

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

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OFFICE OF
WATER

MEMORANDUM

SUBJECT: Liability of Private Operators of POTWs

FROM: James R. Elder, Director
Office of Water Enforcement
and Permits (EN-335)

TO: Addressees

On April 15, 1988, I met with several private operators of publicly owned treatment works (POTWs) to discuss their potential liability as National Pollutant Discharge Elimination System (NPDES) co-permittees under EPA regulations and policy. The purpose of this memorandum is to solicit your comments on some options we have developed to address their concerns.

There are roughly ten private companies throughout the country serving about 150 POTWs. It appears that four of these companies are responsible for most of the contract operations. Service provided by the contractors ranges from complete operation of the POTW to limited supervisory assistance.

40 CFR §122.21(b) provides that when an NPDES facility is owned by one person but operated by another person, it is the operator's duty to obtain a permit. The purpose of this provision was to make the person most involved in day-to-day operation of the facility responsible for permit compliance. In April, 1987, Martha Prothro sent a memo to the Regional Water Management Division Directors which stated in part that upon permit reissuance, permitting authorities should make private operators of POTWs and municipalities co-permittees where the municipality continues to own the treatment works.

Pursuant to EPA regulations and policy, some permitting authorities have started to issue permits to private operators and POTWs as co-permittees. Both permittees would be jointly

and severally liable for any permit violation. The operators have expressed concern about this practice, since they lack control over certain matters affecting compliance with NPDES permit conditions, such as pretreatment enforcement, revenue raising, and facility upgrading. They believe that conscientious operation of an otherwise inadequate system will not protect a private operator who is a co-permittee.

Although in most cases there are contracts between the private operator and the POTW which could provide for ultimate compensation by the party responsible for a permit violation, the private operators have argued that these arrangements are inadequate if they are made co-permittees. This is because there are limitations in most states arising from the revenue-raising authority of the municipality which restrict the practical availability of funds from which the contractor could expect to be indemnified. In addition, some states have laws which could be interpreted by courts as forbidding the reimbursement of persons who are not officials of a political subdivision, even though those individuals perform a public service. The operators therefore believe that their liability under the NPDES permit is essentially uninsurable. This would necessitate raising fees substantially to compensate for their liability for risks, which could severely curtail the private contract operations business.

We share the concern of the private operators about the possible curtailment of their services, since we believe that many of these businesses provide valuable assistance to POTWs, to the ultimate advantage of the pretreatment program. At the same time, we want to make sure that all interested parties have a chance to express their views about this issue. To this end, we have developed the following options to address the problem:

1. Change the NPDES regulations to require that the POTW be the sole permittee even when the plant is operated by a private concern.

Pro: §122.21(b) was intended to address situations where the owner was essentially a passive partner in the facility (i.e., a landowner) and the operator had complete control. This is arguably never the case with POTWs. The regulatory change under this option would place responsibility for permit compliance on the party who may ultimately have the most control over such compliance. This option would also provide ease of enforcement - the permitting authority could take action against the POTW, which could then be compensated by the private operator if appropriate.

Con: Since some operators are completely responsible for day-to-day operation of the POTW, it is arguably inappropriate to relieve them of permitting responsibilities.

2. Make POTWs and private operators co-permittees, but specify in the permit that either permittee may claim as an affirmative defense that the other permittee caused a violation (sample permit language attached).

Pro: Permitting authority could take appropriate action against either or both parties, while the private operator would be afforded more protection in case of non-negligence.

Con: Would be difficult for all parties to agree on the appropriate burden of proof of the party using the defense, since it is hard to foresee the circumstances of many violations.

3. Pursue the regulatory change in option 1 and encourage use of the affirmative defense option as an interim measure.

Pro: Could afford private operators relief until a regulatory change was promulgated.

Con: Same as Option #2.

4. Retain current policy

Pro: Ease of enforcement - no need for permitting authority to determine who is responsible for a violation. POTWs and operators could then handle the compensation issue between themselves as in option #1.

Con: Doesn't alleviate concerns about private operators' liability for events beyond their control.

We are very interested in your opinion about the relative advantages and disadvantages of these options. Please give this question your serious attention and let us know your views, including which option you believe is the best. I would appreciate it if you could contact Marilyn Goode of my staff (PTS 475-9533) with your comments by June 3, 1988. Thank you for your help in resolving this issue.

Attachment

Addressees:

Water Management Division Directors, Regions I-X
Susan Lepow, Office of General Counsel
Glenn Unterberger, Office of Enforcement and
Compliance Monitoring
Ken Kirk, Association of Metropolitan Sewerage Authorities