

MEMORANDUM

TO: Director, Enforcement Division, Region VIII

FROM: Deputy Assistant Administrator for Water Enforcement (EN-335)

SUBJECT: Comments on Region VIII's Approach to Writing Effluent Limits for Confined Animal Feeding Operations Smaller than 1,000 Animal Units

Members of my staff have discussed with Region VIII personnel the approach outlined in the strategy paper entitled "New Strategy for Issuing Permits for Feedlots in Region VIII." In addition, we have informally solicited opinions from the Office of General Counsel (OGC) and from other Regional Offices on the approach.

The situation necessitating the new strategy, as we understand it, was brought about by the Flannery Decision which required EPA to extend the NPDES permit program to previously excluded categories. The amended regulation defining the extended program for Concentrated Animal Feeding Operations (CAFO) was promulgated on March 18, 1976 (41 FR 11458), and, among other things, required a CAFO confining less than 1,000 animals, meeting certain conditions, to apply for an NPDES permit. It is the permit that will be issued to each CAFO, as required by the new regulation, that the strategy is concerned with.

The Region VIII strategy is, essentially, that for facilities smaller than 1,000 animal units and for which no guideline has been promulgated, that BAT is "no discharge" of process wastewater except overflow due to a 10-year, 24-hour precipitation event (or chronic equivalent). In certain cases an overflow from a flow-through watering system may be allowed. Due to time requirements for permit issuance and facility construction, Region VIII does not feel that it is appropriate to determine BPT requirements at this time, but rather to proceed directly with compliance schedules requiring implementation of BAT technology on a reasonable timetable.

We believe there are a number of policy implications in ignoring the BPT requirements of the Act. The rationale for not defining BPT for these smaller CAFO facilities is primarily based on time requirements relating to both permit issuance and construction of abatement facilities which, in combination, would make it difficult to achieve compliance by July 1, 1977.

Given the fact that the Effluent Guidelines Division was unable to establish an effluent guideline for a CAFO smaller than 1,000 animal units, we feel that it is inappropriate for us to establish national guidance since circumstances differ from region to region. Since Region VIII is in a geographic area where annual evaporation exceeds annual rainfall, we feel containment of contaminated runoff in retention basins followed by land application is probably appropriate to reflect BPT levels of treatment. Suggestions for correlating the appropriate size of the retention basin to a specific feeding operation may be sought from the Soil Conservation Service or a local land grant college. These two institutions are well suited to utilize information concerning the operator's economic situation, location of the facility with respect to streams, and rainfall data to best determine a reasonable abatement program.

Where the established BPT limitation or requirement cannot be met by July 1, 1977, an acceptable approach, in our opinion, is to issue an Enforcement Compliance Schedule Letter (ECSL) as outlined in the attached memorandum. As you know, this approach would require the region to determine BPT for CAFOs which are not included in the current guideline (40 CFR 412), and to issue an NPDES permit with an abatement schedule requiring compliance by July 1, 1977. As has been discussed, one of the main reasons the ECSL was developed was to provide a firm but fair policy for those dischargers who will be unable to meet the July 1, 1977 date because they have not been issued an NPDES permit, or because they will receive the NPDES permit so late that it will be physically impossible to complete construction of the necessary facilities by July 1, 1977. If a permittee indicates he cannot meet the July 1, 1977 date after having made a good faith effort, then he is a candidate for an ECSL. Of course to obtain an ECSL, the discharger must submit: (1) documented evidence that, despite all reasonable good faith efforts, he cannot achieve BPT by July 1, 1977; and (2) a critical path or other construction management analysis of the shortest reasonable schedule by which he can achieve BPT.

For CAFOs smaller than 1,000 animal units, the required evidence and management analysis would, due to their small size, be easy to prepare and evaluate. If the permit's effective compliance date is between now and July 1, 1977, the required evidence substantiating that despite a reasonable good faith effort the July 1, 1977 date cannot be

met, is practically self-evident. In fact part of the rationale for your direct approach to BAT was the short time period between permit issuance and July 1, 1977. Additionally, the management analysis could be as simple as a construction schedule to install the required retention basin.

Should you feel that it is appropriate to set limits for BAT at this point in time, we would not discourage you from doing so, provided that BPT limits were also established in the permit. The permit must require that such BPT limits be met by July 1, 1977. An ECSL, however, can be issued along with the permit to provide for additional time to achieve BPT.

Given the concerns expressed in your proposal, and the similarity of those concerns with problems we face with other categories of sources, we would strongly advise that you utilize the ECSL in lieu of, or in concert with, your strategy. The ECSL has been tested in court, has been issued to several dischargers, and provides a reasonable method for accommodating your concern without adversely affecting the statutory structure.

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