

May 4, 2020

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**Re: Comments of the American Public Power Association on U.S. EPA Region 10 Draft National Pollution Discharge Elimination System Permits for Hydroelectric Facilities on the Lower Columbia and Snake Rivers**

Dear Ms. Wu:

The American Public Power Association (APPA or Association) appreciates the opportunity to submit these comments on U.S. Environmental Protection Agency (EPA or Agency) Region 10's Draft National Pollution Discharge Elimination System (NPDES) Permits to discharge pollutants under Clean Water Act (CWA), 33 United States Code (U.S.C.) §1251, for the eight dams located on the Lower Columbia and Snake Rivers.<sup>1</sup> APPA's comments largely pertain to special condition E, Cooling Water Intake Structure (CWIS) Plan and CWIS Annual Report as referenced in Lower Columbia and Snake River Draft Fact Sheets.<sup>2</sup>

These Proposed Permits are EPA's first statement on the applicability of CWA § 316(b) to hydroelectric facilities. The Draft Fact Sheets include a framework for evaluating whether hydroelectric facilities satisfy "best technology available" (BTA) under CWA § 316(b) on a case-by-case, "best professional judgment" (BPJ) basis. In each of the Proposed Permits, the Region makes a determination that existing facility attributes, with an additional reporting requirement, is enough to satisfy BTA for § 316(b). APPA respectfully disagrees, that CWA § 316(b) is applicable to hydroelectric facilities. Interpreting §316(b) to apply to hydroelectric facilities would be a significant expansion of EPA's regulatory jurisdiction and would duplicate

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<sup>1</sup> Bonneville Project, U.S. Army Corps of Engineers WA0026778, The Dalles Lock and Dam, U.S. Army Corps of Engineers WA0026701, John Day Project, U.S. Army Corps of Engineers WA0026832, McNary Lock and Dam, U.S. Army Corps of Engineers WA0026824 (together, Proposed Permits).

<sup>2</sup> Draft NPDES Permit Fact Sheet, Lower Columbia River Hydroelectric Facilities, at 52 (Mar. 18, 2020) (Draft Lower Columbia River Facilities Fact Sheet) and Draft NPDES Permit Fact Sheet, Lower Snake River Hydroelectric Facilities, at 51-52 (Mar. 18, 2020) (Draft Lower Snake River Facilities Fact Sheet) (together, Draft Fact Sheets).

other federal and state requirements. Even if the statute leaves room for EPA to interpret § 316(b) as applicable to such facilities, there are sound reasons for EPA to determine that it does not apply.

APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. The Association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power. APPA members operate hydroelectric facilities, power plants, and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. APPA's membership includes owners and operators of hydroelectric facilities that would be affected by the adoption and issuance of the Proposed Permits and to the extent they are relied on by other EPA regions and state permit writers. The issuance of these Proposed Permits is particularly important to the public power utilities that purchase power from the Bonneville Power Administration, as these Proposed Permit conditions could have rate impacts for Bonneville's customers throughout the Northwest.

While there are aspects of the Proposed Permits, we support. APPA makes the following points.

- CWA § 316(b) does not apply to hydroelectric facilities. Congress and EPA never considered applying CWA §316(b) to hydroelectric facilities, which divert small quantities of water for cooling purposes.
- APPA supports EPA's determination that the 2014 Existing Facilities Rule does not apply to hydroelectric facilities.<sup>3</sup>
- Other federal and state regulations comprehensively regulate hydroelectric facilities and their environmental impacts, including the Federal Energy Regulatory Commission (FERC).
- APPA recommends several changes to the proposed BPJ framework, including clarification regarding how certain aspects of the proposed four-factor analysis would

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<sup>3</sup> Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014) (2014 Existing Facilities Rule).

be applied and recommends the elimination of facility wide PBJ conditions that exceed EPA's § 316(b) authority.

The below comments elaborate on our concerns and points of clarification. APPA is a member of the Utility Water Act Group (UWAG) and supports their detailed technical and legal comments.

