

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

**AUG 12 1988**

**OFFICE OF  
WATER**

**MEMORANDUM**

**SUBJECT: Colorado Springs' Proposed Alternative  
Biomonitoring Regulation**

**FROM: James K. Elder, Director  
Office of Water Enforcement  
and Permits (EN-335)**

**TO: Max H. Dodson, Director  
Water Management Division  
Region VIII**

The Office of Water Enforcement and Permits has reviewed the "Proposed Alternative Biomonitoring Regulation" dated July 14, 1988 which was developed by the City of Colorado Springs Wastewater Division. Although the proposal is comprehensive and innovative in certain respects, we have identified a number of serious concerns with the contents of the draft itself. Our most significant concerns are described below, while our specific comments are included in the Attachment.

Our overall comment is that the proposal defines a permitting and enforcement program in a level of detail not appropriate for State regulations. These procedures are likely to be too rigid and quickly outdated by advances in treatment technology and improvements in the monitoring capabilities of consulting engineers, laboratories, and permittees.

The basic definition of a permit limit in the proposal is inconsistent with Federal requirements. As is discussed in the Attachment, the proposed requirement that there be a "pattern of toxicity" prior to an enforcement action conflicts with Federal requirements for calculating effluent limitations (see 40 CFR 122.45(d)) and enforcing permit violations (see CWA §402(b)(7) and 40 CFR 123.27). In addition, the required showing of a "lack of diligence" on the part of the permittee by a regulatory authority is inconsistent with 40 CFR 123.27(b)(2) and confuses the exercise of enforcement discretion by the permitting authority with the issue of whether a permit violation has occurred. Enforcement must be based on the results of a

measurement of an effluent constituent or parameter, such as toxicity, which indicates a violation of a permit limit. The proposal unequivocally states that the results of biomonitoring tests alone shall not constitute a permit violation. This is not acceptable in a State regulation.

In the attached June 7, 1988 letter to the Association of Metropolitan Sewerage Agencies (AMSA), I recognized that POTWs have certain special problems involving toxics control. I stated that EPA is developing a compliance monitoring and enforcement strategy for water quality-based toxics control that attempts to address some of the problems which are unique to POTWs. When final, the strategy will ensure that enforcement actions on effluent toxicity are not initiated without allowing POTWs an opportunity to establish a program for achieving compliance. The draft strategy supports the use of compliance schedules as permit conditions. It would allow a municipality to identify a means for achieving compliance within a specified period of time. EPA is also reviewing draft permit language based on the draft compliance monitoring and enforcement strategy which would allow for an affirmative defense against a penalty action where a POTW is truly unable to comply with a toxic limit after all reasonable efforts to achieve compliance have been unsuccessful. In addition, to successfully invoke an affirmative defense, the permittee would be required to show that it is in compliance with all other requirements and conditions of the permit.

I must emphasize however, that this draft language has not been adopted and is still undergoing legal review within the Agency. Therefore, while we agree in concept with certain elements of the proposed regulation which take into consideration the particular concerns of POTWs in complying with toxics requirements, it is inappropriate to include these elements of the proposal in a State regulation. Since the CWA is a strict liability statute, EPA and State regulatory authorities must retain the option of enforcing any exceedence of a permit limit as a violation. It should also be noted that the proposed regulation is not limited to POTWs, but applies to all NPDES permittees in Colorado.

We also have a number of technical concerns with the proposed regulation. Several sections of the proposal are inconsistent with EPA's surface water toxics control program. Exemptions and waivers from requirements of the proposed regulation are provided for various categories of dischargers. Some of these waivers and exemptions are inappropriate unless they are further qualified to ensure that all discharges which are potentially toxic are covered by the regulation. Another concern is the provision that would allow a discharger to modify the biomonitoring test protocol. The situations in which this might be needed are anticipated to occur very infrequently if at all, but the language leads one to believe that it may be a

common occurrence. In addition, this provision is an example of the level of detail which is inappropriate for a regulation. The language should be removed and the subject left to the permit issuance process if and when one of these occasions might arise. The proposal also fails to address requirements for development of limitations to prevent chronic toxicity.

Another concern involves the variance provision specified in 6.9.7(3)(d)(iii)(D). The proposed variance is tied in the proposal to an analysis of costs and benefits for an individual discharger. This is inconsistent with applicable Federal water quality standards regulations and is discussed in more detail in the Attachment.

In a more positive light, we note that the regulation contains some very useful features. In particular, the utilization of toxicity-based permit limits and corresponding Toxicity Reduction Evaluations (TREs) indicate a realization that these requirements are essential to implementing a fully effective toxics control program. These sections of the proposal must be retained and, where necessary, strengthened by including limitations for controlling chronic toxicity impacts.

We believe the proposal must be significantly revised in the areas noted here before we could recommend concurrence as a modification to Colorado's NPDES program. We also believe that a proposed revision of this magnitude would constitute a substantial revision under 40 CFR 123.62(b)(2), and would thus be subject to Federal public notice and comment requirements prior to approval by EPA.

Although we have considerable concerns with the current proposal, we remain willing to work with all parties to develop an effective biomonitoring regulation. Please do not hesitate to contact me at (FTS) 475-8488 if you have any questions or have your staff contact Rick Brandes of my staff at (FTS) 475-9525.

Attachment

cc: Bob Shukle, State of Colorado