

# Chapter B6: Other Administrative Requirements

## INTRODUCTION

This chapter presents several other analyses in support of the Proposed Phase II Existing Facilities Rule. These analyses address the requirements of Executive Orders and Acts applicable to this rule.

### B6-1 EXECUTIVE ORDER 12866: REGULATORY PLANNING AND REVIEW

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 a “significant regulatory action” as one that is likely to result in a rule that may:

- ▶ have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or Tribal governments or communities; or
- ▶ create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or
- ▶ materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- ▶ raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, EPA determined that this proposed rule is a “significant regulatory action.” As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

### B6-2 EXECUTIVE ORDER 12898: FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS

Executive Order 12898 (59 FR 7629, February 11, 1994) requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. E.O. 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 such programs, policies, and activities do not have the effect of (1) excluding persons (including populations) from participation in, or (2) denying persons (including populations) the benefits of, or (3) subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

#### CHAPTER CONTENTS

B6-1 E.O. 12866: Regulatory Planning and Review . . . .	B6-1
B6-2 E.O. 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations . . . . .	B6-1
B6-3 E.O. 13045: Protection of Children from Environmental Health Risks and Safety Risks . . . . .	B6-3
B6-4 E.O. 13132: Federalism . . . . .	B6-4
B6-5 E.O. 13158: Marine Protected Areas . . . . .	B6-5
B6-6 E.O. 13175: Consultation with Tribal Governments . . . . .	B6-6
B6-7 E.O. 13211: Energy Effects . . . . .	B6-6
B6-8 Paperwork Reduction Act of 1995 . . . . .	B6-7
B6-9 National Technology Transfer and Advancement Act . . . . .	B6-7
References . . . . .	B6-8

Today’s final rule would require that the location, design, construction, and capacity of cooling water intake structures (CWIS) at Phase II existing facilities reflect the best technology available for minimizing adverse environmental impact. For several reasons, EPA does not expect that this final rule would have an exclusionary effect, deny persons the benefits of the participation in a program, or subject persons to discrimination because of their race, color, or national origin.

In fact, because EPA expects that this final rule would help to preserve the health of aquatic ecosystems located in reasonable proximity to Phase II existing facilities, it believes that all populations, including minority and low-income populations, would benefit from improved environmental conditions as a result of this rule. Under current conditions, EPA estimates approximately 2.2 billion fish (expressed as age 1 equivalents) of recreational and commercial species are lost annually due to impingement and entrainment at the 539 in-scope Phase II existing facilities. Under the proposed regulation, over 1.2 billion individuals of these commercially and recreationally sought fish species (age 1 equivalents) will now survive to join the fishery each year (435 million fish due to reduced impingement impacts, and 789 million fish due to reduced entrainment). These additional 1.2 billion fish will provide increased opportunities for subsistence anglers to increase their catch, thereby providing some benefit to low income households located near regulation-impacted waters.

The greatest benefits from this rule may be realized by populations that fish for subsistence purposes. While the extent of subsistence fishing in the U.S. or in individual states and cities is not generally known, it is known that Native Americans and low income Southeast Asians are the major population subgroups participating in subsistence fishing. However, Native Americans fishing on reservations are not required to obtain a license, so records of the number of Native Americans fishing on reservations are not available. Similarly, Southeast Asians often do not purchase licenses and therefore the extent of their participation in subsistence fishing is unknown.

Due to the lack of data, EPA uses simplifying assumptions to estimate the number of subsistence fishermen. In some past analyses, EPA assumed that subsistence fishermen constitute 5 percent of the total licensed population. This assumption is, however, likely to understate the number of recreational fishers, because although fishing licenses may be sold to subsistence fishermen, many of these individuals do not purchase fishing licenses. Therefore, in more recent analyses EPA has assumed that the number of subsistence fishermen would constitute an additional 5 percent of the licensed fishing population. Using this 10 percent assumption, the number of subsistence fishermen that may benefit from increased fish populations as a result of this rule is substantial.

