UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: Water quality-based and technology-based CSO requirements

FROM: Michael B. Cook, Director
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TO: Water Division Directors, Regions 1-10
Regional Counsels, Regions 1-10
Enforcement Division Directors, Regions 1, 2, 6, 8

Since EPA released the Combined Sewer Overflow (CSO) Control Policy in 1994 (59FR 18688), questions have arisen concerning the relationship between the water quality-based and technology-based requirements of the Clean Water Act to CSOs, particularly where enforcement cases are pending or imminent. This memorandum clarifies that:

1. Because CSOs are subject to the technology-based requirements of the Clean Water Act (CWA), permitting authorities must specifically determine best available technology economically achievable (BAT)/best conventional pollutant control technology (BCT) on a case-by-case basis using best professional judgment (BPJ) during the permitting process. Given the protectiveness of properly-applied water quality standards (WQS), we expect the combination of the nine minimum controls (NMC) and water quality-based controls described in the CSO Policy to be generally at least as stringent as any applicable BAT/BCT requirements. Therefore, evaluation of CSO controls beyond the NMC may appropriately focus primarily on water quality issues.

2. Enforcement, permitting, and water quality programs should coordinate closely to reach agreement on the requirements of a long-term CSO control plan (LTCP). Where there is a pending enforcement case, the enforcement remedy should be consistent with WQS and with both water quality-based and technology-based permit requirements resulting from the CSO planning process.

Our expectation is that NPDES permitting, enforcement, and WQS staff would work on a cooperative basis with the permittee, following the course described below. This process assumes the collaborative participation of the CSO discharger in the approach to CSO planning described in EPA's policy and guidances. In enforcement cases, court-ordered litigation schedules or serious lack of good faith in negotiations by a defendant may influence the process for planning and selecting a CSO remedy.

Water quality-based requirements

The CSO Policy encourages a watershed-based approach to CSO planning. The LTCP should include extensive analysis of current water quality conditions, including the impacts of CSOs and other pollution sources on WQS attainment. It should evaluate the cost, performance, and likely water quality improvements associated with a wide range of CSO control alternatives and evaluate control measures based on cost/performance criteria (as described in EPA guidance) as well as CWA requirements.

Data developed during LTCP development can inform decisions about the attainability of designated uses and the appropriateness of any WQS revisions. Data contained in the LTCP can in many cases be used as the basis of a use attainability analysis. State and Federal WQS authorities need to be involved throughout the planning process to ensure that, if the LTCP is based in part on anticipated changes to WQS, those changes are appropriate and satisfy Federal regulatory requirements.

State and Federal NPDES authorities must coordinate throughout the planning process to ensure that the controls in the proposed LTCP will ensure that CSOs do not cause or contribute to any exceedance of WQS, including any applicable revisions to WQS. Stakeholders, especially groups representing environmental interests, should be encouraged to participate actively during the development of the LTCP, including the consideration of potential WQS revisions.

Technology-based requirements

The CSO Policy calls for all CSO communities to implement the NMC. For each CSO community, the NPDES authority must determine on a best professional judgment (BPJ) basis whether the NMC satisfy the technology-based requirements of the CWA, considering the factors identified at 40 CFR 125.3.[1] The LTCP must include sufficient information concerning these factors to support a BPJ determination by the permitting authority. A BPJ analysis of any potential technology-based controls beyond the NMC would typically be conducted on a system-wide basis, rather than outfall-by-outfall.

We expect that, given the protectiveness of properly-applied WQS, the NMC, combined with water quality-based controls, will generally provide a level of CSO control that meets CWA requirements and is at least as stringent as technology-based controls identified on a BPJ basis. Although the permitting authority must still perform an analysis of technology-based requirements, the evaluation of potential CSO controls beyond the NMC may appropriately focus primarily on water quality issues, as described in EPA guidance.[2]

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1. EPA, 1995. *Combined Sewer Overflows — Guidance for Permit Writers* (EPA 832-B-95-008), p. 3-8.

2. EPA, 1995. *Combined Sewer Overflows — Guidance for Long-Term Control Plan* (EPA 832-B-95-002).

Coordination of enforcement, permitting, and water quality programs in enforcement cases

When an enforcement action is pending, enforcement, permitting, and WQS staff (both State and Federal) should coordinate closely throughout the CSO planning process, with the goal of reaching consensus on a LTCP that will meet all expected water quality-based and technology-based permit requirements and is consistent with the CSO Policy.

During the planning process, enforcement staff should clearly articulate its views concerning the appropriateness of any proposed WQS revisions, proposed water quality-based and technology-based permit requirements, and the adequacy of CSO control alternatives. Issues of concern between enforcement, permitting, and WQS staff should be elevated early in the planning process to ensure agreement on the LTCP when it is completed.

Assuming that there is agreement that the LTCP will meet the expected requirements of a Phase 2 permit, the enforcement program would then negotiate a schedule in an enforceable mechanism for implementation of the LTCP. If a LTCP assumes future revisions to WQS, the implementation schedule may account for such revisions if there is reasonable confidence that these revisions will become effective in the near future (i.e., that the WQS authority will in fact proceed with such revisions expeditiously, and that EPA will approve them). In such a case the schedule should include a reopener provision in the event that the anticipated revisions do not in fact occur. Such a reopener should require the implementation of specific controls, rather than a return to the planning phase.

If EPA concludes that it will disapprove the anticipated revisions to WQS and promulgate Federal WQS, then the enforcement remedy should provide for attainment of the expected Federal WQS. Similarly, if EPA concludes that it will object to an anticipated State-issued permit and issue a Federal permit if necessary, the enforcement remedy should be consistent with the expected conditions of the Federal permit.

If there is disagreement among EPA programs as to whether anticipated revisions to WQS should be disapproved, or as to whether EPA should object to an anticipated Phase 2 permit, the relevant programs should attempt to resolve the issue, and elevate it if necessary. The enforcement program should seek a remedy consistent with the resolution of the WQS and permitting issues, in order to ensure that the enforcement remedy is consistent with the expected WQS and permit requirements.

If you have questions concerning this memorandum, please contact one of us, or have your staff call John Lyon of the Office of Regulatory Enforcement at (202) 564-4051 or Ross Brennan of the Office of Wastewater Management at (202) 260-6928.