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

TAB A

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Regional Administrators
Directors of the Approved NPDES Programs

FROM: Assistant Administrator for Enforcement (EN-329)

General Counsel (A-130)

SUBJECT: State Regulation of Federal Facilities Under the Federal Water Pollution Control Act Amendments of 1977 (Clean Water Act) -- POLICY GUIDANCE MEMORANDUM

Introduction

The recent amendments to the FWPCA have significantly changed the regulatory relationship of States to Federal facilities under the FWPCA. First, section 313 of the FWPCA was substantially amended to provide that Federal facilities must comply with substantive and procedural requirements of State law regarding the control of water pollution including State permits. Second, Federal permits to Federal agencies now require State certification under section 401.

State Issuance of Permits to Federal Facilities

Under the 1977 amendments, States are authorized to issue water pollution control permits to Federal facilities. Prior to these amendments, the Supreme Court had held that States could not require federally owned or operated facilities to obtain State discharge permits.1/

1/ EPA v. California Regional Water Resources Control Board 426 U.S. 200 (1976).

Section 313 was amended to require that Federal facilities:

> . . . shall be subject to and comply with all . . . State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . .. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, <u>any requirement respecting permits</u> and any other requirement, whatsoever), (B) to the exercise of any . . . State or local administrative authority . . .. (Emphasis added.)

<u>State and NPDES Permits</u>

States are authorized to issue water pollution control permits to Federal facilities. The section 313 amendments do not restrict this authority to State or NPDES permits, therefore States may issue both. Obviously, only approved NPDES States can issue section 402 permits. Where a non-approved State issues a State permit to a Federal facility, the Regions should continue to issue an EPA permit in the same manner as any other NPDES permit. To the extent possible, issuance by a Region of an NPDES permit in these circumstances should be coordinated with the State to avoid inconsistencies and procedural delays.

The effect that the 1977 Amendments will have on the NPDES permit program as it relates to State regulation of Federal facilities is discussed below. The issuance of State permits to Federal dredge and fill activities, and State administration of the section 404 program is not covered by this memorandum. These issues will be discussed later.

<u>State NPDES Programs</u>

Section 402(c)(1) of the Clean Water Act provides that upon approving a State program, "the Administrator shall

suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program . . .." Except for Federal facilities, it has always been EPA's position that section 402(c)(1) requires States to have authority to issue permits to all point sources. Prior to the enactment of the Clean Water Act of 1977, EPA withheld approval of State NPDES authority over Federal facilities because Federal law precluded States from issuing permits to Federal agencies. The Supreme Court adopted EPA's position in EPA v. California Regional Water Resources Control Board, supra n. 1.

However, in its decision, the Court made it clear that Congress intended "that the States be given maximum responsibility for the permit system . . .." Id. at n. 39. Moreover, the Court approved withholding EPA approval of State programs to the extent that they applied to Federal facilities only because EPA "may not . . . approve a state plan which the State has no authority to issue because it conflicts with federal law." Id. at 226. Now that Congress has amended the Clean Water Act specifically to include Federal facilities within the class of dischargers subject to State permits, it seems clear that States may no longer exclude Federal facilities from regulation, just as they may not exclude steel mills or power plants, or other sources over which they may assert jurisdiction.

Accordingly, all NPDES programs approved before the 1977 Amendments should be modified, including the Memoranda of Agreement, to reflect the States new authority to issue Federal facilities permits.2/ As part of this modification,

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2/ Modification is required because many States are prevented by State law from issuing permits to Federal facilities. Moreover, all States which administer the NPDES program have entered into a Memorandum of Agreement which includes a provision that prevents the State from issuing permits to Federal facilities. For example, the State of Missouri Agreement provides that:

> This agreement does not cover the issuance of NPDES permits to Federal facilities within the State of Missouri. It is understood by both parties that it is the intent of EPA to expressly retain the permit issuance authority for Federal facilities . . ..

the State shall submit a statement from its attorney general that the laws of the State provide adequate authority for issuance of permits to Federal facilities and to carry out the reporting, monitoring, inspection and entry authorities set out below. The Office of Enforcement will develop regulations to require these programs to be modified within one year of promulgation unless a State must amend or enact a law in order to make the necessary modification. In that case the modification must be made within two years of the date of regulation promulgation. Programs may be modified before these regulations are issued. Program modifications should be subject to public notice and opportunity for comment. Modifications to the Memorandum of Agreement must be approved by the Administrator.

