



Litigation on Final 316(b) Rule

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Final 316(b) Rule

- Signed 5/19/14
- Issued in Federal Register 8/15/14
- Covers plants with design intake flow of 2 mgd or more – below, BPJ is applied
- Plants with actual intake flow of 125 mgd or more have to do detailed studies
- Impingement – 7 compliance options available
- Entrainment – requirements determined on case-by-case basis, using EPA-specified factors
- Detailed new requirements for consultation with FWS/NMFS over impacts to endangered species

Litigation Process

- Rule deemed effective for judicial review 8/29/14
- Petitions for review can be filed within 120 days after 8/29/14 – so by 12/27/14
- Petitions can be filed in the Court of Appeals for any circuit if the petitioner is affected in that circuit
- There are 12 circuits – DC and 1st through 11th
- Multiple cases on same rule have to be consolidated in one court for decision
- So EPA came up with “race to the courthouse” rule, so there is orderly process of deciding proper venue

“Race to the Courthouse”

- Parties who want to be part of the “race” had to file petitions, and then deliver copies to EPA in DC, by 10 days after effective date – 9/8/14
- EPA will bundle those petitions and send them all to Judicial Panel for Multi-District Litigation
- Panel will hold a LOTTERY to decide which circuit court gets all of the consolidated cases
- BUT parties also may file motions to transfer the case to one of the other circuits
- The “winning” court will then decide whether to keep the case or transfer it

Rest of Litigation Process

- Once venue (which court) is decided, court will issue briefing schedule for all parties
- Briefing schedule will include opportunity for each side to file briefs as intervenors, explaining why the other side's challenges to EPA's rule are wrong
- At least 3 sets of briefs – opening briefs by petitioners, responses by EPA and intervenors, then replies by petitioners – after that, oral argument scheduled
- Outside parties may also intervene or file amicus briefs
- Case could take a year or more to decide, AFTER the venue issue is decided – then possible appeal to Supreme Court

Timing of Appeal and Permits

- Not clear when venue briefing will start – court might wait until after all petitions filed (i.e., after 12/27/14) to decide venue issue
- Rule is effective while on appeal, unless parties can convince court to issue stay
- Stay is very unlikely, so should assume that States will be using rule in issuing permits while the appeals are pending

Who Is Filing Petitions?

- Environmental groups have filed petitions in the 1st (NYC), 2nd (Boston) and 9th (San Fran) Circuits
- Utilities filed in 5th (New Orleans), API filed in 7th (Chicago), and other groups (including CIBO) filed in 4th Circuit (Richmond)
- Other petitions can be filed between now and 12/27/14; these will not be part of venue race, but will be treated the same as all other petitions going forward

Filing of Individual Petitions

- Individual companies often file their own petitions, even if they are already members of an association that has filed
- That allows them to file separate briefs if they have site-specific issues that are not going to be covered by the associations that are filing petitions
- Separate petitions also allow a company to engage in discussions with EPA, before briefing, about addressing its concerns through rule changes or guidance, but then withdraw petition

So What Now?

- Cases will work their way through the courts
- Companies and associations have until 12/27/14 to file petitions for review of rule and join case
- In the meantime, States will be putting 316(b) provisions in permits – there's a lot to negotiate
- Because there are 7 control options for impingement, and site-specific decisions on entrainment, it is CRITICAL that each plant come up with its plan for how it will address 316(b) issues – what is your goal for control?

Questions?

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