

LEXSTAT 40 CFR 125.94

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\*\*\* THE FEDERAL REGISTER \*\*\*

TITLE 40 -- PROTECTION OF ENVIRONMENT  
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY  
SUBCHAPTER D -- WATER PROGRAMS  
PART 125 -- CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM  
SUBPART J -- REQUIREMENTS APPLICABLE TO COOLING WATER INTAKE STRUCTURES FOR PHASE  
II EXISTING FACILITIES UNDER SECTION 316(B) OF THE ACT

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§ 125.94 How will requirements reflecting best technology available for minimizing adverse environmental impact be established for my Phase II existing facility? [This section is suspended. See 72 FR 37107, 37109, July 9, 2007.]

[PUBLISHER'S NOTE: This section was suspended for an indefinite period of time at 72 FR 37107, 37109, July 9, 2007, effective July 9, 2007.]

(a) Compliance alternatives. You must select and implement one of the following five alternatives for establishing best technology available for minimizing adverse environmental impact at your facility:

(1)(i) You may demonstrate to the Director that you have reduced, or will reduce, your flow commensurate with a closed-cycle recirculating system. In this case, you are deemed to have met the applicable performance standards and will not be required to demonstrate further that your facility meets the impingement mortality and entrainment performance standards specified in paragraph (b) of this section. In addition, you are not subject to the requirements in §§ 125.95, 125.96, 125.97, or 125.98. However, you may still be subject to any more stringent requirements established under paragraph (e) of this section; or

(ii) You may demonstrate to the Director that you have reduced, or will reduce, your maximum through-screen design intake velocity to 0.5 ft/s or less. In this case, you are deemed to have met the impingement mortality performance standards and will not be required to demonstrate further that your facility meets the performance standards for impingement mortality specified in paragraph (b) of this section and you are not subject to the requirements in §§ 125.95, 125.96, 125.97, or 125.98 as they apply to impingement mortality. However, you are still subject to any applicable requirements for entrainment reduction and may still be subject to any more stringent requirements established under paragraph (e) of this section.

(2) You may demonstrate to the Director that your existing design and construction technologies, operational measures, and/or restoration measures meet the performance standards specified in paragraph (b) of this section and/or the restoration requirements in paragraph (c) of this section.

(3) You may demonstrate to the Director that you have selected, and will install and properly operate and maintain, design and construction technologies, operational measures, and/or restoration measures that will, in combination with any existing design and construction technologies, operational measures, and/or restoration measures, meet the performance standards specified in paragraph (b) of this section and/or the restoration requirements in paragraph (c) of this section;

(4) You may demonstrate to the Director that you have installed, or will install, and properly operate and maintain an approved design and construction technology in accordance with § 125.99(a) or (b); or

(5) You may demonstrate to the Director that you have selected, installed, and are properly operating and maintaining, or will install and properly operate and maintain design and construction technologies, operational measures, and/or restoration measures that the Director has determined to be the best technology available to minimize adverse environmental impact for your facility in accordance with paragraphs (a)(5)(i) or (ii) of this section.

(i) If the Director determines that data specific to your facility demonstrate that the costs of compliance under alternatives in paragraphs (a)(2) through (4) of this section would be significantly greater than the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards in paragraph (b) of this section, the Director must make a site-specific determination of the best technology available for minimizing adverse environmental impact. This determination must be based on reliable, scientifically valid cost and performance data submitted by you and any other information that the Director deems appropriate. The Director must establish site-specific alternative requirements based on new and/or existing design and construction technologies, operational measures, and/or restoration measures that achieve an efficacy that is, in the judgment of the Director, as close as practicable to the applicable performance standards in paragraph (b) of this section, without resulting in costs that are significantly greater than the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards. The Director's site-specific determination may conclude that design and construction technologies, operational measures, and/or restoration measures in addition to those already in place are not justified because of the significantly greater costs. To calculate the costs considered by the Administrator for a facility like yours in establishing the applicable performance standards you must:

(A) Determine which technology the Administrator modeled as the most appropriate compliance technology for your facility;

(B) Using the Administrator's costing equations, calculate the annualized capital and net operation and maintenance (O&M) costs for a facility with your design intake flow using this technology;

(C) Determine the annualized net revenue loss associated with net construction downtime that the Administrator modeled for your facility to install this technology;

(D) Determine the annualized pilot study costs that the Administrator modeled for your facility to test and optimize this technology;

(E) Sum the cost items in paragraphs (a)(5)(i)(B), (C), and (D) of this section; and

(F) Determine if the performance standards that form the basis of these estimates (i.e., impingement mortality reduction only or impingement mortality and entrainment reduction) are applicable to your facility, and if necessary, adjust the estimates to correspond to the applicable performance standards.

(ii) If the Director determines that data specific to your facility demonstrate that the costs of compliance under alternatives in paragraphs (a)(2) through (4) of this section would be significantly greater than the benefits of complying with the applicable performance standards at your facility, the Director must make a site-specific determination of best technology available for minimizing adverse environmental impact. This determination must be based on reliable, scientifically valid cost and performance data submitted by you and any other information the Director deems

appropriate. The Director must establish site-specific alternative requirements based on new and/or existing design and construction technologies, operational measures, and/or restoration measures that achieve an efficacy that, in the judgment of the Director, is as close as practicable to the applicable performance standards in paragraph (b) of this section without resulting in costs that are significantly greater than the benefits at your facility. The Director's site-specific determination may conclude that design and construction technologies, operational measures, and/or restoration measures in addition to those already in place are not justified because the costs would be significantly greater than the benefits at your facility.

(b) National performance standards. -- (1) Impingement mortality performance standards. If you choose compliance alternatives in paragraphs (a)(2), (a)(3), or (a)(4) of this section, you must reduce impingement mortality for all life stages of fish and shellfish by 80 to 95 percent from the calculation baseline.

(2) Entrainment performance standards. If you choose compliance alternatives in paragraphs (a)(1)(ii), (a)(2), (a)(3), or (a)(4) of this section, you must also reduce entrainment of all life stages of fish and shellfish by 60 to 90 percent from the calculation baseline if:

(i) Your facility has a capacity utilization rate of 15 percent or greater, and

(ii)(A) Your facility uses cooling water withdrawn from a tidal river, estuary, ocean, or one of the Great Lakes; or

(B) Your facility uses cooling water withdrawn from a freshwater river or stream and the design intake flow of your cooling water intake structures is greater than five percent of the mean annual flow.

(3) Additional performance standards for facilities withdrawing from a lake (other than one of the Great Lakes) or a reservoir. If your facility withdraws cooling water from a lake (other than one of the Great Lakes) or a reservoir and you propose to increase the design intake flow of cooling water intake structures it uses, your increased design intake flow must not disrupt the natural thermal stratification or turnover pattern (where present) of the source water, except in cases where the disruption does not adversely affect the management of fisheries. In determining whether any such disruption does not adversely affect the management of fisheries, you must consult with Federal, State, or Tribal fish and wildlife management agencies).

(4) Use of performance standards for site-specific determinations of best technology available. The performance standards in paragraphs (b)(1) through (3) of this section must also be used for determining eligibility for site-specific determinations of best technology available for minimizing adverse environmental impact and establishing site specific requirements that achieve an efficacy as close as practicable to the applicable performance standards without resulting in costs that are significantly greater than those considered by the Administrator for a facility like yours in establishing the performance standards or costs that are significantly greater than the benefits at your facility, pursuant to § 125.94(a)(5).

