



# Federal Register

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**Thursday,  
December 26, 2002**

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**Part VI**

## **Environmental Protection Agency**

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**40 CFR Part 125**

**National Pollutant Discharge Elimination  
System—Amendment of Final Regulations  
Addressing Cooling Water Intake  
Structures for New Facilities; Rule and  
Proposed Rule**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 125**

[FRL-7430-4]

**National Pollutant Discharge Elimination System—Amendment of Final Regulations Addressing Cooling Water Intake Structures for New Facilities**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** Today's direct final rule makes minor changes to EPA's final rule published December 18, 2001 implementing section 316(b) of the Clean Water Act (CWA) for new facilities that use water withdrawn from rivers, streams, lakes, reservoirs, estuaries, oceans or other waters of the United States for cooling. The December 2001 rule established national technology-based performance requirements applicable to the location, design, construction, and capacity of cooling water intake structures at new facilities. The national requirements establish the best technology available for minimizing adverse environmental impact associated with the use of these structures. EPA is making several minor

changes to the December 2001 rule because, in several instances, the final rule text does not reflect the Agency's intent.

**DATES:** This direct final rule is effective on March 26, 2003 without further notice, unless EPA receives adverse written comment by January 27, 2003. If EPA receives such comment, it will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that this rule will not take effect.

**ADDRESSES:** Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.B. of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Martha Segall, USEPA Office of Water by phone at (202) 566-1041 or by e-mail at [rule.316b@epa.gov](mailto:rule.316b@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Regulated Entities*

This direct final rule applies to new greenfield and stand-alone facilities that use cooling water intake structures to withdraw water from waters of the U.S. and that have or require a National Pollutant Discharge Elimination System

(NPDES) permit issued under section 402 of the CWA. New facilities subject to this regulation include those that have a design intake flow of greater than two (2) million gallons per day (MGD) and that use at least twenty-five (25) percent of water withdrawn for cooling purposes. Today's rule does not apply to existing facilities, major modifications to existing facilities that would be "new sources" under 40 CFR 122.29(b) as that term is used in the effluent guidelines and standards program, or facilities that employ cooling water intake structures in the offshore oil and gas extraction point source category as defined under 40 CFR 435.10 and 40 CFR 435.40.

The following table is not intended to be exhaustive; rather, it provides a guide for readers regarding entities likely to be regulated by this action. The table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria at 40 CFR 125.81. If you have questions about the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Category	Examples of Regulated Entities	Standard Industrial Classification Codes	North American Industry Codes (NAIC)
Federal, State and Local Government.	Operators of steam electric generating point source dischargers that employ cooling water intake structures.	4911 and 493 .....	221111, 221112, 221113, 221119, 221121, 221122, 221111, 221112, 221113, 221119, 221121, 221122
Industry .....	Operators of industrial point source dischargers that employ cooling water intake structures..	See below .....	See below
	Steam electric generating .....	4911 and 493 .....	221111, 221112, 221113, 221119, 221121, 221122, 221111, 221112, 221113, 221119, 221121, 221122
	Agricultural production .....	0133 .....	111991, 11193
	Metal mining .....	1011 .....	21221
	Oil and gas extraction (Excluding offshore and coastal subcategories).	1311, 1321 .....	211111, 211112
	Mining and quarrying of nonmetallic minerals .....	1474 .....	212391
	Food and kindred products .....	2046, 2061, 2062, 2063, 2075, 2085.	311221, 311311, 311312, 311313, 311222, 311225, 31214
	Tobacco products .....	2141 .....	312229, 31221
	Textile mill products .....	2211 .....	31321
	Lumber and wood products, except furniture .....	2415, 2421, 2436, 2493.	321912, 321113, 321918, 321999, 321212, 321219
	Paper and allied products .....	2611, 2621, 2631, 2676.	3221, 322121, 32213, 322121, 322122, 32213, 322291
	Chemical and allied products .....	28 (except 2895, 2893, 2851, and 2879).	325 (except products 325182, 32591, 32551, 32532)
	Petroleum refining and related industries .....	2911, 2999 .....	32411, 324199
	Rubber and miscellaneous plastics products .....	3011, 3069 .....	326211, 31332, 326192, 326299
	Stone, clay, glass, and concrete products .....	3241 .....	32731