### **I. CWA § 316(b) Is Not Applicable to Hydroelectric Facilities**

The Region's proposal to apply CWA § 316(b) to hydroelectric facilities even on a BPJ case-by-case basis, is not consistent with the statute. The Draft Fact Sheets for Region 10's Proposed Permits assert, for the first time, that "all cooling water intake structures at hydroelectric facilities are subject to [BPJ] Section 316(b) cooling water intake structure conditions."<sup>4</sup> The Proposed Permit points to EPA's authority under 40 Code of Federal Regulations (C.F.R) §125.90(b), meaning that a "cooling water intake structure not subject to substantive provisions under the existing facility rule (40 C.F.R. §125.94-99) or another 316(b) requirements rule must meet requirements established on a case-by-case, BPJ basis."<sup>5</sup> However, EPA never considered applying §316(b) requirements to sources outside the categories for which it had developed national standards, such as hydroelectric facilities. The Proposed Permits and Draft Fact Sheets fail to provide any legal support or analysis for applying § 316(b) to hydroelectric facilities, even on a BPJ basis.

CWA§ 316(b) applies only where EPA establishes technology standards under §§ 301 and 306 for point sources. Unlike the other facilities to which EPA has applied § 316(b), EPA has not established technology-based limitations and standards for hydroelectric facilities, nor would it be reasonable to do so given the *de minimis* nature of their discharges. As the United States Supreme Court has recognized, absent clear direction from Congress, courts will view (and agencies should view) with skepticism statutory interpretations that extraordinarily expand regulatory jurisdiction.<sup>6</sup>

Of course, EPA can identify additional categories of discharges suitable for development of national standards, but nothing in the statute authorizes the application of § 316(b) to industries for which no standards exist or suitability determination has been made. It, therefore, would be

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<sup>4</sup> Draft Fact Sheet Lower Columbia and Snake River Hydroelectric Generating Permits at 52.

<sup>5</sup> *Id.*

<sup>6</sup> *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

unlawful for EPA to interpret the BPJ provision as a loophole to this statutory requirement – especially when EPA never indicated in its promulgation of the BPJ regulation its intent to apply the provision to any facilities not subject to national guidelines. When EPA adopted its § 316(b) rules, it never considered the data collection requirements for, the availability and costs of technology, and the impacts or benefits of applying § 316(b) to sources outside those categories for which it had developed national standards.

EPA’s longstanding position that § 316(b) only applies to those industries for which categorical standards have been developed or are determined to be necessary and appropriate has remained in effect. EPA’s BPJ provisions have been in effect for almost two decades and neither federal nor state NPDES permitting authorities have interpreted that BPJ provision to apply to hydroelectric facilities.<sup>7</sup>

EPA regions and other permitting authorities should not rely on the BPJ provision to circumvent § 316(b)’s statutory requirements without adequate legal, technical, economic, and policy rationale developed through a rulemaking process. Therefore, EPA should determine that CWA § 316(b) does not apply to hydroelectric facilities. APPA recommends EPA clarify in the final permits that it is not determining § 316(b) be applied to all hydroelectric facilities nationwide, but rather any such determination is inconsistent with statutory language and regulatory framework for hydroelectric facilities.

**A. EPA Has Never Provided an Opportunity to Comment on the Applicability of § 316(b) Requirements to Hydroelectric Facilities.**

Under the Administrative Procedures Act, an agency must publish a notice of proposed rulemaking in the *Federal Register*, which “shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>8</sup> After the notice is published, the agency must “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”<sup>9</sup> Prior to the implementation of the 2014 Existing Facilities Rule, there had never been any indication from EPA or Congress that CWA § 316(b) could apply to hydroelectric facilities.

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<sup>7</sup> 40 C.F.R. § 125.90(b) (New Facilities BPJ provision, effective since 2001) and 40 C.F.R. § 125.90(b) (Existing Facilities BPJ provision, effective since 2004).

<sup>8</sup> 5 U.S.C. § 553(b)(3).

