



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20450

June 3, 1976

n-76-2

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Regional Administrators
Regional Enforcement Division Directors
NPDES State Directors

SUBJECT: Procedures for Issuance of Enforcement Compliance
Schedule Letters

Policy. An Enforcement Compliance Schedule Letter ("ECSL") is an enforcement mechanism to be used only in those specific instances described in written policy guidance from the Assistant Administrator for Enforcement. ECSLs should not be used in other situations without the prior written approval of the Assistant Administrator for Enforcement. In appropriate circumstances described in separate Enforcement policy guidelines, ECSLs should be issued simultaneously with NPDES permits requiring achievement of final effluent limitations by July 1, 1977. The following describes the procedures for the use of an ECSL in connection with the issuance of an NPDES permit.

The Permit. The permit should be in the usual form and conform to previously issued Permit Program guidelines. It should contain appropriate interim and final effluent limitations and should normally be for a term of five years. It should contain realistic milestones for the attainment of final effluent limitations, between the date of issuance and June 30, 1977, and should require the achievement of such limitations on July 1, 1977, and throughout the remaining term of the permit. Any questions or requests for guidance or assistance regarding the permit should be made to the Director, Permits Division, Office of Water Enforcement.

Enforcement Compliance Schedule Letters. An Enforcement Compliance Schedule Letter (ECSL) is the exercise by the Agency or an NPDES State of its prosecutorial discretion. An ECSL should be issued only in a case where the appropriate Enforcement official determines that the discharger meets the requirements set forth in the policy memoranda cited above.

An ECSL should not be issued unless the discharger has submitted: (1) documented evidence that, despite all reasonable good faith efforts, it cannot achieve the final effluent limitations in the permit by July 1, 1977; and (2) a critical path or other construction management analysis of the shortest reasonable schedule by which it can achieve such limitations. The Regional Enforcement Director or the NPDES State Director must review the submission critically and in detail. If he concurs with the submission, he should prepare an ECSL containing a compliance schedule based upon that analysis. Of course, if he determines that compliance cannot be obtained earlier than indicated in the analysis, he should base the compliance schedule in the ECSL on his determination. The burden is on the discharger to prove: (1) that it cannot achieve the final effluent limitations contained in the permit by July 1, 1977, despite all reasonable good faith efforts; and (2) all other relevant facts requisite to a determination that an ECSL should be issued.

An ECSL should contain the following specific elements:

1. Reference to the underlying permit.
2. A compliance schedule for the achievement of the final effluent limitations in the underlying permit, as expeditiously as practicable, but no later than in accordance with the schedule contained in the ECSL, such schedule to be established as outlined above.
3. A statement that the ECSL is an exercise of prosecutorial discretion.
4. A statement that the enforcement authority will exercise its prosecutorial discretion not to enforce the final effluent limitations in the permit against the discharger between July 1, 1977, and the date established in the ECSL for compliance with such limitations as long as:
 - a. The discharger complies fully with all terms of the ECSL;
 - b. The discharger complies fully with all terms of the underlying permit with the exception of the provision requiring achievement of the final effluent limitations by July 1, 1977;
 - c. Circumstances do not occur which would warrant modification of the permit; and
 - d. Circumstances do not occur which would warrant an action under section 504 of the FWPCA.
5. A statement that the ECSL does not preclude the possibility of actions to enforcement the underlying permit by third parties pursuant to section 505 of the Act. Since an ECSL should only be issued after a careful determination that the schedule contained therein is the most expeditious schedule possible, few such actions by third parties are

anticipated. It is nevertheless important to everyone concerned to be aware that the possibility of such an action exists.

6. A termination date for the ECSL shortly after the date specified in the ECSL for achievement of the final effluent limitations, to be followed by an enforcement action if the limitations are not met on schedule. If the limitations are not on schedule the underlying permit would continue to regulate the discharge after the termination of the ECSL.

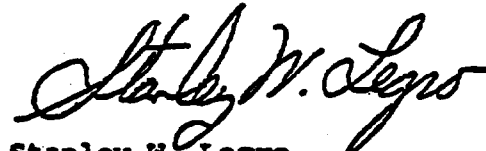
7. The discharger's agreement that the schedule contained in the ECSL is reasonable and achievable and that the discharger will meet it should be obtained from a corporate officer with authority to sign in the form of a copy of a vote of the directors, certified by the Clerk or Secretary of the Corporation.