Category	Examples of Regulated Entities	Standard Industrial Classification Codes	North American Industry Codes (NAIC)
	Primary metal industries .....	3312, 3313, 3315, 3316, 3317, 3334, 3339, 3353, 3363, 3365, 3366.	324199, 331111, 331112, 331492, 331222, 332618, 331221, 22121, 331312, 331419, 331315, 331521, 331524, 331525
	Fabricated metal products, except machinery and transportation equipment.	3421, 3499 .....	332211, 337215, 332117, 332439, 33251, 332919, 339914, 332999
	Industrial and commercial machinery and computer equipment.	3523, 3531 .....	333111, 332323, 332212, 333922, 22651, 333923, 33312
	Transportation equipment .....	3724, 3743, 3764	336412, 333911, 33651, 336416
	Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods; watches and clocks.	3861 .....	333315, 325992
	Electric, gas, and sanitary services .....	4911, 4931, 4939, 4961.	221111, 221112, 221113, 221119, 221121, 221122, 22121, 22133
	Educational services .....	8221 .....	61131
	Engineering, accounting, research, management and related services.	8731 .....	54171

*B. How Can I Get Copies of This Document and Other Related Information?*

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. OW-2002-0052. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as confidential business information (CBI) and other

information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.A.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

*C. How and to Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. Please submit with your comments any references cited in your comments. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments; however, late comments may be considered if time permits. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.C. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact

information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID No. OW-2002-0052. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to [OW-Docket@epa.gov](mailto:OW-Docket@epa.gov), Attention Docket ID No. OW-2002-0052. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit 1.B.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send an original and three (3) copies of your comments to the

"Water Docket," U.S. Environmental Protection Agency, Mailcode: 4101T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. OW-2002-0052.

3. *By Hand Delivery or Courier.* Deliver your comments to: Water Docket, EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC, Attention Docket ID No. OW-2002-0052. Such deliveries are only accepted during the Docket's normal hours of operation as identified in Unit 1.A.1.

#### *D. How Should I Submit CBI to the Agency?*

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. Send information identified as CBI by mail only to the following address: Office of Science and Technology, Mailcode 4303T, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention: Martha Segall/ Docket ID No. OW-2002-0052.

You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

#### **II. Legal Authority, Purpose and Scope of Today's Direct Final Rule**

On December 18, 2001, EPA published a final rule implementing section 316(b) of the Clean Water Act (CWA) for new facilities that use water withdrawn from rivers, streams, lakes, reservoirs, estuaries, oceans or other waters of the United States for cooling purposes. EPA often refers to the final

rule implementing section 316(b) for new facilities as the "Phase I rule" (this term is used to avoid confusion with other phases of the section 316(b) rulemaking that cover existing facilities). The legal authority, background, and basis for the Phase I rule are discussed in the **Federal Register** notice and in the record for the rule. See 66 FR 65256, December 18, 2001. EPA reviewed the final rule text and believes that the regulatory language did not correctly reflect its intent with respect to three issues. EPA is, therefore, making several minor changes to the regulatory text. This document does not reopen the final rule in any respect other than the changes discussed here. EPA does not solicit comment on any issues except for the three discrete ones discussed here.

