

316(b) Phase II Implementation Question and Answer Document

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Figure 1 Timing of Requirements

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1. Introduction

On July 9, 2004, the U.S. Environmental Protection Agency (EPA) published final regulations under Clean Water Act (CWA) § 316(b) establishing requirements for cooling water intake structures at Phase II facilities. *See* 69 Fed. Reg. 41576 (July 9, 2004). The purpose of this Question and Answer document is to provide guidance on the implementation of the 316(b) Phase II rule. It is being posted on EPA's web site. As EPA receives additional questions from permit writers, industry, environmental groups, and other members of the public, this document will be updated. The advice in this document is based on EPA's regulations. Users of this document should also consult applicable state law, because the CWA reserves to the States the authority to adopt or enforce any requirement with respect to control or abatement of pollution that is more stringent than those required by federal law. *See* CWA § 510; 40 CFR §125.90(d).

This document discusses existing provisions of the Clean Water Act (CWA) and EPA's implementing regulations. Those CWA provisions and regulations contain legally binding requirements. This document describes these requirements; it does not substitute for those provisions or regulations. This document also contains recommendations. These recommendations are not binding; indeed, there may be other approaches that would be appropriate in particular situations. EPA expects the permitting authority to make its decisions based on the applicable requirements of the CWA and implementing regulations, taking into account comments and information presented at that time by interested persons. EPA may change this guidance in the future.

2. Timing of Requirements

2.A. Each of the following scenarios (Q1 through Q5) assumes that a facility's permit expired prior to the effective date of the 316(b) Phase II rule and that the facility had filed its application for renewal on a timely basis.

Q1: The final permit is issued by the State or EPA Region (as the case may be) before the 316(b) Phase II rule takes effect. What is the basis for the 316(b) limitations in the permit?

A1: Because the Phase II rule was not in effect at the time of permit issuance by the State or EPA Region (as the case may be), the 316(b) limitations must continue to be based on BPJ under authority of 40 C.F.R. § 401.14 and 40 CFR §122.43.

Q2: The draft permit is proposed before the 316(b) Phase II rule takes effect, but the final permit would be issued after the Phase II rule takes effect. At the time of final permit issuance by the State or the Region (as the case may be), the facility has not submitted the comprehensive demonstration study and other information needed to determine limitations under the 316(b) Phase II rule. What is the basis for the 316(b) limitations in the permit?

- A2: The 316(b) limitations in the draft permit would be based on BPJ under authority of 40 C.F.R. § 401.14. The 316(b) limitations in the final permit can be based on BPJ under the same authority. However, under 40 C.F.R. § 122.43(b), the Director has the discretion to reopen the permit proceedings when he or she determines prior to issuance of the final permit, based on information in the record, that the new Phase II requirements, e.g., including authorization to impose a schedule, are of sufficient magnitude to make additional proceedings desirable (e.g., re-proposing the draft permit to reflect the new Phase II requirements). A decision whether or not to reopen the proceedings should be explained in the permitting record. For example, the Director could reasonably determine that the Phase II requirements are not of sufficient magnitude *at that time* to justify reopening the permit to consider new limitations when, as here, the facility has not provided the permit writer with the comprehensive demonstration study or other information needed to determine limitations based on one of the compliance alternatives in the Phase II rule. The 316(b) limitations would be based on BPJ whether or not the Director reopens the permit, because under § 125.95(a)(2)(ii) of the Phase II rule, a BPJ-based permit limit is required for facilities that have not submitted the information required under the Phase II rule. However, because the permittee will have to comply with the information submission requirements in 40 C.F.R. § 125.95 for the next permit anyway, the Director should consider including in the final permit a schedule by which the facility must submit the Phase II information. The schedule would need to reflect a deadline that is as expeditious as practicable but not later than January 7, 2008. *See* 40 C.F.R. § 125.95(a)(2)(ii).
- Q3: The draft permit is proposed after the 316(b) Phase II rule takes effect. At the time of permit issuance, the facility has not submitted the comprehensive demonstration study and other information needed to determine limitations under the 316(b) Phase II rule. What is the basis for the 316(b) limitations in the permit?
- A3: The 316(b) limitations in the proposed and final permit would be based on BPJ under authority of 40 C.F.R. § 125.95(a)(2)(ii). The permit would also need to include a schedule requiring the facility to submit the comprehensive demonstration study and other information required by 40 C.F.R. § 125.95 as expeditiously as practicable but not later than January 7, 2008.
- Q4: The permit is proposed before the 316(b) Phase II rule takes effect, but would be issued after the Phase II rule takes effect. Prior to issuance of the final permit, the facility submits the comprehensive demonstration study and other information needed to determine limitations under the 316(b) Phase II rule. What is the basis for the 316(b) limitations in the permit?
- A4: The 316(b) limitations in the draft permit would be based on BPJ under authority of 40 C.F.R. § 401.14. However, as noted above, the Director has the discretion to reopen the permit proceedings when he or she determines, based on information in the record, that the new Phase II requirements are of sufficient magnitude to make additional proceedings desirable (e.g., re-proposing the draft permit to reflect the new Phase II requirements). In this fact pattern, the Director possesses the comprehensive demonstration study and other information necessary to calculate Phase II limitations. Therefore, the Director should reopen the proceedings and propose new 316(b) limitations based on the studies and other

information unless the Director has a good reason, on the record, for declining to exercise this discretion.

