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

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Review of State NPDES Permits Written Prior to State Program Revision

TO: Regional Enforcement Division Directors

FROM: R. Sarah Compton
Deputy Assistant Administrator
for Water Enforcement (EN-335)

A question has arisen recently as to the applicability of certain requirements contained in the consolidated permit regulations to States which have not yet revised their NPDES programs to explicitly incorporate the consolidated permit requirements. Specifically, we have been asked whether NPDES States can be required to incorporate reopener clauses into their permits if their currently approved programs and practices do not require such a provision. The answer is that mechanisms do exist and should be employed if necessary to assure that reopener clauses are included in all NPDES permits issued before June 30, 1981, which are not based on finally promulgated best available technology (BAT) guidelines.

As discussed in the Revised NPDES Second Round Permits Policy (my memo to you of August 29, 1980), the issuance now of long-term BAT permits based on best professional judgment (BPJ) is appropriate in industries for which BAT guidelines will not be promulgated by June 30, 1981. NPDES States should not be discouraged from issuing such permits in appropriate circumstances. However, as required by the NRDC Settlement Agreement, permits issued before June 30, 1981 and before applicable BAT guidelines have been published, must contain reopener clauses. 40 CFR §122.62(c). The reopener clause ensures that when the BAT guidelines are promulgated, any more stringent limitations will replace the BPJ permit limits.

It has come to my attention that at least one NPDES State has begun to issue long-term BAT BPJ permits which do not contain reopener clauses. Its claimed justification is that its currently approved NPDES program does not require the inclusion of reopener clauses. The requirement to include reopener clauses in BPJ permits issued before June 30, 1981, is among the NPDES permit conditions contained in the consolidated regulations (40 CFR §122.62) and is applicable to State NPDES programs. However, 40 CFR §123.13(g) allows States one year (two years if statutory changes are necessary) to revise their programs to comply with the applicable provisions of the consolidated regulations. Thus, this State argues that it need not include permit conditions required by the consolidated regulations, such as reopener clauses, until its program has been revised and approved by the Administrator, and that permits written without these conditions are valid NPDES permits, not subject to EPA objection or veto.

This argument is incorrect. Many NPDES States currently have the necessary statutory and regulatory authority to include a reopener clause in the NPDES permits they issue. Although they may not currently be issuing permits with such clauses, nothing in State law prevents them from doing so. Such States should immediately begin issuing NPDES permits with reopener clauses as part of their approved program.

In those NPDES States whose statutory or regulatory authority prevent the issuance of permits with reopeners, long-term BAT BPJ permits should not be issued. These States should, instead, extend their expired NPDES permits - if State law allows them to do so - until their programs have been revised to allow the incorporation of reopener clauses. If a State proposes to issue a long-term BAT BPJ permit without a reopener clause, EPA can object to and veto that permit under the authority of either 40 CFR §123.75(c)(1) or (6). The former allows the Regional Administrator to object to a permit which fails to apply an applicable requirement of Part 123 (in this case, §122.62, which is made applicable to States through §123.7(d)(11)); the latter allows objections to BPJ permits which fail to carry out the provisions of regulations issued under the Clean Water Act. While EPA veto of a State permit is a harsh remedy, it is justified and should be exercised when necessary to prevent the issuance of BPJ permits which would not require reopening to incorporate a more stringent effluent limitation subsequently promulgated by the Agency.

All NPDES States should currently be in the process of revising their programs to incorporate the requirements of the consolidated regulations. When this process is completed the need for the actions described above will be obviated, and States will, as a matter of course, include reopeners in the permits they issue. Until such time, the overriding goal of controlling

toxic pollutant discharges must take precedence. Proposed State BAT BPJ permits should be reviewed, and any necessary action taken if they do not include reopener clauses. Please note also that under §122.64(a)(2) no permit written to expire after June 30, 1981, may be issued unless the discharger has submitted the toxic pollutant discharge information required by §122.53(d)(7)(ii). If I can be of any assistance in implementing or further explaining this policy, please contact me (FTS 755-0440) or Joel Blumstein (FTS 426-4793) of my staff.