UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
WATER

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MEMORANDUM

SUBJECT: Questions and Answers on Implementation of Section 304(l) of the Clean Water Act

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This memorandum addresses questions that have come up during implementation of 304(l). A number of these questions were raised at the 304(l) and WLA Coordinators Meeting held in Philadelphia, PA on September 27 and 28, 1989. Ken Fenner, Region V, also raised several implementation issues in a memorandum dated September 11, 1989.

Q1. How and when does EPA take over the authority to issue an ICS?

The new regulations at 40 CFR 123.46(f) provide that any time after the Regional Administrator disapproves an ICS (or conditionally approves a draft permit as an ICS), the RA may submit written notification to the State that the Regional Office intends to issue the ICS. Upon mailing the notification, and not-withstanding any other regulation, exclusive authority to issue the permit passes to EPA. Headquarters recommends that the Regions assume sole authority over issuance of an ICS only as a last resort where the NPDES-authorized State refuses to fully implement the requirements of 304(l).

We suggest the following procedure:

1. Instruct States that they must issue ICSs that EPA approved on 6/4/89 as final permits by February 4, 1990.

2. After review of comments received during the 120-day public comment period on the lists and ICSs, we recommend the Regions issue formal responses to all comments in early 1990 along with the final lists.

3. Where EPA disapproved a State's ICS on 6/4/89, but the State is nonetheless issuing the permit, the State should submit acceptable drafts by February 4, 1990. This date is designed to allow the Region sufficient time to prepare a draft permit should the State fail to do so. In any case, an acceptable draft permit must be in place by June 4, 1990. For drafts already submitted, the Permits Branch Chief should send a letter to the State pointing out which draft ICSs appear acceptable, and which ones do not. This letter should indicate that EPA may formally take over authority to issue the disapproved ICSs at any time via letter from the RA to the State Director, if corrections to unacceptable ICSs are not made. The letter should point out that it is not a final decision regarding the sufficiency of the ICS and is not the formal permit objection required by existing State/EPA MOU, nor is it the letter which transfers authority to issue the permit under 40 CFR 123.46(f).

4. Where the Regions determine they must assume sole authority to issue an ICS, the Region should send letters from the RA to the State and to the permittee saying that EPA is taking over sole authority to issue the permit. The letter should list the reasons for this action and relate them to specific regulations. These letters should include a copy of the responses to comments received during the 120-day public comment period or information regarding where the responses are available.

5. Where the Region assumes sole authority to issue an ICS that was disapproved in June of 1989, the Region or the State must prepare a draft permit by June of 1990 and issue the final permit by February of 1991.

6. In cases where the Region assumes sole authority to issue an ICS that was originally approved in June of 1989 but where the State has failed to fulfill its commitment to issue the final permit by February 4, 1990, the Region should withdraw its approval of the ICS and prepare its own draft or final permit by June of 1990.

Q2. Can EPA modify a permit issued by the State?

The regulations at 40 CFR 123.46 and 124.5 are silent on whether EPA can assume the authority to modify a State-issued permit and if so what the correct procedures for doing so are.

The preamble to the section 304(l) regulations (at 52 FR 23890) states that section 304(l) gives EPA the authority to reopen a permit before the term of the permit expires. The term reopen suggests that permit modification and revocation and reissuance might both be viable options for EPA. However, little legal assurance in the form of regulatory authority or precedent exists which would allow EPA to modify a State-issued NPDES permit. A possible result of such a modification could be the existence of EPA-issued and State-issued conditions in the same NPDES permit that conflict or perhaps the existence of two NPDES permits (one EPA-issued and one State-issued) for the same facility. While the existence of State and NPDES permits for the same facility is not uncommon, contradictory NPDES permits or permit conditions for the same facility would be unworkable.

Thus, the statement in the preamble to the section 304(l) regulations (52 FR 23890) that section 304(l) gives EPA the authority to reopen an NPDES permit needs clarification. It is clear that EPA can reopen and modify a permit that EPA has issued. However, in the case of State-issued NPDES permits, since there is little legal basis for EPA to modify an NPDES permit issued by a State, and for the reasons stated above, EPA should not attempt to modify State-issued NPDES permits, but rather revoke and reissue such permits as a last resort where the State refuses to modify or reissue the permit to be consistent with the requirements of section 304(l).

Q3. If EPA issues a permit as an ICS, what is the status of the State-issued permit?

