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Power by Association℠

Edison Electric Institute

December 20, 2013

The Honorable Regina A. McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

Dear Administrator McCarthy:

On behalf of the Board of Directors and member companies of the Edison Electric Institute (EEI), as well as our partners at the Nuclear Energy Institute (NEI), Clean Energy Group's 316(b) Initiative (CEG), and Utility Water Act Group (UWAG), we want to extend our sincere thanks to Ken Kopocis and his team for meeting with our staff on December 18, 2013 to discuss remaining electric power sector concerns with the Clean Water Act (CWA) § 316(b) cooling water intake structures rulemaking for existing facilities which is expected to be completed by January 14, 2014. Last week's meeting was attended by Howard Shelanski, Dan Utech, and Gary Guzy and their respective teams, allowing for frank and open dialogue on the remaining issues.

Earlier in the year, you asked for feedback on certain issues of importance to the electric utility industry. Our September 17th response (attached) outlined our concerns about the proposed rule. Since that time, we understand that language in the rule has continued to be refined and that several of the issues we raised at that time have been the subject of revision. It is our understanding that several of these issues remain to be resolved and a new issue regarding permit application requirements has arisen. We are writing to explain those concerns and offer our recommendations on how best to resolve them in the final rule.

Endangered Species Act (ESA) Consultation and ESA-Related Regulatory Requirements

In a prior communication with you (see Utility Water Act Group letter dated October 25, 2013), we have stated that the proposed § 316(b) rule will have only beneficial effects on listed species and the Services should conclude consultation with either a "not likely to adversely affect" concurrence, or a biological opinion finding that no jeopardy or adverse modification will occur as a result of the rule. Nevertheless, it is our understanding that in response to the ESA consultation, the rule could require permittees to provide vastly expanded information to permitting authorities on the potential for direct and indirect impacts to threatened and endangered species. We have further concerns that any new ESA framework would raise considerable practical and legal problems and impose potential liabilities on the permittees. Trying to address species that may be in the area, but have no risk of being impinged or indirectly affected, and are potential prey of a listed species is much broader than the current ESA applications in the NPDES permitting process. To address these concerns, we request that:

- The Services reach a "not likely to adversely affect" concurrence, and

- Any focus in the rule, both in terms of monitoring and study requirements, must be on organisms inhabiting or likely to inhabit the zone of influence of the intake and thus likely to be *directly* affected by the intake.

ESA issues have long been evaluated and addressed at each our facilities as required by the Endangered Species Act. It is essential that EPA reconsider and not include this new scope of monitoring and study requirements in the final rule.

Definition of Closed-Cycle Cooling and Waters of the United States (WOUS)

We remain very concerned that EPA has not resolved this issue according to established legal and regulatory precedent. Whether an existing facility is open-cycle or closed-cycle is a function of design choices made at the time of construction, not the jurisdictional classification assigned to any man-made ponds or impoundments included in its design. In addition to maintaining the current regulatory exemption for waste treatment systems, we recommend that EPA specify that cooling ponds or impoundments lawfully created principally to serve as part of a closed-cycle cooling system can continue to serve that purpose and will satisfy § 316(b) for both impingement and entrainment. To do otherwise would result in stranding these assets because these impoundments would no longer be usable for the purpose for which they were designed. Requiring that their status as a compliance technology hinge on their jurisdictional status as WOUS is wholly inconsistent with the statements EPA explicitly made in justifying its 1979 NPDES rule defining WOUS, which **explicitly** acknowledged that an impoundment could function as a compliance technology even if classified as a WOUS. 44 Fed. Reg. 32,585, col. 1.

Use of Cost-Benefit Analysis and Willingness-to-Pay (WTP) Survey Issues

EPA's proposal appropriately requires permitting authorities to consider a variety of factors, including costs and benefits, when making a best technology available (BTA) determination. We understand that EPA's most recent thinking restores costs and benefits in BTA determinations to the list of mandatory actions to be considered by the Director. This is a positive step. However, there remain certain concerns regarding the continued reference to and endorsement of the use of WTP surveys on an individual permit basis despite the significant, demonstrable problems with the use of such surveys.

To resolve these remaining concerns we ask that EPA take the following actions:

- Moderate the language which encourages the quantification of non-use benefits of reducing entrainment. It must be clear that states are not required to conduct a WTP survey to consider a permit application. This can be accomplished by (1) adding language acknowledging that in many cases, non-use benefits may not occur, (2) acknowledging the substantial issues involved in developing WTP surveys capable of producing reliable information, and thus the inherent uncertainty in monetizing non-use benefits through the WTP methodology, and (3) in the discussion of social benefit evaluation, endorsing the use of qualitative descriptions and adding language similar to that included in the preamble to the Phase II rule, which specifically provided that monetization of non-use benefits was not warranted unless the entrainment characterization study indicated substantial harm to listed threatened and endangered species, to the sustainability of populations of important species of fish, shellfish, and wildlife, or to maintenance of community structure and function in a facility's waterbody or watershed. 69 Fed. Reg. 41,648, col. 1,

- Ensure that the preamble and the rule clearly state that all non-water quality impacts are to be equally considered and weighed in determining whether further entrainment controls are justified, and

- Modify the "backstop" provisions that require the Director to require closed-cycle cooling if any portion of the permit application is viewed to be "inadequate." Currently, these provisions could be interpreted as requiring closed-cycle cooling if a facility does not conduct and submit a WTP survey as part of a cost-benefit study.

