

date. EPA subsequently received adverse comment on the direct final rule, and withdrew the direct final rule on March 19, 2003 (68 FR 14164). Today's rulemaking constitutes EPA's final action on the proposed rule. With this final action, EPA is addressing and responding to the adverse comments received on the proposed rule and the direct final rule.

The legal authority, background, and basis for the December 2001 rule are discussed in the **Federal Register** notice of rulemaking (66 FR 65256, December 18, 2001). 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 mainly cover existing facilities.

III. Summary of the Final Rule

This rule makes minor changes to the regulations at 40 CFR 125.80, National Pollutant Discharge Elimination System: Regulations Addressing Cooling Water Intake Structures for New Facilities published on December 18, 2001 (66 FR 65256). The changes will clarify three technical issues on velocity monitoring, authority to require additional design and construction technologies, and procedures governing requests for less stringent alternative requirements.

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 that velocity be monitored 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 infeasible, 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 relates 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 specified that additional design and construction technologies or operational measures are required if, "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 specified that those technologies are required if, "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 required 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