#### **III. Discussion of Direct Final Rulemaking**

EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comment since we are correcting technical errors and not otherwise amending the regulatory text of the December 2001 Phase I final rule. However, in the "Proposed Rules" section of today's **Federal Register**, we are publishing a separate document that will serve as the proposal to amend the Phase I final rule if adverse comments are filed. This rule will be effective on March 26, 2003 without further notice unless we receive adverse comment by January 27, 2003. If EPA receives adverse comment on one or more distinct amendment(s), paragraph(s), or section(s) of this rulemaking, the Agency will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment. Any distinct amendment, paragraph, or section of today's rulemaking for which we do not receive adverse comment will become effective on the date set in this direct final rule, notwithstanding any adverse comment on any other distinct amendment, paragraph or section of today's rule. If adverse comment is received, we will address all public comments in a subsequent final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

#### **IV. Corrections to Regulatory Text**

##### *A. Velocity Monitoring*

The first revision to the regulatory text relates to velocity monitoring. In the final rule for cooling water intake

structures at new facilities, EPA required monitoring velocity at cooling water intake structures at least once per quarter. In monitoring velocity, facilities that employ surface intake screens are required to monitor head loss across the intake screens at the "minimum ambient source water surface elevation." EPA qualified that language in the requirement by adding a parenthetical phrase that would allow the minimum ambient source water surface elevation to be determined using the Director's best professional judgment based on available hydrological data. See 40 CFR 125.87(b). However, EPA also defined "minimum ambient source water surface elevation" at 40 CFR 125.83 to mean "the elevation of the 7Q10 flow for freshwater streams or rivers; the conservation pool level for lakes or reservoirs; or the mean low tidal water level for estuaries or oceans." EPA further defined each of these low flows in terms of a temporal and hydrological basis. See 66 FR 65339, December 18, 2001.

EPA understands that ambient source water surface elevations fluctuate through time, and it would be difficult, if not unfeasible, to coordinate the measurements of head loss to the time when these minimum ambient source water surface elevations were occurring in the waterbody. It was EPA's intent that the velocity be measured at a time that is predicted, based on knowledge of the hydrology of the waterbody, to be a time of reasonable low flow representative of the low surface elevations that might occur during the months that comprise each quarter. For example, in tidal waters the velocity measurement should be taken at a low tide. If tide tables and/or other records indicate that the surface elevations in a particular month are typically lower than in other months, the facility should measure intake velocity at one of the lowest predicted tides during that particular month. In reservoirs where water levels are drawn down at certain parts of the year, the facility should measure intake velocity immediately after a drawdown or release has occurred. In freshwater rivers and streams, the facility should measure intake velocity during the month that typically has the lowest flows. Such monitoring should occur at a time when flows are not temporarily elevated due to recent storm events. The Director should determine and specify the appropriate time of measurement in the facility's NPDES permit based on available existing hydrological information and information submitted by the owner of the facility with its

permit application. Accordingly, to conform the regulatory text to EPA's intent, EPA believes that the regulatory language at 40 CFR 125.87 is sufficient and that the definition of "minimum ambient source water surface elevation" is no longer needed. Therefore, today's action will only delete the definition of "minimum ambient source water surface elevation" at 40 CFR 125.83.

#### *B. Director's Authority To Require Additional Design and Construction Technologies or Operational Measures in Track I*

The second set of revisions to the regulatory text relate to the Director's authority to require additional design and construction technologies or operational measures in Track I. There are five provisions at issue: 40 CFR 125.84(b)(4)(ii), (b)(4)(iii), (b)(5)(ii), (c)(3)(ii), and (c)(3)(iii). Four of these provisions specify circumstances where design and construction technologies or operational measures for minimizing impingement mortality of fish and shellfish are required. At 40 CFR 125.84(b)(4)(ii) and (c)(3)(ii), facilities are required to select and implement design and construction technologies or operational measures for minimizing impingement mortality of fish and shellfish if "There are migratory and /or sport or commercial species of impingement concern to the Director or any fishery management agency(ies), which pass through the hydraulic zone of influence of the cooling water intake structure." The language should have read, "Based on information submitted by any fishery management agency(ies) or other relevant information, there are migratory and/or sport or commercial species of impingement concern to the Director that pass through the hydraulic zone of influence of the cooling water intake structure." Paragraphs (b)(4)(iii) and (c)(3)(iii) require a facility to select and implement design and construction technologies or operational measures for minimizing impingement mortality if "It is determined by the Director or any fishery management agency(ies)..." The language should have read, "It is determined by the Director, based on information submitted by any fishery management agency(ies) or other relevant information, that..." The fifth provision, paragraph (b)(5)(ii), addresses circumstances where design and construction technologies or operational measures are required for minimizing entrainment of entrainable life stages of fish and shellfish. The language used in this provision was similar to that in paragraphs (b)(4)(ii), (b)(4)(iii), (c)(3)(ii), and (c)(3)(iii) and therefore requires similar corrections.

