



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

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Procedures for Processing Plans of Approved NPDES States
to Implement NPDES General Permit Programs

TO: Enforcement Division Directors, Regions I-X
NPDES State Directors

FROM: R. Sarah Compton
Deputy Assistant Administrator
for Water Enforcement (EN-335)

INTRODUCTION

In recent months there has been a great deal of interest on the part of approved NPDES States to proceed with plans to implement NPDES general permit programs. To date my office has received draft general permits from seven approved NPDES States for review by EPA Headquarters. It is clear from these submissions that there exists much confusion concerning the proper procedures to be followed in authorizing NPDES States to issue and enforce general permits. The purpose of this memorandum is to clear up that confusion by establishing uniform procedures for authorizing approved NPDES States to implement general permit programs.

BACKGROUND

The general permits program arose out of the decision in NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977), which denied EPA's authority to exclude certain categories of point sources from permitting under section 402 of the Clean Water Act. The design for an NPDES general permit program was first outlined in the June 7, 1979 NPDES regulations in 40 CFR §122.48. Though the recent May 19, 1980 consolidated permit regulations have largely adopted this same permitting scheme, several important changes were made. The primary change, for the purposes of this memorandum, affects the procedure for authorizing an approved NPDES State's authority to implement a general permit

program. The June 7, 1979 regulations permitted an approved NPDES State to submit an Attorney General's statement certifying the State's legal authority to issue and enforce general permits either prior to, or at the same time they submitted their proposed general permits. 40 CFR 123.12(a)(14)(ii). The consolidated permit regulations emphasize the need to obtain prior approval of a State's Attorney General's statement where an approved NPDES State seeks to implement the general permit program under 40 CFR 122.59. See 40 CFR §123.5(c). Accordingly, all NPDES States desiring to implement a general permit program should proceed as follows.

RECOMMENDED PROCESSING PROCEDURES

An approved NPDES State's plan to implement a general permit program will be processed as a revision to the State's NPDES program requiring compliance with the procedures outlined in 40 CFR §123.13*. Pursuant to this section and §123.5(c), the State must submit an Attorney General's statement certifying that the laws and regulations of the State provide adequate legal authority to issue and enforce general permits.

The Regional Administrator will have initial responsibility for review of the Attorney General's statement. In addition to evaluating the Attorney General's statement, she or he must examine the State's Memorandum of Agreement (MOA) to determine whether any provisions of the MOA limit or restrict the State's authority to implement a general permit program. It is expected that in most instances only an Attorney General's statement will need to be submitted. However, if the MOA does restrict the State's authority in any way, the RA must require submission of a modified MOA, and such other documents as she or he may determine to be necessary under the circumstances.

40 CFR §123.13(b)(2) requires EPA to determine whether a proposed program revision is substantial, thereby triggering public notice and comment requirements. Under a general permit program, an approved NPDES State may be regulating numerous categories of point sources currently requiring individual permits with general permits covering large geographic areas. Most often those areas will be Statewide as indicated by those draft permits already submitted. In most instances, these general permits will impose less stringent requirements than those necessary in individual permits. EPA has therefore determined that every revision of a State NPDES program made for the purpose of implementing a general permit program will be considered substantial, thereby necessitating public comment. The Regions are required to issue public notice of the proposed program revision which should be mailed to all interested persons and

* A program revision is necessary because in most NPDES States the controlling State statutory and/or regulatory authority must be modified or supplemented to demonstrate the State's new authority to administer a general permits program.

should be published in the Federal Register and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice must provide a 30 day public comment period and indicate that a public hearing will be provided if sufficient interest is expressed.

After the close of the public comment period or after a public hearing, if one is held, an Action Memorandum should be sent from the Regional Administrator to the Administrator recommending action on the State's plan to implement a general permit program. It has been proposed that the authority for final approval of a State's revised program be delegated from the Administrator to the Assistant Administrator for Enforcement. Until this delegation is approved, however, the Action Memorandum should be sent to the Administrator. The Action Memorandum should contain copies of the following: the State Attorney General's statement, correspondence with the State Director, the modified MOA where prepared, public notice, all comments received or a summary of these, the Regional Administrator's response to comments, a draft letter from the Administrator approving the State's authority to implement a general permit program, and any other relevant documents.

This package will then be sent to the Assistant Administrator for Enforcement and the Deputy Assistant Administrator for Water Enforcement for concurrence. If everything is in order it will then be sent to the Administrator for a decision on approval. The program revision will become effective when the approval letter is signed and transmitted by the Administrator. Notice of approval will be published in the Federal Register.

EPA's 90 day review period, set out at 40 CFR §123.75, for commenting upon or objecting to proposed general permits drafted by the States, can not begin to run until the State's authority to implement a general permit program is approved in accordance with the above procedures. This is true even where draft general permits were submitted prior to obtaining approval of a State Attorney General's statement. However, where draft general permits have already been submitted, my staff has begun review of these and will send any comments to the appropriate Regions for forwarding to the States. In this way we hope to expedite EPA's review period.

CONTACT WITH STATES

Priority attention should be given to those approved NPDES States which have already submitted draft general permits. Immediate review should begin and public notice issued of

these States' Attorney General's statements. Where approved NPDES States have submitted draft general permits without Attorney General's statements, an Attorney General's statement must be requested for review.

Further guidance on the procedures to be followed in approving NPDES States' authority to implement general permit programs will be forthcoming in a State NPDES Program Guidance Document. This document is intended to assist States with existing NPDES programs in revising their programs to fulfill the requirements of the consolidated permit regulations. A separate General Permits Guidance Document is also being prepared which will review procedures to be followed in program approvals and detail EPA procedures for review of draft and proposed general NPDES permits submitted by approved States.

Much concern has been expressed over the delays these intended procedures will cause to approved NPDES States' plans to issue general permits. While I understand these concerns, the procedures recommended for approving NPDES States' submissions for implementing NPDES general permit programs are necessary to fulfill our obligations under the law and to ensure proper public comment on these proposed program revisions. Despite these delays, we intend to complete the entire review process as expeditiously as possible.

Please refer all questions or requests for further information to Karen Wardzinski of my staff at 426-4793.