(c) Requirements for restoration measures. With the approval of the Director, you may implement and adaptively manage restoration measures that produce and result in increases of fish and shellfish in your facility's watershed in place of or as a supplement to installing design and control technologies and/or adopting operational measures that reduce impingement mortality and entrainment. You must demonstrate to the Director that:

(1) You have evaluated the use of design and construction technologies and operational measures for your facility and determined that the use of restoration measures is appropriate because meeting the applicable performance standards or site-specific requirements through the use of design and construction technologies and/or operational measures alone is less feasible, less cost-effective, or less environmentally desirable than meeting the standards or requirements in whole or in part through the use of restoration measures; and

(2) The restoration measures you will implement, alone or in combination with design and construction technologies and/or operational measures, will produce ecological benefits (fish and shellfish), including maintenance

or protection of community structure and function in your facility's waterbody or watershed, at a level that is substantially similar to the level you would achieve by meeting the applicable performance standards under paragraph (b) of this section, or that satisfies alternative site-specific requirements established pursuant to paragraph (a)(5) of this section.

(d)(1) Compliance using a technology installation and operation plan or restoration plan. If you choose one of the compliance alternatives in paragraphs (a)(2), (3), (4), or (5) of this section, you may request that compliance with the requirements of § 125.94(b) during the first permit containing requirements consistent with this subpart be determined based on whether you have complied with the construction, operational, maintenance, monitoring, and adaptive management requirements of a Technology Installation and Operation Plan developed in accordance with § 125.95(b)(4)(ii) (for any design and construction technologies and/or operational measures) and/or a Restoration Plan developed in accordance with § 125.95(b)(5) (for any restoration measures). The Technology Installation and Operation Plan must be designed to meet applicable performance standards in paragraph (b) of this section or alternative site-specific requirements developed pursuant to paragraph (a)(5) of this section. The Restoration Plan must be designed to achieve compliance with the applicable requirements in paragraph (c) of this section.

(2) During subsequent permit terms, if you selected and installed design and construction technologies and/or operational measures and have been in compliance with the construction, operational, maintenance, monitoring, and adaptive management requirements of your Technology Installation and Operation Plan during the preceding permit term, you may request that compliance with the requirements of § 125.94 during the following permit term be determined based on whether you remain in compliance with your Technology Installation and Operation Plan, revised in accordance with your adaptive management plan in § 125.95(b)(4)(ii)(C) if applicable performance standards are not being met. Each request and approval of a Technology Installation and Operation Plan shall be limited to one permit term.

(3) During subsequent permit terms, if you selected and installed restoration measures and have been in compliance with the construction, operational, maintenance, monitoring, and adaptive management requirements in your Restoration Plan during the preceding permit term, you may request that compliance with the requirements of this section during the following permit term be determined based on whether you remain in compliance with your Restoration Plan, revised in accordance with your adaptive management plan in § 125.95(b)(5)(v) if applicable performance standards are not being met. Each request and approval of a Restoration Plan shall be limited to one permit term.

(e) More stringent standards. The Director may establish more stringent requirements as best technology available for minimizing adverse environmental impact if the Director determines that your compliance with the applicable requirements of this section would not meet the requirements of applicable State and Tribal law, or other Federal law.

(f) Nuclear facilities. If you demonstrate to the Director based on consultation with the Nuclear Regulatory Commission that compliance with this subpart would result in a conflict with a safety requirement established by the Commission, the Director must make a site-specific determination of best technology available for minimizing adverse environmental impact that would not result in a conflict with the Nuclear Regulatory Commission's safety requirement.

**HISTORY:** [69 FR 41576, 41685, July 9, 2004; suspended at 72 FR 37107, 37109, July 9, 2007]

**AUTHORITY:** AUTHORITY NOTE APPLICABLE TO ENTIRE PART:  
The Clean Water Act, 33 U.S.C. 1251 et seq.

**NOTES:** [EFFECTIVE DATE NOTE: 69 FR 41576, 41685, July 9, 2004, added Subpart J, effective Sept. 7, 2004; 72 FR 37107, 37109, July 9, 2007, suspended this section for an indefinite period of time, effective July 9, 2007.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

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