



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

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Leslie Carothers, Director, Enforcement Division,
Region I

SUBJECT: Request for Policy and Legal Guidance on the Possible
Use of NPDES Permits to Promote Better Sludge
Management Practices

This is in response to your memo requesting policy and legal guidance on the possible use of NPDES permits to promote better sludge management practices. You specifically asked, "...[t]o what extent can and should EPA include conditions in permits requiring the permittee to develop or implement sound sludge treatment and disposal practices."

I. Existing Guidance

The General Counsel's memorandum "Requirements of Best Management Practices in NPDES Permits," March 3, 1976, states that an NPDES permit is the vehicle for the application of effluent limitations on particular dischargers. Section 402(a)(1) allows the issuance of permits upon the dischargers' compliance with sections 301, 302, 306, 307, 308, and 403. While section 308 deals with data collection and reporting, all of the other sections prescribe effluent limitations. We have interpreted section 402(a)(2) as allowing the imposition of "other requirements [the Administrator] deems appropriate" only insofar as they relate to the achievement of effluent limitations, and not as they require the use of unrelated operation and maintenance procedures.

There are three additional circumstances under which the Agency has authority to include as a condition in an NPDES permit, a requirement that a permittee employ particular operational and management practices. Such practices may be required (1) if they are essential as a condition of State certification under section 401(d); (2) if they are elements of an approved 208 plan; or (3) if they are necessary to the attainment of best practicable waste treatment technology as defined in section 201(g)(2)(A).

The memorandum elaborates on the interaction of sections 208, 401, and 201(g)(2)(A) with section 402. Section 208(e) provides that "No permit under section 402 of this Act shall be issued for any point source which is in conflict with a plan approved pursuant to subsection (b) of this section" (emphasis added). It is impossible to determine at this time a more precise guideline, as each case must be considered on its own factual basis; however, it is conceivable that a 208 plan requirement relating to sludge disposal could be included in a 402 permit.

Section 401(d) provides that States may include in their certification any "appropriate" requirement of State law, and that requirement shall become a condition in a 402 permit. Therefore, it is conceivable that a State could require, as a condition of certification, a particular sludge disposal practice. However, although the Agency position has consistently been that EPA has no discretion to review and reject State certification requirements, it should be noted that this position has been questioned in the courts. See Consolidation Coal Co., Inc. v. EPA, 537F.2d1236 (4th Cir. 1976).

Section 301(b)(2)(B) requires POTWs to comply with the requirements of section 201(g)(2)(A) by the July 1, 1983, deadline. That section provides that grant applicants develop plans for the application of best practicable waste treatment technology (BPWTT). While the description of BPWTT does not refer solely to the achievement of effluent limitations, it does require that the applicant study and evaluate alternative waste treatment techniques [section 201(g)(2)(A)]. However, as information on the meaning of BPWTT has been published pursuant to section 304(d)(2), we may not be able to go beyond the requirement of this manual (copy attached).

This interpretation of the Act was reaffirmed in the attached opinion of the General Counsel No. 33, dated October 21, 1975, (hereinafter referred to as "Blue Plains"). In responding to the question of whether permit conditions could be imposed governing the disposal of sludge generated at Blue Plains, the opinion stated that there is "...no independent basis in section 402 or elsewhere in the FWPCA..." which allows the Region to direct certain sludge control practices (see page 4). The statute permits such a condition only where there is "...a rational connection between the condition and the assured attainment of the effluent limitation." Note the following language of General Counsel:

It is my view that if certain sludge handling conditions could be shown to influence the attainment of BOD, suspended solids or other permit limitations, such provisions are proper conditions in the permit. For example, if sludge disposal or handling at the facility adds to or, conversely, decreases pollutant loadings, conditions on that sludge disposal method may be incorporated in a permit if necessary to assure that effluent limitations contained in the permit are met. (See page 3, Blue Plains Opinion.)

The opinion is consistent with the memorandum on best management practices in noting that sludge disposal requirements could be imposed in an NPDES permit because of a requirement of State certification under section 401, or a requirement of a section 208 plan. Moreover, the Blue Plains opinion states that sludge disposal conditions could be imposed in a permit expiring after July 1, 1977, where those conditions are necessary to the attainment of the 1983 requirements of "best practicable waste treatment technology" under section 301(b) (2)(B) of the Act (See page 5).

