



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

OFFICE OF
WATER

JAN 16 1984

MEMORANDUM

SUBJECT: Continuance of NPDES General Permits Under the APA
FROM: Bruce R. Barrett, Director *BRB*
Office of Water Enforcement and Permits (EN-335)
TO: Regional Water Management Division Directors
Regional Counsels

We have received a number of inquiries as to whether continuation of expired general permits is allowed under the Administrative Procedure Act (APA) and the NPDES regulations. A recent Office of General Counsel (OGC) opinion (attached) indicates that such continuance is legally permissible. However, there are important reasons for EPA not to rely on APA continuance except in extreme cases where permit reissuance is delayed for unexpected or unavoidable reasons. This memorandum addresses the general permit reissuance process in light of OGC's recent review of the continuance issue.

SUMMARY

NPDES general permits may be continued under the APA where the Agency has failed to reissue the permit prior to expiration. Although continuance is legally permissible, permits should be continued only as a last resort and continuance should be avoided by timely reissuance of general permits wherever possible.

Because of the geographic scope of general permits and the number of facilities covered, continuance could raise questions as to whether EPA has adequately considered long-term cumulative environmental impacts, exacerbate the permit issuance backlog, and create new issues or workload problems associated with new facility permits since new facilities cannot be covered by a continued permit. Continuance is generally avoidable given adequate planning. Where continuance is unavoidable, it should be for the shortest possible time. Upon determining that a general permit will not be reissued prior to expiration, the

Regional Water Management Division Director should inform the Permits Division Director and provide a specific schedule for completing reissuance.

IMPLEMENTATION

The following requirements govern the continuance of general permits:

- o Only those facilities authorized to discharge under the expiring general permit are covered by the continued permit.
- o Where the notification requirements of a general permit provide permit coverage prior to the actual commencement of operations at a site (e.g., mobile seafood processors and oil and gas drilling vessels) facilities providing such notice prior to expiration are covered by the continued permit.
- o At least six months prior to the expiration date of a general permit, the Regional Water Management Division Director should submit a draft general permit and a schedule for permit issuance or reissuance to the Permits Division Director. If a draft general permit is not ready at that time, an explanation of the reasons for delay and a schedule for permit development and reissuance, should be submitted instead. The Permits Division Director will expedite permit issuance and reissuance processes at headquarters as much as possible and will inform upper management in the Office of Water of any significant delays.

DISCUSSION

As with individual NPDES permits, it may become necessary to administratively continue a general NPDES permit when reissuance of the permit or issuance of a new permit is impossible before permit expiration. The APA allows for continuance of a Federal license or permit when a permittee has made a timely and complete application for a new permit. Until OGC's recent review of the issue, OWEF had advised the Regional Offices that general permits could not be continued under the APA because the NPDES regulations do not require applications for general permits. OWEF requested that OGC review and provide a written opinion on this issue since a number of parties had questioned our legal position. On November 17, 1983, OGC informed OWEF that general permits can legally be continued under the APA.

There are a number of strong policy and program reasons to assure timely reissuance rather than relying on APA continuance. Many general permits cover several dozens or even hundreds of individual facilities. The large number of facilities covered and the broad geographic coverage tend to focus industry and public attention on Agency inaction when the permit is allowed to expire, especially in the early stages of implementation of the general permit program.

Many general permits are controversial at the time of initial permit issuance. Similar controversies can be anticipated during reissuance. EPA cannot allow the public to perceive that we are avoiding these issues through administrative continuance of expired permits. For example, cumulative environmental impact assessments hinge on the number and volume of discharges. Information gathered during the term of the original permit may justify new permit limitations, terms and conditions at the time of reissuance. For marine dischargers, determinations pursuant to §403(q) of the Clean Water Act are usually dependent on the estimates of the number of facilities that will discharge during the term of the permit. Delay in updating these determinations raises questions about potential environmental impacts and the efficacy of permit conditions. Similar issues arise where there have been new standards or effluent limitation guidelines promulgated during the course of the permit or changes in the CWA or applicable requirements under other applicable statutes (e.g., Coastal Zone Management Act, Endangered Species Act).

