

DATE: October 13, 1988

SUBJECT: 316 Guidance for Permit Reissuance

FROM: Charles H. Kaplan, P.E. (4WM-FP) *CH Kaplan*  
National Expert, Steam Electric/Water

TO: EPA Regional Permit Staff  
Delegated State NPDES Sections

Questions continue to be received from EPA Regions and delegated States as to the procedures and requirements necessary for reissuing an NPDES permit for a facility which presently has thermal limitations based on a previous variance granted under Section 316(a) of the Clean Water Act.

The attached material is provided to assist in this activity and includes:

1. August 11, 1988, letter sent to States in Region IV,
2. Sample language for public notice/fact sheet/rationale being used by EPA Region IV staff, and
3. February 24, 1982, Legal Opinion on §316 of the Clean Water Act.

Should you require additional information or assistance, do not hesitate to contact me at 404/347-3012 or FTS/257-3012.

cc w/attachments:  
James D. Gallup  
Stephen Bugbee



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET  
ATLANTA, GEORGIA 30365

August 11, 1988

REF: 4WM-FP

Mr. Ralph M. Sinclair  
Office of Water Management  
Bureau of Environment  
TN Department of Health & Environment  
T.E.R.R.A. Building  
150 Ninth Avenue, North  
Nashville, TN 37203

RE: 316 Guidance for Permit Reissuance

Dear Mr. Sinclair:

Questions have arisen as to what procedures and activities are necessary in reissuing a permit for a facility which has thermal limitations based on a previous variance granted under Section 316(a) of the Clean Water Act. The following is provided as a follow-up to information provided at the February 1988, EPA/State meeting in Destin, Florida.

A thermal variance granted under §316(a) terminates on expiration of the NPDES permit of which it is a part (Attachment A). Procedures for a reissuance are virtually unchanged from an initial determination. The amount of data necessary to support the variance at the time of reissuance will probably be minimal. However, if conditions have changed materially, a significant quantity of information may be needed.

NOTE: To the extent that permittees are unaware of these requirements, they should be notified of them expeditiously so that they can be prepared.

The general procedure is as follows:

1. The permittee must request that the variance be continued, preferably at the time of permit application. At that time, he should provide a basis for that continuance. The basis could be as simple as: (a) plant operating conditions and load factors are unchanged and are expected to remain so for the term of the reissued permit, (b) there are no changes (to his knowledge) to plant discharges or other discharges in the plant site area which could interact with the thermal discharges, and (c) there are no changes (to his knowledge) to the biotic community of the receiving water body which would impact the previous 316 determinations.
2. If the permitting authority agrees with the basis, appropriate permit conditions would be developed; otherwise, additional data would be requested as needed. Request for additional data must be made within 60 days of receipt of the application (Answer to Question 7, Attachment A). Additional studies can be made a permit requirement if needed (Answer to Question 7).

August 11, 1988

3. The Fact Sheet/Rationale should contain a summary of 316 variance activities from the previous permits (dates, determinations, limitations, etc.) and an indication of the proposed basis for continuing the 316 variance. Sample language is included in Attachment B.
4. The Public notice requirements are contained in §124.75(a). Sample language is also included in Attachment B.

Should you have have questions or need assistance, feel free to contact me at 404/347-3012.

Sincerely yours,

CHK

Charles H. Kaplan, P.E.  
National Expert Steam Electric/Water

Enclosures

cc: 10 copies for distribution

Identical letters sent to all states in Region IV





FEB 24 1982

OFFICE OF  
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Legal Opinion on §316 of the Clean Water Act

FROM: Gail B. Cooper, Attorney  
Water & Solid Waste Division (A-131) *Gail B. Cooper*

TO: Joseph J. Zedrosser  
Regional Counsel  
Region II

THRU: Bruce M. Diamond *BMD*  
Acting Associate General Counsel  
Office of General Counsel (A-131)

You requested that this office prepare a legal opinion on several permit-related issues pertaining to §316 of the Clean Water Act (CWA). This memorandum is our response to your request. A previous draft was discussed with Wendy Fodge of your staff.

Richard Stoll has left EPA so you should address any future §316 questions to me. My number is FTS 426-3246.

QUESTION 1

Where a permittee requests and is granted a thermal variance pursuant to §316(a) of the Clean Water Act does the variance terminate upon expiration of the NPDES permit term during which it was granted?