The Office of General Counsel concluded in an opinion dated December 13, 1973, (see Decision of the General Counsel No. 6, attached) that EPA issued NPDES permits for dischargers into navigable waters may also be conditioned to control associated well discharges to prevent ground water pollution. Presumably, this could be applied to sludge disposal facilities such as lagoons, sanitary landfills, etc., where pollutants may seep or leach into the ground waters because of facility design, operation or maintenance. However, there is no EPA jurisdiction to regulate the discharge of pollutants into wells which are not directly associated with an NPDES discharge to navigable waters. See United States v. GAF Corp., 389 F.Supp. 1379 (SD Texas 1975). Even EPA's limited authority to regulate well injections is now being challenged by the Exxon Corporation in a case now before the Fifth Circuit Court.

II. Section 405

There is another statutory tool which may be used to regulate sludge disposal. Section 405 of the FWPCA authorizes EPA to set up a program for the issuance of permits to regulate the disposal of municipal sludges.

While no specific regulations have been promulgated under section 405, 40 CFR 125.1(o) includes sludge disposal permits under section 405 under the general NPDES regulations.

Because the issuance of a section 405 permit is conditioned upon a finding that any pollutant from the sludge "would... enter[ing]...navigable waters," it would appear to add little to the alternative of issuing a permit under section 402 (section 405(a), P.L. 92-500).

III. Summary

There are six alternatives which the Region may consider in the use of the NPDES permit to control the disposal of sludge. The first two alternatives are approaches not presented in your memorandum. The last four alternatives cover the approaches which you discussed:

1) If the disposal site can be identified as a point source of pollutant discharge to waters of the United States, that discharge can be controlled in a section 402 permit as another outfall.

2) Conditions can be imposed on publicly owned treatment works which are necessary to the attainment of best practicable waste treatment technology (BPWTT). See P.L. 92-500, section 301(b)(2)(B). While BPWTT is not, strictly speaking, a limitation on discharge, it requires that the permittee demonstrate that it has fully considered the alternatives of land disposal and reclamation to that of effluent treatment. See P.L. 92-500, section 301(b)(2)(B), 201(g)(2)(A), 201(b). Whether sludge disposal can be required, therefore, depends on the particular factual situation involved, i.e., whether certain sludge disposal management practices are necessary to the attainment of BPWTT.

3) The Region can enforce the general condition regarding sludge disposal in existing permits. This only would apply where the sludge pollutants are or may be entering waters of the U.S. To our knowledge, no cases have been brought on this theory. (Reference your memorandum, approach #1.)

4. As explained in the Blue Plains opinion, sludge handling or disposal can be directed in the section 402 permit if it is shown to influence the attainment of BOD, suspended solids, or other permit limitations. This alternative would appear to apply only where sludge handling and disposal is confined to the treatment plant site. (See Decision of the General Counsel #33 attached.) Under this approach, the development of a sludge management plan can be required in a permit only if it has a rational connection to the attainment of effluent limitations. See best management practices memorandum attached. (Reference your memorandum, approaches #2 and #3).

5) The NPDES permit must not be in conflict with the 208 plan [section 208(e)]. A clarification of those provisions which might "conflict" with a 208 plan must await a specific factual basis. However, it is conceivable that a 208 plan requirement relating to sludge disposal could be included in a 402 permit. Permits must also include "appropriate" provisions of State law required for State certification under section 401(d), which could include a State sludge handling requirement. (Reference your memorandum, approach #4.)

6) Based on proposed regulations published in the Federal Register for February 2, 1977, sludge management practices will be considered to the extent feasible in establishing new national pretreatment standards. However, no single sludge disposal or utilization method will be used in developing those standards. Where a POTW requests a variance or modification of the national pretreatment standards, it would first be required to demonstrate environmentally adequate sludge disposal or utilization, as defined in accordance with standards and guidelines issued under Subpart C of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580). (Reference your approach #5.)

Stanley W. Legro