Finally, a major goal of the general permit program is to reduce the Agency's NPDES permit issuance backlog. Allowing general permits to expire aggravates the backlog problems. In addition, new dischargers would not be covered until EPA reissued the general permit. Since these facilities would be liable for discharge without a permit, they would likely request an individual permit and be required to submit a full application and do appropriate testing. This creates a permit issuance workload demand that would be avoided by timely reissuance of the general permit, as well as putting burdens on permit applicants that would be removed by reissuance of the general permit.

Given the drawbacks and problems, administrative continuance of general permits should be the exception rather than the rule. Adequate planning and timely permit preparation will allow us to avoid the necessity to use administrative continuance except as a stop gap, short term measure. The Office of Water Enforcement and Permits will work with the Regions to avoid continuance wherever possible.

cc: Colburn T. Cherney, OGC

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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Continuance of NPDES General Permits Under
the Administrative Procedures Act (APA)

FROM: Margaret B. Silver *MBS*
Attorney
Water Division (LE-132W)

THRU: Colburn T. Cherney *CTC*
Acting Associate General Counsel
Water Division (LE-132W)

TO: Bruce Barrett
Director
Office of Water Enforcement
and Permits (EN-335)

This memorandum responds to your request for a legal
opinion on several issues related to the expiration, reissuance,
and continuance of general permits under the APA.

(1) Issue: Can a general permit be continued under
the APA in the absence of a renewal application requirement?

Response: A good legal argument can be made that a general
permit may be continued under the APA, even though there is
no specific requirement for a renewal application.

Discussion:

Section 9(b) of the APA, 5 U.S.C. §558(c), provides that:

When the licensee has made timely and sufficient
application for a renewal or a new license in
accordance with agency rules, a license with
reference to an activity of a continuing nature
does not expire until the application has been
finally determined by the agency.

This provision allows a licensee (i.e., permittee) to
lawfully continue its licensed activity after its license
has expired when the issuing agency has failed to act on the
licensee's renewal application.

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The purpose of this provision is clearly set out in the legislative history of the APA:

[This provision is] necessary because of the very severe consequences of the conferring of licensing authority upon administrative agencies. The burden is upon private parties to apply for licenses or renewals. If agencies are dilatory in either kind of application, parties are subject to irreparable injuries unless safeguards are provided. The purpose of this section is to remove the threat of disastrous, arbitrary, and irremediable administrative action.

92 Cong. Rec. 5654 (1946) (remarks of Representative Walter).

The courts have consistently relied on this statement of legislative intent in construing the purpose of this provision. In Committee for Open Media v. FCC, 543 F.2d 861 (D.C. Cir. 1976), the D.C. Circuit described the purpose of this section as the "protection of licensees from the uncertainties stemming from protracted administrative consideration of applications for license renewals." Id. at 867. In County of Sullivan v. CAB, 436 F.2d 1096 (2nd Cir. 1971), Judge Friendly agreed that Section 9(b) was intended to protect licensees from an agency's failure to act: "[t]he valuable rights conferred by a license for a limited term shall not be lost simply because the agency has not managed to decide the application before expiration of the existing license." Id. at 1099. The court in Banker's Life & Casualty Co. v. Calloway, 530 F.2d 625 (5th Cir. 1976) quoted Judge Friendly's language and added that "the kind of case that the statute was meant to cover was that in which time exigencies within the agency prevent it from passing on a renewal application, where an activity of a continuing nature is involved." Id. at 634.

Section 9(b) of the APA requires the licensee to make "timely and sufficient application for a renewal ... in accordance with agency rules" to qualify for continuance of its permit. The issue that has been raised is whether the APA continuance provision applies to NPDES general permits since there is no renewal application requirement for such permits. In the case of an individual NPDES permit, the permit holder must submit an application to renew its permit, so the issue does not arise. ^{1/} Persons who wish to be

^{1/} The NPDES regulations recognize that the APA continuance provision applies to individual NPDES permits. 40 CFR 122.6(a).

covered under a general permit, however, generally need only submit a "notice of intent to be covered" by the general permit, after the general permit is issued. 2/ Neither the terms of the general permit nor the NPDES permit regulations discuss requirements for coverage after a general permit expires. In other words, in the case of an individual permit, the renewal process is initiated by the permit holder who must submit a renewal application, whereas the Agency must initiate the renewal process for a general permit because the Agency does not provide any opportunity for the permit holder to submit a renewal application.