<sup>9</sup> *Id.*

## 1. Hydroelectric Facilities Were Not Evaluated in Prior §316(b) Rules

EPA issued its first § 316(b) rule in 1976 but the U.S. Court of Appeals for the Fourth Circuit remanded it to EPA on procedural grounds.<sup>10</sup> EPA's remaining rule and guidance instructed NPDES permit writers to make case-by-case determinations regarding BTA for CWIS at point sources subject to EPA technology standards established pursuant to §§ 301 or 306.<sup>11</sup> Subsequently, EPA has issued several rules for existing, new and low flow steam electric plants and manufacturing facilities which were ultimately withdrawn.<sup>12</sup> Then in 2014, EPA issued a single rule for Existing Facilities.

During the development of the Phase I, II, and III rules, EPA never suggested that any of those rules would apply to hydroelectric facilities, whether or not the facilities use cooling water and need an NPDES permit. In the preamble to the proposed rule for Existing Facilities, EPA explicitly stated that withdrawals from hydroelectric facilities were not meant to be addressed by the Existing Facilities Rule:

Given the diversity of industrial processes across the U.S., there are many other industrial uses of water not intended to be addressed by today's proposed rule . . . Warming water at liquefied natural gas terminals, and hydro-electric plant withdrawals for electricity generation are not cooling water uses and are not addressed by today's proposal . . .<sup>13</sup>

EPA has implemented § 316(b) by issuing regulations that establish BTA standards for intake structures that become binding for certain facilities only after the standards are incorporated into an NPDES permit for discharges from a regulated facility. At no point during EPA's long history of implementing § 316(b) have EPA's regulatory actions addressed the applicability of CWA § 316(b) to hydroelectric facilities or suggested that CWA § 316(b) would apply to hydroelectric facilities on a case-by-case BPJ basis. Then in 2018, EPA Region 1 and 10 proposed NPDES general permits for hydroelectric facilities in Idaho, Massachusetts, and New Hampshire that

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<sup>10</sup> *Appalachian Power Co. v. Train*, 566 F.2d 451 (4th Cir. 1977).

<sup>11</sup> 40 C.F.R. § 401.14.

<sup>12</sup> Phase I Rule, 66 Fed. Reg. at 65,256, Phase II Rule, 69 Fed. Reg. 41,576 (July 9, 2004) and the Phase III rule, 71 Fed. Reg. 35,006 (June 16, 2006).

<sup>13</sup> 76 Fed. Reg. at 22,190 (emphasis added).

would apply CWA § 316(b).<sup>14</sup> EPA Region 1 and 10 have not finalized the proposed general permits. To date, EPA has not responded to stakeholder concerns raised in those proceedings.

## **II. Applicability of EPA’s 2014 § 316(b) Existing Facilities Rule**

APPA supports EPA’s determination that the 2014 § 316(b) Existing Facilities Rule does not apply to hydroelectric facilities. If EPA concludes that CWA § 316(b) applies to hydroelectric facilities, the requirements of EPA’s 2014 § 316(b) Existing Facilities Rule are not appropriate for such facilities, which are fundamentally different from the steam electric power and manufacturing plants considered in that rulemaking. The Draft Fact Sheets state that, even though the facilities meet the regulatory thresholds for the 2014 Existing Facilities Rule, EPA has determined, “in light of the text, structure, history and purpose of the regulation, in the case of hydroelectric facilities, the rule is ambiguous as to application of the substantive requirements and that the EPA never intended that the rule’s substantive provisions would apply to them.”<sup>15</sup> The 2014 Existing Facilities Rule’s administrative record provides further evidence EPA did not consider technologies, costs, and associated benefits of hydroelectric facilities. The economic analysis in the 2014 Existing Facilities Rule describe steam electric facilities as those generating units that are fueled by “coal, gas, oil, waste, nuclear, geothermal, and solar steam.”<sup>16</sup> EPA did not include an economic analysis of the 2014 Rule’s impact on hydroelectric facilities. Further, in the Technical Development Documents, EPA provides a table of the 1,065 estimated facilities potentially affected by the 2014 Rule and did not include hydroelectric facilities. EPA made no attempt to determine whether any of the nation’s 2,100 hydroelectric facilities would meet the rule’s thresholds. Instead, EPA concluded that “[u]nits with water turbines, or ‘hydroelectric units,’ ... do not use a steam loop and do not use cooling water....”<sup>17</sup>

Accordingly, it is appropriate for EPA to determine, as it has in the Draft Fact Sheets, that the 2014 Existing Facilities Rule does not apply to hydroelectric facilities.

