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

MAR 22 1978

OFFICE OF GENERAL COUNSEL

MEMORANDUM

SUBJECT: Confidentiality of NPDES Permit Applications

FROM: Joan Z. Bernstein
General Counsel (A-130)

TO: Thomas C. Jorling
Assistant Administrator for
Water and Hazardous Materials (WH-556)

Marvin Durning
Assistant Administrator
for Enforcement (EN-329)

Attached is a Class Determination I have issued concerning the status of potentially confidential business information contained in NPDES permits and NPDES permit applications. I have concluded that section 402(j) of the FWPCA requires that NPDES permits and permit applications be made public notwithstanding the fact that some of the information contained in them would otherwise be treated as confidential.

The Class Determination will be used by this office and the Regional Counsels in making final confidentiality determinations under the regulations in 40 CFR Part 2, Subpart B. Any request for confidentiality of information in a permit application or permit would be denied citing the Class Determination. The applicant would be given 10 days notice prior to disclosure in which to seek a judicial remedy. At the end of the 10-day notice period the information would be made available to the public.

An important part of implementing this Class Determination is to inform the various EPA regions and State agencies of the decision. I have informed the Regional Counsels of the Class Determination and of the way in which it is to be implemented. You will need to inform your counterpart offices in the Regions and the States.

I think it is also important that this be reflected in the NPDES regulations, in the application forms, and in any informational materials used by EPA to explain the NPDES program.

From what I have been able to determine, this decision may be a change from past practice in the treatment of information in NPDES permit applications. I believe that in the past section 402(j) was overlooked, and most offices treated information in NPDES permit applications the same as section 308 information. Accordingly, it will take time to bring everybody up to speed on this change.

If you have questions about how your offices should implement the Class Determination or other related matters, contact James Nelson at 755-0794.

Attachment

CLASS DETERMINATION 1-78

CONFIDENTIALITY OF INFORMATION IN NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMITS AND PERMIT APPLICATIONS UNDER SECTION 402(j) OF THE FEDERAL WATER POLLUTION CONTROL ACT

Under the Federal Water Pollution Control Act (FWPCA), as amended (33 U.S.C. 466 et seq.), the Environmental Protection Agency (EPA) or counterpart State agencies issue National Pollution Discharge Elimination System (NPDES) permits to individual sources of water pollution. This program is administered primarily in EPA's Regional offices. Those offices have asked for a Class Determination concerning the confidentiality of information contained in NPDES permits and permit applications in light of section 402(j) of the FWPCA. Under 40 CFR 2.207, I have authority to issue Class Determinations concerning the confidentiality of classes of information obtained by EPA.

In the case of information contained in NPDES permit applications and NPDES permits, I have found:

1. EPA possesses and will continue to acquire information in NPDES permits and permit applications.

2. The information contained in NPDES permits and permit applications is of the same character. It is proper to treat all of the information as in the same class.

3. A Class Determination would serve a useful purpose in clarifying the status of potentially confidential information contained in NPDES permits and permit applications as restricted by section 402(j) of FWPCA.

I have determined that information contained in NPDES permits and NPDES permit applications is not entitled to confidential treatment because section 402(j) of the FWPCA mandates disclosure of this information to the public notwithstanding the fact that it might be trade secrets or commercial or financial information.

Section 402(j) of FWPCA states "[a] copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available upon request for the purpose of reproduction." This language is different from that in section 308 of the FWPCA. Section 308 is the basic information gathering authority of the FWPCA. Paragraph (b) of section 308 states "[a]ny records, reports, or information obtained under this section...shall be available to the public, except upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code...."

The inconsistency between the language of section 402(j) and that of section 308 was brought to the attention of the House Committee on Public Works in a letter dated December 13, 1971, from William Ruckelshaus, Administrator of EPA. Congress chose to treat the information covered

by section 402(j) differently from the information obtained under section 308. In all versions of the bill that became the 1972 amendments to FWPCA, the same basic approach of requiring public disclosure of NPDES permits and permit applications was followed. The only amendments to section 402(j) were to eliminate a specific enumeration of the offices in which copies would have to be kept. In Senate Report 92-414, October 28, 1971, at page 72, the Senate Committee on Public Works made the following comments:

> An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing by the Federal Government, or if State participation is approved by the Administrator, the State, and other provisions to make available to the public all relevant information surrounding a discharge source and the control requirements placed on it. This includes the deposit of any permit, and the conditions thereto, in a place of ready public access. The scrutiny of the public and the exercise of authority under this section is extremely important to insuring expeditious implementation of the authority and a high level of performance by all levels of government and discharge sources.

It is clear from the language of section 402(j) and the legislative history of that provision that Congress intended section 402(j) to be a disclosure mandate in contrast to the basic approach of section 308 which provides protection for trade secret information. Accordingly, EPA is required to make public NPDES permits and NPDES permit applications.

The NPDES permit application is a standard form specified by EPA. It asks the applicant to supply certain specific information. In some cases, there is insufficient space for the applicant to supply all of the requested information. In those cases the applicant attaches additional sheets with the further information. For purposes of section 402(j), the NPDES permit application required to be made public is the application form itself and any attachments that are used to supply information requested by the application form. Any information obtained by EPA that goes beyond that asked for in the application, whether submitted by the applicant or obtained by EPA under authority such as 40 CFR 125.13, is not considered part of the permit application as contemplated by section 402(j). This additional information will be treated in accordance with the procedures of 40 CFR 2.302.

If an applicant has claimed as confidential any information contained in the NPDES permit application or the NPDES permit, confidential treatment will be denied in accordance with this Determination and notice given to the applicant in accordance with 40 CFR 2.205(f).

Joan Z. Bernstein
General Counsel (A-130)

3/22/78
Date