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# EPA's Power-Plant Cooling Water Rule Takes a Surprise Endangered Species Turn - Environmental Protection Agency

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A surprise awaits those who reach page 334 of the 559-page preamble to EPA's final cooling-water-intake rule – a potentially significant expansion of the Endangered Species Act.

The rule, which EPA has not yet officially published, is intended to protect aquatic species affected by cooling water intake at power plants and other large facilities. It is the result of a lawsuit by environmental groups, settled by EPA, and delayed on several occasions. Most recently, the rule was hung up as a result of concerns voiced by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) about whether the final rule would do enough to protect threatened and endangered species. EPA thought it would; the Services disagreed. The Services' concerns eventually caused EPA to miss a court-ordered deadline to publish the final rule.

Now that the rule is out, it appears that, in order to finally get the Service's approval, EPA included in the final rule a first-of-its kind process that expands the Endangered Species Act to entities that previously didn't have to comply with it. Understanding why requires a paragraph of background:

The ESA applies to (1) anyone who might harm or harass a listed species and (2) federal government actions in general. Federal government compliance typically involves a process under Section 7 of the Act called "consultation," which essentially involves the agency working with the Services to determine if the action will harm species or their habitat. Many federal environmental responsibilities are carried out at the state level, including issuing clean water act permits like the ones involved in the 316(b) rule. But states don't have to engage in consultation when they undertake these federal responsibilities. Until now.

EPA's 316(b) rule doesn't call the new process consultation, but it looks a lot like it. Consultation involves the federal action agency, in concert with the Services, determining whether the action will jeopardize the recovery of protected species or adversely modify their habitat. Often, if the Services conclude that there might be an ESA issue, they recommend project changes to eliminate the possibility. Since projects can't go forward if the Services believe species or their habitat will be adversely affected, these recommended changes are usually adopted by the action agency.

The new 316(b) process looks very similar: The state drafts a 316(b) permit for a facility's cooling-water intake structure. But rather than finalize it and send it to the facility, which they do for every

other clean water act permit, the state will send a copy of the draft 316(b) permit to the Services. The Services may then provide "recommendations" on the permit. If they do, the state must include those recommendations in the permit and the facility receiving the permit must implement them. If not, the facility is in violation of 316(b).

In other words, just as in consultation, the Services are consulted about impacts to species and their habitat. If the Services have concerns, they will provide recommended changes to the State permit writer. The State has to adopt those changes and the facility has to implement them or else the project can't go forward. Thus, for the first time, states issuing federal permits will have to function like a federal agency for Section 7 purposes. We've attached a copy of the Services' flowchart of the process below (in the flowchart, the state is referred to as the "Director.").

We'll be following this process closely, both to see if it is challenged and to see if it spreads to other federal clean water or clean air act permitting carried out at the state level.

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