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

MEMORANDUM

OFFICE OF ENFORCEMENT

TO: James O. McDonald, Director
Enforcement Division, Region V

FROM: Deputy Assistant Administrator for Water Enforcement
(EN-335)

SUBJECT: Additional Questions on Enforcement Compliance
Schedule Letters

This is in response to your memo transmitting "Additional Suggested Questions on Enforcement Compliance Schedule Letters." Your memorandum arrived shortly before the final changes were made in the memorandum of December 10, 1976, from the Assistant Administrator for Enforcement, that provided questions and answers on the ECSL policy, and we did not attempt to revise that memo. The questions attached to your memo are restated below together with answers in the same format used in the December 10 memorandum.

1. "The theory of the ECSL is that it is only the exercise of the enforcement discretion, not a modified permit. In the Adjudicatory Hearing situation, however, knowledge and approval of all those participating would be needed.

   Would it therefore be appropriate to have the Adjudicatory Hearing settlement stipulation address both the modified permit and the ECSL and attach both as exhibits?"

In cases where an adjudicatory hearing settlement contemplates the issuance of an ECSL, the settlement stipulation still must require the achievement of the appropriate limitations established under the FWPCA on or before July 1, 1977. Anticipating the issuance of an ECSL, it may contain factual rationale for an extended compliance schedule, and a recitation of the circumstances that warrant a finding of good faith. It should not contain an express commitment by EPA to issue an ECSL, as the exercise of enforcement discretion is an issue separate and distinct from the matters in controversy at the hearing. For that reason the consent of other parties to the hearing is neither necessary nor appropriate in issuing the ECSL.

2. "In view of item #12 (Draft Response), what if a State takes over the program after U.S. EPA has issued an ECSL, and the state had not itself signed the ECSL; is it bound by the ECSL?"

Since an ECSL is a documentation of the Agency's exercise of its prosecutorial discretion, it does not bind a State unless the State is a signatory. That is, a State is bound by its own action; and ECSLs issued by EPA do not mitigate against any State taking action under section 505. It would be appropriate, however, to provide the State the opportunity to co-sign any ECSL. Although State agreement is not a prerequisite, the ECSL policy encourages coordination and cooperation with the State in the development of ECSL conditions whether or not the State has NPDES program approval. When such coordination has taken place, the risk of later conflict in a situation such as described would be minimized.

3. "What about extending compliance schedule dates after issuance of an ECSL by modifying the ECSL? Would another Public Notice be required?"

The ECSL policy does not contemplate the modification of an ECSL. Should the compliance dates contained in the ECSL not be met, it would usually be appropriate to elect other enforcement measures as the most appropriate course of action. In the unusual situation where an ECSL is modified, the modification should be subject to public notice.

4. "Where an Adjudicatory Hearing has been settled by a withdrawal agreement contingent upon permit modification and ECSL, and a public notice issued as to the modified permit, can this notice also reference the ECSL or must there be two separate public notices?"

The public notice used with regard to the modification of a permit (presumably a matter not related to the extension of a compliance date beyond July 1, 1977) may be used for the purpose of providing notice of an ECSL that deals with the same permittee's compliance schedule.

5. "When is a permit finally effective for the purpose of an ECSL? Where some or all of a permit is being held in abeyance by an adjudicatory hearing request, this is <u>not</u>, per the June 3 memo, a finally effective permit. At what stage does it become finally effective:

ALJ record to RA?
RA ruling?
Administrator EPA ruling?
Circuit Court of Appeals decision?
U.S. Supreme Court decision?"

A permit becomes finally effective when the Agency takes its final administrative action without further administrative appeal, i.e., permit issuance when not followed by a request for an adjudicatory hearing which is granted, the RA's decision in an adjudicatory hearing when not followed by a request for appeal-to the Administrator which is granted, or the Administrator's decision on appeal. In some situations, however, it may be appropriate to issue an ECSL to settle an appeal of the Administrator's decision to the Court of Appeals (see the answer to Question #5 in the memorandum of December 10, 1976, from the Assistant Administrator for Enforcement, on this subject).

6. "Should the ECSL include a reference to the permit reporting requirements and/or include reporting requirements on the interim limits? Once the final limits are attained, or the final increment of the compliance schedule is reached, does the ECSL expire and the permit take over?"

The answer to both questions is "yes". Any interim limit <u>and</u> attendant monitoring and reporting requirements should be in the ECSL. The "Sample Enforcement Compliance Schedule Letter" provided with the June 3, 1976, memorandum on "Procedures for Issuance of Enforcement Compliance Schedule Letters" includes the following provision: "Unless previously revoked, the effectiveness of this Enforcement Compliance Letter shall expire thirty (30) days after the date specified above for achievement of the Limitations of the Discharge." Early compliance is an appropriate reason for revoking the ECSL. The permit would then stand alone as a basis for assessing compliance.

7. "There is no specific statement anywhere in the several June 3, 1976, memoranda or the October, 1976 Draft Response that there can be no request for adjudicatory hearing pursuant to an ECSL. But it is also not specifically allowed in any of these documents. The June 3 Procedures memo, however, states:

> "When the permit issuing authority intends to use an ECSL in connection with the issuance of NPDES permits, the ECSL should be subject to the same public participation requirements as the underlying permit."

Does this include the right of "any interested person" to request an adjudicatory hearing within 10 days after issuance of permit and ECSL?

If not, are the levers available to the public:

1. To complain at the public hearing;

2. To take action via a section 505 Citizen's Suit?"

Because of the nature of the action taken by a regulatory agency in issuing an ECSL, the public participation requirements of the ECSL policy were not intended to extend to requests for an adjudicatory hearing. If serious matters or controversy arise, it may be more appropriate to pursue other enforcement measures in order to establish appropriate compliance schedules. The ability of the public to know the nature of action taken by EPA or an NPDES State when there is non-compliance with permit schedules is assured by the quarterly non-compliance reports. Permittees failing to comply with their permit schedule must be included in the quarterly non-compliance report; and when an ECSL has been issued or is contemplated, that should be noted as the action taken or proposed. A citizen's ability to act is the same as in the case of any discretionary enforcement measure. One of the features of the ECSL policy is that it does not foreclose citizen suits. The added assurance of public participation in the case of ECSL's is the public notice and opportunity for public hearing whereby the views and complaints of all parties may be heard.

8. "Regarding item #7 of the draft response, why shouldn't an ECSL be allowed for an industrial tie-in to a municipal plant after July 1, 1977, where a discharger has no effective permit and it is not physically possible to meet BPT by July 1, 1977, by either construction of discharger's own treatment system or through tie-in to the municipality?"

A discharger that has no effective permit and meets the other qualifications for the issuance of an ECSL may be issued an ECSL. An ECSL for such a discharger may specify that the discharger connect to

another treatment facility by a date-certain. While this is not a typical tie-in situation, it is one for which an ECSL may be used. Situations in which (1) an industrial discharger has a finally effective permit requiring a connection to a POTW and (2) the industry will be unable to comply with its permit because of the unavailability of the municipal treatment, will be dealt with under a separate policy currently being developed.

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