Does the response to this question differ depending on whether the permittee had to alter its operation to meet the requirements of the variance?

If the variance does not terminate, and the variance carries over into future renewal permits, does the variance remain in effect

- (a) for an indefinite period of time through all future renewal permits?
- (b) until the permit issuing authority independently determines that there has occurred a significant biological change affecting the assurance of a balanced, indigenous population of shellfish, fish and wildlife in and on the body of water into which the discharge is to be made?
- (c) until the permit issuing authority independently determines that a significant change has occurred with respect to the thermal loading of the receiving water body (i.e., independent of any biological determination concerning balanced, indigenous populations)?
- (d) until a change occurs in the State thermal criteria for the receiving water body as a result of a valid review of State Water Quality Standards pursuant to §303(c) of the Clean Water Act?
- (e) until the permit issuing authority becomes aware that the effective operating life of the facility from which the thermal discharge emanates will exceed the effective operating life assumed by the permit issuing authority in formulating its decision to initially grant the requested variance?

#### ANSWER

A §316(a) thermal variance is a permit condition and it terminates at the same time as the NPDES permit of which it is a part expires. This is the rule for all variances and there is nothing in the CWA to suggest a different result for a §316(a) variance. In fact, the Agency's regulations establish procedures for renewal of a §316 variance at the expiration of the permit. See 40 CFR §125.72(c) and the note after §125.72(f). As explained in response to questions 6 and 7, however, there is no requirement that EPA, the State, or applicant start from scratch when renewing a permit.

The response to the question does not differ depending on whether the discharger had to alter its operation to meet the requirements of the variance. Section §316(c) of the statute provides that EPA cannot impose more stringent thermal effluent limitations for certain point sources for a ten year period but these restrictions affect the substantive requirements that can be imposed in a new permit, and not the requirement to renew a permit after five years.



QUESTION 2

If the granting of a variance under §316(a) of the Act remains effective for more than a single permit term, what circumstances other than those indicated in Question 1.(b)-(e) would allow the permit issuing authority to impose different and/or stricter thermal effluent limitations than those allowed in the variance?

ANSWER

There is no need to answer this question.

QUESTION 3

If the duration of a §316(a) variance is limited to a single permit term, or if changed circumstances can result in the imposition of stricter thermal effluent limitations after the granting of a thermal variance request, may the new thermal effluent limitations be proposed for a permit only during the permit issuance comment period?

ANSWER

A public comment period is always necessary when a new or modified thermal variance is proposed. However, as discussed below, a variance may be proposed before, after, or in conjunction with the issuance of a permit.

There is no distinction between the procedures for issuance and renewal of a permit. Therefore, the procedures for renewal of a permit and variance are those appearing in 40 CFR §124 for a new permit. 40 CFR §§124.6 and 124.10 specifically require a public comment period on draft permits, and 40 CFR §124.57(a) requires that public notice of the draft permit contain information about requests for a §316(a) variance.

Normally, a variance request is noticed for public comment at the same time as the draft permit. However, under 40 CFR §124.66(a), a permit applicant may request a final decision on a §316(a) variance before the final permit is issued. An early variance decision is considered as permit issuance and is subject to the same requirements of public notice and comment.

If there is no early variance decision in a state where EPA is the permit issuing authority and the Regional Administrator determines under 40 CFR §124.63 that it would significantly delay the processing of the rest of the permit to process the variance request simultaneously, the variance request may be separated from the rest of the permit. In this case, the Regional Administrator is required to prepare a new



draft permit and give public notice of his tentative determination on the variance. 40 CFR §124.63(a)(3) states that the only matters to be considered at that time are those relating to the variance; thus, issues pertaining to other aspects of the permit are not to be reopened.

The Administrator also may modify a permit during its term if the proposed modification is consistent with 40 CFR §122.15. In such cases, 40 CFR §124.5(c) requires the permit issuing authority to prepare a draft permit under 40 CFR §124.6 and give public notice. It is important to remember that §316(c) of the statute restricts the issuance of more stringent thermal effluent limitations for a ten year period if the discharger modified the point source after 1972, is currently in compliance with effluent limitations issued under sections 301 and 303, and is discharging at a level which assures the protection and propagation of a balanced, indigeneous population of shellfish, fish, and wildlife.

