



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

June 3, 1976

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OFFICE OF ENFORCEMENT

TO: Regional Administrators
Regional Enforcement Directors
NPDES State Directors

SUBJECT: Enforcement Actions Against a Municipal Discharger that Fails to Meet the July 1, 1977, Statutory Deadline for Achieving Secondary Treatment. Where the Municipal Discharger is Currently Funded for a Step 1, 2 and/or 3 Construction Grant Directed Toward Achieving Secondary Treatment or Occupies a Position on a Priority List Such that it Can Reasonably Be Expected to Be so Funded Prior to July 1, 1977.

Municipal dischargers are required to achieve secondary treatment* by the July 1, 1977, deadline set forth in section 301(b)(1)(B) of the Federal Water Pollution Control Act, as amended in 1972 (FWPCA). The July 1, 1977, date is of fundamental importance to the integrity of the FWPCA and to the National Pollutant Discharge Elimination System (NPDES) permit program. Fortunately, many of the subject municipal dischargers have finalized permits and are on engineering and construction schedules which will lead to attainment of secondary treatment on or before July 1, 1977. However, it has now become apparent that a significant number of these municipal dischargers will not achieve secondary treatment by that date.

Where a municipal discharger 1) will not achieve secondary treatment by the July 1, 1977, date; and 2) is funded for a Step 1, 2 and/or 3 construction grant directed toward achievement of secondary treatment or occupies a position on a priority list such that it can be expected to be so funded by July 1, 1977, by funds authorized in section 207 of the FWPCA; and 3) is not proceeding as expeditiously as practicable toward the achievement of secondary treatment consistent with the construction grant process: the Regions are directed to take firm and prompt enforcement actions. Appropriate penalties and other applicable sanctions should be sought. Vigorous enforcement of the July 1, 1977, date is vital to preserve the integrity of the program, to make all

* It should be noted that municipal dischargers are also required to achieve water quality standard limitations by July 1, 1977. Section 301(b)(1)(C) of the Act. In addition, municipal facilities that have been approved under section 203 of the Act prior to June 30, 1974, may be accorded up to June 30, 1978, to achieve secondary treatment limitations. For the sake of simplicity reference is made throughout this memorandum to achievement of secondary treatment limitations by July 1, 1977, but this reference should be understood to include meeting water quality standard limitations by that date and, if appropriate, achieving secondary treatment limitations by June 30, 1978.

dischargers aware that future deadlines will also be strictly enforced and to provide equitable treatment to the vast majority of municipal and industrial dischargers who have moved quickly and cooperatively to install necessary control technology to meet the statutory deadline. A failure to enforce vigorously this deadline would present undue and unfair advantages to those recalcitrant dischargers who have delayed without good cause the installation of required equipment and would allow them to profit through postponement of capital and operating costs. Accordingly, for these and a number of other reasons, I cannot overemphasize the importance of firm enforcement of the July 1, 1977, date for compliance with the final effluent limitations.

In following this firm enforcement of the July 1, 1977, deadline, we must not lose our sense of fairness nor be so procrustean in our approach as to impact harshly and unfairly on a municipal discharger that will not achieve secondary treatment by July 1, 1977, not so much because it has not made all reasonable good faith efforts to do so, but more from processes within the control of EPA or an NPDES State. These situations are:

1. Where a discharger has no effective permit, either because EPA or an NPDES State has not yet issued the permit or the final effluent limitations or compliance schedule are stayed by the pendency of an adjudicatory hearing; and
2. Where a discharger's progress is delayed by the protracted nature of the construction grant process. This situation would occur, of course, only when the discharger:
 - a. has proceeded toward achievement of secondary treatment limitations in good faith as expeditiously as practicable consistent with the construction grant process; and
 - b. is currently funded for a Step 1, 2, and/or 3 construction grant directed toward achieving secondary treatment limitations or occupying a position on a priority list such that it reasonably can be expected to be so funded prior to July 1, 1977, from funds authorized in section 207 of the FWPCA.

It would be unfair to penalize such a discharger for delay that could be attributed to EPA or an NPDES State or to utilization of appeal procedures made available by EPA or an NPDES State. Moreover, an enforcement

action against most such dischargers would probably not decrease the time required to achieve secondary treatment and in many cases might substantially increase the time required to achieve secondary treatment through protracted litigation.