All of these revisions are necessary because the decision of what to require under section 316(b) of the CWA belongs to the Director. Although EPA did not intend to delegate the decisionmaking to another agency, the Director may obtain information from another agency to make a decision. Therefore, today's action amends the requirements at 40 CFR 125.84(b)(4)(ii), (b)(4)(iii), (b)(5)(ii), (c)(3)(ii), and (c)(3)(iii) to reflect the intent that the information of another agency informs the decision of the Director.

#### *C. Deletion of Inappropriate Cross Reference in the Alternative Requirements Section*

The third issue relates to drafting errors in the alternative requirements section of the rule. The regulation at 40 CFR 125.85 in paragraphs (a)(2) and (3) currently refers to local water resources "not addressed under § 125.84(d)(1)(i)" intending to refer to local water resource issues other than impingement or entrainment. Cross-referencing this other section of the regulations is not technically correct, however, because subsection (d) of § 125.84 is part of Track II while the alternative requirements provision applies to either Track I or Track II. Therefore, this action deletes the reference to 40 CFR 125.84(d)(1)(i) and substitutes language referencing "significant adverse impacts on local water resources other than impingement or entrainment." Similarly, to eliminate any uncertainty regarding applicability of the alternative requirements provision at § 125.85 to the Track II performance requirements at § 125.84(d), this action deletes § 125.84(d)(ii) because it is unnecessary and confusing.

#### **V. Statutory and Executive Order Reviews**

##### *A. Executive Order 12866: Regulatory Planning and Reviews*

Under Executive Order 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector or the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order."

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and therefore is not subject to OMB review.

#### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule merely makes three minor technical revisions to the December 2001 Phase I final regulations for cooling water intake structures. These minor changes will clarify the Agency's intent on velocity monitoring, authority to require additional design and construction technologies, and procedures for seeking less stringent alternative requirements. It would affect the same facilities as the December 2001 rule, would have no additional costs or benefits beyond those already projected, and would not reduce the level of environmental protection projected.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

#### C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for

Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandates that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or to the private sector, in any one year. This rule merely makes three minor technical revisions to the December 2001 Phase I final regulations for cooling water intake structures. These minor changes will clarify the Agency's intent on velocity monitoring, authority to require additional design and construction technologies, and procedures for seeking less stringent alternative requirements. It would affect the same facilities as the December 2001 rule, would have no additional costs or benefits beyond those already projected, and would not reduce the level of environmental protection projected. Thus, today's rule is not subject to the

requirements of section 202 and 205 of the UMRA. For the same reasons, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of the UMRA.

#### D. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA), 5 U.S.C. 601 *et seq.*

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business based on the Small Business Administration's size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impact of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This direct final rule does not substantively change the December 18, 2001 Phase I final rule (66 FR 65256), nor does it impose a significant economic impact on a substantial number of small entities. This rule merely makes three minor technical revisions to the December 2001 rule for cooling water intake structures. These minor changes will clarify the Agency's intent on velocity monitoring, authority to require additional design and construction technologies, and procedures for seeking less stringent alternative requirements. It would affect the same facilities as the December 2001 rule, would have no additional costs or benefits beyond those already projected, and would not reduce the level of environmental protection projected.

