

MEMORANDUM

TO: Director, Enforcement Division, Region IX

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

SUBJECT: NPDES Permits and Requirements of State Law

Region IX has issued an NPDES permit to McClellan Air Force Base for discharge into an intermittent stream, while the State has expressed an intent to amend the California basin plan so as to prohibit stream discharge and require discharge into a regional sewer system. The following is in response to your memorandum of February 11, 1977, regarding the implementation of that basin plan prohibition through the NPDES permit. The memorandum focuses on two primary inquiries. First, whether the anticipated discharge prohibition would be binding on the NPDES permit as a requirement of State law; and second, whether the existing NPDES permit for the Base must be modified to comply with the basin plan prohibition.

1. NPDES Permit Requirements

From a review of California law and regulations, it would appear that a discharge prohibition applicable to McClellan Air Force Base through its adoption into the State basin plan would be a binding NPDES permit requirement for that facility under section 301(b)(1)(C) of the FWPCA.

Discussion

Generally speaking (as the attached OGC memorandum of August 24, 1976, indicates), there are no legal implications of Phase I basin plans on NPDES permits, although great weight should be given to plan recommendations and/or limitations. However, by virtue of Section 301(b)(1)(C) of the FWPCA, more stringent limitations in the form of

water quality standards, treatment standards, and schedules of compliance must be included in an NPDES permit, provided that they are established pursuant to State law or regulations. Accordingly, since the basin plan prohibition would be a more stringent treatment standard, the determination of whether it falls within the scope of 301(b)(1)(C) requires an examination of pertinent State laws and regulations.

The expected California basin plan prohibition of discharge by McClellan Air Force Base into an intermittent stream will not be expressly incorporated into the body of State law and regulations. Nevertheless, under the terms of State law and regulations, the authority to prohibit specific discharges through basin plans is acknowledged and given a binding legal effect by reference.

Under the Porter-Cologne Act (Division 7 of the California Water Pollution Control Laws), regional water quality control plans may "specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted" (section 13243). Notice and hearing are required prior to the adoption of such a prohibition (section 13244). In addition, waste discharge requirements in State permits must comply with prohibitions contained in water quality control plans (section 13263; section 2235.5 of the State regulations). Any discharge of wastes in violation of either discharge prohibitions or discharge requirements prescribed by the regional water quality control board are subject to enforcement actions by the State board (section 13301; section 2240 of the State regulations).

Thus, under both State law and regulation, basin plan discharge prohibitions are expressly acknowledged; must be incorporated into waste discharge permits; and are directly enforceable even absent a permit. Given these circumstances, the prohibition of discharge by the McClellan Air Force Base, if adopted in a basin plan, would be required in an NPDES permit as "more stringent limitations... established pursuant to any State law or regulations."

The foregoing interpretation is also consistent with the terms of Executive Order 11752, which requires federal facilities to comply with substantive State water pollution control standards.

2. Permit Modification and Reissuance

Even considering that a discharge prohibition for the McClellan Air Force Base would be valid as an NPDES permit requirement under 301(b)(1)(C), modification of the existing permit for the facility would not be mandatory.

Discussion

Consistent with the attached memoranda of April 2, 1976 and August 24, 1976, existing NPDES permits generally should not be modified to conform to new State basin plan/water quality management plan requirements, even where these requirements are established pursuant to State law. Of course, in extraordinary circumstances, modification of a permit under existing policies and procedures may be found appropriate.

Jeffrey G. Miller

Attachments

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