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<sup>14</sup> EPA’s Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho (IDG360000) (July 11, 2018), 83 Fed. Reg. 18,555 (Apr. 27, 2018) and EPA Region 1 Proposed NPDES General Permit for Hydroelectric Generating Facilities in Massachusetts (MAG360000) and New Hampshire (NHG360000) (Oct. 19, 2018), 83 Fed. Reg. 42,118 (Aug. 20, 2018).

<sup>15</sup> Draft Lower Columbia River Facilities Fact Sheet at 52; Draft Lower Snake River Facilities Fact Sheet at 51.

<sup>16</sup> Technical Development Document for Final Section 316(b) Existing Facilities Rule (May 19, 2014) (2014 TDD) TDD at 4-23 (“Only prime movers with a steam-electric generating cycle use large enough amounts of cooling water to fall under the scope of the proposed rule.”).

<sup>17</sup> 2014 TDD at 4-22.

## **A. Other Statutes and Federal Requirements are in Place to Address CWIS**

The Proposed Permits only apply to certain federal hydroelectric facilities on the Columbia and Snake Rivers while non-federal hydroelectric facilities are regulated under the Federal Power Act (FPA) by FERC. The FERC hydroelectric licensing process generally address all issues related to the use of water by non-federal hydroelectric facilities, including any water quality issues raised by a state CWA § 401 certification. Federal hydroelectric facilities are authorized through a variety of mechanisms, including specific legislation, and are often subject to National Environmental Policy Act (NEPA) and Endangered Species Act (ESA) reviews and requirements. The Proposed Permits introduce a framework that could have implication beyond federal hydroelectric facilities including non-federal hydroelectric projects. Applying the Proposed Permit's BPJ framework conditions more broadly could be duplicative of other federal and state requirements already in place.

Federal requirements under NEPA and ESA compel the evaluation of potential impacts to aquatic species. Federal hydroelectric facilities have an obligation to ensure that their actions are not likely to jeopardize the continued existence of any federally listed endangered or threatened species.<sup>18</sup> Non- FERC regulated facilities engage in consultation with the U.S. Fish and Wild Life Services (FWS) and or the National Marine Fisheries Service (NMFS) (together, the Services) to satisfy the obligation under ESA § 7. Through this process, these agencies and the project proponent work together to eliminate or minimize potential impacts to these species. At the conclusion of this process, these agencies impose conservation and mitigation measures to minimize impacts to protected species from hydroelectric facilities, including from the diversion of cooling water. For projects that will result in incidental take, these agencies recommend imposition of reasonable and prudent measures to minimize the take of listed species. These eight federal dams have been subject to stringent fish protection measures required by previous biological opinions and state requirements.<sup>19</sup>

FERC authorized hydroelectric facilities require project sponsors engage in informal consultation with NMFS and/or FWS to determine whether the project will impact a federally listed species. This process frequently results in implementing measures to protect listed species

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<sup>18</sup> 16 U.S.C. § 1536.

<sup>19</sup> See 2019 National Marine Fisheries Service Columbia River System Biological Opinion (2019 NMFS CRS BiOp).

that might be impacted by hydroelectric facility operations, including the diversion of cooling water.

NEPA reviews require the federal agency operating the facility or FERC to develop a Finding of No Significant Impact (FONSI), an Environmental Assessment (EA), or an Environmental Impact Statement (EIS) for a project. Entrainment, impingement, and other impacts on fish and wildlife are analyzed in these environmental documents. The environmental analyses conducted under NEPA generally address entrainment associated with all water passing through the projects, including the enormous amount of water that goes through the turbines for electricity generation. While these environmental studies do not specifically focus on entrainment specific to the small pipes and other structures that various hydroelectric facilities use to divert water for service water and cooling purposes, withdrawals and entrainment impacts from these cooling water diversions would be exceptionally smaller. In addition, FERC frequently addresses the issue of fish impingement and entrainment by requiring licensees to screen their intakes to prevent or minimize fish from entering the penstock, which can eliminate or reduce the possibility of impingement or entrainment during the diversion of water from the penstock for cooling purposes.

