



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

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Revised NPDES Second Round Permits Policy

TO: Regional Enforcement Division Directors
State NPDES Directors
Director, National Enforcement Investigations
Center

FROM: R. Sarah Compton,
Deputy Assistant Administrator
for Water Enforcement

The new consolidated permit regulations (40 CFR Parts 122-124, 45 FR 33280-33513, May 19, 1980) and the accompanying preamble contain several revisions to the NPDES Second Round Permit Policy. Previous expressions of the policy in the NPDES regulations of June 7, 1979 (44 FR 32854-32956) and in Policies and Guidance for Issuing the Second Round of NPDES Permits to Industrial Dischargers (July, 1978, known as the Second Round Permits Policy) are partially superseded by the new regulations. This memorandum outlines the key features of the new Second Round Permits Policy. Relevant portions of the new regulations and preamble are attached for your reference. Continuation of certain other features of the Second Round Permits Policy is also noted in this memorandum. Finally, procedures for implementing the new NPDES application requirements for existing industrial dischargers are discussed.

A. Issuance of BAT Permits to Primary Industries

1. Short-term BPT permits for all primary industry dischargers may be set to expire no later than June 30, 1981.

The original Second Round Permits Policy (pp. 22-26 and Appendix B) and the June 7, 1979 regulations (40 CFR 122.12(c)) required that any BPT (best practicable control technology currently available) permit issued to a primary industry discharger (any of the 34 industries listed in the amended NRDC Settlement Agreement) must not be set to expire later than one of the following dates (each of which pertained to several of the primary industries): September 30, 1980; December 31, 1980; March 31, 1981; and June 30, 1981. These dates were selected

to allow a modest slippage in promulgation of the new BAT effluent limitations guidelines controlling toxic pollutants and to account for the time needed to review an application and issue a permit. Therefore, they were set at 18 months later than the expected guidelines promulgation dates listed for these industries in the NRDC Settlement Agreement. Further delays in guideline promulgation now necessitate a change in these short-term permit expiration dates.

The Consolidated Permit Regulations, in 40 CFR 122.64 (45 FR 33452, Attachment 1), now uniformly set the latest allowable BPT permit expiration date for all primary industry dischargers at June 30, 1981 (the latest reasonable date in light of the July 1, 1984 statutory deadline for compliance with BAT - best available technology economically achievable).

The Consolidated Permit Regulations, in 40 CFR 122.62(c) (45 FR 33449, Attachment 2), maintain the pre-existing requirement, in compliance with the NRDC Settlement Agreement, that all short-term BPT permits must contain reopener clauses.

The above changes are discussed in the preamble to §122.62(c) at 45 FR 33339-40 (Attachment 3).

2. All permits written after June 30, 1981 for primary industries must contain BAT and BCT limits, as appropriate, whether or not applicable effluent guidelines have been promulgated.

As indicated in the preceding discussion, June 30, 1981 is the latest reasonable date to wait for BAT guidelines in light of the July 1, 1984 deadline for compliance with BAT. Therefore, §122.62(c)(2) (Attachment 2) states that any permit issued after June 30, 1981, must include effluent limitations and a compliance schedule to meet the BAT (and BCT, best conventional pollutant control technology, for conventional pollutants) requirements. These permits are not required to contain reopener clauses, and they may be issued for a full five years.

This provision is very important. To implement this provision, permit writers must make case-by-case determinations of BAT and BCT, under the authority of section 402(a)(1) of the Clean Water Act, for those industries for which promulgation of guidelines is delayed beyond June 30, 1981. As in past case-by-case determinations for BPT, the permit writer will be required to use best professional judgment. (The previously used phrase, "best engineering judgment", is modified to more accurately reflect the range of technical and economic factors which must be considered in setting BAT and BCT limits.)

On June 25, 1980, I sent to each of you a memorandum outlining our initial plans for handling case-by-case determinations. As noted in that letter, coordination among experts in EPA Headquarters, EPA Regions and approved NPDES States will be essential in this effort.

As outlined in the June 25 memorandum, we are organizing teams of State and EPA Regional staff who are experts on certain industries. My staff has already assembled a list of experts supplied to us by various States and Regions, and I continue to solicit your participation on these teams. It is essential that we begin to use all means at our disposal (e.g., industry teams and the treatability manual) to begin to control toxic pollutants. This is a demanding and time-consuming task, but it is an essential one if we are to succeed in eliminating harmful levels of toxic pollutants from waters of the United States.

3. Long-term BAT permits may be issued to primary industries before June 30, 1981, when appropriate, even when effluent limitations guidelines have not yet been promulgated.

The original Second Round Permits Policy (pp. 24-25) required EPA permit writers to issue short-term permits prior to issuance of BAT guidelines. The purpose was to allow permits to expire early enough so that uniform guidelines-based BAT permits could then be issued in time for dischargers to construct and startup necessary equipment by July 1, 1984. States were encouraged, but not required, to follow this policy. They were allowed the alternative of issuing long-term BAT permits (using best professional judgment).