When EPA issues an NPDES permit as an ICS to replace an existing State-issued NPDES permit, EPA should follow the procedures for revocation and reissuance of permits at 40 CFR 124.5(c) and (e). The regulations at 124.5(c)(2) provide: "When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all the conditions of the existing permit until a new final permit is reissued." The status of the State-issued permit upon EPA-reissuance of the new final permit is that it is revoked and no longer effective as a State-issued NPDES permit; it may continue indefinitely as a State-issued non-NPDES permit.

Q4. Do EPA and States have an obligation to issue permits that have compliance dates within the permit term?

Yes. In order for EPA to approve or issue an ICS it must make a finding that the permit contains the requirements necessary to meet water quality standards by the section 304(l) deadlines. To make this finding, the permit must require compliance with a limit. The permit can only require compliance with limits that are effective within the term of the permit. Furthermore, it is EPA practice to require compliance deadlines within the term of the permit. This is sound practice and should continue so that the full enforceability of the permit is uncompromised.

Thus, there are two available options for issuance of ICSs where the compliance deadline required by section 304(l) and 40 CFR 123.46 (1992 or 1993) would extend beyond the term of the existing permit. The first option is to revoke and reissue the permit thereby creating a new five year term of the permit. The second option is to require, in the existing permit, compliance with ICS conditions within the term of the permit, even if such compliance would be required before 1992 or 1993. Section 304(l)(1)(D) and 40 CFR 123.46(a) require ICSs to achieve compliance with applicable water quality standards as soon as possible, but not later than three years after the establishment of the ICS. To the extent that the permitting authority can negotiate compliance deadlines that fall prior to 1992 or 1993 (and within the term of the existing permit), it should do so. If the permitting authority is unable to negotiate or otherwise establish a compliance deadline within the term of the existing permit (which is being modified to meet the requirements of section 304(l)), then revoking and reissuing the permit may be the only available recourse.

Q5. Is the term "draft permit" as applied to section 304(l) regulations consistent with the term as defined in 40 CFR 122.2?

Yes. The term "draft permit" found at 40 CFR 123.46(c) is intended to be consistent with the same term as defined at 40 CFR 122.2. The definition of "draft permit" at 122.2, together with the requirements at 124.6(e), indicate that "draft permits" should be made available for public comment. Since completion of the public notice period is necessary before the permit may be issued as a final permit and because of the short deadlines for developing final permits, EPA and the States should, wherever possible, public notice draft permits at or before the time such permits are approved as ICSs. In all cases, final permits to meet the ICS requirements of 304(l) must be issued by February 4, 1990 where EPA initially and finally approved the ICS and by February 4, 1991 where EPA initially or finally disapproved the ICS.

Q6. What should the Regional Office do if a State challenges EPA's authority to disapprove an ICS or to implement the requirements of Section 304(l) after disapproval?

The Regional Office should cite EPA's authority under the regulations at 40 CFR Part 123.46(f). The validity of these regulations has been challenged by several parties, but these challenges do not affect whether the Region may rely on the regulations. Section 304(l)(2) gives EPA the authority to approve or disapprove the control strategies submitted under paragraph (1) by any State. Section 304(l)(3) mandates the action to be taken by EPA: "If a State fails to submit control strategies in accordance with paragraph (1) or the Administrator does not approve the control strategies submitted by the State in accordance with paragraph (1), then, not later than 1 year after the last day of the period referred to in paragraph (2), the Administrator, in cooperation with such State and after notice and opportunity for public comment, shall implement the requirements of paragraph (1) in such State...." This is new, one-time authority for EPA which is unique to the Section 304(l) process.

Q7. What is the difference between "vetoed" permits and approved/disapproved ICSs?

The key differences between a permit "veto" and an ICS disapproval are that the authorities are different. Where as a permit objection is based upon the failure of the permit to be consistent with the CWA and implementing regulations, an ICS approval/disapproval is based on the adequacy of the permit limits that are designed to meet the ICS requirements under Section 304(l) of the CWA. A "vetoed" NPDES permit is one that EPA is objecting to either during public comment on the draft permit, at the proposal stage (under authority found at 40 CFR 123.44), or after the permit has been issued (under an memorandum of agreement) between EPA and the approved NPDES State). An EPA disapproval of an ICS on the other hand, is based on the authority provided by section 304(l)(3) and 40 CFR Part 123.46(f). EPA disapproval of an ICS is essentially EPA's finding that those limitations and conditions in an NPDES permit that are designed to comply with water quality standards by 1992 (or in some cases 1993) are inadequate.

