



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 Where an Industrial Discharger
Fails to Meet the July 1, 1977, Statutory Deadline
for Achieving Best Practicable Control Technology
or Other Applicable Effluent Limitations

Industrial dischargers, i.e. all dischargers except municipal dischargers, are required to achieve "best practicable control technology currently available" ("BPT") by the July 1, 1977, deadline set forth in section 301(b)(1)(A) 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, the great majority of industrial dischargers have finalized permits and are on engineering and construction schedules which will lead to attainment of BPT on or before July 1, 1977. However, it has now become apparent that there are some industrial dischargers which will not achieve BPT by that date.

Where an industrial discharger will not achieve BPT by the July 1, 1977 date, 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 dischargers aware that future deadlines will also be strictly enforced and to provide equitable treatment to the vast majority of 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

^{*} It should be noted that industrial dischargers are also required to meet water quality standard limitations by July 1, 1977. Section 301(b)(1)(C). For the sake of simplicity reference is made through this memorandum to achievement of BPT by July 1, 1977, but this reference should be understood to include meeting water quality standard limitations by that date.

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 reflecting BPT.

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 an industrial discharger which will not achieve BPT by July 1, 1977, because it has no effective permit, either because EPA has not yet issued the permit or because compliance schedule or final effluent provisions of the permit are stayed by the pendency of an adjudicatory hearing. 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 BPT and in many cases might substantially increase the time required to achieve BPT through protracted litigation.

It is apparent that some dischargers which do not have effective permits at the present time and which do not presently have BPT cannot be expected to accept permits requiring achievement of BPT by July 1, 1977, if it would be physically impossible to achieve BPT 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 BPT for substantial periods of time. These dischargers must be dealt with in the manner best calculated to achieve BPT at the earliest possible date and to impose appropriate penalties on those dischargers whose failure to achieve BPT in a timely manner is attributable in whole or in part to the lack of best efforts by the dischargers. It is imperative to get these dischargers on compliance schedules to achieve BPT 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. In his decision in the matter of NPDES Permit for the Bethlehem, Pennsylvania Plant, Bethlehem Steel Corporation (Docket No. PA-AH-0058, September 30, 1975), the Administrator determined that he did not have the authority to issue a permit to a non-municipal discharger extending the 1977 statutory date for achievement of 1977 statutory requirements for its facility even if he made a finding that the facility could not achieve BPT within the statutory period. The rationale of the recent decision by the U.S. Dist

Court for the Eastern District of Virginia in State Water Control Board v. Train (8 ERC 1609) supports the Administrator's decision. Since a permit cannot be issued which does not require by its terms compliance by July 1, 1977, with BPT effluent limitations, 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 BPT 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 BPT 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.

A discharger which has proceeded in good faith but which does not have a finally effective permit and which cannot achieve BPT by July 1, 1977, should be dealt with by: 1) issuing a permit requiring the achievement of BPT by July 1, 1977; and 2) simultaneously issuing an Enforcement Compliance Schedule Letter ("ECSL") establishing a compliance schedule to achieve BPT 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 BPT as long as the discharger complies with the terms of the ECSL and all terms of the permit other than that requiring the achievement of BPT 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 BPT by July 1, 1977; and 2) a critical path or other construction management analysis of the shortest reasonable schedule by which it can achieve BPT. 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 BPT. The ECSL is discussed in detail in an accompanying memorandum entitled "Procedures for Issuance of Enforcement Compliance Schedule Letters."

An ECSL shall be issued only for reasons beyond the control of the discharger: 1) where NPDES permits have not been issued in a timely manner; 2) delays have occurred in the resolution of adjudicatory hearings; or 3) section 316(a) determinations have resulted in delay. Of course, where the discharger's projected failure to achieve BPT 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 Enforcement.

The issuance of ECSL's must be carefully applied to afford relief only to those dischargers that despite all reasonable good faith efforts do not presently have finally effective permits and cannot achieve BPT by July 1, 1977. This mechanism should not be used to give relief to dischargers which are violating compliance schedules in finally effective permits 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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