8. The ECSL should be signed by the Director of the Regional Enforcement Division or by the NPDES State program to underscore the fact that it is an exercise of the prosecutorial discretion of the enforcement authority.

A sample ECSL is attached. It should be emphasized that it is only a sample and each ECSL must be carefully drafted, within the guidelines set for the above, to cover the particular situation at issue.

ECSLs proposed to be issued by NPDES States should be reviewed by EPA Regional Offices. In the case of an ECSL issued by an NPDES State, it should be noted that the ECSL would not be binding on EPA. For this reason most permittees will wish to have EPA as a joint signator on the State-issued ECSL or to have EPA issue a separate ECSL. Regional Offices and NPDES States should establish mutually satisfactory procedures to accomplish this end where the Regional Enforcement Division Director concurs in the required determinations made by the NPDES State Directors. Likewise, permittees may wish to have States or joint signators on EPA ECSLs and this too is appropriate.

When the permit issuing authority intends to use an ECSL in connection with the issuance of NPDES permits, the ECSL should be subject to the same public participation requirements as the underlying permit. The schedule contemplated in the draft ECSL should be described in the public notice of the proposal to issue the permit and in the fact sheet and should be subject to the same public comment and opportunity for a hearing as if the schedule were contained in the permit.



Stanley W. Legro
Assistant Administrator
for Enforcement

Attachment

SAMPLE ENFORCEMENT COMPLIANCE SCHEDULE LETTER

Subject: NPDES Permit No. _____

Name of Permittee: _____

Location of Permitted Discharge: _____

Dear Sir:

The above cited permit (the "Permit") requires the discharge identified in and authorized by the Permit (the "Discharge") to meet the final effluent limitations (the "Limitations") contained in the Permit by the July 1, 1977, date specified in section 301(b)(1) of the Federal Water Pollution Control Act (the "Act"). Section 301(b)(1) of the Act and subsequent decisions of the Administrator of this Agency and Federal Courts prevent a permit issued pursuant to section 402 of the Act from embodying a compliance schedule to achieve the Limitations later than such date.

The permittee has submitted documentation, including a critical path construction management analysis, intended to establish that it cannot, despite all reasonable best efforts, achieve the Limitations from the discharge between the final effective date of the Permit and July 1, 1977.

The compliance schedule contained in the Permit notwithstanding, this Agency, in the exercise of its prosecutorial discretion, will not take action against the Permittee under section 309 of the Act with respect to the Permittee's failure to achieve the limitations on and after July 1, 1977, until the date specified herein for the achievement

of the Limitations; provided, however, that the Permittee complies with all of the following conditions:

1. Achieve Construction milestone by _____;
2. Achieve Construction milestone by _____;
3. Achieve Construction milestone by _____;
4. Achieve the Limitations by _____;
5. Meet all of the terms and conditions of the Permit, except as provided above;
6. Meet all of the terms and conditions of this Enforcement Compliance Schedule Letter;

and provided further, that conditions do not arise which warrant an emergency action under section 504 of the Act or modification of the Permit.

The Permittee should note that this Enforcement Compliance Schedule Letter does not preclude the initiation of an action, pursuant to section 505 of the Act, by a third person other than the Agency to enforce the Permit's requirements to achieve the Limitations by July 1, 1977.

This Enforcement Compliance Schedule Letter does not constitute a waiver with respect to or imply that the Agency will not take appropriate enforcement action against the Permittee for its failure to: (1) achieve the Limitations on and after July 1, 1977, if the Permittee does not fully satisfy the conditions set forth above; or (2) fully comply with other relevant statutory, regulatory, permit and other legal requirements with regard to the Permittee. Unless previously revoked, the effectiveness

of this Enforcement Compliance Letter shall expire thirty (30) days after the date specified above for achievement of the Limitations of the Discharge.

Sincerely yours,

Director, Enforcement Division

Region _____

The Permittee hereby agrees that the schedule established above for the achievement of the Limitations from the Discharger is reasonable and achievable and that the Permittee will comply with that schedule.

PERMITTEE

By _____

Authorized Corporate Officer