Q8. Can the Regional Administrator or an officially appointed designee still object to and take over authority to issue an ICS if it has not been objected to under the normal permit issuance process?

Yes. The process for ICS approval/disapproval can be independent of the process for EPA review and objections to State

permits (40 CFR 123.44). A final issued permit that EPA reviewed and did not object to under 40 CFR 123.44 could be disapproved as an ICS by EPA. (Failure to object to a permit does not necessarily indicate that EPA approves of the ICS.) However, EPA should not put itself in the position of approving ICS conditions within a permit and subsequently objecting to those same conditions under a separate review (although EPA may object based on non-section 304(l) conditions). EPA should make every effort to be consistent in its ICS and permit reviews.

Q9. If, after the 120-day public comment period, EPA approves an ICS that is a draft permit, can conditions in the permit change before it becomes a final permit?

Yes, provided the changes do not jeopardize compliance with the 1992 or 1993 statutory deadlines. If the changes are inconsistent with section 304(l) then EPA can reconsider or withdraw its approval of the ICS.

Q10. What should EPA Regions do if a member of the public has requested an extension to the 120-day public comment period on approvals and disapprovals? Must EPA grant the extension? If EPA grants an extension to one party, must all parties automatically receive an extension?

EPA may, upon request, agree to consider particular comments received after the 120-day public comment period or EPA may formally extend the comment period and provide notice that it is doing so. Extensions may be of any length. Headquarters recommends that the Regions accept comments after the close of the comment period and/or grant extensions only where the Region believes that the deadlines for draft and final permits established by the 304(l) regulations will not be compromised. Regardless of whether an extension is granted, the 6/4/90 deadline for EPA final approval of ICSs and the statutory compliance deadlines of 1992 or 1993 apply for <u>all</u> ICSs. If EPA agrees to accept comments from one person until a particular date it should agree to accept comments from others until that same date.

Q11. If a State issues an ICS now, when is the compliance date for that ICS?

The latest possible compliance date will either be 6/92 or 6/93. If EPA initially <u>or</u> finally disapproved the ICS then the later date will apply. The compliance date does not depend on the permit issuance date. However, we recommend that wherever possible the State or Region negotiate compliance dates prior to 6/92 or 6/93. The discharger should comply with the ICS conditions as soon as possible, but not later than three years after EPA approval of the ICS or preparation of the draft permit.

The ICS conditions are the water quality-based limits on section 307(a) toxic pollutants or indicator pollutants that are to achieve applicable water quality standards. EPA should work with States to evaluate what will be necessary for a facility to comply with its ICS and then negotiate the earliest compliance date possible.

Q12. What happens to the B and C lists where a State adopts a water quality criterion that is more or less stringent than the criterion that served as the basis for listing the facility and the receiving water?

In those States where EPA has not yet finally approved or disapproved State section 304(l) lists, new information may become available which indicates that a water quality standard for a priority pollutant at a location is no longer exceeded. This information may include a new numeric criterion adopted by a State under section 303(c)(2)(B) or a new and formal State interpretation of its narrative criterion. In such cases, where a water is not exceeding the water quality standard as required by section 304(l) at the time of final Agency approval or disapproval, then the water or facility need not be listed.

Where a State adopts a more stringent water quality criterion and as a result, prior to EPA taking final action on lists, EPA determines that additional waters and facilities should be listed, EPA should notify the State and facility, list such waters and facilities, and provide for public comment on those additions.

Q13. Under what circumstances (other than those discussed in Q12) can EPA or a State add waters or facilities to the 304(l) lists?

Up to the time EPA finally disapproves State section 304(l) lists, the Agency can add waters to the lists based on public comments or the receipt of additional data and information. If EPA adds waters, based on substantially new data discovered independently of the public comment process, it must provide public notice of the additions to the lists and allow an opportunity to comment. If, however, the data was made available by the public during the comment period, the Region does not need to provide any additional public notice, although the State and any affected dischargers should be notified. This advice applies to additions to each of the lists. The 1993 statutory deadline for compliance with applicable water quality standards still applies to any additions to the B and C lists after June 4, 1989.

EPA can add facilities to the C list that discharge to waters already on the B list as well as facilities that discharge to waters added to the B list. Such additions must be based on

public comments, new data, or the fact that a facility was mistakenly left off of the C list. The decision to add the facility to the C list is EPA's decision. If a State wishes to add a facility to the C list, it must provide EPA with information sufficient to support the addition.

