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

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OFFICE OF
GENERAL COUNSEL
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MEMORANDUM

TO: Assistant Administrator for Enforcement

Regional Enforcement Directors

NPDES State Directors

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

SUBJECT: Certification and Permitting of Dischargers Located on Waters Forming Boundries Between States

## QUESTIONS PRESENTED

When a facility is located within one State, but the end of the discharge pipe is located within the waters of another State, which State has certification rights pursuant to Section 401 of the Clean Water Act ("The Act")? If the Section 402 NPDES permitting authority has been transferred by the Administrator to the States, which State has the 402 permitting authority?

## FACTS

On February 16, 1978, the Atomic Safety and Licensing Appeal Board of the Nuclear Regulatory Commission issued a decision which interpreted Section 401 of the Act. The Board determined that the proper State to issue a certification is the State which has jurisdiction over the navigable waters in which the discharge originates rather than the State in which the facility is located. The Board noted that:

> "we are prepared to give substantial weight to the interpretation given a statute by the agency Congress entrusted with its administration. In this case, we acknowledge that EPA is that Agency with respect to the Water Act. But EPA has not specified how Section 401 controls the outcome of the issue

> before us. We are, therefore, left to do so ourselves." (PUBLIC SERVICE COMPANY OF INDIANA, INC., Docket Nos. STN 50546, STN 50-547, slip op. at 20-21, footnotes omitted).

On February 28, we received a letter from the attorneys for the Public Service Company of Indiana requesting that we address the legal issue which is before the NRC. In addition, we had informal communications with representatives from the NRC staff and the Commonwealth of Kentucky similarly requesting that we address the issue. On March 20, we wrote the Secretary of the NRC and notified him that we would prepare a legal opinion on the 401 certification question.

The proposed Marble Hill Nuclear Generating Station will be located in Indiana. Its discharge will enter the Ohio River, which forms the border between Kentucky and Indiana. Apparently, the precise border is located at the low water mark on the Indiana side of the river.1/

The legal question raised is of significance to this Agency because there are 29 rivers in the United States that are boundaries between two States. While the boundary line between the States is usually the midline or thread of the channel of the stream, this is not always the case. For some rivers the boundary line is the high-water mark or low-water mark on one side of the river.

The boundary line creates questions not only in regard to certification under Section 401 of the Act but also in regard to the question of which State has the permitting authority under Section 402 of the Act. In this opinion we shall address both issues.

**ANSWER**

The State in whose waters the discharge originates is the certifying authority pursuant to Section 401 of the Act. Section 401(a)(1) provides that whenever the construction or operation of a facility "may result in any discharge into the navigable waters", the certifying State shall be the one

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1/ There is a factual question as to whether the discharge originates in Kentucky or Indiana waters. As noted in our March 20 letter, we shall not address this factual question.

"in which the discharge originates or will originate." While it might be argued that a discharge of pollutants actually "originates" where the manufacturing or industrial facility is located, rather than at the end of the discharge pipe, the entire structure of the Clean Water Act, its legislative history, and intent clearly establish that the State whose waters are affected by the discharge is the proper certifying State.

Similarly, the State in whose waters the discharge originates is the Section 402 permitting authority. Section 402(b) provides that a permitting State shall "administer its own permit program for discharges into navigable waters within its jurisdiction."

The State in which the facility is located has rights pursuant to Section 401(a)(2) and Section 402(b)(5) only to the extent that the quality of its waters is affected by the discharge.

DISCUSSION

The Clean Water Act is a comprehensive statute designed to reduce and ultimately to eliminate the discharge of pollutants into the nation's waters. The Act provides for a delicate partnership between the Federal government and the States in achieving this result. A major responsibility of the Federal government under the Act is the development and promulgation of uniform national technology-based standards for categories and classes of industrial dischargers. At the same time, the States are granted the authority (with Federal support and in some cases oversight) to institute a range of more stringent, more comprehensive requirements to assure protection of the navigable waters within each State.

Pursuant to Section 510 of the Act, the States are empowered to develop more stringent water pollution control requirements than those developed by EPA. Section 510(2) also explicitly retains the authority of each State to control the waters within its jurisdiction.

In addition to these general powers, the Act provides that States shall have a series of rights and responsibilities based upon the State's jurisdiction and control over waters

of the United States. Section 208(a)(2) of the Act requires a State or its designated areawide agency to develop comprehensive pollution control plans for areas of the State which have "substantial water quality control problems." Clearly the State whose waters are affected must take the lead role in devising a plan to protect its waters.