Based on estimates of the number of anglers calculated from the 1996 *National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* (U.S. DOI 1997), the average in-scope facility has a subsistence population of nearly 15,000 people living within 50 miles of the facility. EPA estimated average subsistence populations by waterbody type. The results indicate that, although the estimated subsistence fishing population comprises a small percentage of the total population, a significant number of persons may engage in subsistence fishing within the vicinity of in-scope facilities. The results of this analysis are presented in Table B6-1.

**Table B6-1: Estimated Subsistence Fishing Population Within 50-mile Radius of In-scope Facilities <sup>a</sup>**

Waterbody Type	Number of In-Scope Facilities	Average 2000 Population <sup>b</sup>	Average Estimated Subsistence Fishing Population <sup>a</sup>
Estuary - NonGulf	78	7,045,000	20,000
Estuary - Gulf	30	1,845,000	12,000
Freshwater	393	1,578,000	14,000
Great Lake	16	3,195,000	6,000
Ocean	22	5,101,000	13,000
<b>All In-Scope Facilities</b>	<b>539</b>	<b>2,576,000</b>	<b>15,000</b>

<sup>a</sup> Estimated as 10% of total estimated anglers living within 50 miles of an in-scope facility. Rounded to nearest thousand.

<sup>b</sup> Rounded to the nearest thousand.

Source: Angler estimates calculated from U.S. DOI, 1997; U.S. EPA analysis, 2002.

Because the estimates presented in Table B6-1 are estimates that are not based on actual subsistence fishing data, they may tend to underestimate or overestimate the actual levels of subsistence fishing within a given waterbody type. As a secondary

analysis, EPA calculated the poverty rate and the percentage of the population classified as non-white, Native American, and Asian for populations living within a 50-mile radius of each of the 539 in-scope facilities.

The results of this secondary analysis, presented in Table B6-2, show that the populations affected by the in-scope facilities have poverty levels and racial compositions that are quite similar to the U.S. population as a whole. In-scope facilities located on oceans and non-gulf estuaries do tend to have significant Asian populations. As such, in these areas persons that rely on subsistence fishing may benefit greatly due to increases in fish populations resulting from changes mandated by the rule. However, taken as a whole, a relatively small subset of the facilities are located near populations with poverty rates (24 of 539, or 4.5%), non-white populations (101 of 539, or 18.7%), Native American populations (30 of 539, or 5.6%), or Asian populations (48 of 539, or 8.9%) that are significantly higher than U.S. average levels.

Waterbody Type	Number of In-Scope Facilities	Average 1998 Poverty Rate	Average 2000 Percent of Population			Number of Facilities with Levels >= 1.5 Times the U.S. Level			
			Non-white <sup>a</sup>	Native American <sup>b</sup>	Asian <sup>c</sup>	Poverty Rate	Non-White Pop	Native American Pop	Asian Pop
Estuary - NonGulf	78	11.2%	28.5%	0.8%	6.2%	0	38	0	33
Estuary - Gulf	30	13.4%	24.0%	0.8%	2.5%	0	6	0	0
Freshwater	393	12.7%	17.5%	1.6%	1.7%	22	44	27	1
Great Lake	16	11.1%	19.5%	1.6%	2.3%	0	3	2	0
Ocean	22	13.7%	33.8%	1.6%	15.4%	2	10	1	14
<b>All In-Scope Facilities</b>	<b>539</b>	<b>12.5%</b>	<b>20.2%</b>	<b>1.4%</b>	<b>3.0%</b>	<b>24</b>	<b>101</b>	<b>30</b>	<b>48</b>
<b>U.S.</b>	<b>---</b>	<b>12.7%</b>	<b>22.9%</b>	<b>1.5%</b>	<b>4.2%</b>	<b>---</b>	<b>---</b>	<b>---</b>	<b>---</b>

- <sup>a</sup> Non-white population defined as any person who did not indicate their race to be "White," either alone or in combination with one or more of the other races listed.
- <sup>b</sup> Defined as any person who indicated their race to be "Native American" or "Native Alaskan" either alone or in combination with one or more of the other races listed
- <sup>c</sup> Defined as any person who indicated their race to be "Asian" either alone or in combination with one or more of the other races listed.

