



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

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OFFICE OF WATER

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**Subject: Initiation of Formal Consultation on the EPA's Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities**

Dear Ms. Wieting and Mr. Frazer:

The U.S. Environmental Protection Agency is requesting formal consultation, pursuant to Section 7(a)(2) of the Endangered Species Act and implementing regulations at 50 CFR § 402.14(c), with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (the Services) on the EPA's "Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities." Pursuant to 40 C.F.R. § 402.12, I have sent under separate cover the EPA's Biological Evaluation. The BE evaluates the potential effects of the EPA's action on listed and proposed species and designated and proposed critical habitat and assesses whether any such species or habitat are likely to be adversely affected by the action.

Thank you for the considerable time and effort that you and your staff have devoted to the informal consultation process that we initiated in July 2012 with NMFS and in October 2012 with FWS, including multiple briefings on the contents of the draft 316(b) rule, discussion of the proposed outline and methodological approach for a biological evaluation, and review of two drafts of the BE.

As we have discussed, the 316(b) rule when promulgated will reduce the current mortality of aquatic organisms, including threatened and endangered species, at cooling water intake structures. The magnitude of mortality reduction, however, will depend on the type, size, and location of facilities, the degree of improvement in CWIS performance required by the rule, the nature and number of T&E species in the vicinity of CWISs, as well as other site-specific factors. Because the 316(b) rule will reduce impacts to listed species from cooling water take structures, the Agency continues to believe that it will not cause adverse effects and will benefit affected

species whether threatened, endangered, or otherwise. Nonetheless, the EPA has decided to request formal consultation to ensure full and expeditious consideration of the impacts to listed species under section 7(a)(2). Consequently, the EPA is requesting initiation of formal consultation under Section 7 of the ESA because, as discussed in the BE, after promulgation and implementation of the 316(b) rule, the rule may allow as many as 215 T&E species and 30 critical habitats of T&E species to continue to be affected.

The sections below provide the necessary information for initiating consultation pursuant to 50 CFR 402.14(c).

## **I. Description of Agency Actions**

The action on which the EPA requests formal consultation is a regulation the EPA is in the process of finalizing, to implement CWA Section 316(b). Section 316(b) requires that the EPA establish standards for cooling water intake structures that reflect the best technology available for minimizing adverse environmental effects. The final rule will be implemented through conditions included in NPDES (National Pollutant Discharge Elimination System) permits, required under section 402 of the CWA, for facilities that withdraw cooling water from waters of the United States.

On April 20, 2011, the EPA published proposed standards for cooling water intake structures at all existing power generating facilities and existing manufacturing and industrial facilities. The proposal included requirements for facilities that have a design intake flow of greater than two million gallons per day from waters of the United States and use at least 25 percent of the water they withdraw exclusively for cooling purposes on an actual intake flow basis. The proposal included provisions to address impingement (pinning of organisms against intake screens) and entrainment (organisms sucked through intake screens). While the proposal included an impingement mortality performance standard, the EPA did not propose uniform entrainment controls. Rather, the EPA proposed that entrainment requirements should be established by NPDES permitting authorities on a site-specific basis. In connection with the development of these requirements, facilities with an average intake flow of more than 125 mgd would need to develop an entrainment characterization study to help permit Directors determine facility-specific entrainment requirements.

The EPA has included in the BE a description of the number of facilities subject to the rule. The EPA has accurate information on the location of electric generators, but does not have complete information on the location of all manufacturing facilities with a CWIS. To compensate for this, the EPA has included information in the BE on all manufacturers in the industries known to use cooling water, even though some of these facilities will not have a CWIS.

## **II. Description of Action Area**

The action area for the 316(b) rule includes “waters of the United States,” defined in 40 CFR § 122.2 as certain inland waters and the territorial sea extending three miles from shore. As discussed in the BE, the EPA’s analysis examined CWIS impacts and regulatory benefits in seven aquatic study regions: California, North Atlantic, Mid-Atlantic, South Atlantic, Gulf of

Mexico, Great Lakes, and Inland. The study regions were chosen based on regional similarities within ecosystems, aquatic species, and characteristics of commercial and recreational fishing activities. Based on the delineation between marine and freshwater ecosystems, these seven study regions were broadly categorized into Coastal, Great Lakes, and Inland regions.

### **III. Description of Listed Species or Designated Critical Habitat That May Be Affected**

As discussed in the BE, the 316(b) rule is likely to affect 215 T&E species with habitat ranges that overlap with at least one CWIS. Additionally, the critical habitats of 30 T&E species overlap with at least one CWIS. Few data are available for the EPA to estimate the mortality of T&E species at CWISs subject to the 316(b) final rule. Consequently, to assess the potential for impacts of the 316(b) rule on T&E species, the EPA identified current spatial overlap between the locations of CWISs subject to the rule and the location of federally designated critical habitats or habitat ranges of T&E species. The overlap analysis was conducted for all life history stages for all aquatic T&E species with available data. However, due to the uncertainty regarding the location of all CWISs, the EPA was not able to conclusively identify all listed species or associated life stages that could be potentially affected. Accordingly, the EPA followed ESA regulations requiring the assumption of a reasonable worst case analysis when more accurate data are unavailable.

The BE addresses aquatic T&E species as well as aquatic-dependent T&E species which include reptiles, birds, and terrestrial mammals whose diet contains an appreciable proportion of aquatic organisms. These species are likely to be only indirectly affected by the 316(b) rule.

### **IV. Description of How Agency Actions May Affect Listed Species**

The EPA attempted to estimate the changes in mortality as a result of the 316(b) rule for all T&E species. Sufficient data, however, have not been collected at CWISs to estimate the baseline or amount of future reduction in mortality of T&E species. The 316(b) rule, as currently written, would require facilities to collect source water baseline biological characterization data, entrainment biological characterization data, and where applicable, biological performance studies over a two year period prior to submission of an application for a permit. These data will enable permit Directors, and the Services, to determine whether T&E species are present, whether they are being harmed, and to require appropriate CWIS controls.

### **V. Next Steps**

My staff and I have appreciated the positive, collaborative effort among our agencies during the informal consultation process of developing the BE. We look forward to continuing that relationship through formal consultation. Separate from this letter, we are providing you with a predecisional, deliberative copy of the draft 316(b) rule along with a copy of the BE. Additionally, my staff are providing the Services with the raw data files used to produce the BE. As we have discussed, we will schedule reoccurring biweekly meetings with the Services to assist with your preparation of the biological opinion. We will also schedule regular check-in meetings with senior management at our respective agencies to ensure steady progress throughout this consultation.

Please do not hesitate to call me at (202) 566-1822 or Julie Hewitt at (202) 566-1031 if you or anyone on your staff has questions regarding this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert K. Wood". The signature is stylized with a large, looped "R" and a long horizontal stroke at the end.

Robert K. Wood, Director  
Engineering and Analysis Division