UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

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MEMORANDUM

LEGAL AND ENFORCEMENT COUNSEL

SUBJECT: Statutory Deadlines for Compliance by Publicly Owned Treatment Works under the Clean Water Act

FROM: Robert M. Perry
Associate Administrator
and General Counsel

TO: Frederic A. Eidsness, Jr.
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ISSUE

Section 21 of the Municipal Wastewater Treatment Construction Grant Amendments of 1981, amended §301(i) of the Clean Water Act by substituting "July 1, 1988," for "July 1, 1983." What effect, if any, does this amendment have on the statutory compliance deadlines for publicly owned treatment works contained in §301(b)(1)(B) and §301(b)(1)(C), and on the authority of EPA and States to establish compliance schedules by the exercise of enforcement discretion?

ANSWER

Section 21 of the 1981 Amendments does not amend the July 1, 1977, compliance deadlines for POTWs contained in §301(b)(1)(B) and §301(b)(1)(C). However, under §301(i) as amended, EPA and States with approved NPDES programs may extend this deadline in NPDES permits up to, but not beyond, July 1, 1988, for POTWs which satisfy the criteria in §301(i) and implementing regulations. Although permits for POTWs which do not qualify for §301(i) extensions must require immediate compliance, EPA and States may use their enforcement discretion to establish compliance schedules in the context of enforcement actions, such as administrative orders and judicial decrees.

DISCUSSION

In 1972, Congress established July 1, 1977, as a statutory deadline by which publicly owned treatment works (POTWs) were required to comply with effluent limitations based on secondary treatment (§301(b)(1)(B)) and any more stringent limitations, including those necessary to meet water quality standards (§301(b)(1)(C)). Numerous administrative and judicial decisions held that the Agency lacked authority to extend the date for compliance in NPDES permits beyond the statutory deadline.

Bethlehem Steel Corp. v. Train, 544 F.2d 657 (3d Cir. 1976); United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977); Republic Steel Corp. v. Costle, 581 F.2d 1228 (6th Cir. 1978).

With respect to POTWs in particular, the Fourth Circuit held that EPA lacked authority to extend the 1977 deadline in an NPDES permit issued to a POTW, notwithstanding that the Federal Government had illegally impounded Federal construction grant money. State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977). However, the court also noted that the Agency had discretion in enforcing the deadline, and that it expected the Agency to exercise its discretion in a responsible manner:

> Our holding in this case does not mean that, absent Congressional action, severe sanctions will inevitably be imposed on municipalities who, despite good faith efforts, are economically or physically unable to comply with the 1977 deadline. We fully expect that, in the exercise of its prosecutorial discretion, EPA will decline to bring enforcement proceedings against such municipalities. Furthermore, in cases where enforcement proceedings are brought, whether by EPA or by private citizens, the courts retain equitable discretion to determine whether and to what extent fines and injunctive sanctions should be imposed for violations brought about by good faith inability to comply with the deadline. In exercising such discretion, EPA and the district courts should, of course, consider the extent to which a community's inability to comply results from municipal profligacy. 559 F.2d at 927-28.

Realizing that many dischargers would fail to meet the 1977 deadline despite good faith efforts, EPA formalized a system by which to establish realistic compliance schedules through the exercise of enforcement discretion. Under this policy, EPA and NPDES States issued "enforcement compliance schedule letters" (ECSLs) to POTWs and industrial dischargers which were unable to meet the July 1, 1977, deadline despite all good faith efforts. An ECSL contained: 1) an expeditious but realistic compliance schedule; 2) the discharger's commitment to abide by the schedule and acknowledgement that the schedule was achievable; and 3) the Agency's commitment not to take further enforcement action if the discharger complied with the schedule.

The Clean Water Act Amendments of 1977 addressed the issue of noncompliance with the 1977 deadline in different ways for municipal dischargers and industrial dischargers. For direct industrial dischargers, Congress chose not to allow any extensions of the 1977 deadline to be contained in NPDES permits. Rather, Congress directed the Agency to use its enforcement discretion in such cases, and authorized EPA to issue "extension orders" under the authority of §309(a)(5)(B). Thus, for industrial dischargers, Congress clearly defined the terms upon which it authorized the

Agency to use its enforcement authority to address noncompliance with the 1977 deadline.