Furthermore, states are provided broad discretion under CWA § 401 to impose conditions as part of state-issued water quality certificates in the context of FERC's licensing and relicensing of projects or federal authorizations for non-FERC regulated facilities (e.g., NPDES permits). FERC may not issue a license, and non-FERC regulated facilities generally cannot operate, unless the state has either issued or waived the water quality certificate. States have used this authority to impose conditions related to fisheries, aesthetics, recreation, and more.<sup>20</sup> Such conditions are considered "mandatory," meaning the federal agency has no discretion but to incorporate them into the facility's authorization, be it a FERC license or NPDES permit.

The FERC licensing process already provides for measures to minimize adverse environmental impacts of hydroelectric operations and, at times, may be more stringent than § 316(b) requirements. Any obligation to apply § 316(b) requirements, through application of a

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<sup>20</sup> See, e.g., *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006) (holding FERC-licensed dams must comply with state certification that required operator to maintain stream flow and allow passage for certain fish and eels).



case-by-case BPJ determination, would be largely duplicative of existing federal and state requirements already in place.

### **III. EPA Should Clarify the Proposed BPJ Framework and Conditions**

The Proposed Permits appropriately recognize that hydroelectric facilities' existing controls are technologies that satisfy the requirements of BTA to minimize entrainment and impingement mortality.<sup>21</sup> EPA acknowledges "many hydroelectric facilities are required to implement measures that reduce the impacts of the dam, including the impacts to passage of aquatic life through the dam, as conditions of a FERC license or a Biological Opinion."<sup>22</sup> These statement further support the conclusion that §316(b) does not apply to hydroelectric facilities. APPA maintains that § 316(b) does not apply to hydroelectric facilities and, as such, the BPJ four factor analysis is inappropriate and unnecessary.

The Propsoed Permits outline four factors that are considered "technologies" that could minimize adverse environmental impacts from the use of a CWIS at hydroelectric facilities. APPA provides the following recommondations to clarify the conditions under which the BPJ analysis is performed. The Draft Fact Sheets include a four-factor framework for evaluating whether a hydroelectric facility meets BTA for purposes of CWA § 316(b). The four-factor framework is based on: (1) efficiency of power generation; (2) cooling water withdrawn relative to waterbody volume or flow; (3) location of the intake structure; and (4) technologies at the facility.<sup>23</sup> To the extent these factors apply more broadly to other hydroelectric facilities outside of the Proposed Permits, EPA must clarify how the four factor BPJ analysis would apply.

The Draft Fact Sheets state that "EPA may use any of the four factors, or other facility-specific factors, in its BPJ analysis to determine whether BTA requirements have been satisfied. Any combination of one or more of the factors may be used to address entrainment and impingement."<sup>24</sup> APPA agrees that permit writers should find BTA is satisfied if any one of the four factors outlined is met. But it is unclear how EPA would apply Factors 1-3, since EPA

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<sup>21</sup> Draft Lower Columbia River Fact Sheet at 53; Draft Lower Snake River Fact Sheet at 52.

<sup>22</sup> *Id.*

<sup>23</sup> Draft Lower Columbia River Facilities Fact Sheet at 53-54; Draft Lower Snake River Facilities Fact Sheet at 52-53.

<sup>24</sup> Draft Lower Columbia River Fact Sheet at 53; Draft Lower Snake River Fact Sheet at 52.

determined that the Lower Columbia River and Lower Snake River facilities at issue satisfy BTA based solely on Factor 4.

APPA is concerned, however, that EPA's application of Factor 4 (existing technologies at the facility) for the Proposed Permits relies on the technologies or facility attributes as a whole, and not the intake structure. The incorporation of such facility-wide operations and attributes as enforceable NPDES permit conditions could create duplicative and, in some cases, conflicting requirements that would go beyond EPA's authority under CWA § 316(b), which is limited to the "location, design, construction, and capacity" of the CWIS. A closer review of the four factors is warranted.

**A. Efficiency of Power Generation- Factor 1**

EPA proposes to consider how efficient a facility produces electricity by comparing megawatts produced to the quantity of cooling water used. APPA agrees with EPA's assessment that hydroelectric facilities are generally more efficient than a once-through steam electric facility as they generate less waste heat. Based on this factor alone, permit writers should be able to conclude that § 316(b) BTA requirements have been satisfied. EPA should clarify what kind of analysis or support permit writers would need to use to rely on this factor. APPA recommends that EPA clarify that, if this factor is satisfied, the permit writer need not evaluate the other factors. In order to satisfy this, an applicant would need to provide a calculation of the ratio of million gallons a day (MGD) of cooling water used by the hydroelectric facility to megawatts (MW) produced. In general, those ratios, when compared to steam electric plants, demonstrate that the hydroelectric facilities' flows are much more efficient than once-through steamelectric facilities and compare favorably to rates achieved by existing steam electric plants with closed-cycle recirculating cooling systems.

**B. Cooling Water Withdrawn Relative to Waterbody Volume or Flow- Factor 2**

The second factor proposes to consider "proportional flow." In previous rulemakings, EPA stated that using a low percentage of the waterbody flow or volume for cooling could be a factor that addresses impacts due to entrainment. In the 2014 Existing Facilities Rule, EPA established "proportional-flow requirements" that were intended to provide protections in addition to those

commensurate with closed cycle and velocity requirements.<sup>25</sup> APPA supports EPA's use of the New Facility Rule's "proportional flow requirements" and agrees that the cooling water withdrawn at hydroelectric facilities will almost always be below 5% (in most cases, less than 1%) of the water passed through the dam for generating purposes. However, EPA's use of proportional flow requirements does not only address entrainment, this it also addresses impingement, another relevant issue. The underlying record that EPA has established for impingement through its § 316(b) rules assumes mobility. Once organisms are committed to moving through the facility, mobility would not matter. Therefore, EPA should clarify that the proportional flow factor may be used to address both impingement and entrainment.

### **C. Location of the Intake Structure- Factor 3**

The Draft Fact Sheet states the location of the intake in areas with lower densities of impingeable or entrainable organisms will reduce the adverse impacts associated with the use of the CWIS.<sup>26</sup> Hydroelectric facilities vary significantly in terms of design and configuration, especially when it comes to the pipes and structures that divert water for purposes of cooling. EPA notes, dams are designed such that the location of the penstock openings on the dam face are located at a depth with a lower density of organisms to reduce entrainment through the dam thus minimizing impacts from the operations of the turbine. As the CWIS is within the dam, there is a similar reduction in the density of organisms as compared to an intake on the face of the dam or in the waterbody itself. APPA agrees that the location of the intake structure in the penstock or scroll case can demonstrate that the facility meets BTA for § 316(b). Permit writers should be able to conclude that § 316(b) BTA requirements have been satisfied based where the intake is located within the dam, on this factor alone.

### **D. Technologies at the Facility- Factor 4**

EPA relied on Factor 4, the technologies at the facility, in its BPJ evaluation for BTA. Existing technologies at these facilities include measures to deter fish from intakes, encourage fish to travel through fish passage structures or over spillways, and decrease velocities through turbines to minimize impingement and entrainment of aquatic life at cooling water intakes.

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<sup>25</sup> Draft Lower Columbia River Fact Sheet at 53; Draft Lower Snake River Fact Sheet at 52.

<sup>26</sup> Draft Lower Columbia River Fact Sheet at 54; Draft Lower Snake River Fact Sheet at 53.

The technologies which EPA relies on in the application of Factor 4 are technologies or attributes for the whole facility, and not the intake, and therefore goes beyond the scope of EPA's § 316(b) authority. While these technologies may help indicate that a facility already meets BTA (because any adverse impacts are minimized by virtue of those non-CWIS technologies), those technologies should not be incorporated as enforceable conditions of an NPDES permit. APPA urges EPA to limit the factors of its BPJ test to factors specific to the cooling water intake and to remove permit conditions that would impose operations or technology requirements for the whole facility.

