



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

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

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

FROM : General Counsel (A-130)

SUBJECT: Clarification of OGC Opinion No. 40.

QUESTION

In OGC Opinion of Law No. 40, Apr. 2, 1976, the General Counsel stated that the Regional Administrator may, when issuing an NPDES permit, consider the economic impact on an individual discharger of the effluent limitations which are proposed to be imposed in establishing effluent limitations representing the "best practicable control technology currently available", when effluent limitations guidelines applicable to the source involved have not been promulgated under FWPCA §§301 and 304. The Opinion states that the Regional Administrator must weigh the "internal" and "external" costs of effluent reduction against the effluent reduction achieved, and that "the resolution of that process is, of course, a matter within the sound discretion of the Regional Administrator; it is not a matter of law." Id. at 6.

You have asked (1) whether the Director of an approved State NPDES program has the same discretion as the Regional Administrator in this regard, and (2) whether there are any limits on that discretion.

ANSWER

The State has the same discretion as the Regional Administrator would have in issuing permits prior to promulgation of effluent limitations guidelines. However, both the State and the Regional Administrator must exercise that discretion in a reasoned manner, considering all pertinent evidence before them, and in light of the purpose, provisions, and legislative history of the Federal Water Pollution Control Act.

The tacit assumption underlying OGC Opinion No. 40 is that permit conditions may have to be established upon a consideration of the economic situation of an individual discharger if more complete information is not available to the State or the Regional Administrator. But the permit issuing authority is obligated to consider as fully as practicable the information which the Administrator would consider in establishing national effluent limitations for the same type of facility, if such information is reasonably available. And, like any administrative agency, the State Director must articulate the basis for his decision. As was stated in Opinion No. 40, at 7:

. . . where information is available as to levels of treatment reasonable for the industry as a whole, it might well be arbitrary for the Regional Administrator, in disregard of such evidence, to issue a permit requiring some lesser degree of treatment on the basis of an individual discharger's economic situation.

G. William Frick

cc: All Regional Enforcement Directors
All Regional General Counsels