



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

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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Eligibility for Variances under Section
301(i)(1) of the Clean Water Act

FROM: Colburn T. Cherney *CTC*
Associate General Counsel
Water Division (LE-132W)

TO: Rebecca Hanmer
Director
Office of Water Enforcement and
Permits (EN-335)

Bruce Barrett requested my legal opinion on a set of five issues relating to the eligibility of publicly owned treatment works (POTWs) for compliance extensions under Section 301(i)(1) of the Clean Water Act (CWA). This memorandum responds to that request.

QUESTION 1

(1) Can EPA (or an approved NPDES State) issue a Section 301(i)(1) compliance extension to a municipal permittee that will not be receiving Federal funds to construct its treatment facility?

ANSWER

Yes, if the permittee is otherwise eligible. In order to be eligible a POTW would have to establish that it applied by June 26, 1978 and meets a variety of substantive criteria discussed below.

Discussion

Under Section 301(b)(1)(B) and (C) of the CWA, enacted in 1972, all POTWs were required to comply with secondary

treatment, as well as a variety of other requirements, 1/ by July 1, 1977. To assist POTWs to meet the 1977 compliance deadline, Congress also enacted in 1972 Title II of the CWA, which provided Federal grant assistance for POTW construction. Congress did not, however, condition the applicability of the compliance deadline upon the timely receipt of Federal funds. See State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977).

Many POTWs failed to meet the 1977 deadline, in part because of delays in Federal funding. Therefore, in the 1977 Amendments to the CWA, Congress enacted a new Section 301(i)(1) granting EPA the authority to extend the compliance deadline for particular POTWs in appropriate circumstances. 2/ Section 301(i)(1) as originally enacted read as follows:

Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection. The Administrator (or if appropriate the State)

1/ These consist of "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations (under authority preserved by section 510), or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act." Section 301(b)(1)(C).

2/ Congress also granted EPA authority to extend compliance deadlines for direct dischargers that had planned to discharge into POTWs that were not yet fully constructed and were granted Section 301(i)(1) extensions. See Section 301(i)(2).

may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsection (b) through (g) of section 201 of this Act, section 307 of this Act, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act.

On December 29, 1981, Congress again amended the Clean Water Act by enacting the "Municipal Wastewater Treatment Construction Grant Amendments of 1981," P.L. 97-117 ("1981 Amendments"). The 1981 amendments reduced Federal funding of POTWs, both in aggregate terms and in the maximum percentage of construction costs that may be borne by EPA.

The 1981 Amendments also extended the compliance deadline for recipients of Section 301(i) extensions to July 1, 1988. The remainder of the section was unchanged. Thus, the criteria that previously applied to obtaining and granting extensions have remained in effect. Congress did, however, restrict the availability of extensions beyond July 1, 1983:

The amendment shall not be interpreted or applied to extend the date for compliance with section 301(b)(1)(B) or (C) of the Federal Water Pollution Control Act beyond schedules for compliance in effect as of the date of enactment of this Act, except in cases where reductions in the amount of financial assistance under this Act or changed conditions affecting the rate of construction beyond the control of the owner or operator will make it impossible to complete construction by July 1, 1983.

1981 Amendments, Section 21(a).

The criteria set forth in Section 301(i)(1) and in Section 21(a) of the 1981 Amendments are designed to assess

whether a POTW has justifiably failed to achieve compliance with the relevant compliance deadline. 3/ These include the POTW's ability to physically construct by the deadline; the impact of Federal failure to provide funding in a timely manner upon the POTW's schedule; and changed conditions that have affected the rate of construction beyond the POTW's control. None of these statutory criteria makes a POTW's eligibility for an extension contingent upon the likelihood that the POTW will receive Federal funds in the future.

Likewise, nothing in the legislative history prevents EPA from granting a Section 301(i) extension to an otherwise eligible POTW that will not receive Federal funds. The relevant legislative history consists of the following brief discussion in the Senate Report:

The 1972 Act originally required municipal plants to comply with effluent limitations based on secondary treatment by 1977. This deadline proved to be difficult, and in many cases impossible to meet, largely because of insufficient Federal funding. The 1977 amendments, therefore, permitted extension of the deadline to municipalities acting in good faith which were unable to meet this requirement. Such extensions were to be in no case later than July 1, 1983.

With the projected shortfall in Federal expenditures, and the reduced Federal share for the construction grant program, it is once more apparent that many communities will be unable to meet the 1983 deadline. The legislation thus extends the deadline to 1988 for communities which cannot meet earlier deadlines because Federal funds are not available. The Committee emphasizes that the same good faith requirements now in existing law are also extended to facilities seeking the new extension.