It is apparent that some dischargers which do not have effective permits at the present time and do not presently have secondary treatment cannot be expected to achieve secondary treatment by July 1, 1977. These dischargers must be dealt with in the manner best calculated to achieve secondary treatment at the earliest possible date and to impose appropriate penalties on those dischargers whose failure to achieve secondary treatment in a timely manner is attributable in whole or in part to the lack of best efforts by the dischargers. Few, if any, of these dischargers could be expected to accept permits requiring achievement of secondary treatment by July 1, 1977 if it would be physically impossible to achieve secondary treatment by that date and would be subject to liability for a permit violation for such failure. Most permittees would contest the schedules in the permits through adjudicatory hearings and judicial appeals, thus deferring the date for achievement of secondary treatment for substantial periods of time. It is imperative to get these dischargers on compliance schedules to achieve secondary treatment at the earliest reasonable date after July 1, 1977.

While a possible approach might be to issue permits to such dischargers with compliance schedules extending beyond July 1, 1977, that course of action is foreclosed by decisions of the Administrator and Federal Courts interpreting section 301 of the Act. On February 9, 1976, the U.S. District Court for the Eastern District of Virginia in the case of State Water Control Board v. Train (8 ERC 1609) issued an opinion that interpreted section 301 of the FWPCA. That opinion held that a permit cannot be issued which does not require by its terms compliance by July 1, 1977, with secondary treatment effluent limitations. Accordingly, the permit alone cannot solve this situation.

In particular cases it may be appropriate to establish a compliance schedule for a discharger that does not have a finally effective permit and cannot achieve secondary treatment by July 1, 1977, by the issuance

of an administrative order, the commencement of a civil action, or the issuance of a permit requiring achievement of secondary treatment by July 1, 1977. In the latter instance the discharger would be expected to appeal the schedule to the appropriate Court of Appeals, usually on a stipulated set of facts and on narrowly focused issues. These methods should be utilized against such dischargers, however, only after prior coordination with the Director, Enforcement Division, Office of Water Enforcement.

Cases where a discharger (a) does not have a finally effective permit (or has a permit expiring prior to July 1, 1977, which must be reissued) and cannot achieve secondary treatment by July 1, 1977, and is currently funded for a Step 1, 2 and/or 3 construction grant directed toward achieving secondary treatment or (b) occupies a position on a priority list such that it can reasonably be expected to be so funded prior to July 1, 1977, from funds authorized in section 207 of the FWPCA, should be dealt with by: 1) issuing a permit requiring the achievement of secondary treatment by July 1, 1977; and 2) simultaneously issuing an Enforcement Compliance Schedule Letter ("ECSL") establishing a compliance schedule to achieve secondary treatment in the shortest reasonable period of time after July 1, 1977, and stating the permit issuing authority's intention to refrain from enforcing the July 1, 1977, requirement for achieving secondary treatment as long as the discharger complies with the terms of the ECSL and all terms of the permit other than that requiring achievement of secondary treatment by July 1, 1977. An ECSL may not be issued unless the discharger has submitted: 1) documented evidence that, despite all reasonable good faith efforts, it cannot achieve secondary treatment by July 1, 1977; and 2) a critical path or other construction management analysis of the shortest reasonable schedule by which it can achieve secondary treatment. If the Regional Enforcement Division Director or the NPDES State Director concurs with the submission, he should prepare an ECSL to the discharger establishing the shortest realistic schedule by which the discharger can achieve secondary treatment. The ECSL is discussed in detail in an accompanying memorandum entitled "Procedures for Issuance of Enforcement Compliance Schedule Letters." Of course, where the dischargers's projected failure to achieve secondary treatment is occasioned in whole or in part by its own lack of good faith, this method should not be employed: the discharger should be dealt with by traditional enforcement mechanisms.

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 determinations made by the NPDES State Director.

As required by the FWPCA and the NPDES regulations, the public must be given notice and opportunity for a hearing on all permits. Permits issued in the context of this memorandum are not exceptions to that rule. Additionally, however, public notices and, where appropriate, fact sheets issued for these permits should include notice of the ECSL and its contents. Copies of these notices and fact sheets should be transmitted to the Director, Permits Division, Office of Water Enforcement.

The issuance of ECSL's must be carefully applied to afford relief only to those municipal dischargers that despite all reasonable good faith efforts do not presently have finally effective permits (or have permits expiring prior to July 1, 1977, which must be reissued), cannot achieve secondary treatment by July 1, 1977, and that are currently funded for a Step 1, 2 and/or 3 construction grant directed toward achieving secondary treatment or occupies a position on a priority list such that it reasonably can be expected to be so funded prior to July 1, 1977, from funds authorized in section 207 of the FWPCA. This mechanism should not be used to give relief to dischargers which are violating compliance schedules in finally effective permits or which are not funded or likely to be funded with construction grants prior to July 1, 1977, from current appropriations, or to weaken or undermine the integrity of the July 1, 1977, date which is of fundamental importance to the structure of the FWPCA and its goal of improving our Nation's water quality.



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