Under Section 303 of the Act each State is required to develop water quality standards for all waters within its jurisdiction. Such standards consist of a designated use/uses of the stream (e.g. "protection and propagation of fish and wildlife") and criteria necessary to support the use, (e.g. "not less than 5 mg/l of dissolved oxygen"). Prior to the passage of the 1972 Amendments, such water quality standards were the major water pollution control mechanism under the Federal law. See State Water Control Board v. EPA, 426 U.S. 200, (1976). While the role of water quality standards was somewhat diminished by the 1972 Amendments, the standards form a major basis for numerous State and Federal programs. The difference between the designated standards and the actual ambient water quality may provide the basis for Section 208 planning. Under Section 303(d) of the Act, States must identify those streams where the federal technology-based standards are insufficient to meet the designated water quality standards. The States are required to develop maximum daily loads for such streams and to develop more stringent effluent limitations which will achieve the standards as part of the continuing planning process under Section 303(e).2/

These State plans, laws, regulations, and other requirements are translated into limitations applicable to individual point source dischargers through the NPDES permit program pursuant to Section 402 of the Act. And under Section 208(e) of the Act, no permit can be issued which is in conflict with an approved 208 plan. Under Section 301(b)(1)(C), a discharger must achieve by July 1, 1977, any more stringent limitation necessary to meet the requirements of State law,

2/ In addition, Section 305(b) requires each State to submit biannually a report describing the water quality of all navigable waters within the State and the steps which will be taken to improve water quality.

including water quality standards. The 402 permitting authority is required to assure that permits are consistent with Sections 208(e) and 301(b)(1)(C), and thus consistent with the requirements of State law including State water quality standards and limitations developed pursuant to such standards.

Section 401 of the Act provides another mechanism to insure that NPDES permits (as well as other Federal licenses and permits) meet the requirements of state law, particularly State water quality standards. Section 401 has its origins in Section 21(b) of the Water Quality Improvement Act of 1970, April 3, 1970, P.L. 91-224, 84 Stat. 91. This provision required that any applicant for a federal license or permit which might result in a discharge into navigable waters must provide the permitting authority with a certificate from the State in which the discharge originates or will originate that:

> "There is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards."

Section 21(b)(1) also provided that if the standards had been promulgated by the Secretary of the Interior, the certification should be from the Secretary. Section 21(b(9) further provided that if there were no applicable water quality standards, no certification should be required. Section 21(b) therefore recognized that the appropriate certifying authority is that which has developed and implemented water quality standards for the water body into which the discharge originates, since only the authority that develops and implements the standards could provide the "reasonable assurance" that the standards won't be violated.

The substance of Section 21(b) became Section 401 of the 1972 Federal Water Pollution Control Act Amendments. The State was no longer required to directly certify that its water quality standards would be met by the permit, but was instead required to certify that the discharge would comply with "the applicable provisions of Sections 301,

302, 306 and 307 of this Act."3/ It is clear from the legislative history of the 1972 Amendments that the major purpose of Section 401 was to allow a State to assure that its water quality standards would be met.

As noted in the Senate Report:

> "The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."

A Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works, Committee Print, 93rd Cong. 1st. Sess., 1973 ("Leg. Hist.") at 1487.

In his statement on the Conference Bill, Senator Muskie further explicated this concern:

> "If a State establishes more stringent limitations and/or time schedules pursuant to Section 303, they should be set forth in a certification under Section 401." Leg. Hist. at 171.

3/ Section 401 was amended by the Clean Water Act of 1977 to include Section 303 in the list of enumerated sections. As stated in the Conference Report:

> The inserting of Section 303 into the series of sections listed in Section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under Section 402, must be certified to comply with State water quality standards adopted under Section 303. The inclusion of Section 303 is intended to clarify the requirements of Section 401. It is understood that Section 303 is required by the provisions of Section 301 . . . Section 303 is always included by reference where Section 301 is listed. (House of Representatives, Report No. 95-830, 95th Cong. 1st Sess. December, 1977 at 96)

> "Secondly, the Conferees agreed that a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State." Leg. Hist. at 176.

The legislative history of Section 401 thus shows that Congress intended that the certifying State be the State with jurisdiction over the navigable waters at the point of discharge.

The language of Section 401 itself further supports the same conclusion. First, Section 401(a)(1) grants certification to the State "in which the discharge originates or will originate." Under Section 502(12) the discharge of the pollutant is defined as "any addition of any pollutant to navigable waters from any point source." Thus, there is no discharge until the pollutants enter navigable waters. For the purposes of Section 401, at least, the discharge thus originates at the point at which it enters the navigable waters.4/

Secondly, when an interstate water pollution control agency "has jurisdiction over the navigable waters at the point where the discharge originates or will originate" it, rather than any State has the certifying authority. This is further indication that the certifying authority derives from jurisdiction over the navigable waters, not over the land where the facility is located.