Based on the overall purpose of Section 9(b), i.e., to limit continuance to situations where the Agency, and not the permittee, has failed to act, we believe it is reasonable to conclude that continuance of general permits is permissible when the Agency has not provided an opportunity to submit a renewal application. 3/ The APA requires the permittee to submit an application "in accordance with agency rules" as a condition for continuance. However, since the current agency rules do not provide a discharger covered under a general permit the opportunity to initiate renewal, the discharger has in essence done all it can to ensure continued permit coverage. Therefore, where "time exigencies" have prevented Agency action, it is a reasonable interpretation of the APA to allow a discharger the protection of the continuance provision where the permit has not been renewed through no fault of the discharger. We believe this position is fair, as well; it does not make sense for continuance to be available to individual permit holders, but not general permit holders, simply because the Agency has not provided for a renewal application for general permits. Also, not allowing continuance would seriously undermine the usefulness of general permits, which were designed to reduce both the regulatory burden on dischargers and the administrative burden on EPA.

Although we believe the position that general permits may be continued under the APA is legally defensible, we strongly recommend that the general permit provisions of the NPDES rules be amended to clarify this issue. The rules should explain how and when a general permit may be continued,

2/ This is a requirement imposed by the terms of the general permit itself, not the NPDES regulations.

3/ Only dischargers covered under the original general permit would be entitled to operate under the continued permit. New dischargers, who would otherwise qualify for coverage under the general permit, could not be covered by the general permit until EPA had reissued it.

and who may discharge under the continued permit. At that time, we may want to consider imposing some sort of application requirement, such as a new notice of intent to be covered when a general permit is about to expire (this provision has appeared in draft amendments to the NPDES rules).

2) Issue: If the Agency conducted an assessment under Section 403(c) of the Clean Water Act before it issued a general permit, can the general permit be continued without a new assessment under the Ocean Discharge Criteria Guidelines? Is continuance affected by the similar requirements of the Endangered Species Act (ESA) and the Coastal Zone Management Act (CZMA)?

Response: A general permit may be continued without additional evaluations under Section 403(c), the Endangered Species Act, or the Coastal Zone Management Act.

Discussion:

As explained above, the APA continuance provision is a stop-gap measure designed to protect the permittee when the Agency has failed to reissue an expired permit. There is no requirement that the Agency have even begun the renewal process for continuance to occur. Since the 403(c), ESA, and CZMA determinations are conducted as part of the permit issuance (or reissuance) process, it is clear that the Agency need not complete any of these determinations before a general permit is continued. In fact, failure to make one or more of these determinations may be precisely the reason for the delay in reissuing the permit.

(3) Issue: What is the effect of issuance of a general permit on previously issued individual permits covering the same type of discharge?

Response: Persons who hold a current individual permit remain covered by that permit until they request coverage under the general permit (generally by submitting a notice of intent to be covered under the general permit) and EPA revokes the individual permit. Persons who hold expired, APA-continued individual permits are covered by the general permit as soon as EPA issues it.

Discussion:

Section 122.18 of the NPDES regulations states that after EPA issues a general permit, a discharger with an individual permit is not covered by the general permit until EPA revokes the individual permit. To date, each general permit has included this provision. It is not clear whether this provision

applies only to current individual permits, or to expired, APA-continued individual permits as well. We think the better reading is to limit this provision to current individual permits. 5/ In the case of an expired, APA-continued individual permit, we believe that issuance of a general permit that covers the discharge should be considered "Agency action" on the permittee's request for renewal of the individual permit (unless the terms of the general permit state otherwise) and that the discharger is covered by the general permit as of the effective date of the general permit. In addition, we believe a new notice of intent would be unnecessary in this case since the discharger has already submitted an application for renewal of its individual permit (both the notice of intent and renewal application serve a similar function, i.e., to inform the Agency who is discharging under the general permit).

Once again, it is important to spell out these provisions in future general permits, or better yet, in the NPDES rules. By distinguishing between current individual permits and expired, APA-continued permits, and the effect of issuing a general permit on each, it will be clear which permit (individual or general) is in effect for each discharge at any given time.

5/ For the sake of efficiency, we may want to consider revoking all outstanding individual permits as part of the general permit issuance proceeding, rather than revoking them individually.