

September 5, 2014

Clean Water Act: Court Challenges to EPA's Final Rule

Earlier this week, commencing what will likely be a lengthy appeal process, a number of environmental organizations filed challenges in federal court to the U.S. Environmental Protection Agency's final regulations governing the use of cooling water at existing power plants and industrial facilities.

On September 2, the following organizations filed petitions with three federal appellate courts, seeking judicial review of the EPA's Final Rule under Section 316(b) of the Clean Water Act:

- First Circuit Court of Appeals: Environment America and Environment Massachusetts;
- Second Circuit Court of Appeals: Riverkeeper, Inc; Natural Resources Defense Council; Waterkeeper Alliance, Inc.; Soundkeeper, Inc.; Delaware Riverkeeper Network; Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper); Hackensack Riverkeeper; Casco Baykeeper; Save the Bay?- Narragansett Bay; American Littoral Society; Surfrider Foundation; and Scenic Hudson; and
- Ninth Circuit Court of Appeals: Sierra Club, Inc.

It is anticipated there will also be appeals of EPA's Final Rule on behalf of industry.

Section 316(b) requires that the location, design, construction, and capacity of Cooling Water Intake Structures ("CWISs") reflect the best technology available ("BTA") for minimizing adverse environmental impacts. EPA has said the Final Rule will affect approximately 1,065 existing facilities, including 544 electric generators and 509 manufacturers.

EPA's Final Rule applies to existing facilities that withdraw more than 2 million gallons per day of water from the waters of the United States and that use at least 25 percent of this water exclusively for equipment cooling purposes. The Final Rule's requirements are in response to the potential adverse environmental impacts?- impingement and entrainment - associated with the use of CWISs at existing facilities.

The EPA announced the Final Rule in May 2014. (A [Day Pitney Alert](#) on May 21, 2014, summarized the key provisions of the Final Rule.) The Final Rule was published in the Federal Register on August 14, 2014, and is effective, absent a stay of the Final Rule, on October 14. It is available [here](#).