The prohibition against EPA permit writers issuing long-term permits to primary industries prior to issuance of applicable effluent guidelines is now rescinded. (See the announcement of this change in the preamble discussion at 45 FR 33340 (Attachment 3).) However, as required by the NRDC Settlement Agreement, permits issued prior to June 30, 1981 and before applicable guidelines have been published must contain reopener clauses. See 40 CFR 122.62(c). This will ensure that when the BAT guidelines are promulgated, those limitations, if more stringent, can be put in the permit in substitution for the BPJ limits.

It has become clear, as discussed above, that some effluent guidelines will not be promulgated by June 30, 1981. It may not be efficient to issue a short-term permit for one year (1980-1981) and then issue a BAT permit using best professional judgment the next year. Therefore, some permit writers may choose now to issue some BAT permits, based on best professional judgment, in industries where guidelines promulgation will be delayed beyond June 30, 1981. (Where such delays occur, proposed guidelines, in addition to all the other guidance mentioned above, will often be available as another source of guidance for the permit writer.) In general, the fact that we are now two years closer to the July 1, 1984 deadline than we were in mid-1978, when the short-term permit policy was established, implies a greater need to begin issuing BAT permits now to reduce permit-issuing bottlenecks in 1981. (A general schedule for issuing BAT permits is contained in the June 25, 1980 memorandum referred to above.)

B. Issuance of BCT Permits to Secondary Industries

Permit writers should continue to focus their present industrial* permit-writing activities upon secondary industries to insure compliance with BCT.

Pages 28-34 of the Second Round Permits Policy advised permit writers to give priority to the issuance of permits to secondary industries, so that these permits will have been issued by the time that the intensive issuance of BAT permits begin. This policy remains in effect.

Two changes in the policy of issuing permits to secondary industries should be noted:

1. The Second Round Permits Policy advised permit writers not to issue permits to secondary industries which discharge COD, phosphorus, or oil and grease until the Agency announced its final decision whether to add those pollutants to the list of conventional pollutants. Since the Agency published its decision on July 30, 1979 (44 FR 44501) to add only oil and grease to the conventional pollutant list all pending secondary industry permits withheld under this policy should now be issued.

2. For secondary industries that were already covered by BAT guidelines prior to 1977 (such as the Dairy, Seafood, Fruits and Vegetables, etc. industries), the Second Round Permits Policy advised permit writers to either make section 402(a)(1) best engineering judgment (now called "best professional judgment") determinations of BCT or wait for the BAT guidelines review under section 73 of the Clean Water Act of 1977 (determining whether BAT passes the BCT cost test) to be completed.

EPA completed its guidelines review on August 29, 1979 (44 FR 50732). EPA determined in the review that BAT for 45 of the 93 reviewed industrial subcategories failed the BCT cost test. For those subcategories, the existing guideline limitations for conventional pollutants have been withdrawn. For the remaining subcategories, BAT passed the cost test. Thus, for those subcategories, the existing BAT guideline limitations for conventional pollutants remain in effect as BCT guidelines. It should be noted that for some secondary industry subcategories, guidelines have never been promulgated.

Since the guideline review is now complete, all permits to secondary industries should now be issued. Where BCT guidelines either are withdrawn or have never been promulgated, permit limits must be set on a case-by-case basis using best professional judgment.

* As noted in the July 10, 1980 memorandum sent by Jeffrey G. Miller, Acting Assistant Administrator for Enforcement, to the EPA Regional Administrators, the issuance of major municipal permits in Fiscal Year 1981 is also a high priority at the present time.

In light of resource constraints and the volume of secondary permits to be issued within a brief time-period, it will be difficult to routinely perform (and to defend in hearings) case-by-case determinations of BCT. Such determinations not only require comparison of incremental treatment costs divided by incremental pounds of removal to the average POTW ratio of cost per pound of removal (the 1979 BAT guidelines review used a POTW cost of \$1.15 per pound of removal), but also require identification of appropriate treatment technologies prior to the BCT cost test exercise in cases where BAT guidelines have never been promulgated.

EPA cannot, in the absence of promulgated guidelines, blanketly determine that BCT automatically equals BPT where no BCT guidelines exist. However, EPA is taking certain steps to assist the Regions and States in issuing second round permits to secondary industries. These are discussed below.

1. EPA's Effluent Guidelines Division (EGD) is taking several actions which will assist permit writers in developing BCT limits:

- a. EGD has reviewed its data for secondary industries and determined several industries for which BCT limits are likely to equal BPT if and when the guidelines are ultimately published. The list of these industries is contained in Attachment 4.
- b. EGD will propose BCT guidelines for the Meat Packing, Fruits and Vegetables, and Seafoods Industries in 6 to 12 months.
- c. EGD will develop revised development documents for the Dairy and Sugar Refining Industries in 6 to 12 months.
- d. EGD will assist in interpretation of BCT guidance or development documents where requested by EPA Regional or State permitting offices.