Source: Non-white, Native American, and Asian population estimates compiled from U.S. DOC, 2000; Average poverty rate compiled from U.S. DOC, 1998.

Based on these results, EPA does not believe that this rule will have an exclusionary effect, deny persons the benefits of the NPDES program, or subject persons to discrimination because of their race, color, or national origin. To the contrary, it will increase the number of fish and other aquatic organisms available for subsistence, commercial, and recreational anglers of all races, color, and natural origin.

### **B6-3 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 and 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 proposed rule is an economically significant rule as defined under Executive Order 12866. However, it does not concern an

environmental health or safety risk that would have a disproportionate effect on children. Therefore, it is not subject to Executive Order 13045.

## B6-4 EXECUTIVE ORDER 13132: FEDERALISM

Executive Order 13132 (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 are 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.”

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by state and local governments or unless EPA consults with state and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts state law, unless the Agency consults with state and local officials early in the process of developing the proposed regulation.

This proposed 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. EPA expects an annual burden of 146,983 hours for states to collectively administer this proposed rule. EPA has identified 65 Phase II existing facilities that are owned by state or local government entities. The annual impacts on these facilities are not expected to exceed 2,252 burden hours and \$56,739 (non-labor costs) per facility.

The proposed national cooling water intake structure requirements would be implemented through permits issued under the NPDES program. Forty-five states and territories are currently authorized pursuant to section 402(b) of the CWA to implement the NPDES program. In states not authorized to implement the NPDES program, EPA issues NPDES permits. Under the CWA, states are not required to become authorized to administer the NPDES program. Rather, such authorization is available to states if they operate their programs in a manner consistent with section 402(b) and applicable regulations. Generally, these provisions require that state NPDES programs include requirements that are as stringent as Federal program requirements. States retain the ability to implement requirements that are broader in scope or more stringent than Federal requirements. (See section 510 of the CWA.)

EPA does not expect the proposed Phase II regulation to have substantial direct effects on either authorized or nonauthorized states or on local governments because it would not change how EPA and the states and local governments interact or their respective authority or responsibilities for implementing the NPDES program. This proposed rule establishes national requirements for Phase II existing facilities with cooling water intake structures. NPDES-authorized states that currently do not comply with the final regulations based on this rule might need to amend their regulations or statutes to ensure that their NPDES programs are consistent with Federal section 316(b) requirements. (See 40 CFR 123.62(e).) For purposes of this proposed rule, the relationship and distribution of power and responsibilities between the Federal government and the state and local governments are established under the CWA (e.g., sections 402(b) and 510); nothing in this proposed rule would alter that. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA did consult with state governments and representatives of local governments in developing definitions and concepts relevant to the section 316(b) regulation and this proposed rule:

- ▶ During the development of the proposed section 316(b) rule for new facilities, EPA conducted several outreach activities through which state and local officials were informed about this proposal. These officials then provided information and comments to the Agency. The outreach activities were intended to provide EPA with feedback on issues such as adverse environmental impact, BTA, and the potential cost associated with various regulatory alternatives.
- ▶ EPA has made presentations on the section 316(b) rulemaking effort in general at eleven professional and industry association meetings. EPA also conducted two public meetings in June and September of 1998 to discuss issues related to the section 316(b) rulemaking effort. In September 1998 and April 1999, EPA staff participated in technical workshops sponsored by the Electric Power Research Institute on issues relating to the definition and

assessment of adverse environmental impact. EPA staff have worked with numerous states such as New York, New Jersey, California, Rhode Island, and Massachusetts and regions such as Region 1 and Region 9.

