of that rule allows existing plants to use restoration projects instead of requiring that they retrofit the plants for closed-cycle **cooling** systems.

Among the plants along the lower Hudson River, yesterday's ruling would affect the **cooling** system to be used at the proposed Bowline Point Steam Electric Generating Station No. 3 in West Haverstraw.

But there are conflicting views as to how, or if, the court ruling would affect existing power plants and the state's permit process. At stake are the **cooling** systems used by the Indian Point nuclear power plants in Buchanan, and the existing Bowline 1 and 2 power plants, the Lovett coal-fired power plants in Stony Point, and the Roseton Generating Station in Newburgh.

Entergy Nuclear Northeast, which owns Indian Point, received a draft permit from the state Department of Environmental Conservation in November allowing the plants to continue siphoning billions of gallons of Hudson River water and killing millions of fish annually, as long as Entergy agrees not to seek an extension of its licenses, which expire in about 10 years. Entergy, which has not said what it plans to do, also has to contribute \$24 million annually to a restoration fund.

"The court ruling does not affect the draft permit for the Indian Point plants," DEC spokesman Mike Fraser said. "Indian Point is an existing facility. If it was a new facility, we wouldn't need a restoration fund. We feel there will be a different standard for existing plants, so this should not affect the draft permit for Indian Point."

Entergy attorney Elise Zoli said the court's rejection of restoration programs "would present problems for the DEC. They proposed a \$24 million contribution to a restoration fund. It is my assessment that it would not be permitted."

The court, Zoli said, recognized the difference between new plants, which can factor the cost of new technologies into their building plans, and old plants, which could face severe financial difficulties trying to upgrade to new technologies. Therefore, she said, the state permit allowing Indian Point to continue using the Hudson should not be affected.

Reed Super, senior attorney for Riverkeeper, which has been battling the EPA in court over this issue since 1993, disagreed.

"The ruling means that the new regulations for existing plants, which EPA is about to issue, cannot include restoration measures," he said. "We are asking EPA Administrator Michael Leavitt not to issue such a rule as it would clearly violate the Clean Water Act. If they do, we will have no choice but to challenge that rule as well."

EPA officials said they had not had time to assess the impact of the court's decision. The state DEC, in an environmental impact study released in July, found that the Bowline, Indian Point and Roseton plants kill billions of fish and plants annually in their **cooling** operations. The agency monitored five of the more than 100 species of fish in the Hudson. It found that more than 2 billion of those five species died annually in the plants and millions more died of thermal shock when they encountered the heated water poured back into the river.

Reach Roger Witherspoon at rwithers@thejournalnews.com or 914-696-8566.