

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

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Regional Enforcement Division Directors
Director, NEIC
NPDES State Directors

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

SUBJECT: Office of General Counsel (OGC) Memorandum

Attached is a copy of a legal opinion prepared by OGC in response to questions concerning the inclusion of compliance schedules in Second Round and new permits. The Permits Division is including this document in its Policy Book as 78-21-IV. If you have any questions or comments about this opinion please contact Scott Slesinger (EN-336), 202-755-0750.

Jeffrey G. Miller

Attachment

cc: Regional Permits Branch Chiefs



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

78-21-IV

DEC 20 1978

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

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

FROM : Associate General Counsel *James P. Ryan*
Water and Solid Waste Division (A-131)

SUBJECT: Request for a Legal Opinion -- Inclusion of Compliance Schedules in Second Round Permits and Newly Issued Permits -- Your Memo of November 2, 1978

QUESTION

You have asked a series of questions regarding the requirements of best practicable control technology currently available ("BPT") and water quality standards ("WQS") in permits issued after July 1, 1977. Your first questions concern reissuance of a permit to a source which had already been subject to BPT requirements in an expiring permit. If BPT or WQS have become more stringent since issuance of the first permit and additional construction would be necessary for the source to meet the changed requirements, you ask whether the permit must require the source to meet the new BPT or WQS requirements and, if so, whether the permit may include a schedule for achieving the new requirements. In addition you ask, in the case of a new permit, whether the permit may ignore BPT and WQS requirements and place the source on a direct schedule to BAT/BCT. In both cases, you ask whether a schedule of compliance, if allowable, may provide a time period during which no construction is required, to allow the permit writer and the discharger to determine what construction will be required by BAT/BCT where those requirements cannot be clearly determined when the permit is issued.

ANSWER

If a source, other than a publicly-owned treatment works, has never received an NPDES permit setting forth any applicable BPT and WQS based effluent limitations, a permit issued to such source must require immediate compliance with the applicable requirements of BPT or WQS as those requirements are in effect at the time the permit is issued. If a non-POTW source has achieved its first-round effluent control requirements, a new or reissued permit to that source should assure that the source will continue to achieve those effluent reductions. In addition, revised BPT and WQS must be applied to the source. Since the Act provides no fixed schedule for compliance with these requirements, EPA should adopt a reasonable scheme for attaining compliance expeditiously, consistent with orderly application of the Act's 1984 requirements.

DISCUSSION

Section 301(b)(1)(A) of the Clean Water Act requires all sources of pollutants, other than publicly-owned treatment works, to achieve BPT by July 1, 1977, and Section 301(b)(1)(C) requires all sources to comply with WQS by that date. Section 301(b)(2) establishes a second set of more stringent technological requirements to be achieved by non-POTW's by 1984 (or three years after the date the requirements are established, up to 1987). Thus, the Act establishes a two-phase structure for achieving specified effluent limitations.

The questions raised by your memorandum arise because (1) some sources did not achieve compliance with the Phase I requirements by July 1, 1977, and (2) in some instances the definitions of BPT, or the requirements of WQS, have been revised, and current levels of treatment, previously in compliance with BPT or WQS, as defined in an NPDES permit, are not adequate to meet the revised BPT or WQS. The Act addresses the first situation, but it is silent as to the second.

I

Congress made it clear, in Section 301(b)(1), that initial compliance with BPT and WQS was to be achieved by July 1, 1977. In the 1977 amendments to the Act Congress recognized that some sources had not met those requirements, sometimes for justifiable reasons. Nonetheless, it refused to waive or extend the deadline for such sources. See H.R. 3199, 95th Cong. 1st Sess., Section 13, eliminated in conference; see also, Cong. Rec. S 13538, Aug. 4, 1977, explaining that the 1977 amendments do not extend the deadlines of Section 301 but allow the Administrator certain Section 309 enforcement options.

Since Congress expressly determined not to waive Phase I compliance requirements or allow permits to extend the compliance deadlines of Section 301(b)(1), EPA cannot claim implied authority to do so. Instead, if a permit must be issued or reissued to a source which has never achieved compliance with applicable BPT or WQS requirements, the permit must require immediate compliance with those requirements as they are currently in effect when the permit is issued, and if relief is to be provided, Section 309(a)(5) orders must be employed.

II

A source which had complied with BPT before the determination of BPT changed is in a different position from the source which never complied. This source has already achieved the Act's Phase I requirement as administratively interpreted and applied to it and is in a position to proceed with the second phase. Therefore, it would be inappropriate to impose an immediate requirement that revised BPT be achieved.

The requirement that BPT be achieved remains in the Act even after the 1977 deadline has passed. However, the Act does not set a specific deadline for attaining revised BPT requirements, and some reasonable scheme should be adopted to ensure that such requirements be achieved as expeditiously as practicable, consistent with orderly imposition of Phase II (BAT and BCT) requirements. Thus, for example, if compliance with revised BPT is a logical step towards attainment of BAT or BCT limitations, such compliance could be included as a reasonable interim element of the source's permit responsibilities. Certainly any applicable BPT requirements would have to

be met not later than the date on which compliance with BCT and BAT is required. However, where a compliance date prior to that time would require construction or modification in addition to previously defined BPT, and where that construction would not constitute a logical step toward BAT, imposing the interim BPT requirement might well undermine the Act's orderly progression from the 1977 to the 1984 requirements.

III

The issue of compliance dates for ongoing WQS compliance is less clear. The Act establishes the end date for the first stage of WQS compliance, but for subsequent levels of possibly more stringent WQS, the Act defers to State planning determinations. See Section 303(e)(3)(A), Section 303(e)(3)(F), Section 208(b)(2)(B), Section 208(e), and Section 303(e)(3)(B). If a state has revised its WQS and established a schedule of compliance at least as stringent as any federal requirement, the NPDES permit would have to impose the state-established limitation. However, if the State plans do not contain specific compliance schedules, the EPA permit writer must establish the source's Phase II WQS compliance schedule.

The Act supplies no express guidance as to what the EPA-determined, post-1977 WQS compliance schedule should be. In general, Congress intended compliance with the Act's requirements to occur at the earliest practicable time.* One option, therefore, might be for EPA simply to establish the policy that post-1977 compliance must be achieved by the earliest practicable time.

Alternatively, the Section 301(b)(2) pattern is to require second round municipal compliance in 1983 and second round industrial compliance in 1984. It is reasonable to

* The Section 301 requirements are all to be met "no later than" the statutory deadlines. See, e.g., Leg. Hist. 163. In the 1977 amendments, Congress confirmed its interest in securing the earliest possible compliance. See Sections 309(a)(5) and 309(a)(6), added by the amendments.

establish WQS compliance schedules in harmony with the Act's general regulatory structure. Thus, EPA may infer that the Section 301(b)(2) dates should be applied to WQS, in the absence of any more stringent state schedules.

Which of these approaches (or what combination of them) is to be selected is a policy judgment. Since the Act does not express compliance schedule requirements for post-1977 WQS compliance, EPA may wish to supply guidance by regulation. This would provide a reasonable, permanent method for establishing WQS compliance schedules where none are available from the states.