

facility and the existing plant with new intake technology installed, several commenters proposed the following approach: The entrained biomass could be measured by sampling the waterbody near the intake (the hypothetical shoreline intake for the baseline plant and the existing or relocated intake for the future complying plant). To calculate the mass of organisms that would be entrained both by the hypothetical shoreline intake without any protective technology and by whatever new proposed intake technologies are being assessed, the density of entrainable organisms present in the samples would be used (number/volume). An important consideration in evaluating entrainment is the element of time, *i.e.*, the density of entrainable organisms will fluctuate. EPA is soliciting comment on the use of total biomass or density in predicting or determining the entrainment reduction that would occur at a cooling water intake structure.

EPA received numerous comments requesting clarification of the averaging period for determining the percent reduction required by the impingement mortality and entrainment performance standards. The commenters stated that due to significant natural temporal and spatial variability in fish abundance and distribution, a short-term averaging period may not be appropriate. Entrainment may be near zero during months when there are no entrainable organisms near the intake. Additionally, the density of aquatic populations varies naturally over the longer term. Some commenters suggested that the averaging period for determining reductions should be two to five years to verify that the technology is achieving reductions within the ranges specified for the performance standards. This could involve measuring the percent reductions over the entire monitoring period. EPA is considering specifying an averaging time for determining compliance with performance standards over 1 year, 3 years, or a running average over the entire permit term (5 years). In addition, EPA is considering requiring the use of basic arithmetic means as the averaging methodology. EPA is requesting comment on the time frames and averaging method discussed above. In addition, EPA requests comment on the appropriate methodology for determining the averaging period. EPA is also considering leaving it to the Director to determine appropriate averaging periods and methodologies, either programmatically or on a site-

specific basis, and requests comment on this approach.

C. Compliance Timelines, Schedules, and Determination

The proposed rule states that Phase II existing facilities would have to comply with the proposed rule requirements when a NPDES permit containing requirements consistent with the proposed Subpart J requirements is issued to the facility (see proposed § 125.92). Under existing NPDES program regulations, this would occur following publication of the final rule when an existing NPDES permit is reissued, or when an existing permit is modified, or revoked and reissued. EPA is considering options that would require full compliance with the rule after the effective date, similar to what EPA did in the Concentrated Animal Feeding Operations Rule, to the extent the best technologies will not be available immediately after promulgation of the final rule. As discussed below, the nature of this regulation is such that facilities may need to test and verify the efficacy of the technology option that they choose. (68 FR 7176, 7214 Feb. 12, 2003). EPA requests comment on this approach.

Commenters raised numerous issues regarding the proposed implementation and compliance schedules. Key comments include concern that the proposed rule does not provide sufficient time for permittees to develop necessary information, prepare the permit application, and come into compliance; suggestions that each permit renewal need not encompass a complete re-application and re-development of the permit; questions regarding how the proposed requirements will be enforced (*i.e.*, what constitutes compliance); and a general request for additional clarification about implementation timing issues (*e.g.*, effective date).

Several commenters indicated that the proposed requirement to submit data associated with the Comprehensive Demonstration Study at least 180 days prior to permit renewal is unrealistic. These commenters indicated that sufficient time is needed to collect data and prepare the permit application, as well as to design and test equipment. Commenters suggested various means by which time could be built into the implementation schedule, including allowing for the use of compliance schedules, phased compliance requirements, and providing a fixed period of time for facilities to evaluate how they will comply and submit an application.

The proposed 180-day requirement is based on the existing NPDES permit program requirement for renewal of existing permits (40 CFR 122.21(d)(2)). EPA proposed this time period, in part, to ensure consistency with the existing NPDES program. The 180-day time period ensures that permit writers have sufficient time to review NPDES permit applications, which for Phase II existing facilities will often be complex and include considerable amounts of information.

Some commenters have suggested EPA allow for the use of compliance schedules for Phase II existing facilities to conform to newly promulgated section 316(b) requirements. NPDES regulations at § 122.47 allow for the use of compliance schedules in NPDES permits by allowing permittees additional time to achieve compliance with the CWA and applicable regulations. Examples of situations where compliance schedules have been used include, but are not limited to, where new or revised effluent limitations guidelines were promulgated prior to 1989, or where new water quality standards are developed. EPA believes that the use of compliance schedules in the context of section 316(b) warrants consideration because such schedules are intended to allow permittees additional time where it clearly is necessary to achieve compliance. Compliance schedules, in association with the proposed Phase II regulations, would allow facilities whose NPDES permit would be reissued within the first few years after promulgation, additional time during the term of the permit to collect the information needed for the analyses required for the permit application, and/or to design, install, and optimize technologies to meet the performance standards. For example, facilities that would be issued a revised NPDES permit six months after the Phase II rule was published may not have provided the Director with information on their cooling water intake structure, and even if they had, it may not have contained the regulation-specific information such as the Impingement Mortality and Entrainment Characterization Study, the Design and Construction Technology Plan, or the Verification Monitoring Plan. In addition, the facility may not have assessed feasibility and certainly would not have begun construction of technologies. Use of compliance schedules under the NPDES permit program would require that the permit writer develop a schedule that is reasonable and that will ensure that the