2. EPA's Permits Division will assist permit writers in developing case-by-case BCT limits where guidelines are unavailable by providing the following documents in the next few months:

- a. a treatability manual which identifies treatment techniques and associated costs.
- b. a brief guidance document explaining, with examples, how to compute the cost per pound removal ratio to apply the BCT cost test.

As a matter of priority, emphasis should be placed on developing BCT limits for those industries for which EGD has promulgated guidelines, developed guidance or draft development

documents or determined that BCT will likely equal BPT. BCT limits for other industries could be developed after these secondary industries are issued BCT permits. This procedure would insure that BCT limits are set for the maximum number of dischargers using the minimum amount of resources possible. Of course, should a particular permit merit Regional or State attention, we would be pleased to assist in the development of permit conditions, regardless of how the permit would be classified in this informal priority classification.

C. Application Requirements

1. New Application Requirements have been Established for Existing Industrial Dischargers

40 CFR 122.4(d) and 122.53(d) and (e) established new NPDES application requirements for existing industrial dischargers. The EPA Forms 1, 2b and 2c, which will implement the new requirements, are published at 45 FR 33555-79 (May 18, 1980).

40 CFR 122.53(c) contains the schedule for submission of new applications (45 FR 33442-3, Attachment 5). (Forms are presently available in each Regional office.) The main point is that any discharger whose existing permit expires on or after December 1, 1980 must follow the new requirements. Furthermore, any discharger whose permit expires before that date but who did not already submit the old application form by April 30, 1980 must submit a new application form. See the preamble discussion at 45 FR 33336-7 (Attachment 6). This rule applies in approved NPDES States through 40 CFR 123.13(g) (45 FR 33464, Attachment 7). See the preamble discussion at 45 FR 33384 (Attachment 8).

Any discharger who has applied before April 30, 1980 but has not yet been issued a permit need not reapply. However, before issuing a permit to any primary industry discharger, the Director must at least have received the information listed in §122.53(d)(7)(ii) (sampling and analysis of process wastewater for toxic pollutants). See §122.64(b). This information will be essential to issuing BAT permits to primary industries, particularly where guidelines have not been issued.

As shown in the schedule in §122.53(c), EPA is temporarily relaxing the rule that applications for EPA-issued permits be submitted to EPA at least 180 days prior to permit expiration. Those dischargers whose permits expire during the period December 1, 1980 - May 31, 1981, may apply as late as 90 days prior to permit expiration. This will provide more time for these dischargers to prepare their applications.

Two types of time extensions for submission of applications may be granted by the Director on a case-by-case basis.

1. The Director may grant an oral extension to submit an application until no later than the permit expiration date.

2. The Director may grant a written extension of up to 6 months beyond the application deadline for submission of toxic pollutant analyses and related information. However, the extended date may in no event go beyond June 30, 1981. Furthermore, it may be granted only upon a written request stating why this information could not be submitted in time.

Factors to be considered in deciding whether to grant either of the above extensions and, if so, how much extension, include the amount of time needed by the applicant to collect required data and the Director's priorities for issuing permits.

An additional factor in considering requests for the second type of extension is an applicant's ability or inability to arrange for an available commercial laboratory to perform analyses for toxic pollutants on time. The applicant must show a good faith effort in having contacted commercial laboratories as early as possible. Since the application requirements were published in the Federal Register on May 19, 1980, applicants whose permits expire soon should already be making arrangements to have their process wastewater outfalls sampled and analyzed.

If a complete application is submitted in a timely manner (i.e., in accordance with regulations) to EPA but EPA fails to issue a new permit before the existing permit expires, the existing permit remains in effect under section 558(c) of the Administrative Procedures Act. See 40 CFR 122.5. If a written extension to submit toxics data is granted under the second type of extension listed above, the EPA extension will apply if all parts of the application are submitted within the time required by the regulations and the Director's grant of extension. The procedures on written requests for and approvals of extensions of time to submit toxics data should be strictly adhered to in order to clearly establish in each case that a complete and timely application was submitted.

Many States have provisions similar to 40 CFR 122.5 under which an existing permit is extended pending administrative decision on the application for permit renewal. The discussion in the preceding paragraph applies to these States as well as to EPA.

2. New Application forms for new sources and new dischargers and for POTW's are being developed.

New sources and new dischargers must continue to use the existing NPDES Standard Form C (or Short Form C, if appropriate) or the appropriate State form. POTW's should continue to use Standard Form A or the appropriate State Form. The Permits Division is currently developing new forms for these applicants, which will be Forms 2d (new sources and new dischargers) and 2a (POTWS) of the EPA Consolidated Application Form. Drafts of these forms will be made available for comment this Fall.

Further Information

If you have any questions or comments concerning the above issues, please call me (202-755-0440) or Bill Jordan, Industrial Permits Branch Chief (202-755-2545). In addition, please let us know of additional subjects in this area for which guidance would be useful.