#### QUESTION 4

Where an EPA-issued permit for which the permittee has timely requested a variance under §316(a) of the Clean Water Act has expired prior to the Regional Administrator's determination, and where EPA has retained permit issuing authority, may EPA grant the requested variance prior to the effective date of a subsequently issued permit (e.g., where significant delay is contemplated prior to issuance of the subsequent permit)? If so, must any special procedure be followed?

#### ANSWER

EPA may grant a §316(a) variance prior to a final agency decision on a permit application. 40 CFR §§124.63, 124.66, and 125.72(f) establish specific procedures for early decisions on §316(a) variances.

#### QUESTION 5

Where an EPA-issued permit for which the permittee has timely requested a variance under §316(a) of the Clean Water Act has expired prior to the Regional Administrator's determination and where permit issuing authority has been assumed by a State during the term of the EPA-issued permit,

- (a) may EPA grant the requested variance prior to the effective date of a subsequently issued permit? If so, must any special procedure be followed?
- (b) may only the permit issuing State issue the determination with respect to the requested variance?

if (b), then

- (c) may the State make a determination with respect to the requested variance prior to the effective date of the permit which it issues? If so, must any special procedure be followed?

ANSWER

(a) The answer to your question depends upon what EPA has arranged with the State. 40 CFR §123.71(d) provides that after an NPDES program is approved, EPA retains jurisdiction over any permit it has issued unless the Memorandum of Agreement with the State provides that the State will assume responsibility. This retention of jurisdiction includes the processing of variance requests. Even where the EPA permit has expired (as in the example you give), EPA may retain jurisdiction until the matter is resolved if the State agrees to that approach.

(b) The answer depends on the terms of the Memorandum of Agreement between EPA and the State. 40 CFR §123.71(d) allows the division of responsibility to be worked out on a state-by-state basis.

(c) The State's own laws or regulations determine whether the State can make a variance decision prior to the effective date of a permit. 40 CFR §124.66 procedures are not binding on States.

QUESTION 6

If a determination applying the criteria of §316(b) of the Clean Water Act is made by the permit issuing authority,

- (a) does that determination control §316(b)-related considerations in subsequently issued permits?
- (b) must the permit issuing authority make a new §316(b)-based determination with respect to each permit by considering best cooling water intake structure technology available for minimizing adverse environmental impact as it exists at the time of formulating conditions to apply through the term of each subsequently issued permit?



(c) may the permit issuing authority, at its option, make a new §316(b)-based determination with respect to a particular permit by considering best cooling water intake structure technology available for minimizing adverse environmental impact as it exists at the time of formulating conditions to apply through the term of the renewal permit being considered?

ANSWER

This question appears to ask whether EPA is permanently bound by the first determination applying §316(b), particularly with respect to whether the cooling water intake structure reflects the best technology available for minimizing adverse environmental impact. As a general matter, we are aware of nothing in the Act or its legislative history that would indicate that §316(b) determinations are exempt from the general rule that in issuing a new NPDES permit, the expiring permit conditions may be adjusted. Where appropriate 1/, permit conditions can be made more stringent or less stringent. 40 CFR §122.62(1). Therefore, it is not accurate to conclude that a determination made under §316(b) is permanently binding.

At the same time, there is no requirement that either the permit issuing authority or the applicant start from scratch every time a NPDES permit containing §316(b) limitations expires. Indeed, with regard to §316(a) decisions, neither 40 CFR §125.72(c) nor the note after §125.72(f) (the provisions covering the kinds of data to be collected under §316(a)),<sup>\*</sup> suggest or require that the application and review process proceed as if there had not been a previous §316(a) variance determination. Presumably, the same would hold true under §316(b).

Language in the preamble to the final 1979 NPDES regulations clarifies EPA's intent in regard to §316(a):

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1/ Both §316(c) and §306(d) impose limits on the permit issuing authority's ability to require compliance with stricter standards within ten years of the time a facility is modified or constructed.

