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Court Upholds EPA's 316(b) Rule for Cooling Water Intake Structures

On July 23, 2018, the U.S. Court of Appeals for the Second Circuit dismissed all challenges from several environmental and industry petitioners on the Environmental Protection Agency's (EPA) final rule pursuant to section 316(b) of the Clean Water Act (CWA). Promulgated by EPA on August 15, 2014, the final rule established requirements for cooling water intake structures (CWISs) to reduce impingement and entrainment of fish and other aquatic organisms. The rule applies to existing regulated facilities that use CWISs to withdraw more than two million gallons of water per day, of which 25 percent or more is used for cooling.[1] The final rule was supported by an Endangered Species Act (ESA) biological opinion (BO) jointly issued by the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (or, jointly, the Services). Industry and Environmental Petitioners sought review of the final rule and related BO. The final rule has been in effect throughout the litigation process.

Overall, the three-judge panel concluded that the final rule and the related BO were based on EPA's reasonable interpretations of the applicable statues and were sufficiently supported by the factual record. The following summarizes key aspects of the Court's opinion.

Petitions Challenging the 316(b) Rule

The Court dismissed each challenge from four separate petitions filed by: 1) Environmental Petitioners and Intervenors, 2) the Utility Water Act Group (UWAG),[2] 3) the American Petroleum Institute (API), and 4) the Cooling Water Intake Structure Coalition (CWIS Coalition). Broadly, the four petitioner groups raised challenges related to the CWA, Administrative Procedure Act (APA), and the ESA.

Environmental Petitioners

The Environmental Petitioners argued that the rule's entrainment and impingement provisions violated section 316(b) CWA in several ways and that EPA's definition of a "new unit" was in violation of the APA. In addition, Environmental Petitioners argued that the BO was inconsistent with the Services' implementing regulations. The Court rejected all of the Environmental Petitioners' challenges.

Specifically, for the rule's entrainment standards, the Court held that EPA acted reasonably and within its authority in adopting a case-by-case approach to entrainment standards. The Court also rejected the argument that EPA acted arbitrary and capriciously when it concluded that closed-cycle cooking is not nationally available and held that the process for state directors of National Pollutant Discharge Elimination System programs (Directors) to determine entrainment requirements at individual facilities was reasonable. The Court also concluded that EPA

[1] U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (August 15, 2014) (codified at 40 C.F.R. pts. 122, 125).

[2] The Court refers to "UWAG" to collectively encompass several industry associations include the Utility Water Act Group, Entergy Corporation, Cooling Water Intake Structure Coalition, and American Petroleum Institute.

can rely on cost benefit analyses when determining "best available technology" (BTA) under section 316(b) of the CWA.

Similarly, the Court upheld the impingement standards including EPA's decision to not determine closed-cycle cooling to be BTA. Rather, EPA concluded that modified traveling screens with a fish-friendly fish return constituted BTA. The Court also found that EPA acted rationally in affording Directors some discretion in determining whether a particular facility's impingement reduction efforts are adequate. The Court also concluded that EPA's explanation for its exclusion of fragile species from the calculation of impingement mortality was adequately supported by the administrative record because its data showed that the mortality of these species depends largely on natural conditions, rather than technology performance.

Additionally, the Court upheld the rule's definition of new unit, which excluded those that are rebuilt, repowered, and replaced at existing facilities such that only units added after October 14, 2014 are new stand-alone units subject to closed-cycle.

Regarding the Environmental Petitioners' ESA-based challenges related to the BO underlying the rule, the Court held that the Services' BO was consistent with the ESA and the no-jeopardy finding was supported by record. Additionally, the Court found that the Incidental Take Statement (ITS) was consistent with the ESA and that EPA did not unlawfully delegate its statutory authority by including provisions in the final rule that allow the Services to advise EPA on site-specific impacts of CWISs. For example:

- The Services conditioned their no-jeopardy finding on compliance with certain procedures and represented to the Court that they have an obligation to provide technical assistance if there are ESA-species present as required by the final rule.
- The Court concluded that "nothing in the ESA requires the Services to assess every future phase of an agency action on a site-specific or species-specific basis." The Court also found that "the Services did not violate their statutory obligations when they decided to solicit more data (during the permitting process) in order to assess thermal impacts on a site-specific basis."
- With respect to the ITS, the Court held that it was reasonable for the Services to determine that the lack of data on facilities with CWISs prevented the quantification of anticipated takes and that it was adequate for the Services' to plan to rely on field offices' quantification of incidental take at individual facilitates as part of the technical assistance process.

Industry Petitions

UWAG raised procedural challenges including, among others, that EPA violated the APA by failing to provide notice of and an opportunity to comment on certain provisions of the final rule related to the Service-driven provisions, the BO, and the underlying data for both. However, the Court concluded that there is no independent right to public comment with regard to consultations conducted under section 7(a)(2) of the ESA unless the scientific material in the BO forms the basis for the rule, which was not the case for this rule. The Court also held that provisions added in the final rule were "a logical outgrowth" of the proposed rule and that proposal sufficiently "fairly apprise[d] interested persons that the subjects and issues of its rulemaking included compliance with the ESA and also fairly apprised them of the Services' role in achieving that compliance."

The Court also rejected UWAG's argument that EPA unlawfully delegated its authority to the Services. The Court explained that the final rule does not require that the Directors accept the Services' recommendations. The Court further held that EPA did not abdicate its final reviewing authority under section 316(b) of the CWA by providing

for the Services' input. Rather, the final rule "contemplates that the EPA will independently determine, with the benefit of the Services' expertise, whether the terms of a permit comply with sections 316(b) of the CWA. Such a scheme reflects the cooperative arrangement specified in Congress in the ESA and by the agencies in their [Memorandum of Understanding], not unlawful delegation."

UWAG also raised substantive challenges to the Services' BO. However, the Court held that the agencies acted appropriately in conducting formal consultation and that the Services reasonably concluded that the effects of future CWIS operations on listed species are properly considered indirect effects of the rule. The Court further noted that the "relevant inquiry is whether the action causes jeopardy or adverse modification, period—not whether it provides incremental improvements that make conditions slightly less harmful to a species but still reduce the likelihood of survival and recovery for that species."

API filed a separate petition arguing that that the proposed rule failed to provide adequate notice for the definition of "new unit". However, the Court disagreed noting that API had the opportunity to comment on EPA's original proposed definition of a "new unit." The Court also determined that EPA acted reasonably in estimating compliance costs manufacturing facilities despite having less data than the data EPA had for power plants.

The CWIS Coalition also filed a separate petition arguing that EPA acted arbitrarily and capriciously with respect to permit application requirements and with respect to BTA requirements for intake structures that withdraw little or no water for cooling purposes. The Court found that both arguments relied on misinterpretations of permit application requirements and instead deferred to EPA's reasonable determinations and interpretations of the final rule.

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