

EPA Proposes Standards for Cooling Water Intake Structures at Existing Facilities

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On March 28, the U.S. Environmental Protection Agency (EPA) issued proposed regulations under section 316(b) of the Clean Water Act that set standards applicable to cooling water intake structures for the protection of aquatic organisms. The proposed regulations would require existing large power plants and manufacturing facilities that withdraw water from adjacent water bodies exclusively for cooling to limit the number of aquatic organisms that are killed when they are pinned against the facility's intake structure or that are drawn into the facility's cooling system. The section 316(b) standards would be implemented through National Pollutant Discharge Elimination System (NPDES) permits issued to the covered facilities.

EPA developed the proposed regulations pursuant to section 316(b) of the Clean Water Act, which requires EPA to set standards such that that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." EPA had adopted regulations in 2004 pursuant to section 316(b) that were applicable to existing power plants, but suspended those regulations in 2007 following legal challenges filed by environmental groups and the industry, and a subsequent decision by the U.S. Court of Appeals for the Second Circuit that rejected and remanded back to EPA significant aspects of the regulations.¹

These most recent proposed section 316(b) regulations apply to existing power plants and manufacturing facilities that have the capacity to withdraw at least two million gallons of water per day from an adjacent water body and that use at least 25% of the water that they withdraw exclusively for cooling. Previously, manufacturing facilities had been subject to a different rulemaking under section 316(b), but EPA now is proposing that existing power plants and all manufacturing facilities be subject to the same standards.

Covered facilities would be subject to a limit on the number of fish and other aquatic organisms that are killed when they are pinned against the intake structures of the facility's cooling water system (impingement). The facility would need to work with the state agency that issues its NPDES permit, or the EPA where EPA issues the NPDES permit, to determine the best technology to meet this

1. See our April 2, 2009 Energy LawFlash, "Supreme Court Restores the Use of Cost-Benefit Analysis Under the Clean Water Act for Cooling Water Intake Structures," available at http://www.morganlewis.com/pubs/Energy_CoolingWaterIntakeStructures_LF_02apr09.pdf, for a discussion of the litigation on the earlier section 316(b) regulations.

impingement limit. Alternatively, the facility could limit the velocity of its cooling water intake to no greater than 0.5 feet per second. The proposed regulations provide that covered facilities are required to meet the impingement standard as soon as possible, but no later than eight years after the effective date of the rule.

Covered facilities that withdraw at least 125 million gallons of water per day also would be required to conduct studies to determine the appropriate controls to limit the number of aquatic organisms drawn into the facility's cooling water system (entrainment) and killed. The regulations provide that the entrainment mortality control technology to be used will be determined on a case-by-case basis based on the results of data collected from the applicable water body and facility. The process for determining the appropriate entrainment controls would include public participation. Alternatively, the facility could reduce its cooling water intake to a volume commensurate with that of a closed-cycle system, such as cooling towers. The proposed regulations provide that the schedule for implementing entrainment mortality controls will be determined on a case-by-case basis.

If the owner or operator of a nuclear facility can demonstrate that compliance with the section 316(b) standards conflicts with a safety requirement established by the U.S. Nuclear Regulatory Commission (NRC), the proposed regulations provide that either EPA or the state agency authorized to issue NPDES permits must make a site-specific determination of the best technology available for minimizing adverse environmental impact without conflicting with safety requirements. Before making such a determination, EPA or the state agency would be required to consult with the NRC.

According to the proposed regulations, new units built at the sites of existing facilities will be required to meet the impingement mortality limitations of existing facilities and must limit entrainment by reducing intake flow commensurate with closed-cycle cooling or by demonstrating an entrainment mortality reduction equivalent to at least 90% of the entrainment mortality reduction that could be achieved by reducing its intake flow commensurate with closed-cycle cooling.

The proposed regulations contain detailed instructions on the studies that covered facilities must conduct on their water body and operations and the data that the facilities must report to EPA or to their state permitting authority. We encourage the owners and operators of potentially covered facilities to consider these data collection, monitoring and reporting obligations carefully when reviewing the proposed regulations.

EPA is accepting comments on the proposed rule for 90 days from its date of publication in the *Federal Register*, which is expected soon. The final regulations are scheduled to be published in July 2012.

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