- ▶ EPA met with the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and, with the assistance of ASIWPCA, conducted a conference call in which representatives from 17 states or interstate organizations participated.
- ▶ EPA met with OMB and utility representatives and other federal agencies (the Department of Energy, the Small Business Administration, the Tennessee Valley Authority, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service and the Department of Interior's U.S. Fish and Wildlife Service).
- ▶ EPA received more than 2000 comments on the Phase I proposed rule and Notice of Data Availability (NODA). In some cases these comments have informed the development of the Phase II rule proposal. State and local government representatives from the following states submitted comments: Alaska, California, Florida, Louisiana, Maryland, Michigan, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, and Texas.
- ▶ On May 23, 2001, EPA held a day-long forum to discuss specific issues associated with the development of regulations under section 316(b). At the meeting, 17 experts from industry, public interest groups, states, and academia reviewed and discussed the Agency's preliminary data on cooling water intake structure technologies that are in place at existing facilities and the costs associated with the use of available technologies for reducing impingement and entrainment. Over 120 people attended the meeting.

In the spirit of this Executive Order and consistent with EPA policy to promote communications between EPA and state and local governments, the preamble to this proposed rule specifically solicited comment from state and local officials.

## **B6-5 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.” EPA expects that the proposed Phase II Existing Facilities Rule will advance the objective of Executive Order 13158.

Marine protected areas include designated areas with varying levels of protection, from fishery closure areas, to aquatic National Parks, Marine Sanctuaries, and Wildlife Refuges (NOAA, 2002). The Departments of Commerce and the Interior have included sites that appear to meet the marine protected area definition in a nationwide inventory of marine protected areas. This list has not been completed yet, but includes 32 national sites in the New England region, 31 in the Middle Atlantic region, 43 sites in the South Atlantic region, and 46 in the U.S. Pacific Coast region. Examples of different types of marine protected areas currently in the list include the Great Bay National Wildlife Refuge in New Hampshire, the Cape Cod Bay Northern Right Whale Critical Habitat in Massachusetts, the Narragansett Bay National Estuarine Research Reserve in Rhode Island, Everglades National Park and the Tortugas Shrimp Sanctuary in Florida, and the Point Reyes National Seashore in California.

Marine protected areas can help address problems related to the depletion of marine resources by prohibiting, or severely curtailing, activities that are permitted or regulated by law outside of marine protected areas. Such activities include oil exploration, dredging, dumping, fishing, certain types of vessel traffic, and the focus of section 316(b) regulation, the impingement and entrainment of aquatic organisms by cooling water intake structures.

Impingement and entrainment affects many kinds of aquatic organisms, including fish, shrimp, crabs, birds, sea turtles, and marine mammals. Aquatic environments are harmed both directly and indirectly by impingement and entrainment of these organisms. In addition to the harm that results from the direct removal of organisms by impingement and entrainment, there are the indirect effects on aquatic food webs that result from the impingement and entrainment of organisms that serve as prey for predator species. There are also cumulative impacts that result from multiple intake structures operating in the same local area, or when multiple intakes affect individuals within the same population over a broad geographic range.

Decreased numbers of aquatic organisms resulting from the direct and indirect effects of impingement and entrainment can have a number of consequences for marine resources, including impairment of food webs, disruption of nutrient cycling and energy transfer within aquatic ecosystems, loss of native species, and reduction of biodiversity. By reducing the impingement and entrainment of aquatic organisms, the proposed Phase II Existing Facilities Rule will not only help protect individual species but also the overall marine environment, thereby advancing the objective of Executive Order 13158 to protect marine areas.

