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

OFFICE OF ENFORCEMENT

MEMORANDUM

To: Regional Enforcement Division Directors
State NPDES Program Directors

Subject: Questions Regarding the Policy and Procedures for Enforcement Compliance Schedule Letters

Subsequent to the issuance of the three memoranda on June 3, 1976, that dealt with enforcement actions against municipal and industrial dischargers failing to meet the July 1, 1977, statutory deadlines and procedures for issuing Enforcement Compliance Schedule Letters (ECSL's), a number of questions have been raised and requests for clarification received. They originate from Regions, States, public interest groups, and dischargers. The following question and answer format is provided to present and respond to those concerns.

1. What is the scope of application of the ECSL enforcement policy as it pertains to industry?

The ECSL policy is to be carefully applied to afford relief only to those industrial dischargers that: (1) do not presently have a final effective permit; and (2) cannot achieve best practicable control technology (BPT) by July 1, 1977, despite all reasonable good faith efforts to do so. The ECSL is not to be used to give relief to industrial dischargers that are in violation of compliance schedules or in any way to undermine the integrity of the July 1, 1977, statutory deadline. This criteria should limit the number of ECSL's to less than 250 major industrial dischargers. The memo "Procedures for Issuance of Enforcement Compliance Schedule Letters" specifically cites in the "Policy" section that ECSL's are "...to be used only in those specific instances described in written policy guidance...."

2. Shouldn't there be a maximum period of time (say 2-1/2 years) beyond which no schedule may be extended for an industrial discharger to achieve compliance?

Any concern over the absence of a predetermined amount of time that an industrial discharger may have to achieve compliance is understandable. However, a basic premise in the ECSL approach is to establish a schedule that would be no shorter even if an enforcement

action was taken. That is, judicial action could not be expected to decrease the time required to achieve compliance. Setting an outside date is not consistent with that approach. Each ECSL is to be considered on a case-by-case basis after examination of a construction management analysis. This date must be the shortest reasonable schedule for the achievement of BPT. The existence of an outside date would be nothing more than a target and would not provide the Agency with the intended response.

3. Do ECSL's constitute any relief or might they shield a discharger from meeting the 1983 statutory requirements?

The ECSL does not constitute any such relief. It applies only to the 1977 statutory requirements. Potential recipients of ECSL's are to be advised that full and timely compliance with 1983 requirements is expected. Such a provision should be included in the ECSL.

4. Is there any additional guidance that can be given to characterize "good faith"?

In defining "good faith" it is important to look to the underlying rationale for this policy, i.e., where a judicial enforcement action would not be expected to result in a penalty against the discharger under generally accepted judicial remedial principles, the filing of an action would not result in any sanction and would only serve to lengthen the time before a compliance schedule were begun. Accordingly, guidance in applying the "good faith" standard should be sought in the judicial opinions which are legion in applying a good faith test. As far as availability of the factual information to be used in applying this legal standard is concerned, the record of performance of a major industrial source is well documented in the compliance files and this should normally be sufficient to evaluate its efforts. In those cases where it appears that some additional factual information or clarification is necessary, such facts and information are readily attainable in the customary modes.

5. What is intended by the criteria limiting ECSL's to dischargers that do not have a "finally effective permit"?

The intention was to limit the availability of ECSL's to dischargers for which the Agency has not taken final action with respect to the issuance of a permit by July 1, 1977. This would include dischargers to which the Agency has not issued a permit, municipalities to which

the Agency has issued short term permits expiring prior to July 1, 1977, and permits containing effluent limitations or compliance schedules which have been stayed by the pendancy of an adjudicatory hearing. This was not meant to preclude the use of an ECSL for a discharger which has agreed to all terms of a permit with the exception of the physical possibility of compliance by July 1, 1977, has exhausted its administrative remedies with regard to that issue, and has appealed its permit on that issue to a court of appeals. An ECSL would be available to such a discharger in conjunction with a permit being issued presently. There is no reason to preclude the availability of an ECSL to a discharger that pursued judicial review of a permit issued prior to the issuance of the ECSL policy. Since one of the factors underlying the ECSL policy is the necessity of dealing with physical inability to comply with the 1977 deadline in a non-resource intensive manner, ECSL's should not be issued generally to such dischargers that intend to pursue judicial review after receiving an ECSL. That would result in duplication of effort by this Agency. There may be isolated cases, however, in which the Agency has an interest in the completion of judicial review while not jeopardizing the discharger by withholding an ECSL. ECSL's may be appropriate in such limited cases, but should not be issued without the prior concurrence of the Assistant Administrator for Enforcement.

6. May the ECSL be used in cases where there is a finally effective permit but all parties agree that the schedule is not appropriate?

No. Once a permit has been issued and its terms have not been contested, its terms are legally binding. Violation of those terms are to be dealt with with the normal enforcement responses.

7. May ECSL's be used for dischargers or planned dischargers that will tie-in to municipal waste collection systems after July 1, 1977?