Section 401(a)(3) provides further support for this conclusion. Pursuant to Section 401(a)(3), a certification with respect to the construction of any facility also is binding upon any subsequent operating licenses for such a facility, except that the certification may be withdrawn because of changes in four circumstances:

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4/ In his discussion of Section 401, Senator Muskie says that the certification should come "from the State in which the discharge occurs." (Leg. Hist. at 1388, emphasis added) While there may be some question as to where a discharge originates, there can be no question that the discharge occurs in navigable waters.

It may be that the Congress used the word originates to distinguish between the State in whose waters the discharge initially enters from a downstream State whose waters are also affected by the discharge. See footnote 5, infra.

> (A) The construction or operation of the facility, (B) the characteristics of the receiving waters into which such discharge is made, (C) the water quality standards applicable to such waters, or (D) applicable effluent limitations or other requirements."

A concern for the receiving waters and the criteria applicable to such waters is primarily a concern of the State which has jurisdiction over the receiving waters. A State in which the facility is located may have a variety of concerns about the facility but does not have any direct concern or jurisdiction over the waters affected by the discharge.5/

Our interpretation of Section 401 is further buttressed by a reading of Section 402 of the Act. Under this section, permits are issued to point source dischargers. Although permits are initially issued by EPA, the Act provides that the permitting authority may be transferred to a State which has an adequate program. Section 402(a)(5) provides for a temporary transfer, while Section 402(b) provides for a more permanent transfer. Both sections provide that the State has the power to issue permits for all discharges into its navigable waters:

> "The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into navigable waters within the jurisdiction of such State." Section 402(a)(5) (emphasis added).

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5/ Section 401 does provide protection for any other State whose water quality may be affected by the discharge. Section 401(a)(2). Such State may object to the issuance of a permit and request a public hearing. The permitting agency is then required to hold a public hearing and to "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements."

States whose waters may be affected by the issuance of an NPDES permit by another State also have rights to assure protection of their water quality. See Sections 402(b)(5) and 402(d)(2)(A).

> "At any time after the promulgation of the guidelines required by subsection (h)(2) of Section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." Section 402(b) (emphasis added).

Thus, the explicit statutory language of Section 402 authorizes a State to issue permits for all discharges into navigable waters within its jurisdiction.6/

In its letter requesting our opinion on this issue, the Public Service Company of Indiana suggested that the opposite answer would be preferable administratively since it would avoid the necessity of making a factual/legal determination in each case as to who owned the waters at the point of discharge. We recognize that in some circumstances such a determination may demand the resources of the permitting agency, but we believe that these considerations are insufficient to override the clear language of the Act, its legislative history, and its goals.

It has also been suggested that in issuing permits to facilities located in another State, the permit granting State may encounter difficulties in providing for inspection and monitoring of the facility, and in the enforcement of the permit. We do not regard these difficulties as insuperable, since we assume that all permits would include provisions allowing the issuing State to monitor and inspect the facility. In enforcing these provisions, or other provisions of a

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6/ The House Report clearly states that a permitting State does not have jurisdiction to issue permits for discharges into navigable waters outside of State's jurisdiction:

Subsection (a)(5) further provides that the Administrator may authorize a State, which he determines has the capability of administering a permit program, to issue permits for the discharges into the navigable waters within the jurisdiction of such State (but not in the contiguous zone or the ocean). Leg. Hist. at 813. (emphasis added).

permit, the issuing State could bring an action in its State courts and should be able to establish that the defendant had sufficient contacts necessary to support the State's long-arm jurisdiction.

The questions answered in this opinion have not previously been formally addressed by this Agency. It is our understanding that this opinion is consistent with the actual "real world" permitting and certifying activities in most regions. A number of regions, however, have evidently allowed States to certify and to issue permits to facilities located in such States which discharge into the navigable waters of another State.

A permit issued by a State which does not have the authority under the Clean Water Act to issue such a permit is jurisdictionally defective, and would not therefore provide a discharger with the protection provided by Section 402(k) of the Act. I urge the Assistant Administrator for Enforcement to take whatever steps are necessary to expedite the re-issuing of such permits.

On the other hand, a Federal permit issued despite the lack of certification from the proper State remains valid. The Federal agency which issued such permit had the jurisdiction to take such action. To the extent that the permit is incomplete or illegal because of lack of proper certification, any injured party could seek judicial review of such permit under the appropriate provisions of Federal law. Any State which failed to assert its certification rights within the prescribed statutory and regulatory time period may be deemed to have waived such rights pursuant to Section 401(a)(1) of the Act.