

**EPA Form 2-C Supplemental  
Cooling Water Intake Structures**

**Attachment 2—Analysis of § 316(b) Inapplicability**

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Dept of Ecology  
Central Regional Office

**Public Utility District No. 1 of Chelan County**

**Rock Island Project**

Public Utility District No. 1 of Chelan County (Chelan PUD) is applying to the Washington Department of Ecology for a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit for discharges of cooling and other wastewater to the Columbia River from Chelan PUD's Rock Island Hydroelectric Project.<sup>1</sup> The permit application includes EPA Form 2-C Supplemental for Cooling Water Intake Structures. Chelan PUD's submission of this form is intended only to provide information to Ecology regarding the Project's use of cooling water. For the reasons discussed below, the Project is not subject to the cooling water intake structure requirements of CWA subsection 316(b) or EPA's implementing rules.

CWA subsection 316(b) provides:

*Any standard established pursuant to section 1311 of this title or 1316 of this title [CWA sections 301 and 306, respectively] 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.*

33 U.S.C. § 1326(b) (emphasis added). The CWA requires EPA to establish discharge standards for categories of industries under sections 301 and 306 to ensure that those industries use various forms of the “best” pollution control technology, depending on the type of pollutant and whether the facility is a new or existing facility.<sup>2</sup> See *id.*, §§ 1311(b), 1314(b)-(c), 1316(b). As the emphasized phrase in CWA subsection 316(b) shows, Congress intended that EPA would also establish requirements for cooling water intake structures when it established discharge standards under CWA sections 301 and 306. EPA has established standards under these sections for many industrial categories, but hydroelectric facilities are not among them. See 40 C.F.R. parts 405-471. Until and unless EPA establishes CWA section 301 and section 306 standards for hydroelectric facilities, the cooling water intake structure provisions of CWA subsection 316(b) do not apply to the Project.

Similarly, EPA's rules implementing subsection 316(b) do not apply to hydroelectric facilities. When EPA initially established discharge standards under CWA sections 301 and 306 for different industrial categories, it did not establish—contrary to Congress' intention—cooling water intake structure requirements for those industries. Instead, EPA later promulgated rules establishing cooling water intake structure requirements for almost all industrial categories at the

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<sup>1</sup> The Project is licensed by the Federal Energy Regulatory Commission under the Federal Power Act (FPA) (Project No. 943). The Commission issued the Project's current license on January 18, 1989 for a term of 40 years.

<sup>2</sup> These standards include “best practicable control technology currently available” (BPT), § 1311(b)(1)(A); “best available technology economically achievable” (BAT), § 1311(b)(2)(A); “best conventional pollutant control technology” (BCT), § 1311(b)(2)(E); and “best available demonstrated control technology” (BADT) for new sources, § 1316(a), (b)(1)(B). See also 33 U.S.C. § 1314(b), (c).

same time.<sup>3</sup> See 40 C.F.R. part 125, subparts I (new facilities), J (existing facilities). These requirements apply to cooling water intake structures that exceed certain size thresholds. See 40 C.F.R. §§ 125.81(a), 125.91(a). For cooling water intake structures below these thresholds, the rules provide that the requirements of CWA subsection 316(b) are to be applied “on a case-by-case, best professional judgment (BPJ) basis.” See 40 C.F.R. §§ 125.80(c), 125.90(b), 401.14.

Although EPA’s rules are not expressly limited to facilities for which EPA has established standards under CWA sections 301 and 306, EPA’s authority under CWA subsection 316(b) to establish cooling water intake structure requirements *is* expressly limited to such facilities. Moreover, it is clear from the rulemaking record that EPA did not believe that the rules would apply to hydroelectric facilities, much less consider such facilities when developing the rules’ specific requirements. Hydroelectric facilities are not mentioned at all in the *Federal Register* preamble to the final rules adopted in 2014, see 79 Fed. Reg. 48,300, and the single mention of hydroelectric facilities in the preamble to the proposed rules issued in 2011 was a statement that “hydro-electric withdrawals for electricity generation are not cooling water uses and are not addressed by today’s proposal,” 76 Fed. Reg. 22,174, 22,190. Similarly, EPA’s “Technical Development Document” and “Economic Analysis” for the rules mention hydroelectric facilities only in the context of assuming that they would not be subject to the rules. See “Technical Development Document” at 4-22; “Economic Analysis,” Table 6-2.<sup>4</sup> Perhaps most tellingly, EPA’s September 2015 list of 891 existing cooling water intake facilities subject to the rule<sup>5</sup> does not include any hydroelectric facilities.<sup>6</sup>

In sum, the Project’s intake of cooling water is not subject to CWA subsection 316(b) or EPA’s cooling water intake structure rules, including the permit application requirements for cooling water intake structures at 40 C.F.R. § 122.21(r).

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<sup>3</sup> The exception was the offshore oil and gas extraction facilities category, for which EPA promulgated separate cooling water intake structure requirements. See 40 C.F.R. part 125, subpart N.

<sup>4</sup> These EPA rulemaking documents are available at <https://www.epa.gov/cooling-water-intakes/cooling-water-intakes-rulemaking-history>.

<sup>5</sup> The list is available at <https://www.epa.gov/cooling-water-intakes/cooling-water-intakes-implementation-support-documents>.

<sup>6</sup> Two EPA regions have issued *proposed* general NPDES permits for hydroelectric facilities that include cooling water intake structure provisions. See EPA Region 1, *Draft Fact Sheet, Hydroelectric Generating Facilities NPDES General Permit* (MA and NH) (July 10, 2018); EPA Region 10, *Draft Fact Sheet, Hydroelectric Generating Facilities NPDES General Permit* (ID) (Apr. 2018). Both proposed permits assume that CWA subsection 316(b) applies to hydroelectric facilities but neither analyzes whether it does. The hydroelectric industry has submitted extensive comments on the proposed permits explaining why subsection 316(b) and EPA’s implementing rules do not apply. EPA has not yet issued the permits or formally responded to the comments.