#### E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure

“meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule merely makes three minor technical revisions to the December 2001 Phase I final regulations for cooling water intake structures. These minor changes will clarify the Agency’s intent on velocity monitoring, authority to require additional design and construction technologies, and procedures for seeking less stringent alternative requirements. It would affect the same facilities as the December 2001 rule, would have no additional costs or benefits beyond those already projected, and would not reduce the level of environmental protection projected. Thus Executive Order 13132 does not apply to this rule.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.” “Policies that have Tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes.”

This direct final rule does not have Tribal implications. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes, as specified in Executive Order 13175.

This rule merely makes three minor technical revisions to the final regulations for cooling water intake structures. These minor changes will clarify the Agency’s intent on velocity monitoring, authority to require additional design and construction technologies, and procedures for seeking less stringent alternative requirements. It would affect the same facilities as the December 2001 rule, would have no additional costs or benefits beyond those already projected, and would not reduce the level of environmental protection projected. This rule does not affect Tribes in any way in the foreseeable future. Thus, Executive Order 13175 does not apply to this rule.

*G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe might have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This final rule is not economically significant as defined under Executive Order 12866 and does not concern an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. This rule merely makes three minor technical revisions to the final regulations for cooling water intake structures. These minor changes will clarify the Agency’s intent on velocity monitoring, authority to require additional design and construction technologies, and procedures for seeking less stringent alternative requirements. It would affect the same facilities as the December 2001 rule, would have no additional costs or benefits beyond those already projected, and would not reduce the level of environmental protection projected. Therefore, it is not subject to Executive Order 13045.

*H. Executive Order 13211: Energy Effects*

This direct final rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May

22, 2001) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (“NTTAA”) of 1995 (Public Law 104–113, section 12(d), 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This direct final rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each Federal agency must conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

EPA does not expect that this final rule would have an exclusionary effect, deny persons the benefit of the NPDES program or subject persons to discrimination because of their race, color, or national origin. This rule merely makes three minor technical revisions to the final regulations for cooling water intake structures. These minor changes will clarify the Agency’s intent on velocity monitoring, authority to require additional design and construction technologies, and procedures for seeking less stringent alternative requirements. It would affect

the same facilities as the December 2001 rule, would have no additional costs or benefits beyond those already projected, and would not reduce the level of environmental protection projected.

**K. Executive Order 13158: Marine Protected Areas**

Executive Order 13158 (65 FR 34909, May 31, 2000) requires EPA to “expeditiously propose new science-based regulations, as necessary, to ensure appropriate levels of protection for the marine environment.” EPA may take action to enhance or expand protection of existing marine protected areas and to establish or recommend, as appropriate, new marine protected areas. The purpose of the Executive Order is to protect the significant natural and cultural resources within the marine environment, which means “those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands thereunder, over which the United States exercises jurisdiction, consistent with international law.”

Today’s direct final rule will not enhance or expand protection nor reduce the level of environmental protection of existing marine protected areas. This rule merely makes three minor technical revisions to the December 2001 Phase I final regulations for cooling water intake structures. These minor changes will clarify the Agency’s intent on velocity monitoring, authority to require additional design and construction technologies, and procedures for seeking less stringent alternative requirements. It would affect the same facilities as the December 2001 rule, would have no additional costs or benefits beyond those already projected, and would not reduce the level of environmental protection projected.

**L. Plain Language Directive**

Executive Order 12866 encourages agencies to write all rules in plain language. EPA has written this direct final rule in plain language to make this rule and the final rule at 66 FR 65256, December 18, 2001 easier to understand.

**M. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate,

the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective March 26, 2003.

**List of Subjects in 40 CFR Part 125**

Environmental protection, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: December 19, 2002.

**Christine Todd Whitman,**  
*Administrator.*

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

**PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

1. The authority citation for part 125 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et seq.*, unless otherwise noted.

