





ACWA National Permit Writer's Workshop

Track 1 – §316(b) BPJ Facilities

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A Phase II “BPJ” facility means:

- A facility is subject to a NPDES individual or general permit;
and
- The facility was constructed prior to January 18, 2002;
 - Or is a new stand-alone unit(s) at an existing facility where construction of the new unit began after October 14, 2014 and is not otherwise subject to Phase I requirements;
and
- Where one or more cooling water intake structure (CWIS) is used (either directly, or through a contract or arrangement with a third party “independent supplier”) to withdraw “waters of the U.S.” for cooling purposes;

BUT...

Phase II “BPJ” facilities means (Continued):

But the facility is characterized by one, or more, of the following:

- The cumulative design intake flow (DIF) of all of the CWISs the facility uses, or proposes to use, is equal to or less than 2 MGD;
- *or*
- The CWISs at the facility do not withdraw water from “waters of the U.S.” (e.g., groundwater);
- *or*
- Less than 25% of the water the facility withdraws on an actual intake flow (AIF) basis is used exclusively for cooling purposes.

40 CFR §125.90(b):

“Cooling water intake structures not subject to requirements under §§125.94 through 125.99 or subparts I or N of this part must meet requirements under section 316(b) of the CWA established by the Director on a case-by-case, best professional judgment (BPJ) basis.”

Best Professional Judgment (BPJ)

The NPDES Permit Writer's Manual describes BPJ as:

“...method used by permit writers to develop technology-based NPDES permit conditions on a case-by-case basis using all reasonably available and relevant data.”

The federal statutory authority for BPJ determinations is based on CWA §1342(a)(1), promulgated at 40 CFR §125.3.

BPJ Facility Application Requirements

- Legal challenges to the 2014 Existing Facility Rule argued the permit application requirements at 40 CFR §122.21(r)(1)(ii)(A) applied broadly to “[a]ll existing facilities;”
 - The 40 CFR 40 CFR §125.92(k) definition of “existing facility” does not contain any “below-threshold” exception criteria;
- However, in July 2018, the U.S. Court of Appeals for the Second Circuit ruled the 40 CFR 122.21(r)(1)(ii)(A) application requirements do not apply to “below-threshold” facilities.

So what minimum application information requirements apply to BPJ facilities?

40 CFR §125.3(d)

In establishing case-by-case BPJ permit conditions, federal regulations require that certain factors be considered:

- The process employed [comparable to ~ (r)(3) and (5)?];
- The age of the equipment and facilities involved [~ (r)(8)];
- Process changes [~ (r)(8), (10), and (12)];
- The engineering aspects of the application of various types of control techniques [~ (r)(10)];
- The cost of applying a given technology relative to its impact reduction benefit [~ (r)(10) and (11)]; and
- Non-water quality environmental impacts (including energy requirements) [~ (r)(12)].

40 CFR §125.3(c)(2)(ii)

Such evaluations must also take into account:

“...any unique factors relating to the applicant”

In addition, 40 CFR 122.41(h) reads:

“(h) Duty to provide information. The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for...reissuing...this permit.”

Does such verbiage create an environment for inconsistent discretion being exercised in case-by-case BPJ evaluations?

Important interpretation points - applicability:

- CWA §316(b) makes no mention of minimum withdrawal thresholds or exceptions:

“Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”

Thus, permit packages for all facilities that use a CWIS, including those for BPJ facilities, must include a Best Technology Available (BTA) evaluation of the minimization of adverse environmental impacts for each CWIS.

Important interpretation points – Statements of Basis:

- Fact Sheets and permits for BPJ facilities should not cite any provision of 40CFR §§125.94 through 125.99 as a basis since, by definition, these sections are not applicable to BPJ facilities;

Implementation considerations – information gaps:

- Current available information to make a BTA determination may be limited. Consider basing a “final” BTA determination on the information available at the time of drafting the permit package;

Information gaps (Continued):

- If a material information “gap” exists, then state so in the Fact Sheet and assign a zero or minimal weight to the corresponding 40 CFR §125.3(d) BPJ factor;
- Consider means to fill the information “gap” during the upcoming permit cycle (e.g., via a permit special condition, an informal voluntary agreement, or notification of the information needed to deem the next reissuance application complete);
- BTA determinations are to be evaluated with each permit action. Approach the determinations in an iterative manner. Use the new information gathered to affirm, modify, or refine, the previous cycle’s BTA determination.

Implementation considerations – benefit/cost data gaps

- Information regarding costs and benefits of applying alternative technologies should be of sufficient rigor to support a BPJ BTA determination;
- Costs as a factor should be considered only when benefits are also quantified;
- If the quantity and/or quality of economic data is not of sufficient analytical rigor, then permit writer staff should document the information to be not “readily available.”

Implementation considerations - manpower:

- Case-by-case BPJ analyses can, counterintuitively, be time-consuming and complex to develop and properly document for both permit writers and facility owners due to the lack of uniform industry-wide standards and expectations;

Implementation considerations – hydropower facilities:

- The “*Gorsuch*” and “*Ludington*” federal court of appeals decisions found water withdrawn exclusively for hydroelectric power generation purposes does not lose its status as “waters of the United States.”

National Wildlife Federation, et al. v. Gorsuch et al. (693 F.2nd 156)

National Wildlife Federation v. Consumers Power Company (862 F.2nd 580)

- In most cases, water withdrawn into the penstocks should not be included in the applicability calculations. The percent of water used exclusively for cooling from the diversion pipe may well exceed 25%;
- UWAG and other interest groups have challenged the applicability of the Existing Facility Rule to hydropower facilities via public comments made to EPA Region I and X proposed NPDES Hydropower General Permits.

Implementation considerations – ESA liability:

- “BPJ” facilities are not addressed by the Fishery Services’ 2014 Biological Opinion – and therefore have not been granted an ESA exemption or an incidental take Statement, since the §316(b) “technical assistance” process only applies to applicable facilities;
- Thus, if a “BPJ” facility were to impinge or entrain a federally-listed T&E species without an ESA exemption, then ESA non-compliance liability could arguably be incurred by both the permittee and the permitting authority (for authorizing the activity that resulted in the alleged “take”).

Implementation considerations – ESA liability (Cont'd):

- To receive ESA coverage, a “BPJ” facility may need to apply for a “Section 10” incidental take permit (ITP);
- Directors will need to evaluate their risk tolerance in proceeding with (or suspending) permit processing for BPJ facilities where T&E species or critical habitat may be present and the applicant has not demonstrated receipt of ITP coverage from the Services.

Group Discussion topics:

- Is EPA review and approval of a BPJ facility's BTA required?
- 40 CFR §125.91(a) Applicability criteria:
 - How many significant figures should be used to calculate and evaluate the 25% applicability criteria?
 - Does/should the Rule apply to hydroelectric power plants? What options are available for alternative technologies or control measures for hydro?
 - What constitutes cooling water obtained from a “public water system” that can be excluded from consideration? Does the water need to be treated to meet the requirements of the Safe Drinking Water Act?
- What minimum information should be required to consider an application for a BPJ facility complete?
- Would failure to receive timely ITP coverage impact a facility's eligibility for Administrative Continuance?