The specificity of the Proposed Permit conditions under Factor 4 could also limit adaptive management practices. The Proposed Permit conditions extract specific requirements from Fish Operating Plans and Fish Passage Plans and make those enforceable NPDES conditions, but those plans change frequently as facilities learn what measures are successful and feasible. Moreover, the permit conditions do not provide enough flexibility for the facilities to adjust their operations as needed. For example, requirements to operate turbines at +/- 1% peak efficiency flows could be problematic depending on maintenance or necessary upgrades at a given facility. While technologies may help support a BTA determination the technologies should not be incorporated into an enforceable 5-year NPDES permit.

To the extent, the proposed four factor framework is a model for other states or EPA regions. The final permits should acknowledge the fish protection measures and operational requirements for the eight Corps facilities at issue here are specific to plans that were designed based on the attributes of the facilities, their locations on the Lower Columbia and Lower Snake Rivers, and the salmonid and other fish species in the area, among other things. APPA recommends EPA clarify in the final fact sheet that the facilities at issue have technologies and requirements that are specific to their location, waterbodies, and the relevant species in the area. EPA should acknowledge that many facilities in other parts of the country may not have such technologies or operations requirements. Where hydroelectric facilities do not have such conditions or attributes for the facility as a whole (*e.g.*, operation of turbines at +/- 1% peak efficiency flows), EPA does not have authority under the CWA to require facilities to implement such facility-wide technologies or requirements.

#### **IV. § 316(b)-Related Application or Data Collection Requirements**

The Draft Fact Sheets state that, “[i]n most cases, the EPA expects existing documentation may be used to evaluate these factors.”<sup>27</sup> Even though EPA makes this general acknowledgement, APPA is concerned that the open-ended nature of the BPJ framework could lead permit writers to seek development of new information or costly studies (e.g., impingement and entrainment studies) to inform the application of these four factors. The data and calculations to satisfy Factors 1- 3 should be relatively straightforward. APPA is concerned about what information applicants would be required to provide for Factor 4. Requesting data that facilities do not know how to collect, particularly with respect to Factor 4, is problematic. For many hydroelectric facilities, conducting impingement or entrainment sampling at the pipe or intake structure would be very difficult, or even unsafe. Likewise, for many facilities, it may be difficult to collect information regarding the velocity approaching the intake. Therefore, APPA recommends that EPA include a statement acknowledging that such studies or monitoring are impracticable and/or the regulatory costs would far exceed any plausible environmental benefits and should not be required by permit writers.

## **V. Conclusion**

APPA appreciates the opportunity to submit these comments. The Region’s proposal to apply CWA § 316(b), even on a BPJ case-by-case basis, to hydroelectric facilities is neither required by nor consistent with the CWA or EPA’s previous rulemakings. EPA should clarify in the final permits that it has not made a determination that CWA § 316(b) applies to hydroelectric facilities and that it will not make such a determination without full and procedurally appropriate consideration of the issue via a separate rulemaking. If EPA intends to apply the proposed BPJ framework to apply § 316(b) to hydropower facilities, then EPA should provide the clarifications discussed above and ensure that any BPJ permit conditions are consistent with the limits of EPA’s CWA § 316(b) authority.

APPA hopes that EPA will pursue its recommendations and looks forward to working with you to address these meaningful issues. Please contact Ms. Carolyn Slaughter at [CSlaughter@PublicPower.org](mailto:CSlaughter@PublicPower.org) or 202-467-2900 if you have questions regarding these comments.

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<sup>27</sup> Draft Lower Columbia River Fact Sheet at 53; Draft Lower Snake River Fact Sheet at 52.

Sincerely,

A handwritten signature in black ink that reads "Carolyn Slaughter". The script is fluid and cursive, with the first letters of each word being capitalized and larger than the rest of the letters.

Carolyn Slaughter, Environmental Policy Director  
American Public Power Association