Q14. Under what circumstances (other than those discussed in Q12) can a waterbody or a facility be taken off the final list if it was on the Region's proposed list in June of 1989?

In addition to the reasons presented in Q12, a waterbody or a facility may be taken off the final list if the original basis for listing the facility was incorrect or is no longer correct. Examples of circumstances which warrant removing a waterbody or a facility from the list are: if a facility shuts down or ceases discharging 307(a) pollutants after June 4, 1989, if a facility now discharges to a POTW instead of directly (check to see if POTW is listed), if there was a mistake in the listing data originally used, or in certain cases where the facility was initially listed solely on the basis of whole effluent toxicity (WET) (see Q15 below).

Q15. What is the role of whole effluent toxicity (WET) in ICSs?

WET could have been a reason to initially list a water or a facility. Where toxicity alone was the basis for listing, the water or facility should be removed from the final list unless data is available indicating the WET is caused by one or more 307(a) pollutants. Non-307(a) pollutants, and therefore WET caused by non-307(a) pollutants, are not addressed under the ICS provisions of 304(l). Where WET is caused by non-307(a) pollutants, WET limits can be kept in the permit but the section 304(l) 1992 and 1993 statutory compliance deadlines do not automatically apply. In addition, the absence from an ICS of a WET limit that protects against toxicity caused by non-307(a) pollutants would not be a basis for taking over the authority to issue a permit from a State under section 304(l). When the permitting authority determines that 307(a) pollutants are the source of WET, limits on WET should be included in the permit unless limits on the 307(a) toxic pollutants alone are sufficient to attain and maintain all applicable numeric and narrative water quality standards (see 40 CFR 122.44(d)(1)(v)).

The Section 304(l) regulations allow the use of WET as an indicator parameter for any 307(a) toxicant for which a State numeric water quality criterion is not available. If whole effluent toxicity is used as an indicator parameter, it must meet the following 4 conditions listed at 40 CFR 122.44 (d)(1)(vi)(c): 1) the permit must identify the pollutant to be controlled; 2) the fact sheet must set forth the basis for the limit, including

a finding that compliance with the indicator will achieve water quality standards; 3) the permit must require monitoring to show continued compliance with water quality standards; and, 4) the permit must contain a reopener allowing changes necessary to meet water quality standards. However, we strongly recommend that where a State has adopted a numeric criterion for a 307(a) toxicant, the pollutant be limited directly where necessary to achieve State water quality standards.

Q16. Is dredged spoil considered a point source?

Dredge spoil would only be considered a point source for purposes of Section 304(l) if it were a continuous or intermittent discharge to a water of the U.S. that has been issued or is required to be issued an NPDES permit.

Q17. A number of dischargers have objected to being listed on the C list because of inconsistencies in listing/not listing certain categories of facilities among the States. Is such inconsistency a valid reason for de-listing a discharger?

No. EPA must act on the data that is available. If the data show that a facility is discharging priority pollutants to a water on the B list at levels which cause or are expected to cause or contribute to excursions above applicable numeric and narrative water quality standards due to 307(a) toxics, the facility must be listed. To the extent possible, Regions were to have worked with States to fill significant data gaps. Nevertheless, some inconsistency has still resulted. Where a significant water quality problem exists, but data were not available to put the water on the short list and address the problem through an ICS, the waterbody should still appear on the long list and a high priority should be attached to the problem.

Q18. How do the Regions use Toxics Release Inventory (TRI) data for 304(l) purposes?

EPA indicated its intention to consider TRI data in reviewing 304(l) lists. For final reviews, the TRI data can be used as a check on or as a supplement to State 304(l) short and long list submittals (e.g., to identify POTWs receiving significant quantities of toxics that may have escaped the 16 "categories of waters").

TRI data should be used cautiously as it has a number of limitations: 53 priority pollutants are not reported; only specific Standard Industrial Codes are covered; facilities discharging less than 1000 lbs/yr of a chemical may choose to report only broad ranges of loadings; there are no common identifiers linking all facilities to OW databases; and

facilities calculate their annual releases by different methods (e.g., mass balance calculations vs. using monitoring data). TRI data is therefore most appropriately used as a trigger for other analyses. If TRI data is used as the sole basis for listing, and it was not submitted as part of a petition to list or a comment, then the Region should provide notice and opportunity for comment on the data. If the data were submitted as part of the public comments, then the Region should, in its formal response to comments, notify the State and the discharger that EPA is considering the addition to the list based on the TRI information and provide an assessment as to why the TRI data showed the need to list the facility and develop an ICS.