

Daily News

EPA Wins Cooling Water Rule Extension to Allow for Species Consultation

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By Jenny Hopkinson, IWP News

EPA and environmentalists have agreed to an almost five-month deadline extension for the agency's final Clean Water Act (CWA) cooling water intake rule for power plants and other industrial facilities, a period of time that will allow EPA to consult with federal wildlife services in an Endangered Species Act (ESA) review of the rule.

Under the terms of the June 27 revised settlement agreement in *Riverkeeper, et al. v. EPA*, the agency must release the final rule under CWA section 316(b) by Nov. 4, 131 days beyond the prior June 27 deadline. The extension corresponds with the time needed to complete EPA's just initiated ESA consultation with the National Marine Fisheries Service and the Fish & Wildlife Service --collectively known as the services -- a process EPA launched June 18.

The agency says in the revised settlement agreement the consultation will take 135 days for the services to complete the consultation and issue a biological opinion (BiOp), a risk assessment that could detail steps EPA must take to limit harms to protected species. Section 7 of the ESA requires EPA and other federal agencies to consult with the services before taking an action that could cause jeopardy to endangered species and their habitats, and institute any reasonable and prudent alternatives laid out in the BiOp to mitigate any adverse effects.

EPA has long failed to consult when issuing final rules and taking other actions, however, and in recent years environmentalists have sued the agency for falling short of its responsibility, though many of those cases have focused on the agency's pesticide registration decisions. The agency's request for consultation on the cooling water intake rule appears to be one of the first such examples of EPA's efforts to better comply with the ESA.

The consultation may well stem from pressure from *Riverkeeper* and other environmental groups, who in joint comments to EPA last July argued that EPA needs to better take into account endangered species in the measure. The comments, in response to a proposed notice of data availability concerning impingement standards for the rule, said the groups are "highly alarmed that EPA is shifting the meaning of the term 'species of concern' from 'those species that might be in need of conservation actions, but are not currently listed as threatened or endangered under State or Federal law,' to a term that may allow a Director unfettered discretion to exclude any species, without limits and without standards, from any monitoring, sampling, or study requirements if those species are deemed to be of no concern," in the pending rule.

"The cooling water intake structure rule would be rendered meaningless if facilities are allowed to kill millions of fish that are simply not monitored or counted because they have been excluded by the Director," the groups continued, pointing out that some of the species deemed

not to be of concern could be food for endangered species, thus potentially inadvertently causing harm to those species.

However, while the revised settlement agreement allows time for consultation, it does not leave space for review of the rule by the White House Office of Information & Regulatory Affairs, a process which typically takes up to 90 days, leaving questions as to whether the new deadline will be met.

An agency spokeswoman did not return a request for comment by press time.

Regulatory Flexibilities

EPA's 2011 proposed version of the cooling water intake rule sets a flexible, site-specific standard for reducing the entrainment of fish eggs and larvae into cooling water systems but a strict nationwide standard for reducing the impingement of live adult fish on the structures.

Industry groups have largely praised the entrainment portion of the rule but have urged the agency to develop a similarly flexible standard for impingement. The agency has indicated that it will include significant flexibilities in the final version of the rule, steering away from a closed-system standard. The measure is one of two water rules EPA is developing that power plant operators fear will create a new round of requirements for electricity generators after the agency's suite of recent air rules, and which top industry officials are lobbying EPA to soften.

Top power industry officials met April 15 with EPA's Acting Administrator Robert Perciasepe over the agency's final cooling water intake