Congress took a different approach for POTWs. Section 301(i)(1) authorized EPA and NPDES States to extend, in NPDES permits, the July 1, 1977, deadline up to July 1, 1983, for POTWs which met certain criteria. EPA was able to establish compliance schedules for most POTWs in §301(i) permits, and stopped issuing ECSLs. As 1983 approached, it became clear that many POTWs could not comply by July 1, 1983, and EPA again needed a device to establish realistic compliance schedules. Rather than resurrect the ECSL policy, EPA decided to use its enforcement authority under §309(a)(5)(A). This subsection, added by the 1977 CWA Amendments, authorizes EPA to issue administrative orders which "specify a time for compliance . . . not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." The October 1979 National Municipal Policy and Strategy directed EPA Regions to issue §309(a)(5)(A) orders to POTWs, establishing compliance schedules which could exceed the 1977 deadline, for secondary treatment, but which were not to exceed the 1983 deadline for the more stringent "best practicable waste treatment technology over the life of the works" ("BPWTT") required by §301(b)(2)(B).

In the 1981 CWA Amendments, Congress chose not to supercede the Agency's practice of using §309(a)(5)(A) orders as a means of establishing compliance schedules for POTWs through the use of enforcement discretion. However, Congress repealed §301(b)(2)(B), thereby eliminating the major reason for requiring that such orders not extend beyond July 1, 1983. Congress also amended §301(i) by substituting "July 1, 1988" for "July 1, 1983," wherever the latter appeared, thus allowing NPDES permits for qualifying POTW's to contain compliance schedules up to July 1, 1988.

However, Congress did not modify the 1977 statutory deadline contained in Section 301(b). In fact, §21(a) of the 1981 amendments explicitly states that the Amendments are not intended to extend schedules of compliance then in effect, except where reductions in financial assistance or changed conditions affecting construction beyond the control of the operator made it impossible to complete construction by July 1, 1983.

There is even stronger support for the authority of the Agency (acting through the Department of Justice) and the district courts to establish compliance schedules in judgments entered in civil enforcement actions, including compliance schedules that extend beyond a statutory deadline.[1] (Indeed, if the compliance

[1] As you are aware, the Administrator has issued a policy on enforcement of the December 31, 1982 deadline for attainment of primary ambient standards under the Clean Air Act. This policy assumes that equitable relief may be obtained in judicial enforcement proceedings.

schedule did not extend beyond the statutory deadline, there would probably not be a need to resort to an enforcement action.) The quotation from the State Water Control Board case cited above supports this position. Moreover, the recent Supreme Court decision in Weinberger v. Romero-Barcello, 50 L.W. 4434 (April 27, 1982) provides strong confirmation of this view.

It is important to emphasize the limited purpose and effect of an administrative order, or a judicial decree, that establishes a compliance schedule extending beyond a statutory deadline. Such an order or decree does not "extend the deadline," in a legal sense, for neither the Agency nor the judiciary has authority to amend or disregard a statute.[2] Rather, such orders and decrees are a means of enforcing the statute, and achieving compliance. Neither administrative orders nor judicial decrees "allow" or "permit" continued violations of the law, but rather require compliance with it, as expeditiously as possible.

In summary, the 1977 deadlines in §§301(b)(1)(B) and 301(b)(1)(C) remain in effect for any POTW which does not qualify for an extension under §301(i). However, both judicial interpretation and Congressional acquiesence support EPA's view that the Agency may, and should, use enforcement discretion in a responsible manner to establish expeditious but realistic compliance schedules for POTWs. Use of judicial enforcement and §309(a)(5)(A) orders for this purpose, in appropriate cases, are responsible methods by which to exercise that discretion.

[2] Therefore, courts have held that issuance of an administrative order - even if the discharger complies with it - does not absolve the discharger from liability for the violation, or preclude the Agency from commencing a judicial enforcement action based on the same violation. United States v. Earth Sciences, Inc., 599 F. 2d 368 (10th Cir. 1979). United States v. Outboard Marine Corp., 12 ERC 1346 (N.D. Ill. 1978). United States v. Detrex Chemical Industries, Inc., 393 F. Supp 735 (N.D. Ohio 1975) Nor does issuance of an administrative order preclude citizens' suits against the discharger under §505 of the Act.