* * * * *

The Committee is aware that a number of communities are under court orders to comply with certain pollution control deadlines. These communities will not be helped by the further program limitations and reduced funding imposed by this legislation. This provision

3/ The relevant compliance deadline at present is either no later than July 1, 1977, or, for POTWs that were granted Section 301(i)(1) extensions, no later than July 1, 1983.

expresses the sense of the Congress that courts in supervision of court orders for such non-complying municipalities take cognizance of the amendments contained in this legislation in their consideration of modifications to such deadlines.

Senate Report No. 97-204, 97th Cong., 1st Sess. (1981), at 17 (emphasis added).

Under no circumstances, however, may a POTW delay compliance beyond July 1, 1988. Section 301(i) provides that any extension "shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988" (emphasis added) and must contain interim limitations or other necessary requirements. Thus, even if the POTW does not anticipate receiving any Federal funds, it is required to construct and achieve compliance. ^{4/} The quoted language does indicate, however, that the scheduled availability of Federal funding is a relevant factor in establishing a schedule of compliance for POTWs that are granted extensions under Section 301(i).

QUESTION 2

Can a Section 301(i)(1) compliance extension beyond July 1, 1983 be issued to a permittee that applied for an extension by June 26, 1978, if EPA (or an approved NPDES State) never acted on the request?

ANSWER

Yes.

DISCUSSION

The 1977 Amendments to the CWA provide that EPA may grant an extension to any eligible POTW that applied in a timely manner. There is no deadline by which EPA is required to grant or deny the extension. The 1981 Amendments and legislative history did not alter this conclusion.

^{4/} Moreover, we note that the 1981 amendments cut back on the Federal grants program without providing a waiver for unfunded POTWs. Therefore, POTWs do not have a reasonable basis to expect that Congress will provide further relief from compliance deadlines in the future.

QUESTION 3

Is a permittee that requested a Section 301(i)(1) compliance extension upon which EPA (or the approved State) did not act in violation of the Act or NPDES regulations?

ANSWER

Yes, if the permittee has not achieved compliance with the requirements of Section 301(b)(1)(3) and (C) by the deadline set forth in its permit.

DISCUSSION

Initially, all POTWs should have been issued permits requiring compliance with Section 301(b)(1)(3) and (C), not later than July 1, 1977. This permit deadline remains in effect unless the permit is modified by EPA (or the approved State) under Section 301(i)(1). If EPA (or the approved State) has not modified the permit to extend the deadline and the permittee has not achieved compliance by the deadline, then the permittee is in violation of its permit. 5/

QUESTION 4

Can EPA bring an enforcement action against a POTW where EPA has not yet acted upon the POTW's timely Section 301(i)(1) request?

ANSWER

Yes.

DISCUSSION

EPA may bring an enforcement action under Section 309 of the Act against any permittee that is violating its permit. If a POTW has not complied with the compliance deadline in its permit, it is subject to an enforcement action.

The statute does not provide any defense against enforcement based upon the pendency of a request for an extension, variance, or other permit modification. While the

5/ The Senate Report described the reported bill as extending the 1983 deadline. However, like the enacted amendment, the bill itself did not extend the deadline. Rather, it authorized EPA to do so on a case-by-case basis, thereby assuring, as noted in the Senate Report, that only good-faith actors receive such extensions.

issue has yet to arise in any Clean Water Act case, it has been held that enforcement actions may proceed, and compliance orders may be issued, under the Clean Air Act against violators of State Implementation Plans (SIPs), despite the pendency of variance requests. Train v. Natural Resources Defense Council, 421 U.S. 60, 92 (1975); Ohio Environmental Council v. U.S. District Court, 565 F.2d 393, 397 (6th Cir. 1977); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972).

None of the Clean Air Act cases cited above involved delays as lengthy as EPA's six-year delay in deciding many 301(i) extension requests. However, the principle that valid existing requirements are enforceable remains true in any case. If a POTW believes that the Agency is unduly delaying its Section 301(i) decision to the POTW's detriment, the POTW can challenge the Agency delay, as discussed below. Such delay is not, however, a defense against enforcement of the existing requirement.

This does not mean that a court would ignore a pending variance request. If EPA were to bring an enforcement action against a POTW without having acted upon the POTW's 301(i) request, the POTW may seek (by asserting a counterclaim or initiating a separate lawsuit) to compel EPA to act upon the request. Under the Administrative Procedure Act (APA), 5 U.S.C. §706(1), a reviewing court 6/ may "compel agency action unlawfully withheld or unreasonably delayed." Furthermore, the APA generally requires agencies to conclude matters "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time." 5 U.S.C. §555(b).

