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

SEP 12 1978

MEMORANDUM

OFFICE OF
GENERAL COUNSEL

n-78-15

SUBJECT: Applicability of Section 301(h) and (i)
Modifications to Federal Facilities

FROM : James A. Rogers, Associate General Counsel for Water & Solid Waste (A-131)

TO : Lloyd A. Reed, Director
Enforcement Division
Region X

In your memorandum of June 15, 1978, you requested that we provide legal opinions on three questions concerning the status of Federal facilities under the Clean Water Act.

QUESTIONS

1. Can Federal facilities holding NPDES permits qualify for §301(h) waivers of secondary treatment for marine discharges?
2. Can Federal facilities qualify for §301(i) extensions?
3. Are treatment plants at Federal facilities "publicly owned treatment works" within the meaning of §§301(h) and 301(i)?

ANSWER

Wastewater treatment plants at Federal facilities are not "publicly owned treatment works" within the meaning of §§301(h) and 301(i), and therefore operators of those facilities cannot qualify for modifications under §§301(h) and 301(i)(1).

DISCUSSION

Sections 301(h) and 301(i) were included in the Clean Water Act as part of the 1977 Amendments. Section 301(h) provides for issuance of permits to "publicly owned treatment works" (POTW's) modifying the requirements of §301(b)(1)(B) with respect to discharges into marine waters. Section

301(i)(1) provides for modification of permits for POTW's extending dates for compliance with §§301(b)(1)(B) and (b)(1)(C) of the Act. Section 301(i)(2) provides for modification of permits for point sources which discharge into POTW's (qualifying under §301(i)(1)) allowing an extension of time for compliance with §§301(b)(1)(A) and (b)(1)(C).

Sections 301(h) and 301(i)(1) are applicable only to POTW's. A review of the Act reveals that Congress intended to exclude federally owned treatment works from being classified as POTW's. Moreover, while the Clean Water Act does not specifically define POTW's, the Agency has defined POTW's in its regulations so as to exclude federally owned treatment works from being classified as POTW's.

The legislative history of §301 indicates that Congress considered the term POTW as synonymous with "municipalities" or "communities." Congress referred repeatedly to "municipal treatment works" and the requirements of "communities" under §301(b)(1)(B) to meet secondary treatment standards.^{1/} Similarly, while §307 of the Act sets pretreatment standards for limiting discharges into POTW's, the legislative history reveals that Congress used the term POTW interchangeably with "municipal treatment plant" and "municipal waste treatment systems."^{2/} The municipal character of POTW's is further evidenced in the legislative history of the 1977 Amendments to §402(h) of the Act. Section 402(h) authorizes the States or EPA to enjoin further industrial connections to a POTW where a POTW has violated its permit. This new provision amending §402(h) was entitled "Enforcement of Municipal Permits" in the Senate and Conference Reports.^{3/}

In rulemaking actions, EPA has followed the legislative history and excluded Federal facilities from POTW definitions. The recently published amended pretreatment regulations defined POTW's in part as follows:

^{1/} Legislative History of the Water Pollution Control Act Amendments of 1972 [Legislative History], pp. 843, 1259, 1426, 1460-61.

^{2/} Legislative History, pp. 800, 1479.

^{3/} Report of the Committee on Environment and Public Works, U.S. Senate, July 19, 1977, p. 74; Conference Report, December 7, 1977, p. 37.

§403.3(m) The term "Publicly Owned Treatment Works" or "POTW" means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act).

43 Fed. Reg. 27736, 27747 (June 26, 1978).

The Agency's position on Federal facilities is also set forth in the preamble to amendments of the secondary treatment regulations. In that preamble, which was referred to in the attachment to your memorandum, the Agency stated:

It is clear that section 304(d)(1) of the FWPCA requires promulgation of standards directly applicable to publicly owned treatment works only and therefore 40 CFR 133 is not directly applicable to private or Federal wastewater treatment ponds.

42 Fed. Reg. 54664 (October 7, 1977)

Because they are not "POTW's", as that term is used in the Act, Federal facilities are ineligible for waivers or extensions under §§301(h) or 301(i). Even if Federal facilities could be considered to be POTW's they would clearly not qualify for extensions under §301(i)(1). Section 301(i)(1) provides an extension of time for meeting the requirements of §§301(b)(1)(B) and 301(b)(1)(C) "when the United States has failed to make financial assistance under this Act available."^{4/} This provision could not apply to Federal facilities since such facilities are not eligible for financial assistance under the Act. Section 201(g)(2).

While Federal facility NPDES permittees may not qualify for extensions under §§301(h) or 301(i)(1), they may qualify for extensions under §301(i)(2) of the Act. Section 301(i)(2) is applicable to all "point sources (other than publicly owned treatment works)." If a Federal facility NPDES permittee comes within the definition of "point source" in §502(14) of the Act, then that permittee, like any other point source, may seek a permit modification under the provisions of §301(i)(2).

^{4/} The "financial assistance" referred to in §301(i)(1) is the seventy-five percent funding made available under §201(g)(1) in the construction grants program.