The regulations have also been revised to provide that the specific forms of studies prescribed apply only to the initial grant of a section 316(a) variance. In many cases, neither the nature of the thermal discharge nor the aquatic population will have changed since a variance was initially granted. It would therefore be an unnecessary and costly burden on the Agency and dischargers alike to require a full section 316(a) demonstration for each renewal. Section 125.72 accordingly gives the Director the flexibility to require substantially less information in the case of renewal requests. This does not mean, however, that the Director may not require a full demonstration for a renewal in cases where he has reason to believe that circumstances have changed, that the initial variance may have been improperly granted, or that some adjustment in the terms of the initial variance may be warranted. Persons holding such a variance should, of course, be prepared to justify its continuation with studies based on actual operating experience, and a comment has been added to that effect. 44 FR 32894 (June 7, 1979).

The same logic applies to §316(b).

#### QUESTION 7

Under what circumstances, if any, may EPA or a NPDES State be barred from requiring a permittee to perform additional or updated biological monitoring or studies (with respect to §316(b) of the Act), or thermal modeling, monitoring, or studies (with respect to §316(a) of the Act) as a condition of subsequently issued permit?

#### ANSWER

Neither EPA nor the NPDES state is barred from requiring additional §316 studies as a condition to renewing a variance or permit. 40 CFR §125.72(c) specifically authorizes the permit issuing authority to require applicants for variance renewals to submit the types of information described in 40 CFR §125.72(a) and (b) and §124.73(c)(1). Further, the note at the end of 40 CFR §125.72 states that a discharger seeking to renew a §316(a) variance should be prepared to support continuance of the variance with studies based on the discharger's actual operating experience. Thus, while applicants are not required to submit the detailed plan of study required by 40 CFR §125.72(b), EPA can request information and studies it believes are necessary for a §316(a) demonstration. However, requests for information must be made within 60 days of receipt of the application.



With respect to §316(b) determinations, there is no specific provision addressing EPA's ability to obtain additional data. EPA would have the authority to obtain information to the extent authorized by §308 of the Act. 40 CFR §122.7(h) also allows EPA or the NPDES State to require permittees to furnish permit-related information upon request. Since variances are incorporated into permits, this can be construed to cover information pertinent to renewal of the variance.

cc: Wendy Fodge, Region II  
Bill Jordan, Office of Water Enforcement  
and Permits

## PUBLIC NOTICE and FACT SHEET/RATIONALE

## CLEAN WATER ACT §316(a) and (b)

The thermal component of the discharge is subject to compliance with (State name) Water Quality Standards. Section (citation) of the (citation) provides that heated water discharges (appropriate requirements for discharge temperature, temperature rise, mixing zone, etc. as applicable). Notwithstanding these requirements, Section 316(a) of the Clean Water Act (the Act) allows the permitting authority to impose alternative and less stringent thermal limitations after demonstration that the water quality standards limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the receiving water. In addition, Section 316(b) of the Act requires that the location, design, construction, and capacity of a cooling water intake structure reflect the best technology available for minimizing environmental impacts.

On (date), as a part of permitting activities on his previous NPDES permit, (the permittee) provided information to support his request that alternative thermal effluent limitations (insert description of alternate requested or imposed) be allowed under Section 316(a) of the Act. A determination was made on (date) that the permittee had submitted adequate information to demonstrate that such alternative limitations on the thermal component of his discharge will assure the "protection and propagation of a balanced, indigenous population of shellfish fish and wildlife in and on (name of receiving water body).

On (date), as part of his application for reissuance the NPDES Permit, (the permittee) requested that the §316(a) variance be continued. To support the request (the permittee) has provided the following rationale: (insert). A tentative determination has been made that (continuation of this 316(a) variance is appropriate in the reissuance of this permit or indicate the proposed changes or biological monitoring requirements).

On (date), a determination was made in accordance with Section 316(b) of the Act that the location, design, construction, and capacity of the cooling water intake-structure(s) reflects the best technology available for minimizing adverse environmental impact. This determination was based on information submitted by (the permittee). It has been tentatively determined that the cooling water intake structure(s) [continue to reflect or does not reflect] best technology available and proposes (no changes to the intake at this time or indicate required changes or biological studies to be required).



UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

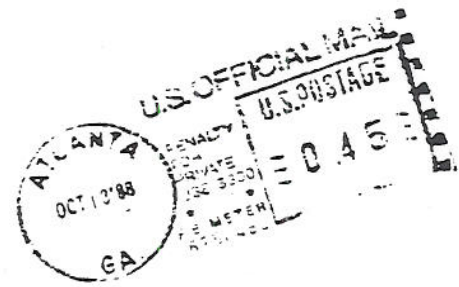
REGION IV

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