Definition of New and Existing Units at Existing Facilities

As stated in our September 17, 2013 letter, the electric power sector strongly believes that EPA should distinguish between "new" and "existing" units at existing facilities consistent with the 2011 proposed rule. We understand that the most recent iteration of the draft rule proposes to pinpoint the moment a modification renders an existing unit a new unit when three things occur: (1) the unit is repowered, replaced or rebuilt; (2) both the turbine and condenser are replaced; and (3) the location of the cooling water intake structure or design intake flow is changed. When these conditions are met, a mandatory closed-cycle cooling requirement would be established. Closed-cycle cooling is not BTA for modified units for the same reasons –land constraints, reliability impacts, non-water quality environmental impacts, etc.—closed-cycle cooling is not BTA for new units. Further, this process establishes a "New Source Review" type program that will discourage future efficiency improvements such as nuclear uprates. There is no evidence that the modifications will result in adverse environmental impact. Of course, states have the opportunity upon every permit renewal to determine if additional protection is warranted as a result of a plant modification. In making this determination, states must consider the same factors that they apply to site-specific decisions for existing facilities. We recommend that the provision be modified to mirror the language of the 2011 proposal which stated that new units at existing facilities should expressly exclude "repowered, rebuilt or replaced" units.

***De Minimis* Concerns**

We appreciate that the Agency has taken a number of positive steps to recognize the importance of including language exempting facilities that have a *de minimis* environmental impact related to impingement. However, we understand that the language includes a broad, generalized application of the ESA in a fashion that would render the language meaningless for facilities because it prohibits the ability of facilities to qualify for the *de minimis* provision if a listed species may be present in the area rather than if the facility is impinging or entraining listed species. As a result, the ESA provisions will tie the hands of permit writers and result in unjustifiable new costs to facilities while producing no environmental benefits. The *de minimis* provision should remain focused on actual impingement, as opposed to indirect or potential impingement, while fully recognizing design and engineering protections. Accordingly, we ask that the *de minimis* provisions be modified to allow the Director to determine that no additional impingement controls may be required at facilities with a low documented rate of impingement provided the facility complies with applicable requirements of the Endangered Species Act.

Low Capacity Utilization Units

We understand the revised rule allows permittees to request less stringent impingement requirements for units with a low annual average capacity utilization rate. This is another positive development. But this provision must apply to entrainment as well as impingement. Units that have low capacity utilization rates are required for a variety of reasons, including but not limited to grid reliability, voltage maintenance, and load balancing. These facilities are infrequently called upon to produce power for the

grid. For those reasons, additional operational costs (such as the installation of impingement and entrainment reduction technologies) could make these units uneconomic and would force closure, thus defeating the reliability purpose they serve. Entrainment control technologies are often the more expensive and capital intensive of CWIS technologies. We would request that the provision be modified to allow permittees to request less stringent impingement and entrainment requirements for low capacity utilization units.

Permit Application Requirements and Deadlines

Permit application deadlines need to be reasonable in length and should not require the selection and installation of impingement control technologies until entrainment requirements have been established. This is a necessary feature of the final rule for engineering and cost reasons. To conduct impingement and entrainment assessments, the proper sequencing and adequate time are both needed. Based on our understanding of the current version of rule, neither is currently being provided.

To ensure that the permit application process is logical and efficient, we recommend that EPA should modify the final rule language to:

- Provide a minimum of five years for all facilities to complete the permit application requirements;
- Add a provision requiring facilities to identify proposed impingement mortality control options compatible with entrainment control options for facilities that do not have in place the impingement control technology on which they plan to rely;
- Authorize permit writers to approve impingement controls based on a predictive demonstration of their performance, with any required two-year optimization study occurring after the technology has been installed; and
- Authorize permit writers to adjust permit application deadlines for cause, regardless of the expiration date of the facility's current NPDES permit.

We thank you for your continued focus on this important rule that will affect almost half of the existing U.S. generation capacity. As we reach the final stages of this process, we are committed to working with the Agency to ensure an equitable and economical final rule that achieves important environmental benefits and ecological benefits throughout the U.S.

Sincerely,

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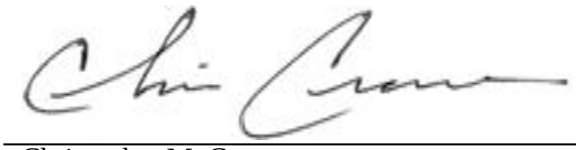

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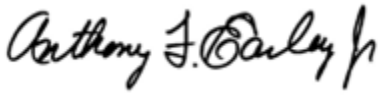

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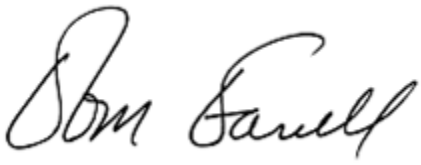

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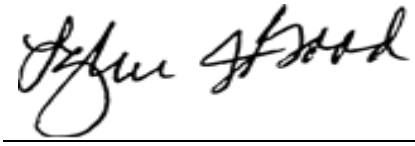

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