A claim to compel agency action might also be asserted under Section 505(a)(2) of the CWA, which provides for an action in district court against the Administrator "where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." A court might accept a POTW's argument that the duty to act upon a 301(i) request within a reasonable time is not discretionary. See, e.g., Rite-Research Improves the Environment v. Costle, 650 F.2d 1312, 1322 (5th Cir. 1981). See also FTC v. Anderson 631 F.2d 741 (D.C. Cir. 1979); Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975).

6/ "Reviewing court" is undefined. However, Section 702 of the APA provides that unless prior, adequate and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

If the POTW asserts a claim, a court may well stay the enforcement proceeding pending an agency decision on the Section 301(i) request. In an extreme case where agency delay has prejudiced the POTW's ability to defend itself (e.g., if POTW employees with pertinent knowledge have left its employ and are unavailable), the court might even dismiss the lawsuit. See, e.g., EEOC v. Liberty Loan Corp., 584 F.2d 853 (8th Cir. 1973) and cases cited therein at 855.

Finally, even if the court allows the case to proceed to judgment in EPA's favor, either before or after a final agency action on the 301(i) request, the court maintains a great deal of equitable discretion to fashion appropriate remedies for violations of Clean Water Act requirements. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982). Moreover, a court would likely be mindful of the admonition in the Senate Report, supra at 17, that courts take cognizance of the 1981 amendments to Section 301(i) in addressing instances of municipal non-compliance and fashioning new court-ordered deadlines. If a POTW submitted a Section 301(i) request in good faith, and EPA has finally denied the request only after years of delay, a Court may well exercise its discretion by declining to impose substantial penalties or a burdensome compliance schedule upon the POTW.

QUESTION 5

Can EPA use the Administrative Order process (Section 309(a)(5)) to issue compliance schedules in lieu of modifying or reissuing permits for municipalities that are eligible for Section 301(i)(1) compliance extensions?

ANSWER

Administrative orders can be used, but not "in lieu" of Section 301(i)(1) compliance extensions.

DISCUSSION

Administrative orders under Section 309(a)(3) and (5)(A) 7/ cannot be used "in lieu" of Section 301(i)(1) extensions

7/ Section 309(a)(3) provides:

Whenever on the basis of any information available to him the Administrator finds that any person is in violation of
(FOOTNOTE CONTINUED ON NEXT PAGE)

because the two processes are functionally distinct. A Section 301(i)(1) extension is set forth in a permit, which thereby establishes a new compliance deadline for the POTW. An administrative order is an enforcement action. Compliance with the order does not relieve the POTW from its legal obligation to comply with the permit deadline. See Montgomery Environmental Coalition v. EPA, 19 E.R.C. 1169, 1171 (D.C. Cir. 1983). The order merely assures the POTW that EPA will exercise its discretion not to enforce against the permit violation if the POTW complies with a specified set of requirements.

The distinction between Section 301(i) extensions and administrative orders may be important from the POTW's point of view. If the POTW is issued a permit containing a Section 301(i) extension and complies with that permit, the POTW has a good defense to citizens' suits. If the POTW does not receive such an extension, it will be subject to citizens' suits alleging a permit violation; compliance with an administrative order is no defense to such a lawsuit. See Montgomery Environmental Coalition v. EPA supra, at n. 6. Therefore, if EPA would attempt to use administrative orders on a broad scale "in lieu of" 301(i) extensions, it would be

(FOOTNOTE 7 CONTINUED)

sections 301, 302, 306, 307, 308, 313, or 405 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act . . . , he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

Section 309(a)(5)(A) provides:

Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

placing those POTWs at risk despite Congress' clear intent to afford them relief. 8/

Nonetheless, the use of administrative orders under Section 309(a)(5) is a permissible means of issuing enforceable compliance schedules to POTWs that are not complying with their permits. While an administrative order does not shield a POTW from citizens suits, it does provide governmental assurances of non-enforcement if the order is complied with. Furthermore, if a citizen suit is brought, the Administrative order is likely to be assigned significant weight by a reviewing court. 9/

8/ As noted above, the failure to act upon requests for Section 301(i) extensions gives rise to potential actions by POTWs or others to compel Agency action. Moreover, in a recent case decided under the Resource Conservation and Recovery Act (RCRA), the Court held that a general agency policy not to issue RCRA permits to certain types of facilities jeopardized the rights and interests of parties and was therefore a rule reviewable in the U.S. Circuit Court of Appeals. Environmental Defense Fund v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983). Extending this line of reasoning, a petitioner might argue that an EPA "decision" not to act upon Section 301(i)(1) applications is a rule and challenge this "rule" in the U.S. Circuit Court of Appeals, alleging that the rule is arbitrary and capricious or is otherwise without legal basis.

9/ The issuance of A.O.s with reasonable compliance schedules also might help EPA defend against a Section 505 action seeking to compel Agency action on the Section 301(i) application.

cc: Louise Jacobs