## **B6-6 EXECUTIVE ORDER 13175: CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS**

Executive Order 13175 (65 FR 67249, November 6, 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 proposed 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. EPA’s analyses show that no facility subject to this proposed rule is owned by tribal governments. This proposed rule does not affect Tribes in any way in the foreseeable future. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

## **B6-7 EXECUTIVE ORDER 13211: ACTIONS CONCERNING REGULATIONS THAT SIGNIFICANTLY AFFECT ENERGY SUPPLY, DISTRIBUTION, OR USE**

Executive Order 13211 (66 FR 28355; May 22, 2001) requires EPA to prepare a Statement of Energy Effects when undertaking regulatory actions identified as “significant energy actions.” For the purposes of Executive Order 13211, “significant energy action” means:

“any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking:

- (1) (i) that is a significant regulatory action under Executive Order 12866 or any successor order, and  
(ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or
- (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action.”

For those regulatory actions identified as “significant energy actions,” a Statement of Energy Effects must include a detailed statement relating to (1) any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies), and (2) reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.

This proposed rule does not qualify as a “significant energy action” as defined in Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The proposed rule does not contain any compliance requirements that would directly reduce the installed capacity or the electricity production of U.S. electric power generators, for example through parasitic losses or auxiliary power requirements. In addition, based on the estimated costs of compliance, EPA currently projects that the rule will not lead to any early capacity retirements at facilities subject to this rule or at facilities that compete with them. As described in detail in *Chapter C3: Electricity Market Model Analysis*, EPA estimates small effects of this rule on installed capacity, generation, production costs, and electricity prices. EPA

therefore concludes that this proposed rule will have small energy effects at a national, regional, and facility-level. As a result, EPA did not prepare a Statement of Energy Effects.<sup>1</sup>

For more detail on the potential energy effects of this proposed rule or the alternative regulatory options considered by EPA, see *Chapter C3: Electricity Market Model Analysis* and *Chapter C7: Alternative Regulatory Options*.

## B6-8 PAPERWORK REDUCTION ACT OF 1995

The Paperwork Reduction Act of 1995 (PRA) (superseding the PRA of 1980) is implemented by the Office of Management and Budget (OMB) and requires that agencies submit a supporting statement to OMB for any information collection that solicits the same data from more than nine parties. The PRA seeks to ensure that Federal agencies balance their need to collect information with the paperwork burden imposed on the public by the collection.

The definition of “information collection” includes activities required by regulations, such as permit development, monitoring, record keeping, and reporting. The term “burden” refers to the “time, effort, or financial resources” the public expends to provide information to or for a Federal agency, or to otherwise fulfill statutory or regulatory requirements. PRA paperwork burden is measured in terms of annual time and financial resources the public devotes to meet one-time and recurring information requests (44 U.S.C. 3502(2); 5 C.F.R. 1320.3(b)).

Information collection activities may include:

- ▶ reviewing instructions;
- ▶ using technology to collect, process, and disclose information;
- ▶ adjusting existing practices to comply with requirements;
- ▶ searching data sources;
- ▶ completing and reviewing the response; and
- ▶ transmitting or disclosing information.

Agencies must provide information to OMB on the parties affected, the annual reporting burden, the annualized cost of responding to the information collection, and whether the request significantly impacts a substantial number of small entities. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

EPA’s estimate of the information collection requirements imposed by the proposed Phase II regulation are documented in the Information Collection Request (ICR) which accompanies this regulation (U.S. EPA, 2002).

## B6-9 NATIONAL TECHNOLOGY TRANSFER AND ADVANCEMENT ACT

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995, Pub L. No. 104-113, Sec. 12(d) directs EPA to use voluntary consensus standards in its regulatory activities unless doing 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 standard bodies. The NTTAA directs EPA to provide Congress, through the Office of Management and Budget (OMB), explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rule does not involve such technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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<sup>1</sup> EPA recognizes that some of the alternative regulatory options discussed in the preamble and analyzed in *Chapter C7: Alternative Regulatory Options* would have larger effects and might well qualify as “significant energy actions” under Executive Order 13211. If EPA decides to revise the proposed requirements for the final rule, it will reconsider its determination under Executive Order 13211 and prepare a Statement of Energy Effects as appropriate.

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