2. In § 125.83, remove the definition for “Minimum ambient source water surface elevation.”

3. Section 125.84 is amended by revising paragraphs (b)(4)(ii), (b)(4)(iii), (b)(5)(ii), (c)(3)(ii), (c)(3)(iii), and (d)(1) to read as follows:

**§ 125.84 As an owner or operator of a new facility, what must I do to comply with this subpart?**

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(ii) Based on information submitted by any fishery management agency(ies) or other relevant information, there are migratory and/or sport or commercial species of impingement concern to the Director that pass through the hydraulic zone of influence of the cooling water intake structure; or

(iii) It is determined by the Director, based on information submitted by any fishery management agency(ies) or other relevant information, that the proposed facility, after meeting the technology-based performance requirements in paragraphs (b)(1), (2), and (3) of this section, would still contribute unacceptable stress to the protected species, critical habitat of those species, or species of concern;

(5) \* \* \*

(ii) Based on information submitted by any fishery management agency(ies)

or other relevant information, there are or would be undesirable cumulative stressors affecting entrainable life stages of species of concern to the Director and the Director determines that the proposed facility, after meeting the technology-based performance requirements in paragraphs (b)(1), (2), and (3) of this section, would contribute unacceptable stress to these species of concern;

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(ii) Based on information submitted by any fishery management agency(ies) or other relevant information, there are migratory and/or sport or commercial species of impingement concern to the Director that pass through the hydraulic zone of influence of the cooling water intake structure; or

(iii) It is determined by the Director, based on information submitted by any fishery management agency(ies) or other relevant information, that the proposed facility, after meeting the technology-based performance requirements in paragraphs (c)(1) and (2) of this section, would contribute unacceptable stress to the protected species, critical habitat of those species, or species of concern;

\* \* \* \* \*

(d) \* \* \*

(1) You must demonstrate to the Director that the technologies employed will reduce the level of adverse environmental impact from your cooling water intake structures to a comparable level to that which you would achieve were you to implement the requirements of paragraphs (b)(1) and (2) of this section. This demonstration must include a showing that the impacts to fish and shellfish, including important forage and predator species, within the watershed will be comparable to those which would result if you were to implement the requirements of paragraphs (b)(1) and (2) of this section. This showing may include consideration of impacts other than impingement mortality and entrainment, including measures that will result in increases in fish and shellfish, but it must demonstrate comparable performance for species that the Director identifies as species of concern. In identifying such species, the Director may consider information provided by national, state, or tribal fishery management agencies with responsibility for fisheries potentially affected by your cooling water intake structure along with data and information from other sources.

\* \* \* \* \*



4. Section 125.85 is amended by revising paragraphs (a)(2) and (3) to read as follows:

**§ 125.85 May alternative requirements be authorized?**

(a) \* \* \*

(2) The Director determines that data specific to the facility indicate that compliance with the requirement at issue would result in compliance costs wholly out of proportion to the costs EPA considered in establishing the requirement at issue or would result in significant adverse impacts on local air quality, significant adverse impacts on local water resources other than impingement or entrainment, or significant adverse impacts on local energy markets;

(3) The alternative requirement requested is no less stringent than

justified by the wholly out of proportion cost or the significant adverse impacts on local air quality, significant adverse impacts on local water resources other than impingement or entrainment, or significant adverse impacts on local energy markets; and

\* \* \* \* \*

5. Section 125.89 is amended by revising paragraph (b)(2) to read as follows:

**§ 125.89 As the Director, what must I do to comply with the requirements of this subpart?**

\* \* \* \* \*

(b) \* \* \*

(2) *Monitoring conditions.* At a minimum, the permit must require the permittee to perform the monitoring required in § 125.87. [For facilities

required to perform the velocity monitoring in § 125.87(b), you should determine and specify the appropriate time of measurement in the permit based on available existing hydrological information and information submitted by the owner of the facility with its permit application.] You may modify the monitoring program when the permit is reissued and during the term of the permit based on changes in physical or biological conditions in the vicinity of the cooling water intake structure. The Director may require continued monitoring based on the results of the Verification Monitoring Plan in § 125.86(c)(2)(iv)(D).

\* \* \* \* \*

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