Q5: The draft permit is proposed after the 316(b) Phase II rule takes effect. Prior to publication of the proposed permit, the facility submits the comprehensive demonstration study and other information needed to determine limitations under the 316(b) Phase II rule. What is the basis for the 316(b) limitations in the final rule?

A5: The 316(b) limitations in the proposed and final permit would be based on the requirements set forth in 40 C.F.R. § 125.94, taking into account the comprehensive demonstration study and other information submitted under § 125.95.

2.B. Each of the following scenarios (Q6 through Q7) assumes that a facility's permit expired after the effective date of the 316(b) Phase II rule and that the facility had filed its application for renewal on a timely basis.

Q6: The facility's permit expires before July 9, 2008. Neither the application nor any other submission from the facility during the permit proceeding contains the comprehensive demonstration study and other information needed to determine limitations under the 316(b) Phase II rule. What is the basis for the 316(b) limitations in the permit?

A6: The 316(b) limitations in the proposed and final permit would be based on BPJ under authority of 40 C.F.R. § 125.95(a)(2)(ii). The permit would also need to include a schedule requiring the facility to submit the comprehensive demonstration study and other information required by 40 C.F.R. § 125.95 as expeditiously as practicable but not later than January 7, 2008.

Q7: The facility's permit expires on or after July 9, 2008. What is the basis for the 316(b) limitations in the permit?

A7: The 316(b) limitations in the proposed and final permit would be based on the provisions in 40 C.F.R. § 125.94, taking into account the comprehensive demonstration study and other information submitted under § 125.95. The studies and other information must be provided to the permit writer as part of the facility's timely filed application for permit renewal. *See* 122.21(r)(1)(ii).

3. **Development of Facility Costs and Cost-Cost Test** [UNDER DEVELOPMENT]
4. **Does the Rule Apply to This Facility?** [UNDER DEVELOPMENT]
5. **Application Requirements/Comprehensive Demonstration Study** [UNDER DEVELOPMENT]
6. **Calculation Baseline/Use of Historical Data** [UNDER DEVELOPMENT]
7. **Performance Standards** [UNDER DEVELOPMENT]
8. **More Stringent Standards** [UNDER DEVELOPMENT]

9. **Velocity** [UNDER DEVELOPMENT]
10. **Restoration** [UNDER DEVELOPMENT]
11. **Model Permit Language** [UNDER DEVELOPMENT]
12. **Miscellaneous** [UNDER DEVELOPMENT]

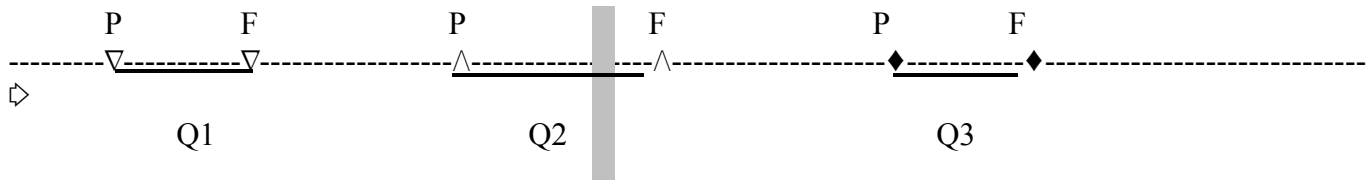
Figure 1. Timing of Requirements

The timelines in figure 1 illustrates the different scenarios discussed in Section 2, Timing of Requirements. See sections 2A and 2B for answers to Q1 through Q7.

KEY
 P = proposed permit
 F = final permit
 gray bar = effective date of the rule (September 7, 2004)
 double line = four years after date of publication in the Federal Register (July 9, 2008)

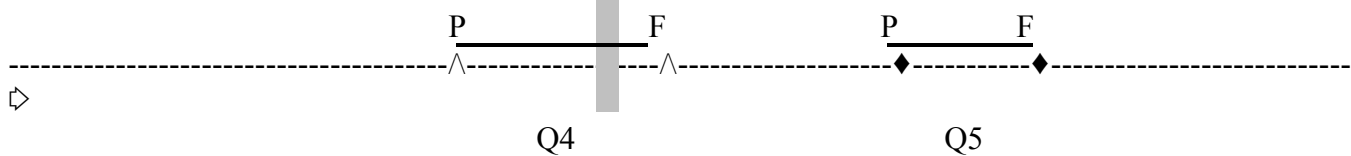
Assumptions for Q1 through Q3:

- Facility's permit expired prior to the effective date of the 316(b) Phase II rule.
- Facility had filed its application for renewal on a timely basis.
- Facility has not provided the permit writer with the Comprehensive Demonstration Study or other information needed to determine limitations under the Phase II rule.



Assumptions for Q4 and Q5:

- Facility's permit expired prior to the effective date of the 316(b) Phase II rule.
- Facility had filed its application for renewal on a timely basis.
- For Q4, facility has provided the permit writer with the Comprehensive Demonstration Study or other information needed to determine limitations under the Phase II rule prior to issuance of the final permit and for Q5 prior to publication of the proposed permit.



Assumptions for Q6 and Q7:

- For Q6, facility's permit expired after the effective date of the 316(b) Phase II rule but before July 9, 2008 and for Q7 on or after July 9, 2008.
- Facility had filed its application for renewal on a timely basis.

