



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Best Professional Judgment for Cooling Water Intake Structures at Hydroelectric Facilities: U.S. Environmental Protection Agency Memorandum

02/01/2021

The U.S. Environmental Protection Agency (“EPA”) addressed a Clean Water Act Issue related to hydroelectric facilities in a January 13th memorandum titled:

Transmittal of Framework for Best Professional Judgment for Cooling Water Intake Structures at Hydroelectric Facilities (“Memorandum”)

The *Memorandum* is transmitted from Andrew Sawyers, PhD., Director, Office of Wastewater Management to EPA Water Division Directors, Regions 1-10.

The *Memorandum* is described as providing a framework that EPA has used to evaluate based on best professional judgment (“BPJ”):

... additional measures may be necessary at hydroelectric generating facilities to minimize impingement and entrainment of fish and other aquatic organisms at cooling water intake structures (CWIS).

As the *Memorandum* notes, Section 316(b) of the Clean Water Act requires EPA to issue regulations on the design and operation of CWIS. The purpose of such regulations is to minimize adverse impacts from impingement and entrainment of fish and other aquatic organisms.

The *Memorandum* sites a 2014 regulation implementing Section 316(b) which established Best Technology Available (“BTA”) requirements for existing CWIS (i.e., that meet certain operational thresholds). This regulation further provides that a CWIS not encompassed by this rule must meet the technology requirements that are established on a case-by-case basis. Such requirements would be established using BPJ.

There are two approaches for developing technology-based limits for industrial facilities:

1. National Effluent Limitations Guidelines (“ELGs”)
2. In the absence of ELGs developed on a case-by-case basis BPJ

The EPA *Memorandum* states that the agency has decided that the previously referenced 2014 rule is ambiguous as to the applicability of the substantive requirements to CWIS at hydroelectric facilities.

Further, because it is concluded that it was not intended that the 2014 rule's substantive provisions apply to CWIS at such facilities, BPJ will be utilized.

The *Memorandum* references what it describes as a "framework" developed in a recent permitting action that considered various technologies utilized by hydroelectric generating facilities to establish BPJ. It provides this framework and argues that it would be useful for permitting authorities to utilize when considering whether additional requirements may be necessary (based on BPJ, to minimize entrainment and impingement mortality from CWIS at hydroelectric facilities).

A copy of the *Memorandum* can be downloaded [here](#).