The ECSL policy was not qualified to include this purpose and should not be used in such cases. The tie-in question is being examined in the light of potential legislation and earlier EPA statements on the subject, and further guidance is planned.

8. Is it necessary to repeat the same public participation requirements for an ECSL in a case where: (1) a permit has been issued but appropriate portions are stayed pending an adjudicatory hearing; (2) all public participation requirements were met for the permit; (3) appropriate issues have been resolved; and (4) it is not necessary to issue or reissue the permit with the ECSL?

Yes. It is recognized that the "underlying permit" may not be issued on the same date as the ECSL, but the public participation requirement of the ECSL procedures memo was not intended as applying only where the permit and ECSL were issued simultaneously. The public participation requirements must be followed for every ECSL.

9. Should interim effluent limits be included in the ECSL?

Yes. Interim effluent limits should be included in the permit insofar as they pertain to the period prior to July 1, 1977, and interim limits should also be included in the ECSL to assure no misunderstanding as to the discharger's responsibility to continuously meet those effluent limits prior to the date set to achieve the final effluent limitations.

10. What additional guidance can be given on what constitutes an appropriate "critical path or other construction management analysis"?

A "critical path or other construction management analysis" may be provided by a number of techniques. (e.g. Critical Path Method or Program Evaluation and Revue Technique). Then such an analysis would depict activities (prepare application, order equipment, construct clarifiers, etc.) and events (application approved, equipment received, construction complete, etc.) and should determine the expected time of completion of the total project and times of completion of the subprojects of which it is composed. It is not intended that a particular technique be used. Considerable unnecessary debate could attend such specific guidance. A helpful rule of thumb would be to seek and approve any construction management analysis that would provide to a judge a satisfactory means of assessing the appropriateness of the schedule and overviewing progress toward completion.

11. Should a time limit be established on the period allowed a discharger to submit information necessary to qualify for an ECSL? If so, what is the deadline?

Each Region, with the knowledge it has on the potential for ECSL's and an awareness of the time needed to review the information and process an ECSL, may set deadlines beyond which only enforcement remedies will be considered. It should be clear to any discharger having potential for an ECSL that the time taken to request and submit the necessary documentation is an important consideration in the assessment of good faith.

12. Must both EPA and an NPDES State sign an ECSL?

No. The policy suggests that co-signing may be sought by the permittee and provided, but there is neither a requirement nor a prohibition in this regard. Each authority must make its own determination based on its assessments.

13. Could the criteria to allow an ECSL for a municipality be extended to include those where funding from current appropriations is reasonably expected by September 30, 1977, rather than by July 1, 1977?

The rationale for this request is understandable in the framework of the construction grants program. However, the principles underlying the policy are rooted in the issue of the 1977 compliance date and are clearly severed by the case referenced in the Eastern District of Virginia (8 ERC 1609). Such exceptions would only be considered under the provisions for prior written approval by the Assistant Administrator for Enforcement.

14. Should a State be allowed to submit or prepare documentary evidence and construction schedule analyses on behalf of a discharger?

Provided the discharger properly assumes responsibility and attests to the documentation, there is no prohibition against such assistance. Each Region should guide the respective NPDES States in this matter, considering such factors as conflicting interests, availability of resources to treat all dischargers equally, and potential for placing the State as a regulatory agency in a compromised or defensive posture. In general, it would appear to be an unwise approach.

15. What should be done in cases where a State refuses to certify a permit associated with an ECSL?

Since an ECSL is merely the formalization of the exercise by the Agency of its enforcement discretion, State certification is not relevant to the issuance of an ECSL. Certification is only a requirement for the issuance of a permit. As in the normal case, denial of State certification of a permit means that the permit must be denied and that enforcement for discharging without a permit should be commenced. Since the ECSL policy calls for the issuance of a permit requiring that the discharger meet its statutory obligations by July 1, 1977, a denial of State certification on the grounds that the permit does not comply with the statutory deadline would appear on its face to be erroneous. However, that is a matter to be settled in the State forum. Appropriate enforcement should be commenced following a denial of a permit on the basis of a denial of State certification.

16. Are approved NPDES States required to use ECSL's? Should NPDES States use ECSL's as a preferred approach to situations fitting the criteria in the ECSL policy?

The ECSL is an option that has been authorized for use in limited cases in addition to other enforcement mechanisms available to NPDES States. NPDES States are encouraged to use the ECSL in appropriate situations. NPDES States are not required to use ECSL's. It is recognized that some States may believe that the use of ECSL's may in some cases be limited by State laws or judicial doctrines. The normal array of enforcement options remain available to them. The use of an ECSL depends on a judgement that it affords the best opportunity for assuring the most expeditious accomplishment of the statutory waste treatment requirements. The July 3, 1976, ECSL policies place considerable emphasis on firm and prompt enforcement to assure the integrity of the program. Enforcement remedies such as administrative orders and referrals for judicial action should be used when they would be the most expeditious manner to assure compliance in the statutory requirements.

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