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## EPA Final 316(b) Rule Establishes Standards for Cooling Water Intake Structures at Existing Facilities

MAY 20, 2014

The US Environmental Protection Agency (EPA) yesterday released its final rule on cooling water intake structures for existing power plants, refineries and factories. The rule was issued under Section 316(b) of the Clean Water Act, which requires cooling water intake structures to reflect the best technology available (BTA) for minimizing adverse environmental impacts, primarily by reducing the amount of fish and shellfish that are impinged or entrained at a cooling water intake structure. The rule applies only to facilities that withdraw at least two million gallons per day of cooling water from "waters of the United States" and use 25% or more of the water withdrawn exclusively for cooling purposes. EPA estimates that the rule covers more than 1,000 facilities. A related fact sheet and the full text of the final rule are available [here](#) and [here](#).

Of particular note, the rule:

- requires facilities to use one of seven compliance alternatives to reduce impingement, all of which are considered equivalent to or better than a national performance standard based on "modified traveling screens" with fish returns;
- calls for site-specific entrainment requirements, reflecting the maximum reduction in entrainment warranted after consideration of an array of relevant factors, and requires facilities that withdraw more than 125 million gallons per day to conduct an entrainment study to help permitting authorities determine any required site-specific controls; and
- establishes a BTA standard for impingement and entrainment for new units at existing facilities. Under this standard, new units must reduce adverse environmental impacts to a level comparable to that which would be achieved through flow reductions commensurate with the use of closed-cycle cooling, or must use control measures to achieve a prescribed reduction in fish and shellfish mortality.

### Background

The rule, which was delayed several times by EPA, is the culmination of EPA's longstanding efforts to implement Section 316(b) of the Clean Water Act. EPA first issued a 316(b) rule in 1976. That was successfully challenged by electric utility companies and remanded to EPA in 1977. EPA

subsequently undertook a rulemaking under a 1995 consent decree with environmental organizations. That was challenged in 2004 and remanded to EPA in 2007. EPA then produced a draft rule in 2011 that generated comments from more than 1,100 organizations and individuals, which led to the final rule issued yesterday. While the final rule already is stirring controversy and may be subject to further legal challenges, it is scheduled to become effective 60 days after it is published in the *Federal Register*.

The rule will be implemented through permits issued under the National Pollutant Discharge Elimination System (NPDES) in Section 402 of the Clean Water Act. State agencies administer the NPDES permit program in most states; EPA administers the program in Idaho, Massachusetts, New Hampshire, New Mexico and Washington DC.

### Implications

1. Facilities that do not meet the BTA standards in the rule may need to upgrade or retrofit their cooling water intake structures. However, where site-specific data show that a *de minimis* rate of impingement exists, the BTA impingement standard may be achieved without additional controls.
2. Facilities that are not covered by the BTA standards in the rule will continue to be subject to Section 316(b) requirements set by permitting authorities on a case-by-case, best professional judgment basis.
3. For new units at existing facilities, agencies may permit alternative requirements to satisfy the rule, where a facility can show that the costs of compliance would be “wholly out of proportion” with the intended benefits, or would have other significant adverse impacts.
4. Data collection and studies required by the final rule may be time-consuming and resource-intensive. While the rule requires compliance “as soon as practicable,” it allows for extensions of NPDES permit applications for facilities whose permit cycles end within the next 45 months. For new units at existing facilities, information required under the final rule must be submitted to the permitting authority no later than 180 days before beginning operation of the new unit.

WilmerHale’s Environmental Group would be happy to discuss with you more particularized implications for your company or industry.

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