It is possible that for some programs only the Memorandum of Agreement need be modified to authorize State takeover of Federal facility permits. In such cases the Regions may relinquish their permit issuing authority to the State solely by modifying the Memorandum of Agreement. Following whatever program modification is necessary, the States become the permit issuing authority for Federal facilities.

Permits issued or in the process of issuance by EPA to Federal facilities located in approved NPDES States should be transferred to the State in the same way other permits were transferred following initial State takeover of the program. In certain cases, however, the Regions may, as an interim measure, issue a Federal facility permit in an approved State before completion of the necessary program modifications if it is apparent that awaiting such modifications will cause an inordinate delay in permit issuance.

Finally, all State programs approved after enactment of the 1977 Amendments (December 27, 1977) must provide for State issuance of permits to Federal facilities. Existing regulations are being changed to reflect this requirement.

Reporting, Monitoring, Inspection and Entry Requirements

The section 313 amendments also explicitly require that Federal facilities comply with any State "recordkeeping or reporting requirement." The Senate Report indicates that this includes any reporting or monitoring requirements. Senate Report at 67.

States must have the right to enter and inspect Federal facilities if their reporting and monitoring authorities are to be meaningful. Moreover, it is clear from the language of section 313 that Congress intended States to have such a right of entry. The President is authorized to grant a "paramount interest" exemption covering "any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property . . .." [section 313(a)] (emphasis added). Clearly, unless the President exempts a Federal facility, a State must be allowed "access" to the facility.3/

Initial State contact with a Federal facility for the purpose of entry and inspection should be closely coordinated with the facility and the Region particularly where access to the facility is restricted.

State Certification Under Section 401

The new amendments eliminated section 401 (a) (6), which provided an exception for Federal agencies from State certification. Accordingly, NPDES permits issued by EPA to Federal facilities require certification by the State that the discharge is in compliance with all of the applicable provisions of sections 301, 302, 303, 306 and 307 of the FWPCA.

Please refer any further questions to Jeffrey G. Miller, Deputy Assistant Administrator for Water Enforcement (8/755-0440).

Marvin B. Durning

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Joan Z. Bernstein

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3/ Section 308(c) authorizes States to exercise entry authority under programs approved by EPA, but such entry authority does not extend to Federal facilities. This section, which was not revised by the 1977 Clean Water Act, cannot be read to weaken or render ineffective the clear authority provided States by the amendments to section 313.

MODIFICATION TO NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MEMORANDUM OF AGREEMENT BETWEEN THE INDIANA STREAM POLLUTION CONTROL BOARD AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION V

The Memorandum of Agreement approved July 22, 1977, by the Administrator of the United States Environmental Protection Agency between the Indiana Stream Pollution Control Board (hereinafter, the "State") and the United States Enviromental Protection Agency (hereinafter, "USEPA") Region V is hereby modified as follows:

The State will administer the NPDES permit program with respect to Federal facilities and has shown that it has the authority to enter and inspect Federal facilities. The State is responsible for the issuance, modification, reissuance, compliance monitoring and enforcement of all NPDES permits in Indiana, including permits applicable to Federal facilities.

All references in the Memorandum of Agreement which have the effect of retai re..ponsibility to USEPA Region V over Federal facilities have no force or effect after the effective date of this Modification. Nothing in this Modification shall be construed to limit the authority of USEPA to take action pursuant to Sections 308, 309, 311, 402, 504, or other Sections of the Act.

INDIANA STREAM POLLUTION CONTROL BOARD

By _____

Date: _____

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION V

By _____

Date; _____

Approved:

_____
Assistant Administrator for Enforcement
United States Environmental Protection Agency

Date: