NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM
ADJUDICATORY HEARING PROCEEDINGS

DECISIONS OF THE ADMINISTRATOR AND DECISIONS OF THE GENERAL COUNSEL

VOLUME 1

SEPTEMBER 1974-DECEMBER 1975

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

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM ADJUDICATORY HEARING PROCEEDINGS

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INTRODUCTION

This volume brings together all the Decisions of the General Counsel on Matters of Law and all the Decisions of the Administrator issued through December 1975 by the United States Environmental Protection Agency (EPA) in connection with National Pollutant Discharge Elimination System (NPDES) adjudicatory hearing proceedings under section 402 of the Federal Water Pollution Control Act, as amended, Public Law 92-500, 33 U.S.C. §1251 et seq. (the Act), and corresponding NPDES regulations, 40 CFR Part 125, as amended, July 24, 1974.

NPDES adjudicatory hearings are conducted by Administrative Law Judges to consider material issues of fact relating to the question of whether an NPDES permit should be issued, denied, or modified. Following the hearing the Administrative Law Judge certifies the hearing record, together with proposed findings and conclusions prepared by the parties, to the Regional Administrator for an initial decision.

Issues of law arising from a request for an adjudicatory hearing, including questions relating to the interpretation of the Act and regulations promulgated thereunder, are referred by the EPA Regional Administrator or the Administrative Law Judge to EPA's General Counsel for a decision. These decisions of the General Counsel are relied upon by the Regional Administrator in reaching his initial decision.

The initial decision of the Regional Administrator becomes the final decision of the Agency unless a party petitions the Administrator for review of the initial decision or unless the Administrator reviews the initial decision on his own motion. On review, the Administrator may affirm, modify, set aside, or remand the initial decision for further proceedings. A petition for review by the Administrator and a decision on that petition are prerequisites for judicial review of the Agency's action.

This collection contains all decisions of the Administrator, including denials of petitions for review, and decisions of the General Counsel reached under these procedures through the end of 1975. Subsequent decisions will be compiled in future volumes.

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DECISIONS

OF THE

ADMINISTRATOR

SEPTEMBER 1974 - DECEMBER 1975

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTERS OF:	
National Pollutant Discharge Elimination System	NPDES Appeal No. 75-1
Permits For	Consolidated No. X-74-17C and Case Nos. X-74-2, X-74-3, X-74-4, X-74-6, X-74-9
Marathon Oil Company (Marathon), Union Oil Company (Union), Atlantic Richfield Company (Atlantic Richfield), Mobil Oil Corporation (Mobil),	
Permittees	

DECISION OF THE ADMINISTRATOR

This is an appeal pursuant to 40 CFR 125.36(n), et seq. from initial decisions of the Regional Administrator, Region X, dated April 7, 1975 (X-74-2), April 8, 1975 (X-74-3, X-74-6, and X-74-9), and May 13, 1975 (X-74-4), in the above-styled consolidated proceeding. This appeal concerns oil and grease effluent limitations and other National Pollutant Discharge Elimination System (NPDES) permit terms and conditions applicable to seven (7) offshore oil and gas production platforms located in Cook Inlet, Alaska. The platforms are identified as follows:

Marathon

Dolly Varden Platform

Union

Grayling Platform
Monopod Platform

Atlantic Richfield

King Salmon Platform
Spark Platform
"A" Platform

Mobil

Granite Point Platform

During the period June 25, 1971, through January 2, 1972, the individual permittees (sometimes referred to herein as the "petitioners") applied to the U.S. Army Corps of Engineers for discharge permits for point source discharges at each of the platforms, pursuant to the then-existing Federal Refuse Act Permit Program. From April 9, 1973, through April 16, 1973, the permittees applied to the U.S. Environmental Protection Agency (EPA) for NPDES discharge permits pursuant to the Federal Water Pollution Control Act Amendments of 1972 (the Act). On September 28, 1973, the EPA Region X staff issued tentative determinations (draft permits) for each of the seven platforms, followed by an informal public hearing in Anchorage, Alaska, on October 31, 1973. On December 21, 1973, the Regional Administrator, Region X, issued final permits for each platform (hereafter referred to as the "final permits"). In January, 1974, the permittees requested adjudicatory hearings on certain terms and conditions of the final permits. By order dated July 11, 1974, the Regional Administrator consolidated the adjudicatory hearings and the consolidated hearing

was held in Anchorage, Alaska, on August 12-16, 1974. The record of the hearing was certified to the Regional Administrator by Administrative Law Judge William J. Sweeney on December 9, 1974. On the same date, seven issues of law were certified to the Assistant Administrator for Enforcement and General Counsel. On April 7, April 8, and May 13, 1975, the Regional Administrator rendered the initial decisions noted above.

On April 16, 1975, the permittees filed a joint petition for review by the Administrator of the initial decisions rendered on April 7 and April 8, 1975. On May 20, 1975, the permittees filed a petition for review by the Administrator of the "second initial decision" rendered on May 13, 1975. On June 5, 1975, EPA's Chief Judicial Officer issued a notice granting permittees' petitions for review by the Administrator. Thereafter, the Chief Judicial Officer, acting pursuant to a general delegation of authority from the Administrator, conducted an informal briefing conference with all the parties on July 10, 1975, received written briefs from the parties on July 25, 1975, and heard final oral argument on August 7, 1975. This decision is based on an extensive review of the record of this proceeding conducted over a period of approximately six weeks.

This proceeding, together with decisions issued simultaneously in two related proceedings involving two additional offshore platforms

(Case No. X-74-5) and three onshore production facilities (Consolidated No. X-74-18C) located in Cook Inlet, Alaska, is the first review conducted by the Administrator under 40 CFR 125.36(n) et seq. It is also, therefore, the first instance in which questions involving the legal sufficiency of the procedures for NPDES adjudicatory hearings have been raised. For these reasons, among others, this decision is lengthier, more detailed, and more significant to the overall administration of the NPDES permit program than otherwise might be the case. Because of the multiple parties and complicated legal and technical issues involved, it is hard to imagine a more difficult set of circumstances to review. In an abundance of caution, therefore, I am setting forth in this decision considerably more detailed findings of fact and conclusions of law than otherwise might be necessary or appropriate in less complicated proceedings.

On April 21, 1975, the Regional Administrator and attorneys acting for the permittees entered into an "Agreement Settling Certain Disputed Issues." The resolved issues include the effluent limitations for domestic wastes, cutting waters and drill cuttings, and drilling muds; the definition of the terms "daily average" and "daily maximum;" the term of the permit; and the wording of the analytical quality control provision. I find no basis on the record for reviewing any of the issues heretofore resolved by stipulation of the parties.

The parties also stipulated and agreed that the issues which remain for resolution are the following:

1. The effluent limitations to be applied to deck drains and produced water.

2. The compliance schedules respecting the implementation of effluent limitations for produced water, deck drains, and domestic waste.

3. Whether an upset provision should be included in the permits pertaining to produced water, deck drains, and sewage facilities and discharges, and, if so, the form which an upset provision should take.

4. Whether a more liberal bypass provision should be included in the permits pertaining to produced water, deck drains, and sewage facilities and discharges, and, if so, the form which a more liberal bypass provision should take.

In addition to the unresolved issues noted above, the petitioners have raised a number of procedural and legal objections to the proceedings below. These objections relate to the form and timing of the Regional Administrator's initial decisions, the form and timing of the disposition of issues of law certified to the Assistant Administrator for Enforcement and General Counsel, and the legal sufficiency of the NPDES adjudicatory hearing process under the Administrative Procedure Act (APA) and the due process clause of the

Constitution of the United States. I will address the procedural and legal issues first.

I. PROCEDURAL AND LEGAL ISSUES

A. Form and Timing of Initial Decisions

The petitioners object to the following elements of the form and timing of the initial decisions:

1. In a consolidated proceeding under 40 CFR 125.36(g), there should be a single, uniform decision applicable to all parties and facilities rather than separate, non-uniform decisions for each of the parties.

The EPA regulations provide, in section 125.36(g), that two or more proceedings may be consolidated to expedite or simplify consideration of the issues. Any party, however, may raise issues that could have been raised if consolidation had not occurred. At the conclusion of the adjudicatory hearing, the Administrator or Regional Administrator must render "a separate decision for each proceeding." The separate cases under consideration here were consolidated in July 1974, on the motion of EPA regional staff. According to the permittees, it was clearly understood and relied upon at the adjudicatory hearing by all the parties that on common issues the evidence jointly provided by the permittees would be uniformly applied in reviewing permit terms and provisions

for all the platforms. EPA's lead counsel reputedly gave oral assurances at the hearing that all the permits would be "uniform" when issued. The permittees further contend that the provision of the aforementioned stipulation which states that, "the Agency shall issue a modified permit for a term of five years, as to those issues which remain for resolution," was understood to mean that uniform permits covering all the issues remaining for resolution would be issued subsequent to the resolution of the disputed issues.

I do not find in the record any conclusive evidence that uniform permits would be issued to all the parties in this consolidated proceeding. It does appear, however, from the manner in which the adjudicatory hearing in this proceeding was conducted that the permittees at least assumed that the evidence presented would be uniformly applied to all the parties and that neither the Presiding Officer nor the EPA staff challenged that implied assumption. Once the hearing was concluded, however, the Regional Administrator apparently felt bound by the requirement of section 125.36(g) to issue separate decisions for each proceeding, in spite of a proposed finding of the EPA regional staff attorneys to the contrary, which stated, in part:

> I cannot logically reconcile this regulatory mandate [for separate decisions] with the inherent character of a consolidated proceeding except by declaring this decision is independently applicable to each of the four Permittees herein. In that respect, it is separately rendered for each.

I agree. The inherent character of consolidated proceedings, together with the actual conduct of the parties prior to and during the adjudicatory hearing in this proceeding, requires me to conclude that the evidence submitted in this proceeding should be uniformly applicable to all the permittees on common issues and, under the circumstances of this case, that uniform permits should be issued for each of the facilities. This decision on appeal -- a single decision uniformly applicable to all four permittees and all seven facilities -- is in accord with this conclusion, which is expressly limited to the peculiar circumstances of this proceeding.

2. The initial decisions fail to set forth an adequate statement of findings and conclusions including the reasons and basis therefor and further fail to address all issues of fact and discretion submitted by the permittees in their proposed findings and conclusions, as required by 40 CFR 125.36(1)(2).

Following the adjudicatory hearing, the permittees submitted 69 proposed findings of fact and 36 proposed conclusions of law. EPA regional staff also submitted numerous proposed findings and conclusions. The separate decisions issued by the Regional Administrator each include several pages of discussion of facts and issues and a one-page "Statement of Findings and Conclusions," consisting of some 6 or 7 items in each case. While I am sympathetic to the difficulty of reviewing a highly complex record and responding, in detail, to all the proposed findings which may

be submitted by a party in a case of this type, I must conclude that the initial decisions do not comply fully with the intent of the regulations. There is considerable merit in the argument made by the EPA regional attorneys that the initial decisions need only contain the "ultimate facts" in issue, and need not address each and every finding proposed by a party. The petitioners contend, however, that a failure to set forth detailed findings and conclusions and the reasons and basis therefor is more than a matter of style and form. Such shortcomings may adversely affect the ability of the parties and reviewing tribunals to perceive adequately the essential facts on which a decision is based. I do not believe that to be the case in this proceeding. Despite the brevity of the statements in the initial decisions, there is sufficient detail and explanation to perceive adequately the essential facts on which the decisions are based. Such infirmities in style and form as do exist are not sufficient to require that the initial decisions be vacated. Considering the extensive review of the record made in reaching this final decision, it is appropriate to set forth herein any additional findings and conclusions needed to adequately apprise the parties and any reviewing court of the reasons and basis for the Agency's final decision.

3. The initial decisions were not issued within 20 days following certification of the record as required by 40 CFR 125.36(1)(1).

There is no question that the initial decisions were not issued within the 20 days following certification of the record by the Presiding Officer on December 9, 1974. Petitioners point out that the first initial decision was issued on April 7, 1975, some 119 days from the date of certification. Reference is made in post-appeal briefs submitted by the parties to the fact that since seven issues of law certified to the Assistant Administrator for Enforcement and General Counsel were not answered until April 4, 1975, it might be argued that the initial decisions were not required until 20 days following that date. That argument, however, begs the question of whether the response to the certified issues of law itself was timely given, since the reference to the General Counsel for resolution also was made on December 9, 1974. I can only presume that one reason for the delay in issuing the initial decisions must have been the continuation of settlement negotiations following the adjudicatory hearing. Counsel for the permittees, especially Marathon, have indicated that between December, 1974, and April, 1975, they made several requests to the Regional Administrator to issue the initial decisions, and finally threatened a mandamus action. It is apparent that the delay was not due simply to inaction on the part of the

regional office. While I do not condone excessive and unexplainable delay in rendering any Agency decision, particularly where regulations provide a specific timetable, I believe the record and issues involved in this proceeding have been exceptionally difficult and time-consuming to review and resolve. Most important, it has not been shown that the permittees were in any way adversely affected by the delay. In fact, the permittees have been able to continue to operate without installing any additional controls at issue in this proceeding pending the outcome of this protracted proceeding. I find no merit in the petitioners' argument that because of this delay the Regional Administrator was ousted from jurisdiction to render the initial decisions and that petitioners' applications and proposed permits must be presumed to have been granted.

4. Issues of law certified to the General Counsel were not decided prior to issuance of the initial decisions and could not therefore have been relied upon by the Regional Administrator as required by 40 CFR 125.36(m)(4).

This objection is largely academic (with one exception) since, as the petitioners point out in their argument on the specific issues, the General Counsel found that 6 of the 7 issues were not appropriate for decision at this time because of their Federal constitutional nature. The remaining issue -- relating to the finality of rulings of the

Presiding Officer on the admissibility of evidence and other procedural matters under 40 CFR 125.36(i)(6) -- has only hypothetical application to this proceeding since the Regional Administrator has not, in fact, substituted his judgment on procedural rulings for that of the Presiding Officer. Therefore, I find no basis for concluding that the Regional Administrator acted contrary to the requirement of 40 CFR 125.36(m)(4). It should be pointed out that, in fact, the General Counsel's decision on the certified issues of law was rendered on April 4, 1975, three days prior to the issuance of the first initial decision. I can only conclude that, considering both the nature of the issues certified to the General Counsel and the form of the General Counsel's response, the Regional Administrator in each instance correctly presumed the validity of the Agency's regulations. I find no fault with that presumption as a basis for issuing the initial decisions and, indeed, would be surprised had he determined otherwise.

5. The Regional Administrator had no jurisdiction to issue the "second initial decision" for the Union "Monopod" platform because the decision labeled X-74-3 was the decision for both the Union "Grayling" and "Monopod" platforms.

Although the record on this matter is confusing, it appears that the Regional Administrator issued a separate decision labeled X-74-4

for the Union "Monopod" platform on May 13, 1975, because Union had filed separate requests for hearings on each of its two platforms. It is apparent, however, that on April 8, 1974, the Regional Administrator consolidated the two Union requests "for all purposes." I can find on the record no logical basis for the issuance of a separate decision on the Union "Monopod" platform, and must conclude that the Regional Administrator erred in the issuance of the "second initial decision" for the reasons stated above.

B. Issues of Law

The issues of law certified to the Assistant Administrator for Enforcement and General Counsel by the Presiding Officer on December 9, 1974, include the APA and constitutional due process issues raised in the petitions for review, and therefore they are addressed together herein.

Before addressing the particular issues raised, I should state unequivocally that I believe the NPDES permit regulations, as written and as applied to the permittees in this proceeding, meet all the applicable requirements of the APA and the fifth amendment to the U.S. Constitution. The constitutionality of the NPDES regulations was fully considered at the time the regulations were promulgated. I should also state clearly at the outset that I do not believe it is necessary or appropriate for me, in this permit review

proceeding, to address in detail the specific constitutional issues which have been raised. These arguments, in all liklihood, would be heard de novo by a Court of Appeals reviewing this decision. To attempt to answer each specific question in this decision (and thus in every other permit review proceeding in which these or other constitutional questions are raised) would place an unacceptable burden on the adjudicatory hearing process. I should note, in addition, that constitutional questions similar to those posed in this proceeding are currently before the Seventh Circuit Court of Appeals in another permit proceeding and in the District Court for the Northern District of Illinois in an APA challenge to the NPDES regulations. Therefore, it is evident that the proper avenues for review of these constitutional issues exist and are being adequately utilized.

Nonetheless, I feel compelled to set forth briefly for the record of this proceeding my general understanding of the nature of the NPDES adjudicatory hearing process within the context of the APA and federal constitutional law relating to administrative hearings for whatever benefit it may have in this and future proceedings. I would be remiss not to address these matters generally and attempt to resolve some elements of the confusion and controversy which have existed in this proceeding (and the related Cook Inlet proceeding designated X-74-18C) regarding the nature of the NPDES adjudicatory hearing process.

Fundamentally, the process of determining terms and conditions for NPDES permits is an information-gathering and fact-finding process. The process begins with the submission of information and data by the applicant. Thereafter, the applicant and the public are provided several opportunities to participate in the administrative process and thereby protect their interests. EPA regulations require that public notice be given of the proposed issuance of each permit, setting forth EPA's tentative determinations. Interested persons may submit written comments concerning the Agency's tentative determinations and may request a public hearing. The written comments must be considered by the Agency in making its final determinations. If it is determined that a significant degree of public interest regarding a proposed permit exists or that a public hearing would provide useful information, the Agency may hold a public hearing after due notice. At the hearing, any person may submit oral or written statements and the information provided must be considered by the Agency in making its final determinations. If the Agency's subsequent determinations are substantially changed from earlier tentative determinations, EPA must give public notice of any such changed determinations.

After a final determination is made by the Agency (i.e., a final permit is tendered to the applicant), any interested person may submit

a request for an "adjudicatory hearing." Such hearings are not required by the Act, but pursuant to EPA regulations will be granted if the applicant has met certain requirements in its request and if EPA determines that the request "sets forth material issues of fact relevant to the questions of whether a permit should be issued, denied, or modified." Following an adjudicatory hearing, the EPA Regional Administrator or his designee renders an initial or recommended decision on the issues presented at the adjudicatory hearing. If the applicant is still dissatisfied with the terms and conditions of the final permit, he may request review by the Administrator.

At each stage of the foregoing process, EPA is required to make technical judgments concerning the degree of effluent control required to comply with the provisions of the Act. In those cases where the Act's technology-based standard for 1977 applies -- i.e., "best practicable control technology currently available" -- the Agency either adheres to formally established "effluent guidelines" for the particular industry or, where such guidelines have not yet been established, relies upon the "professional judgment" of the Agency's staff in setting permit limitations and conditions. In the latter case (which is the case in this proceeding), the exercise of professional technical judgment inherently involves some case-by-case "legislative" or policy determinations, as well as specific

"judicial" or factual determinations. Thus, particularly in the case of pre-guideline permits, it is difficult to separate legislative from judicial facts and determinations in the NPDES permit issuance process.

It is important to note also that the determinations being made in the issuance of NPDES permits relate to future conduct, as distinguished from factual determinations regarding past events. While past performance is pertinent in determining the level of control needed to meet the requirements of the Act, the thrust of NPDES permits is to determine what steps an applicant must take to control future effluent discharges. These considerations are relevant and important to an understanding of how the NPDES adjudicatory hearing process relates to the requirements of the APA and constitutional due process.

With this background, the following questions emerge:

Does the Act require a trial-type APA adjudication in NPDES permit hearings, with all the attendant procedural safeguards of the APA? If not, is the NPDES adjudicatory hearing process nonetheless infirm because it does not provide sufficient procedural safeguards in keeping with due process requirements of the U.S. Constitution?

NPDES adjudicatory hearings are "adjudications," as defined by the APA, since it is inescapable that Agency process for the formulation of an Agency permit is an "adjudication." Significantly,

however, the sections of the APA applicable to Agency adjudications apply "in every case of adjudication required by statute to be determined on the record after opportunity for an Agency hearing . . . (emphasis supplied)." Section 5 of the APA (5 U.S.C. Sec. 554) has been interpreted to mean that Sections 7 and 8 of the APA (5 U.S.C. Secs. 556 and 557) must be applied only where the Agency statute, in addition to providing a hearing, prescribes explicitly that it be "on the record." Section 402 of the Act only requires "opportunity for public hearing" before the issuance of an NPDES permit. I am aware that some courts have found that despite the absence of statutory language directing a hearing "on the record," some Agency hearings may nonetheless fall within the ambit of the APA.

I am also aware of a 1973 opinion of the Department of Justice' Office of Legal Counsel to this Agency, addressing the question of whether administrative law judges would be required to preside at NPDES adjudicatory hearings, which states:

> In the absence of unequivocal history indicating a contrary result, history not here present, we do not believe that the omission of the phrase "on the record" from section 402 may be said to reflect any deliberate Congressional intention.1/

This opinion concluded that since administrative decisions in NPDES cases are subject to judicial review in the courts of appeal and the rules of appellate practice require the submission of the agency record for review, the administrative decision must be "on the record" and, accordingly,

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1/ Memorandum Opinion dated June 5, 1973, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Alan G. Kirk II, General Counsel, EPA, and Anthony L. Mondello, General Counsel, Civil Service Commission.

administrative trial judges would be required. One year after the above opinion was rendered, however, the NPDES regulations were amended in several important respects, and the matter again has been submitted to the Justice Department for a legal opinion. Unfortunately, that opinion is not yet available to me for additional guidance. My impression, however, is that even if the Department of Justice should again opine that administrative law judges are required to preside at NPDES permit hearings, that still would not resolve the issue of whether NPDES permit hearings are subject to the full range of procedural requirements applicable to "adjudications" under the APA. At the very most, it seems to me, adjudicatory hearings on initial NPDES permits might be considered "initial licensing" proceedings under the APA. As such, they would be exempt from certain requirements of the APA, such as the rendering of a recommended decision by an administrative law judge.

On the basis of the foregoing, which is not intended to be an exhaustive analysis of the issues and administrative law involved, I can only conclude that the petitioners have not presented a convincing argument that the APA is fully applicable to NPDES permit hearings.

Even apart from the specific questions of APA applicability, the petitioners have failed to demonstrate that the procedures

employed in this proceeding were fundamentally lacking in fairness. The permittees argue that due process principles under the U.S. Constitution require trial-type adjudicatory hearings on the terms and conditions of NPDES permits and that such hearings be "on the record." While I agree that NPDES permit applicants must be afforded constitutional due process, I do not believe that the Agency's regulations or the procedures employed in this proceeding have denied the permittees a fair hearing in keeping with constitutional due process requirements.

The due process clause does not require a full adjudicatory hearing in every case of government restraint of a private interest. The Supreme Court has stated that:

> . . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.2/

I believe the NPDES regulations fully reflect the "precise nature of the government function involved," as well as the private interests affected, in setting forth the panoply of administrative procedures for determining the terms and conditions of NPDES permits. Both

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2/ Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 894-95 (1960).

the applicant and the public are afforded ample opportunities to challenge the tentative determinations of the Agency, to express their views in informal public hearings, and, in a more formal setting, to present their own evidence, data, and information, as well as rebut information presented by the Agency. To apply the additional strictures which petitioners urge would greatly reduce the flexibility needed to consider and evaluate the technical information and data which is inherent in the NPDES permit process, without materially adding to the elements of a fair hearing already provided.

Without addressing each point separately made by the petitioners it should suffice to state that the due process objections raised -- including commingling of functions in the Regional Administrator, consideration of matters outside the record of the hearing, lack of discovery and subpoena power, and evidentiary rulings by the Presiding Officer -- are not supported by sufficient showings that the petitioners in fact were deprived of opportunities to furnish their own comments and testimony, rebut information and evidence presented by the Agency, obtain additional information in the possession of the Agency, and, by all these means, participate fully in the administrative process to protect their interests.

For these reasons, which I do not intend to be a complete analysis of the issues and constitutional law involved, I am convinced that the petitioners have not been denied due process under the Constitution.

II. FINDINGS

A. Facilities Involved

The record includes considerable information describing the offshore oil and gas production platforms involved in this proceeding. The following findings proposed by the permittees in a document accompanying their written brief submitted on July 25, 1975, are, with certain exceptions indicated, adopted for purposes of this decision:

1. Cook Inlet is a navigable body of water located near Anchorage, Alaska, lying generally in a northeast-southwest direction bordering Anchorage on the northeast and opening into the North Pacific Ocean on the southwest.

2. Petitioners operate offshore oil and gas production platforms in Cook Inlet as follows:

a. Marathon operates the Dolly Varden oil production platform which is approximately eight miles from the mouth of the McArthur River (lat. 60° 48' 28.286"-long. 151° 37' 57.667"). The platform produces about 45,000 barrels per day of crude oil and 12,800 million cubic

feet per day of natural gas. The Dolly Varden has a gravity separator which treats deck drain water. Currently, produced water is pumped to shore through a submarine pipeline for treatment. Domestic waste, drilling muds, cuttings, cuttings wash water and treated deck drain water are discharged into Cook Inlet.

b. Mobil operates the Mobil-Union Granite Point Platform located approximately four miles southeast of Granite Point in Upper Cook Inlet (lat. 60° 57' 30"-long. 151° 19' 53"). From this platform, Mobil produces approximately 6,500 barrels of crude oil per day. All discharges are to Cook Inlet near Granite Point. The platform has a dissolved air-flotation cell currently treating deck drain waste water and capable of treating formation water when produced and, a physical-chemical sewage treatment plant for treatment of domestic waste.

c. Atlantic Richfield operates three platforms:

(1) Platform Spark is located about seven miles from shore in Trading Bay (lat. 60° 55' 42"-long. 151° 31' 50"). Production of crude oil from Spark is approximately 3,600 barrels per day.

(2) Platform A is located approximately seven miles east of the mouth of the McArthur River (lat. 60° 55' 10"-long. 151° 33' 26"). Production of crude oil from A is approximately 3,764 barrels per day.

(3) Platform King Salmon is located approximately five miles southeast of the mouth of the McArthur River (lat. 60° 15' 55"-long. 151° 36' 02"). Production from King is approximately 30,000 barrels of crude oil per day and 9MMCF of gas per day.

Produced water and deck drain waste water from all three Atlantic Richfield-operated platforms are currently pumped to shore through submarine pipelines for treatment. All other discharges are made directly to Cook Inlet.

d. Union operates two platforms:

(1) The Monopod Platform is located approximately 3.5 miles from shore near the West Foreland (lat. 60° 57' 48"-long. 151° 34' 45.5"). The platform produces approximately 21,700 barrels of crude oil per day and 35,700 million cubic feet of natural gas per day. Deck drain oil-water separation equipment is a gravity separator. Domestic waste treating equipment is not presently on the platform. Currently, produced water and deck drain waste water are pumped to shore for treatment through a submarine pipeline. All other discharges are made directly to Cook Inlet.

(2) The Grayling Platform is approximately 6 miles east of the West Foreland (lat. 60° 50' 23"-long. 151° 36' 47"). The platform produces 46,100 barrels of crude oil per day and 27,000 million cubic feet of natural gas per day. Deck drain oil-water

separation equipment is a gravity separator. Domestic waste treating equipment is not presently on the platform. Currently, produced water and deck drain waste water are pumped to shore for treatment through a submarine pipeline. All other discharges are made directly to Cook Inlet.

3. Each of the platforms is located in an area where Cook Inlet is approximately 25 miles wide. None is more than 10 miles from shore.

4. The platforms are fabricated steel structures permanently secured to the Inlet floor with steel pilings and are located in waters varying in depths from 60 to 160 feet at mean low tide. Each platform is constructed to withstand the extreme conditions of Cook Inlet water, including the low winter temperatures of -20°F to -30°F, the abrasive nature of the silt entrained in the water, the range of tides with resulting currents up to 8 knots, and large ice floes 5 to 6 feet in thickness and approximately forty acres in size. Due to the fact that Cook Inlet is located in an active earthquake region, additional structural integrity is required. The legs of the platforms are designed to accommodate the well casings inside them so that ice floe conditions do not result in collapse of the well casings.

Although these platforms are different in configuration, each is specifically designed for the purpose of extracting oil and gas from subsurface geologic formations. Platform activities include drilling, completing, reworking and producing oil and gas wells. The platforms have multiple solid steel decks providing a finite amount of space for equipment and material. As constructed, the platforms have little space available for additional equipment. All but the top decks are enclosed to protect personnel and equipment from the extreme low winter temperatures. Typically, the solid steel decks with drains allow spilled materials to be washed into a deck drain treating system rather than being flushed into Cook Inlet without treatment.

During the life of most oil and gas producing operations, water is produced along with oil and gas from the geologic formations. On some platforms, the produced water is separated from the oil and gas, treated in a gravity separator, flotation cell or coalescer and then discharged into Cook Inlet. On the other platforms, the oil, gas and water are shipped to onshore treating facilities through submarine pipelines that vary in size from four to ten inches in diameter. Lying on the floor of the Inlet, these pipelines are 4 to 9 miles in length.

Platforms in Cook Inlet are entirely self-contained, providing food and lodging for the fluctuating population of operating personnel required to maintain year round production from the platforms.

Since the platforms are permanently secured to the Inlet floor, they are totally dependent on either helicopters or boats for transporting solid wastes, personnel and supplies to and from shore. During periods of severe weather and ice conditions, the platforms are sometimes completely inaccessible.

5. Five major categories of pollutants result from operation of the platforms:

a. The fluid stream produced from the geological formation is an emulsion primarily made up of produced water, crude oil and natural gas. The produced water phase is separated for further treatment and contains various dissolved salts, dissolved gases such as carbon dioxide, suspended solids, and natural surface active agents. [Sentence intentionally omitted.]

b. Deck drain wastes which consist of the materials entering the deck drain waste system. The influent to the deck drain

systems includes melted snow, rain water, oil and grease from platform decks, washdown water, cleaning agents, drilling mud spillage (dry and wet) and glacial and volcanic dust;

c. Domestic wastes which include fresh water, salt water, and human, kitchen, shower and laundry waste;

d. Water-based drilling muds;

e. Cuttings and cuttings water which consist of pieces of the formation brought to the surface during the drilling process and the sea water used to wash them.

B. Effluent Limitations -- Deck Drains

The following findings and discussion pertinent thereto relate to the establishment of oil and grease effluent limitations for deck drain discharges from the platforms. Only those findings necessary to resolve points in controversy in the record are included.

6. The Brown and Root study (Exhibit 2), which uses a substantial data base, including produced water and combined produced water and deck drainage, for determining Best Practicable Control Technology Currently Available (hereafter referred to as "BPT") in the oil and gas extraction industry, concludes that exemplary flotation systems are representative of BPT and provide a reasonable basis for establishing numerical effluent guidelines and limitations.

7. Only three flotation systems currently treating deck drainage from platforms in Cook Inlet present sufficient data for analysis in establishing deck drainage effluent limitations.

8. The only deck drainage data presented in this proceeding representative of BPT systems are those from the Mobil "Granite Point" platform, and only nine (9) of these data points are not contaminated by cooling water. The only other Cook Inlet platforms presenting data representative of BPT systems are the Shell "A" and "C" platforms, which are the subject of the related Cook Inlet offshore permit proceeding designated X-74-5. These Shell data, although not a part of this proceeding, must be considered in determining BPT deck drainage effluent limitations for Cook Inlet platforms.

9. Oil and grease data from other Cook Inlet platforms are not representative of BPT systems or are of questionable reliability because the samples were taken sporadically or were not properly preserved.

10. The effluent limitations for deck drainage set forth herein take into account the factors set forth in Section 304(b)(1)(B) of the Act to the maximum extent possible, recognizing that only three wastewater treatment facilities in Cook Inlet are representative of BPT and that only limited data are available.

11. Mr. Sebesta's analysis of deck drainage oil and grease effluents in Cook Inlet, which includes all available data without regard to type of treatment, concludes that based on a normal theory of distribution, the effluent limitations of 85 mg/l daily average and 140 mg/l daily maximum (hereafter such limitations are sometimes referred to as "85/140, "25/75," etc.) are attainable by the application of BPT.

12. A statistical analysis of the data representative of BPT systems from the three Cook Inlet platforms treating deck drainage indicates that the data are lognormally distributed[3/] and that the following oil and grease effluent limitations for deck drainage are attainable:[4/] 65 mg/l monthly maximum ("daily average") and 90 mg/l daily maximum.[5/]

13. Although the methodology for analyzing the combined deck drainage data is consistent with that for produced water, in the case of deck drainage a "pounds per day" limitation also has been determined. A pounds per day limitation reflects the variability in deck flow and oil mix, and therefore is a preferred limitation for deck drainage.

3/ Aitchison, J., and Brown, J.A.C., "The Lognormal Distribution," (1969), Cambridge University Press.

4/ Analysis of the Shell data shows that the data follow a lognormal distribution with log mean = .98 and log standard deviation = .56. The 97.5% attainable limits for Shell are 83 mg/l monthly maximum and 116 mg/l daily maximum, while the "Granite Point" data shows values of 46/64. The Shell data used in this analysis was that used by Dr. Cook. The Mobil data has been corrected for cooling water which occurred in 17 of the 26 data points.

5/ These limitations are based on four composite samples per month, where each composite sample is the result of four grab samples on a given day. The terms "monthly maximum" and "daily maximum" are defined, with respect to the foregoing sampling scheme, as follows: (1) "monthly maximum" is the value the monthly average shall not exceed, and (2) "daily maximum" is the value the daily composite sample shall not exceed.

The following pounds per day oil and grease effluent limitations for deck drainage are attainable: 5 lbs/day monthly maximum ("daily average") and 9.25 lbs/daily maximum.

In making the foregoing findings, I am aware of the information and data relied upon by the Regional Administrator in rendering the initial decisions. Particularly in the Marathon and Union decisions (X-74-2 and X-74-3), he correctly cited and gave weight to permit application data and data included in letters submitted by Marathon, Mobil, and Union in late 1973, indicating that deck drain oil and grease concentrations below 25 mg/l were being achieved in a considerable number of samples at that time. But he apparently did not give any weight to other information and data available in the record. I believe he should have considered, as well, the Brown and Root report and all the data from comparable systems in Cook Inlet, in establishing deck drain effluent limitations attainable through the application of BPT.

C. Effluent Limitations -- Produced Water

The following findings and discussion pertinent thereto relate to the establishment of effluent limitations for produced water discharges from the platforms. Only those findings necessary to resolve points in controversy in the record are included.

14. The Brown and Root study (Exhibit 2) for determining BPT in the oil and gas extraction industry concludes that the performance of exemplary flotation systems is representative of BPT and, therefore, such systems provide a reasonable basis for establishing numercial effluent guidelines and limitations.

15. The treatability of produced water varies from location to location and even at a single location over time. Variations in effluent concentrations may result from differences in produced water characteristics which vary from strata to strata, from reservoir to reservoir, from oil field to oil field. Nonetheless, there is a correlation between the treatability of produced water being treated in Cook Inlet and in the Gulf of Mexico.

16. The producing characteristics of wells cause rate of flow changes which, in turn, cause intermittent fluctuations in influent volume to produced water treatment facilities, thereby affecting effluent concentrations.

17. Flotation systems are very versatile and produce high quality effluent in the majority of cases. Data used in the Brown and Root performance analysis for flotation units was obtained from a wide variety of sources.

18. The data base for the Brown and Root report was provided by the Offshore Operators Committee (hereafter referred

to as "OOC data"). OOC data includes effluent concentrations from a broad cross-section of production facilities during all periods of production and operation of offshore and onshore facilities, with wide variations in produced water flow rates. Effluent limitations based on OOC data, therefore, reflect variations in produced water due to different formations and normal operation of production facilities.

19. The Brown and Root report makes no reference to the inclusion of "upsets" or "bypassing" in the definition of BPT. The OOC data base includes data obtained during periods of upset, drilling, workover, and other recurring operations associated with oil and gas production. The performance of exemplary flotation systems considered representative of BPT for treating produced water (as well as deck drainage), therefore, takes into account changes in influent, upsets, initial start-up, and other activities associated with the normal operation of oil and gas production facilities. The Brown and Root report does not distinguish between facilities treating large volumes of wastewater and smaller facilities, facilities treating different types of oil, and differing platform operations.

20. The Brown and Root report does not take in consideration sample collection methods, frequency of sampling, and analysis procedures, and did not use all the OOC data.

21. The Brown and Root report recommends that the average oil and grease concentration which should be maintained to be consistent with BPT is less than the highest average effluent concentration observed for any single flotation unit.

22. The OOC data base is composed of data collected both by grab and composite samples. For purposes of statistical analysis, grab sample data should be transformed to make it more representative of composite sample data since the NPDES permits are based on composite sampling.

23. The OOC data[6/] conform to a three parameter lognormal

6/ This data base consists of Brown and Root flotation units ("BRFL") 1 through 41, with the exclusion of the following units for insufficient data.

BRFL Unit #	# of Data Points
18	3
19	3
20	3
21	3
22	2
31	5
35	0
36	2
40	1
41	1

Also excluded from the data base were the following points, for the reasons noted. Where "outlier" is noted, this is with regard to a statistical test based on the studentized maximum. (See Sarhan, A.E. and Greenberg, B.G. (eds.), "Contributions to Order Statistics," (1962), John Wiley, New York.)

BRFL Unit #	# Points	Reason
7	3	Outlier
8	1	Outlier
10	2	Outlier
11	5	Startup
27	4	Outlier
28	1	Outlier
38	15	Startup
	4	Heater-treater malfunction

distribution.[7] (The data base was tested for lognormality by using a goodness of fit test.)[8]

24. A statistical analysis[9] of data representative of BPT systems for treating produced water indicates that the following oil and grease effluent limitations for produced water, using composite sampling, are attainable: 48 mg/l monthly maximum ("daily average") and 72 mg/l daily maximum.[10]

7/ Aitchison, J., and Brown, J.A.C., "The Lognormal Distribution," (1969) Cambridge University Press.

8/ Anderson, T.W., and Darling, D.A., "A Text of Goodness of Fit," American Statistical Association Journal, 49 (1954), pp. 765-769.

9/ The parameters of the lognormal distribution for the daily data are: T = 10, log mean = 1.54 and log standard deviation - .157. Thus the 99% confidence limit about the mean was Max (daily) = 10 1.54+2.33X1.37 -10. The monthly maximum was attained by simulating possible concentrations from the above distribution, averaging four value and applying the confidence limit methodology above.

10/ These limitations are based on four composite samples per month, where each composite sample is the result of four grab samples on a given day. The terms "monthly maximum" and "daily maximum" are defined, with respect to the foregoing sampling scheme, as follows (1) "monthly maximum" is the value the monthly average shall not exceed, and (2) "daily maximum" is the value the daily composite sample shall not exceed.

The record in this proceeding concerning effluent limitations for produced water discharges is extremely thin and confusing. But for the fact that this proceeding already has consumed an inordinate amount of time (some 20 months since the final permits were tendered to the permittees in December, 1973), I might be inclined to remand these proceedings on the issue of produced water limitations for further consideration at the regional level. On balance, however, I believe the findings set forth above are supported by the record and provide a sufficient basis for the conclusions contained in this final decision. A further delay in this proceeding is not warranted.

The Regional Administrator decided not to specify effluent limitations for produced water discharges for two principal reasons: the actual plans of the permittees to discharge produced water offshore were unclear and the record did not contain adequate information upon which to base a decision. He concluded, therefore, that either the matter should be handled outside these proceedings in some unspecified manner or that the permittees could file applications (presumably amendments to the original applications) for the discharge of produced water offshore. I think the facts surrounding this proceeding warrant a different conclusion.

The original applications of the permittees may or may not have specifically requested effluent limitations for offshore discharges of

produced water. In some instances, it appears that such discharges were contemplated from the outset. In others, the desire for permits applicable to such discharges appears to have emerged at later stages in this proceeding. It does not appear, however, that prior to the rendering of the initial decisions the regional office never explicitly rejected whatever contemplations or assumptions may have existed prior to that time. In fact, the total course of conduct of the regional office up to the rendering of the initial decisions seems to have suggested the contrary.

In addition, under the circumstances here presented, I find no inherent difference between the discharge of produced water offshore and onshore, in terms of the effluent limitations for oil and grease in produced water discharges. If the entire production operation, including the platforms and the linked onshore facilities, are considered integral parts of one system, then it would appear unnecessary to distinguish an offshore discharge point from an onshore discharge point for the purpose of establishing oil and grease limitations in Cook Inlet. Therefore, even if the course of conduct noted above were not present, I might still be inclined to suggest that an offshore produced water limitation be established. Since it is apparent on the record that the permittees in fact do plan to discharge produced water offshore at some time in the future

because pumping capacity to shore will be exceeded, the capacity of the submarine pipelines will be exceeded, or free water will be produced and may cause freezing problems in the submarine pipelines during winter months, I find no reasonable basis for failing now to specify produced water limitations for offshore discharges if and when they do occur. To conclude otherwise, when a basis now exists for reaching these determinations, would add needlessly to the already protracted nature of this proceeding and further delay a comprehensive control program for the entire production system.

D. Upset Provision

The following findings and discussion pertinent thereto relate to the issue of whether an upset provision should be included in the permits pertaining to produced water, deck drains, and sewage facilities and discharges, and, if so, the form which an upset provision should take. Only those findings necessary to resolve points in controversy in the record are included.

26. The Brown and Root report (Exhibit 2) makes no reference to the inclusion of "upsets" in the definition of BPT. The OOC data base includes data obtained during periods of upset, drilling, workover, and other recurring operations associated with oil and gas production. The performance of exemplary flotation systems considered representative of BPT for treating produced water and deck drainage, therefore, takes into account changes in influent, upsets, and other activities associated with the normal operation of oil and gas production facilities.

27. All new waste treatment systems must be started and their operations stabilized. During periods of "start-up" and "stabilization" new treatment systems may operate at less than optimum efficiency. Start-up and stabilization of new waste treatment systems have been taken into account in the existing compliance schedule provision. Since most of the equipment items needed to meet BPT requirements are "off-the-shelf" items with which the oil and gas industry has had considerable experience, a 60-day stabilization period following completon of construction is reasonable and has been provided in the permit compliance schedules.

The terms and conditions of the permits may have the effect of inhibiting the installation of new, improved technology because of start-up and stabilization problems. If necessary, the NPDES regulations provide for the amendment of permits to allow for improvements in technology and other changes as may be appropriate.

28. It is recognized that mechanical devices and other equipment will not function properly 100 percent of the time. Such devices and equipment may malfunction or fail. Secondary actions can be taken, however, to prevent discharges of raw or partially treated waste water. A single unit will not operate 100 percent of the time, but the platform together with the onshore system may well eliminate the need to discharge raw or partially treated waste water at any time. BPT consists of an entire system, including process equipment, and not only a single waste treatment unit.

29. The permittees have not provided sufficiently detailed information relating to upsets, malfunctions, equipment failures, high effluent concentrations, and other factors to facilitate an informed judgment concerning situations which are beyond the reasonable control of the permittees, as distinguished from those situations for which the permittees should be held responsible.

30. Most upsets associated with oil and water separators that are not mechanical can be corrected in 8 hours. Correction of mechanical failures would require a longer time in most cases due to delivery problems. (Exhibit C-27).

31. Minor malfunctions or maintenance malfunctions include changing pump packing glands, cleaning weirs, cleaning level control systems, and treating for bacteria with additional chlorine. (Tr. 820).

32. Upsets and malfunctions may be self-correctable or may require process alterations. They do not necessarily cause or require bypassing of the process unit. (Tr. 516).

33. Equipment malfunctions or failures or normal maintenance operations likely to cause upsets (i.e., exceeding the effluent concentration limitations in the permits) can be "corrected" in a variety of ways. Waste water may be diverted to onshore treatment during periods of replacement or repair on the platforms, or it may be held in reserve storage on the platforms while short duration repairs are undertaken. Deck washing can be scheduled to permit equipment replacement, repair, or maintenance operations. Where time losses due to shipment and delivery problems associated with equipment subject to periodic malfunction or failure may be reasonaby anticipated, redundant equipment may be installed or appropriate parts and replacements may be stockpiled to insure rapid replacement or repair.

34. Equipment malfunctions or failures likely to cause upsets can be minimized through proper maintenance and operations. High effluent concentrations do not necessarily reflect, but might suggest improper operating procedures. (Tr. 666-75).

Preventive measures, as well as modifications in the process system and pretreatment, are considered part of BPT. The effluent limitations for produced water were derived from data obtained from facilities having a wide range of maintenance programs, including those which were not

exemplary. Improvements in preventive maintenance should result in less variability in effluent concentrations.

35. Upsets of deck drainage waste treatment systems are practically nonexistent, except for equipment failure and during periods of drilling or construction (Exhibit C-27).

36. Proper operation and maintenance would have the effect of minimizing upset conditions for sewage treatment units (Tr. 820). Experience with extended aeration units in the Gulf of Mexico has shown the overall performance to be good. Although periods of high variability in BOD and suspended solids occur frequently, chlorine residuals have been well within the effluent limitations set forth. Upsets in the bio-mass have not been cited as a problem.

37. There is scant evidence in the record to indicate that the permittees have fully explored or disclosed the various means available to "correct" upset conditions when they occur or to prevent their occurrence. The terms "upset" and "malfunction" are inadequately defined, statements relating to the duration of such conditions are broad and generalized, and the testimony of operating personnel consists of only vague recollections of a few circumstances deemed to require bypassing.

38. In the absence of more detailed and persuasive documentation in the record relating to equipment malfunctions, maintenance, and upsets, and recognizing that the effluent limitations set forth herein are based on data which was obtained during normal operations and includes upset conditions,

periods of high effluent concentration, and drilling operations, there is no justification, based on the evidence available, to include an upset provision in the permits pertaining to produced water, deck drains, and sewage facilities and discharges.

One of the difficulties encountered in reviewing the record of this proceeding has been an apparent confusion in the use of the terms "upset" and "bypass." For the record, it is my understanding that the term "upset" is used generally to describe any situation during which effluent concentration limitations for a particular discharge are exceeded. The causes of upsets apparently are diverse and, at times, unpredictable. For that reason, the permittees predictably hesitate to specify what specific events might be regarded as falling within a proposed upset provision. They are concerned that an upset caused by an event or situation beyond their reasonable control might lead to a permit violation, and thus subject them to civil penalties or criminal prosecution.

As stated in the findings set forth above, I can find no reasonable basis on the record for adopting an upset provision as proposed by the permittees. An open-ended upset provision, quite simply, would invite abuse and greatly complicate enforcement of the permit terms and conditions. The burden on the regional office charged with enforcing the permits would be compounded. As presently formulated in the final permits, the regional office has a difficult task ahead in monitoring the permits, detecting probable violations, and exercising its enforcement discretion. If the permittees' proposal were adopted, the regional

office would be obliged in each case to find that a particular event or situation causing an upset was not beyond the reasonable control of the permittee before initiating any enforcement proceeding. One can imagine that making such a finding, when all the relevant facts are in the exclusive possession of the permittee, would be an exceedingly difficult task. One can also imagine that in most cases the entire enforcement proceeding would then hinge on EPA being able to establish either negligence or intentional misconduct on the part of the permittee as the cause of the permit violation. I do not believe the Act contemplates putting that burden on the Agency.

I am less fearful than the permittees appear to be that EPA's regional enforcement offices will abuse or unreasonably apply their enforcement discretion. I am, therefore, not convinced that any permit provision which would have the effect of diminishing or curtailing the Agency's enforcement responsibility and discretion would be in the best interest of the nation's water pollution control program. At the same time, I am not convinced that the permittees are unnecessarily or unlawfully exposed to the possibility of prosecution for violations not sufficiently set forth in the applicable law and regulations of the Agency.

E. Bypassing Provision

The following findings and discussion pertinent thereto relate to the issue of whether a more liberal bypass provision should be included in the permits pertaining to produced water, deck drains, and sewage facilities and discharges, and, if so, the form which a more liberal bypass

provision should take. Only those findings necessary to resolve points in controversy in the record are included.

39. The findings and discussion in the foregoing section relating to upsets, to the extent they affect considerations relating to bypassing, are incorporated by reference in this section of the decision.

40. The Brown and Root report (Exhibit 2) makes no reference to the inclusion of "bypassing" in the definition of BPT. The OOC data base includes data obtained during periods of upset, drilling, workover, and other recurring operations associated with oil and gas production. The performance of exemplary flotation systems considered representative of BPT for treating produced water and deck drainage, therefore, takes into account changes in influent, upsets, and other activities associated with the normal operation of oil and gas production facilities.

41. Most preventive maintenance operations can be undertaken while the equipment is operating, and therefore do not require bypassing. The only two instances of bypassing discussed in the record, concerning Mobil's deck drain treatment system, were not related to maintenance activities. One bypass occurred when drilling mud was accidentally put into the system (improper operations) and the other when a motor controller burned out, requiring 6 to 8 hours to repair (equipment failure). (Tr. 694).

42. Major maintenance operations do not necessarily cause or require bypassing the process unit. Waste water may be put in reserve storage for short duration maintenance or may be diverted to shore for treatment for longer duration maintenance.

It is recognized that additional free water may increase the potential for freezing of the submarine platform-to-shore pipeline. However, by taking appropriate steps, including scheduling major maintenance in advance for periods when submarine pipeline freezing is not critical and taking other steps to minimize down time, this potential problem is not insurmountable.

43. No adverse conditions or over-burdening problems have resulted from shipping waste water from offshore platforms to shore facilities, even though relatively minor, undefined problems have been reported. (Exhibits 31 and 37).

44. Pipeline freezing problems associated with the transport of produced water to shore facilities have been corrected by enclosing the "pig" receiver facilities onshore. (Exhibit 38).

45. The physical-chemical domestic waste treatment system on the Mobil "Granite Point" platform has experienced severe operational difficulties and maintenance requiring frequent bypassing of the treatment facility.

It is recognized that physical-chemical sewage treatment units are in the developmental and experimental stages and are not dependable or effective for offshore platforms. Effluent limitations attainable by extended aeration units are considered representative of BPT for domestic waste treatment facilities. (Exhibit 36).

46. Shutting in offshore producing wells, even for short periods of time, may cause significant reservoir damage and result in a permanent loss of recoverable oil and gas.

47. Under certain conditions, such as when maintenance operations require a substantial amount of time (and sufficient reserve storage capacity is not provided), the permittees may be faced with the choice between an intentional bypass of the oil and water separation equipment on the platform and shutting down the platform, and therefore shutting in producing wells.

Since waste water can be pumped ashore for treatment, the need to shut down platforms under such conditions would appear to be extremely infrequent. If and when such conditions do exist, it is not inconceivable that the bypass provision relating to the prevention of severe property damage would apply, depending upon the specific circumstances presented.

48. The permittees have not presented sufficient evidence in the record to indicate that a more liberal bypass provision should be included in the permits pertaining to produced water, deck drains, and sewage treatment facilities and discharges.

As stated previously, I find the record confusing in the use of the term "bypass." It is my understanding that the term "bypass" is used generally to describe any situation where an effluent to be treated before discharge is either wholly or partially routed around the waste treatment facility and is thereby discharged to the receiving water untreated or only partially treated. As with upsets, the events or situations leading to a bypass are diverse. The permittees hesitate to specify exactly what events might be regarded as falling within a more liberal bypass provision which they propose. Generally, such events would be associated with maintenance or malfunction of equipment.

The permittees contend that the existing permit provision prohibiting bypass except where necessary to prevent loss of life or severe property damage unnecessarily restricts their ability to perform maintenance and repair of equipment. Moreover, they contend that the concept of BPT inherently involves some provision for upset and bypass situations.

As stated in the findings set forth above, I am not persuaded that the record shows a reasonable basis for liberalizing or expanding the existing bypass provision contained in the final permits. Several alternatives to bypassing are evident, including temporary storage on the platform or diversion to shore for treatment. In the unusual situation where these alternatives are not feasible, some other provision can be made on an ad hoc basis in consultation with the regional office. Where the only apparent alternative is to shut in wells and it is evident that damage to the reservoir would be likely to result, that particular situation might be covered by the existing severe property damage exception to the bypass prohibition clause. These situations are not so frequent that it would impose a great burden on the permittee or the regional office to handle them on a case-by-case basis. Such an approach is preferable to a relaxation of the bypass provision, which would invite abuse and unduly complicate enforcement of the permit terms and conditions.

I am aware of the permittees' repeated assertions that they would not intentionally bypass in any case other than where it is absolutely necessary

to perform maintenance and make repairs. I believe they, as all responsible companies, would adhere to these assertions. Nonetheless, I do not believe that the effect of more liberal bypass provision--a diminution of the Agency's enforcement responsibility and discretion--would be in the best interest of the nation's water pollution control program.

F. Compliance Schedules

I am unable to determine on the record any basis for modifying the compliance schedules as set forth in the final permits issued by the Regional Administrator, except to the extent that the passage of time since the inception of the adjudicatory hearing proceeding may have delayed the implementation of the requirements set forth therein and in this decision.

III. CONCLUSIONS

Procedural and Jurisdictional Matters

1. Jurisdiction exists in this matter under Sections 301 and 402 of the Act (33 U.S.C.A. §§ 1311 and 1342) and 40 CFR 125.36, et seq.

2. Under the peculiar circumstances of this consolidated proceeding, a single decision uniformly applicable to all the permittees is required. This Final decision is uniformly applicable to all the permittees and facilities involved in this proceeding.

3. The initial decisions set forth sufficient findings of fact and conclusions of law to perceive adequately the essential facts and law upon which the decisions are based.

4. The initial decisions were not timely issued, but the permittees were not materially adversely affected by the delay and there is no basis to conclude that the permittees' proposed permits are deemed issued and in effect.

5. Issues of law certified to the Assistant Administrator for Enforcement and General Counsel were answered shortly before the issuance of the initial decisions, but because 6 of the 7 issues related to questions of constitutional law inappropriate for General Counsel determination, the Regional Administrator was justified in assuming the validity and constitutionality of the regulations as a basis for the initial decisions.

6. Permittees' objection relating to the finality of evidentiary rulings by the Presiding Officer is hypothetical in nature and therefore not in issue.

7. The Regional Administrator was in error in issuing an initial decision designated X-74-4 for the Union "Monopod" platform on May 13, 1975, and therefore the initial decision designated X-74-3 issued on April 8, 1975, is applicable to both the Union "Grayling" and "Monopod" platforms. There is no basis to conclude that the permittees' proposed permit for the "Monopod" platform is deemed issued and in effect.

8. The "Agreement Settling Certain Disputed Issues," dated April 21, 1975, is valid and binding on all parties.

9. The NPDES permit regulations (40 CFR 125, et seq.), as written and as applied to the permittees in this proceeding, meet all the applicable requirements of the Administrative Procedure Act and the fifth amendment to the U.S. Constitution.

10. The applicable standard for review of the initial decisions of the Regional Administrator is whether the Findings and Conclusions contained therein are supported by the record and are found not to be arbitrary and capricious.

Permit Terms and Conditions

11. All evidence presented at the consolidated adjudicatory hearing must be considered in establishing effluent limitations for each permit.

12. The oil and grease effluent limitations concerning deck drain waste water in the final permits and in the initial decisions (25/75) are not supported by the record and are not consistent with effluent concentrations attainable through the application of BPT.

13. The oil and grease effluent limitations concerning deck drain waste water proposed by the permittees (85/140) are not supported by the record and are not consistent with effluent concentrations attainable through the application of BPT.

14. Effluent limitations attainable by the application of BPT to deck drain waste water are 65 mg/l monthly maximum ("daily average") and 90 mg/l daily maximum. In terms of pounds per day, a preferred effluent limitation for deck drainage, the following oil and grease effluent limitations are attainable through the application of BPT: 5 lbs/day monthly maximum ("daily average") and 9.25 lbs/day daily maximum.

15. The Regional Administrator was in error in failing to include in the initial decisions effluent limitations for produced water discharges. Even though the permittees presently are not discharging produced water offshore, the record indicates that permits would be issued containing produced water effluent limitations.

16. The oil and grease effluent limitations concerning produced water in the final permits (25/50) are not supported by the record and are not consistent with effluent limitations attainable through the application of BPT.

17. The oil and grease effluent limitations concerning produced water discharges proposed by the permittees (75/100) are not supported by the record and are not consistent with effluent concentrations attainable through the application of BPT.

18. Effluent limitations attainable by the application of BPT to produced water discharges are 48 mg/l monthly maximum ("daily average") and 72 mg/l daily maximum.

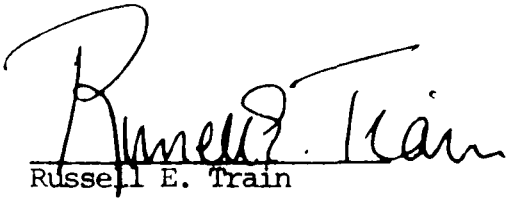
19. The record supports the conclusion of the Regional Administrator that the permits should not include an upset provision pertaining to produced water, deck drains, and sewage treatment facilities and discharges as proposed by the permittees.

20. The record supports the conclusion of the Regional Administrator that the permits should not include a more liberal bypass provision pertaining to produced water, deck drains, and sewage treatment facilities and discharges as proposed by the permittees.

21. The compliance schedules included in the final permits, adjusted as may be necessary and appropriate to take into account any delays in implementation due to the pendency of this proceeding, are affirmed.

22. This decision is based solely on the record presented and other considerations relevant to the record of this proceeding, as provided in 40 CFR 125.36(n)(12).

The Regional Administrator, Region X, shall forthwith modify the final NPDES permits subject to this proceeding as necessary to conform with this decision.



Russell E. Train

Dated: September 25, 1975

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF:

National Pollutant Discharge Elimination System Permit for Shell Oil Company (Shell), Permittee, and Atlantic Richfield Company (Atlantic Richfield), Intervenor	NPDES Appeal No. 75-2 Case No. X-74-5

DECISION OF THE ADMINISTRATOR

This is an appeal pursuant to 40 CFR 125.36(n), et seq. from an initial decision of the Regional Administrator, Region X, dated April 18, 1975, in the above styled proceeding. This appeal concerns oil and grease effluent limitations and other National Pollutant Discharge Elimination System (NPDES) terms and conditions for two (2) Shell offshore oil and gas production platforms located in Cook Inlet, Alaska. The platforms are identified as follows:

"A" Platform

"C" Platform

On July 1, 1971, Shell applied to the U.S. Army Corps of Engineers for discharge permits for point source discharges at each of its two offshore production platforms, pursuant to the then-existing federal Refuse Act Permit Program. On August 7, 1973, Shell filed a short form supplemental application with EPA, pursuant to the NPDES permit program. On September 28, 1973, the EPA Region X staff issued tentative determinations

(draft permits) for the two platforms, followed by an informal public hearing in Anchorage, Alaska on October 31, 1973. On December 21, 1973, the Regional Administrator, Region X, issued final permits for each platform. On January 4, 1974, Shell filed a request for an adjudicatory hearing on certain terms and conditions of the final permits. Shell opposed a motion by LPA regional staff to consolidate this adjudicatory hearing with other Cook Inlet offshore platform permit proceedings (Consolidated No. X-74-17C) and an adjudicatory hearing in this proceeding was held in Anchorage, Alaska on August 6-9, 1974. On April 18, 1975, the Regional Administrator issued the initial decision noted above.

On April 24, 1975, Shell filed a petition for review by the Administrator of the initial decision rendered on April 18, 1975. On June 10, 1975, EPA's Chief Judicial Officer issued a notice granting Shell's petition for review by the Administrator. Thereafter, the Chief Judicial Officer, acting pursuant to a general delegation of authority from the Administrator, conducted an informal briefing conference with the parties on July 9, 1975, received written briefs from the parties on July 25, 1975, and heard final oral argument on August 7, 1975. This decision is based on an extensive review of the record of this proceeding conducted over a period of approximately six weeks.

This proceeding, together with decisions issued simultaneously in two related proceedings involving seven (7) offshore platforms (Consolidated No. X-74-17C) and three (3) onshore production facilities (Consolidated No. X-74-18C) located in Cook Inlet, Alaska, is the first review

conducted by the Administrator under 40 CFR 125.36(n) et seq. It is also, therefore, the first instance in which questions involving the legal sufficiency of the procedures for NPDES adjudicatory hearings have been raised. For these reasons, among others, this decision is lengthier, more detailed and more significant to the overall administration of the NPDES permit program than otherwise might be the case. In an abundance of caution, therefore, I am setting forth in this decision considerably more detailed findings of fact and conclusions of law than otherwise might be necessary or appropriate.

Although not specifically set forth as such in Shell's petition for review, the issues for review, as summarized in Shell's brief submitted on July 25, 1975, are as follows:

1. What oil and grease limitations for the discharge of deck drains from Platforms A and C are achievable through the application of best practicable control technology currently available?

2. Should the NPDES permits for Platforms A and C include a provision for the bypassing of non-functioning pollution abatement facilities?

In addition to the issues noted above, Shell has raised procedural questions and objections concerning the proceedings below. These questions and objections relate to the form of the initial decision, the standard of review of the administrative record in this proceeding, and evidentiary matters.

I. PROCEDURAL OBJECTIONS

Shell objects to the following aspects of the initial decision:

1. The Regional Administrator did not address all issues of fact and discretion contained in proposed findings and conclusions submitted by the parties as required by 40 CFR 125.36(1)(2).

Shell's petition for review cites eleven instances in which they contend the Regional Administrator failed to make a finding or conclusion, as required by the regulations. It is apparent that the initial decision, in fact, did not attempt to respond to each and every finding of fact and conclusion of law proposed by Shell. In general, I must conclude that the initial decision does not comply fully with the intent of the regulations.' I do not find, however, that the initial decision fails to set forth a sufficient statement of reasons and basis for the decision such that the parties and reviewing tribunals are unable adequately to perceive the essential facts on which the decision is based. Therefore, I find no basis for vacating or remanding the initial decision on grounds of arbitrariness, incompleteness, or vagueness. Considering the extensive review of the record made in reaching this final decision, it is appropriate to set forth herein any new supplemental findings and conclusions needed to adequately apprise the parties and any reviewing court of the reasons and basis for the Agency's final decision.

2. The Regional Administrator, in reviewing the record, failed to observe the "substantial evidence" rule or any known standard of review of an administrative record.

Shell contends that the Regional Administrator selectively relied on certain limited information in the record in rendering his initial decision, while totally ignoring a substantial body of additional information submitted to the record by Shell. Shell argues that the Regional Administrator "gave only cursory attention to the record in an attempt to find any evidence to support the permit limitations." Without here reviewing the entire body of information in the record and citing specifically that relied upon by the Regional Administrator, it is apparent that the Regional Administrator's findings and conclusions are not without support in the record and thus are not arbitrary and capricious.

This proceeding, the culmination of a lengthy and detailed fact-finding process leading to the eventual issuance of an Agency permit, cannot be equated with a proceeding required by statute to be heard and decided solely "on the record" of the hearing. In the latter case, it is clear that the substantial evidence test is appropriate in reviewing findings made on the hearing record. Here, the hearing officer was not charged with the responsibility to make findings on the record. Rather, the record was certified to the Regional Administrator for his review and for appropriate findings and conclusions. Although the EPA regulations do not specifically set forth the scope of the Regional Administrator's review of the record, it is clear that he, no less than the Administrator in reviewing a Regional Administrator's initial decision, should decide the matters under review on the basis of the record presented and any other consideration he deems relevant to the record of the proceeding. In this proceeding, therefore, the test should be whether the Regional Administrator's findings and conclusions are supported by the record and thus are not arbitrary and capricious.

3. The Regional Administrator improperly gave weight in making his findings and conclusions to the deposition of an EPA employee taken three months prior to the hearing without opportunity for Shell to participate in the examination.

The deposition of Mr. Bodien (Exhibit 11, introduced by Shell) is objected to on several grounds, including the aforementioned. Shell contends that the Regional Administrator relied exclusively on certain information and analyses contained in the Bodien deposition in rendering his initial decision. I disagree. The initial decision also cites information and data relating to a Mobil platform (I believe the initial decision erred in referring to it as the "Dolly Varden," rather than the "Granite Point") in support of findings relating to deck drain effluent limitations. The initial decision considered and rejected other data and information. Nonetheless, I do not conclude that it was clearly erroneous for the Regional Administrator to give weight to information and analyses contained in the Bodien deposition. Shell had ample opportunity to challenge, rebut, and contradict the matters contained therein.

EPA's regional office staff also has raised an evidentiary question relating to the exclusion at the hearing of Exhibit 18-14-C-1 (the "EPA Preliminary Report") and a portion of Dr. Cook's testimony. They contend that the Regional Administrator and the Administrator both can overrule the Presiding Officer's devisions on the admissibility of evidence.

The Regional Administrator apparently did not consider either of the two excluded items. On the matter of whether the Regional Administrator or the Administrator could consider evidence excluded at the hearing, I am

of the opinion that the provision in the regulations relating to the finality of evidentiary rulings by the Presiding Officer (40 CFR 125.36(i)(6)) would not preclude consideration by the Regional Administrator or the Administrator of matters excluded at the hearing by the Presiding Officer. My understanding of that provision is that it is intended to preclude interlocutory appeals on evidentiary rulings, and not to circumscribe the scope of review of the record by the Regional Administrator or the Administrator.

II. FINDINGS OF FACT

A. Facilities Involved

The record includes information describing Cook Inlet and the two Shell offshore platforms involved in this proceeding. The following findings proposed by Shell in a document accompanying its written brief submitted on July 25, 1975, concerning which there is no dispute on the record, are adopted in full for purposes of this decision:

1. Shell Oil Company operates two platforms in the Middle Ground Shoal Field, Cook Inlet, Alaska, for the purpose of drilling for and producing crude oil. These platforms are designated Platform A and Platform C. Platform A was installed at its present location in the summer of 1965. Platform C was installed at its present location in the summer of 1967.

2. The original equipment on Platform C included a dissolved air flotation cell for the deoiling of platform deck drainage water. Platform A was equipped with a dissolved air flotation cell for the purpose of deoiling platform deck drainage water in the summer of 1967.

3. The flotation cells on Platforms A and C were manufactured by Pollution Control Engineering. The flotation cell on Platform A is designed to treat 150 gallons of water per minute, and the flotation cell on Platform C is designed for 125 gallons per minute. These cells incorporate the principle of air injection upstream of the cell. The air is injected under pressure and "sheared" in the closed stream where it enters a pressured vessel at approximately 60 psi. Downstream of this vessel the pressure is released and the combined stream air and water enter the bottom of the flotation cell. The air bubbles rise to the surface carrying with them oil particles and other suspended solids. A horizontal rotating paddle then skims the oil and other solids off the water surface into a sludge tank for disposal. The clean water is drawn off near the bottom of the cell for discharge or recycled through the cell. Optimum cell operation results when the throughput remains at near constant rates, since the inflow rates are not necessarily constant, a recycle system is used to recycle the effluent water back into the inflow of the cell to maintain a constant flow rate through the cell. Electrolyte in the form of filtered Cook Inlet water is added upstream of the flotation cell.

4. The flotation cells are operated by and regularly checked by fully trained and qualified production operators who report to the Maintenance Foreman who in turn reports to the Production Foreman.

5. Deck drains consist of rainwater, snowmelt and all deck wash water. During times when drilling, reconditioning wells, cleaning the platforms, or moving the drilling rig are occurring on the platforms, the oil and grease concentration in the influent to the flotation cell and, consequently, in the effluent increases.

B. Effluent Limitations--Deck Drains

The following findings of fact and discussion pertinent thereto relate to the establishment of effluent limitations for deck drain discharges from the platforms. Only those findings necessary for the resolution of points in controversy in the record are included.

6. Exemplary flotation systems are representative of the Best Practicable Control Technology Currently Available (hereafter referred to as "BPT") for treating deck drainage and, therefore, provide a reasonable basis for establishing numerical effluent limitations for deck drainage. (Exhibit 8).

7. Only three flotation systems currently treating deck drainage from platforms in Cook Inlet present sufficient data for analysis in establishing deck drainage effluent limitations.

8. In addition to the data presented in this proceeding relating to Shell platforms "A" and "C", data pertaining to Mobil's "Granite Point" platform is pertinent and relevant to this proceeding. The "Granite Point" data, although not a part of this proceeding (but of the related consolidated offshore proceeding designated X-74-17C), must be considered in determining BPT deck drainage effluent limitations for Cook Inlet platforms.

9. Oil and grease data from other Cook Inlet platforms are not representative of BPT systems or are of questionable reliability because the samples were taken sporadically or were not properly preserved.

10. Deck washings result from cleaning various deck areas to remove contaminants which cause safety and fire hazards. The characteristics of the waste are related to the type of equipment on the platform and the presence of drilling operations.

11. The effluent limitations for deck drains set forth herein take into account the factors set forth in Section 304(b)(1)(B) of the Act to the maximum extent possible, recognizing that only three waste water treatment facilities in Cook Inlet are representative of BPT and that only limited data are available.

12. Dr. Holliday's analysis of deck drainage oil and grease data from the Shell platforms concludes that, based on his judgment that the data was not lognormal but subject to the use of "Chebyschev's inequality," effluent limitations of 100 mg/l daily average and 200 mg/l daily maximum (hereinafter such limitations are sometimes referred to as 100/200, 25/75, etc.) are attainable 89% of the time by the application of BPT.

13. A statistical analysis of data representative of BPT systems from the three Cook Inlet platforms treating deck drainage indicates that the data are lognormally distributed[1/] and that the following oil and grease effluent limitations for deck drainage are attainable:[2/] 65 mg/l monthly maximum (daily average") and 90 mg/l daily maximum.[3/]

1/ Aitchison, J., and Brown, J.A.C., "The Lognormal Distribution," (1969), Cambridge University Press.

2/ Analysis of the Shell data shows that the data follow a lognormal distribution with log mean = .98 and log standard deviation = .56. The 97.5% attainable limits for Shell are 83 mg/l monthly maximum ("daily average") and 116 mg/l daily maximum, while the "Granite Point" data shows values of 46/64. The Shell data used in this analysis was that used by Dr. Cook. The Mobil data has been corrected for cooling water flow which occurred in 17 of the 26 data points.

3/ These limitations are based on four composite samples per month, where each composite sample is the result of four grab samples on a given day. The terms "monthly maximum" and "daily maximum" are defined, with respect to the foregoing sampling scheme, as follows (1) "monthly maximum" is the value the monthly average shall not exceed, and (2) "daily maximum" is the value the daily composite sample shall not exceed.

14. A "pounds per day" limitation reflects the variability in deck flow and oil mix and, therefore, is a preferred limitation for deck drainage. The following pounds per day oil and grease effluent limitations for deck drainage are attainable: 5 lbs./day monthly maximum ("daily average") and 9.25 lbs/day daily maximum.

In making the foregoing findings, I am not unaware of the information and data relied upon by the Regional Administrator in rendering the initial decision, including Mobil data which averaged 13.6 mg/l and a review of some 350 samples gathered from three Cook Inlet platforms where the average concentration reported was less than 18 mg/l. I believe he should have given more weight than he did, however, to additional information and data submitted by Shell showing oil and grease concentrations ranging from 2.2 mg/l to 1440 mg/l. Although not relied upon in this decision, I also believe it is unfortunate that the EPA Preliminary Report (Exhibit 18-14-C-1), which was introduced at the hearing but not admitted in evidence, was not considered.

I agree with the initial decision to the extent that Shell has not shown that the effluent limitations it proposes for deck drainage withstand scrutiny and analysis of the pertinent data. As sparse as the relevant data are, I must conclude that the data are sufficient to support the Findings set forth above.

C. Bypassing Provision

The following findings of fact and discussion pertinent thereto relate to the issue of whether the permits should include a provision for the bypassing of non-functioning pollution abatement facilities, and, if so,

the form which such a provision should take. Only those findings necessary for the resolution of points in controversy in the record are included.

15. It is recognized that mechanical devices and other equipment will not function properly 100 percent of the time. Such devices and equipment may malfunction or fail. Secondary actions can be taken, however, to prevent discharges of raw or partially treated waste water. A single unit will not operate 100 percent of the time, but the platform together with the onshore system may well eliminate the need to discharge raw or partially treated waste water at any time. BPT consists of an entire system, including process equipment, and not only a single waste treatment unit.

16. In order to minimize unexpected equipment failures and malfunctions, Shell has a preventive maintenance program underway on each platform (Exhibit 2).

17. Platforms "A" and "C" currently do not have domestic waste water treatment systems, although installation of such systems has been agreed to by Shell pursuant to stipulation with the EPA regional office. Extended aeration units on offshore platforms and drilling rigs in the Gulf of Mexico have shown that overall performance is good, although high BOD and suspended solids concentrations have occurred frequently. No instance has been cited where bypassing was required to correct BOD or suspended solids upset conditions.

18. There is little evidence in the record to indicate that Shell has fully explored or disclosed the various alternatives to bypassing. The record is wholly inadequate in articulating even a representative sampling of the kinds of events which might require bypassing.

19. In the absence of more detailed and persuasive documentation in the record relating to equipment malfunctions, maintenance, and upsets which might require bypassing (or have in the past), and recognizing that the effluent limitations set forth herein are based on data which includes upset conditions, there is no justification, based on the evidence available, to include a provision in the permits for bypassing non-functioning pollution abatement equipment, other than under circumstances already exempt from the bypass prohibition in the final permits.

One of the most troublesome aspects of this proceeding is the wholly inadequate documentation of a need for bypassing, as proposed by Shell. As an example, the Regional Administrator found that, "Shell has facilities for shipping the deck drain ashore for treatment." In its petition for review, however, Shell objects to that finding, stating that, "There is no evidence in the record to support this finding." I can only conclude that if Shell is correct, then I find it hard to determine a need for bypassing when information pertaining to such a potentially significant alternative to bypassing is wholly missing from the record. I should add that the record also does not appear to state the negative, i.e. that Shell does not have facilities for shipping the deck drain ashore for treatment. I dwell on this only as an example of why I believe Shell has failed to present on the record a reasonable case for bypassing.

III. CONCLUSIONS

Procedural and Jurisdictional Matters

1. Jurisdiction exists in this matter under Sections 301 and 402 of the Act (33 U.S.C.A. 1311 and 1342) and 40 CFR 125.36, et seq.

2. The initial decision sets forth sufficient findings of fact and conclusions of law to perceive adequately the essential facts and law upon which the decision is based.

3. The findings and conclusions contained in the initial decision are not so vague or incomplete as to indicate that they are unsupported by evidence in the record or are arbitrary and capricious.

4. The NPDES permit regulations (40 CFR 125, et seq.), as written and as applied to the permittee in this proceeding, meet all the applicable requirements of the Administrative Procedure Act and the fifth amendment to the U.S. Constitution.

Permit Terms and Conditions

5. The oil and grease effluent limitations concerning deck drain waste water in the final permits and the initial decision (25/75) are not supported by the record and are not consistent with effluent concentrations attainable through the application of BPT.

6. The oil and grease effluent limitations concerning deck drain waste water proposed by Shell (100/200) are not supported by the record and are not consistent with effluent concentrations attainable through the application of BPT.

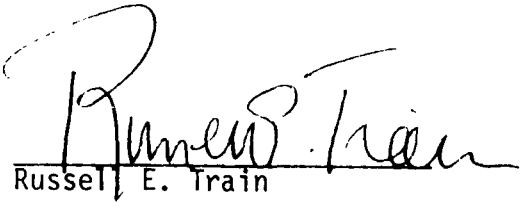
7. Effluent limitations representative of the application of BPT to deck drain waste water are 65 mg/l monthly maximum ("daily average") and 90 mg/l daily maximum. In terms of pounds per day, a preferred effluent

limitation for deck drainage, the following oil and grease effluent limitations are attainable through the application of BPT: 5 lbs/day monthly maximum ("daily average") and 9.25 lbs/day daily maximum.

8. The record supports the conclusion of the Regional Administrator that the permits should not include a provision for bypassing non-functioning pollution abatement equipment, other than under circumstances already exempt from the bypass prohibition contained in the final permits.

9. This decision is based solely on the record presented and other considerations relevant to the record of this proceeding, as provided in 40 CFR 125.36(n)(12).

The Regional Administrator, Region X, shall forthwith modify the final NPDES permits subject to this proceeding as necessary to conform with this decision.



Russell E. Train

Dated: September 25, 1975

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTERS OF:

National Pollutant Discharge Elimination System Permits for Marathon Oil Company (Marathon), Atlantic Richfield Company (Atlantic Richfield) Shell Oil Company (Shell Permittees	NPDES Appeal No. 75-3 Consolidated No. X-74-18C and Case Nos. X-74-8 X-74-10 X-74-11

DECISION OF THE ADMINISTRATOR

This is an appeal pursuant to 40 CFR 125.36(n), et seq. from initial decisions of the Regional Administrator, Region X, dated April 21, 1975, in the above styled consolidated proceeding. This appeal concerns oil and grease effluent limitations and other National Pollutant Discharge Elimination System (NPDES) permit terms and conditions for three (3) onshore oil and gas production facilities located at Cook Inlet, Alaska, The production facilities are identified as follows:

Marathon
Trading Bay Production Facility

Atlantic Richfield
Granite Point Production Facility

Shell
East Foreland Production Facility

During the period June 30, 1971 through December 13, 1971, the individual permittees (sometimes referred to as the "petitioners") applied to the U.S.

Army Corps of Engineers for discharge permits for point source discharges at each of the three production facilities, pursuant to the then-existing federal Refuse Act permit program. On October 12, 1973, the EPA Region X staff issued tentative determinations (draft permits) for each of the three production facilities, followed by an informal public hearing in Anchorage, Alaska on December 13, 1973. On December 28, 1973, the Regional Administrator, Region X, issued final permits for each production facility. On January 4, 1974, the permittees requested adjudicatory hearings on certain terms and conditions of the final permits. Thereafter, on motion of the EPA regional staff, the adjudicatory hearings for the three production facilities were consolidated by the Regional Administrator and the consolidated hearing was held in Anchorage, Alaska on November 12-15, 1974. On March 31, 1975, the Presiding Officer certified the record of the hearing to the Regional Administrator and eight issues of law to the Assistant Administrator for Enforcement and General Counsel.

On April 21, 1975, the Regional Administrator issued the initial decisions noted above.

On April 26, 1975, the permittees filed a joint petition for review by the Administrator of the initial decisions rendered on April 21, 1975. On June 5, 1975, EPA's Chief Judicial Officer issued a notice granting permittees petition for review by the Administrator. Thereafter, the Chief Judicial Officer, acting pursuant to a general delegation of authority from the Administrator, conducted an informal briefing conference with all the

parties on July 9, 1975, received written briefs from the parties on July 25, 1975, and heard final oral argument on August 7, 1975.[1/] This decision is based on an extensive review of the record of this proceeding conducted over a period of approximately six weeks.

This proceeding, together with decisions issued simultaneously in two related proceedings involving seven (7) offshore platforms (Consolidated No. X-74-17C) and two (2) additional offshore platforms (Case No. X-74-5) located in Cook Inlet, Alaska, is the first review conducted by the Administrator under 40 CFR 125.36(n), et seq. It is also, therefore, the first instance in which questions involving the legal sufficiency of the procedures for NPDES adjudicatory hearings have been raised. For these reasons, among others, this decision is lengthier, more detailed and more significant to the overall administration of the NPDES permit program than otherwise might be the case. Because of the multiple parties and complicated legal and technical issues involved, it is hard to imagine a more difficult set of circumstances to review. In an abundance of caution, therefore, I am setting forth in this decision considerably more detailed findings of fact and conclusions of law than otherwise might be necessary or appropriate in less complicated proceedings.

The issues set forth in permittees' petition for review are the following:

1. The effluent limitations to be applied to produced water.

2. The compliance schedule respecting the implementation of effluent limitations for produced water.

1/ Most of the August 7 oral argument transcript in this proceeding was lost by the court reporter and, therefore, pursuant to permittees' request, additional oral argument to reconstruct that portion of transcript was heard in Seattle on September 4, 1975.

3. Whether an upset provision should be included in the permits pertaining to produced water treatment facilities and discharges, and, if so, the form which an upset provision should take.

4. Whether a more liberal bypass provision should be included in the permits pertaining to produced water treatment facilities and discharges, and, if so, the form which a more liberal bypass provision should take.

In addition to the issues noted above, the petitioners have raised a number of procedural and legal objections to the proceedings below. These objections relate to the form and timing of the Regional Administrator's initial decisions, the form and timing of the disposition of issues of law certified to the Assistant Administrator for Enforcement and General Counsel, and the legal sufficiency of the NPDES adjudicatory hearing process under the Administrative Procedure Act (APA) and the due process clause of the Constitution of the United States. I will address these objections first.

I. PROCEDURAL AND LEGAL ISSUES

A. Form and Timing of Initial Decisions

The petitioners object to the following elements of the form and timing of the initial decisions:

1. Issues of law certified to the Assistant Administrator for Enforcement and General Counsel on March 31, 1975, were not decided prior to issuance of the initial decisions and could not therefore have been relied upon by the Regional Administrator as required by 40 CFR 125.36(m)(4).

The record shows that the issues of law certified to the General Counsel on March 31, 1975, were answered on June 27, 1975. Since the initial

decisions of the Regional Administrator were issued on April 21, 1975, there is no question that the Regional Administrator could not have relied upon the General Counsel's response to these questions in preparing his initial decisions. It appears, however, that the objection is largely academic (with one exception) since, as the petitioners point out in their arguments on the other issues, the General Counsel declined to opine on 7 of the 8 issues because of their federal constitutional nature. The remaining issue--relating to the finality of rulings of the Presiding Officer on the admissibility of evidence and other procedural matters under 40 CFR 125.36(i)(6)--has only hypothetical application to this proceeding since it has not been shown that the Regional Administrator in any specific instance substituted his judgment for that of the Presiding Officer on procedural rulings. Therefore, I find no basis for concluding that the Regional Administrator acted contrary to the requirement of 40 CFR 125.36(m)(4). In view of the lateness of the General Counsel's response, I can only conclude that the Regional Administrator in each instance presumed the validity of the Agency's regulations. I can find no fault with that presumption as a basis for issuing the initial decisions and, indeed, would be surprised had he determined otherwise.

2. The Regional Administrator did not address all issues of fact and discretion contained in permittees' proposed findings and conclusions as required by 40 CFR 125.36(l)(2).

Following the adjudicatory hearing, the permittees submitted numerous proposed findings of fact and conclusions of law. EPA regional staff also submitted proposed findings and conclusions. The separate decisions issued by the Regional Administrator each include 2-3 pages of discussion relative to each separate facility and an attached "Statement of Findings and

Conclusions" (8 pages) applicable to all three facilities. While I am sympathetic to the difficulty of reviewing a highly complex record and responding, in detail, to all the proposed findings which may be submitted by a party in a case of this type, I must conclude that the initial decisions do not comply fully with the intent of the regulations. There is considerable merit in the argument made by the EPA regional staff that the initial decisions need only contain the "ultimate facts" in issue, and need not address each and every finding proposed by a party. The petitioners contend, however, that a failure to set forth detailed findings and conclusions and the reasons and basis therefor is more than a matter of style and form. Such shortcomings may adversely affect the ability of parties and reviewing tribunals to perceive adequately the essential facts and law on which a decision is based. I do not believe that to be the case in this proceeding. Even though some statements in the initial decisions are rather perfunctory, there is sufficient detail and explanation to perceive adequately the essential facts and law on which the decisions are based. Such infirmities in style and form as do exist are not sufficient to require that the initial decisions be vacated. (Apparently, as a result of a drafting or editing error, the petitioners request that a "second initial decision" in this proceeding also be vacated. There is no such "second initial decision" at issue in this proceeding.) Considering the extensive review of the record made in reaching this final decision, it is appropriate to set forth herein any new or supplemental findings and conclusions needed to adequately apprise the parties and any reviewing court of the reasons and basis for the Agency's final decision.

B. Issues of Law

The issues of law certified to the Assistant Administrator for Enforcement and General Counsel by the Presiding Officer on March 31, 1975, include the APA and Federal constitutional due process issues raised in the petitions for review, and therefore they are addressed together herein.

Before addressing the particular issues raised, I should state unequivocally that I believe the NPDES permit regulations, as written and as applied to the permittees in this proceeding, meet all the applicable requirements of the APA and the fifth amendment to the U.S. Constitution. The constitutionality of the NPDES regulations was fully considered at the time the regulations were promulgated. I should also state clearly at the outset that I do not believe it is necessary or appropriate for me, in this permit review proceeding, to address in detail the specific constitutional issues which have been raised. These arguments, in all likelihood, would be heard de novo by a Court of Appeals reviewing this decision. To attempt to answer specifically these questions in this decision (and thus in every other permit review proceeding in which these or other constitutional questions are raised) would place an unacceptable burden on the adjudicatory hearing process. I should note, in addition, that constitutional questions similar to those posed in this proceeding are currently before the Seventh Circuit Court of Appeals in another permit proceeding and in the District Court for the Northern District of Illinois in an APA challenge to the NPDES regulations. I believe those to be the proper fora for review of these constitutional issues.

Nonetheless, I feel compelled to state for the record of this proceeding my general understanding of the nature of the NPDES adjudicatory hearing process within the context of the APA and Federal constitutional law relating to administrative hearings, for whatever benefit it may in this and future

proceedings. I would be remiss not to address these matters and attempt to resolve some elements of the confusion and controversy which have existed in this proceeding (and the related Cook Inlet proceeding designated X-74-17C) regarding the nature of the NPDES adjudicatory hearing process.

Fundamentally, the process of determining terms and conditions for NPDES permits is an information-gathering and fact-finding process. The process begins with the submission of information and data by the applicant. Thereafter, the applicant and the public are provided several opportunities to participate in the administrative process and thereby protect their interests. EPA regulations require that public notice be given of the proposed issuance of each permit, setting forth EPA's tentative determinations. Interested persons may submit written comments concerning the Agency's tentative determinations and may request a public hearing. The written comments must be considered by the Agency in making its final determinations. If it is determined that a significant degree of public interest regarding a proposed permit exists or that a public hearing would provide useful information, the Agency may hold a public hearing after due notice. At the hearing, any person may submit oral or written statements and the information provided must be considered by the Agency in making its final determinations. If the Agency's subsequent determinations are substantially changed from earlier tentative determinations, EPA must give public notice of any such changed determinations.

After a final determination is made by the Agency (i.e., a final decision on a permit is tendered to the applicant), any interested person may submit

a request for an "adjudicatory hearing." Such hearings are not required by the Act, but pursuant to EPA regulations will be granted if the applicant has met certain requirements in its request and if EPA determines that the request "sets forth material issues of fact relevant to the questions of whether a permit should be issued, denied, or modified." Following an adjudicatory hearing, the EPA Regional Administrator or his designee renders an initial or recommended decision on the issues presented at the adjudicatory hearing. If the applicant is still dissatisfied with the terms and conditions of the final permit, he may request review by the Administrator.

At each stage of the foregoing process, EPA is required to make technical judgments concerning the degree of effluent control required to comply with the provisions of the Act. In those cases where the Act's technology-based standard for 1977 applies--i.e., "best practicable control technology currently available"--the Agency either adheres to previously established "effluent guidelines" for the particular industry or, where such guidelines have not yet been established relies upon the "professional judgment" of the Agency's staff in setting permit limitations and conditions. In the latter case (which is the case in this proceeding), the exercise of professional technical judgment inherently involves some case-by-case "legislative" or policy determinations, as well as specific "judicial" or factual determinations. Thus, particularly in the case of pre-guideline permits, it is difficult to separate legislative from judicial facts and determinations.

It is important to note also that the determinations being made in the issuance of NPDES permits relate to future conduct, as distinguished from factual

determinations regarding past events. While past performance is pertinent in determining the level of control needed to meet the requirements of the Act, the thrust of NPDES permits is to determine what steps an applicant must take in the future to control effluent discharges. These considerations are relevant and important to an understanding of how the NPDES adjudicatory hearing process relates to the requirements of the APA and constitutional due process.

With this background, the following questions emerge:

Does the Act require a trial-type APA adjudication in NPDES permit hearings, with all the attendant procedural safeguards of the APA? If not, is the NPDES adjudicatory hearing process nonetheless infirm because it does not provide sufficient procedural safeguards in keeping with due process requirements of the U. S. Constitution?

NPDES adjudicatory hearings are "adjudications," as defined by the APA, since, by tracing through the defined terms, it is inescapable that agency process for the formulation of an agency permit is an "adjudication." Significantly, however, the sections of the APA applicable to agency adjudications apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . (emphasis supplied)." Section 5 of the APA (5 U.S.C. § 554) has been interpreted to mean that Sections 7 and 8 of the APA (5 U.S.C. §§ 556 and 557) need be applied only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record'. Section 402 of the Act only requires "opportunity for public hearing" before the

issuance of an NPDES permit. I am not unaware of some cases which have held that even in the absence of statutory language directing a hearing "on the record," some agency hearings may nonetheless fall within the ambit of the APA.

I am also aware of a 1973 opinion of the Department of Justice Office of Legal Counsel to this Agency, addressing the question of whether administrative law judges would be required to preside at NPDES adjudicatory hearings, which states:

> "In the absence of unequivocal legislative history indicating a contrary result, history not here present, we do not believe that the omission of the phrase 'on the record' from section 402 may be said to reflect any deliberate Congressional intention."2/

Thus, the opinion concluded, since administrative decisions in NPDES cases are subject to judicial review in the courts of appeal and the rules of practice require the submission of the agency record for review, the administrative decision must be "on the record" and, accordingly, administrative trial judges would be required. One year after the above opinion was rendered, however, the NPDES regulations were amended in several important respects, and the matter again has been submitted to the Justice Department for a legal opinion. Unfortunately, that opinion is not yet available to me for additional guidance. My impression, however, is that even if the Department of Justice should again opine that administrative law judges are required to preside at NPDES permit hearings, that still would not resolve the issue of whether NPDES permit hearings are subject to the

2/ Memorandum Opinion dated June 5, 1973, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Alan G. Kirk II, General Counsel, EPA, and Anthony L. Mondello, General Counsel, Civil Service Commission, p. 2.

full range of procedural requirements applicable to an "adjudication" under the APA. At the very most, it seems to me, adjudicatory hearings on initial NPDES permits might be considered "initial licensing" proceedings under the APA. As such, they would be exempt from certain requirements of the APA, such as the rendering of a recommended decision by an administrative law judge.

On the basis of the foregoing discussion, which is not intended to be an exhaustive analysis of the issues and law involved, I can only conclude that the petitioners have not presented a convincing argument that the APA is fully applicable to NPDES permit hearings. Even apart from the questions of APA applicability, the petitioners have failed to demonstrate that the procedures employed in this proceeding were fundamentally lacking in fairness.

The permittees argue that due process principles under the U.S. Constitution require trial-type adjudicatory hearings on the terms and conditions of NPDES permits and that such hearings be "on the record." While I agree that NPDES permit applicants must be afforded constitutional due process, I do not believe that the Agency's regulations or the procedures employed in this particular proceeding have denied the permittees a fair hearing in keeping with constitutional due process requirements.

The due process clause does not require a full adjudicatory hearing in every case of government restraint of a private interest. The Supreme Court has stated that:

> ". . .consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."3/

3/ Cafeteria & Restuarant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 894-95 (1960).

I believe the NPDES regulations fully reflect the "precise nature of the government function involved," as well as the private interests affected, in setting forth the panoply of administrative procedures for determining the terms and conditions of NPDES permits. Both the applicant and the public are afforded ample opportunities to challenge the tentative determinations of the Agency, to express their views in informal public hearings, and, in a more formal setting to present their own evidence, data, and information, as well as rebut the information being relied upon by the Agency. To apply the additional strictures which petitioners urge would greatly reduce the flexibility needed to consider and evaluate the technical information and data which is inherent in the NPDES permit process, without materially adding to the elements of a fair hearing already provided.

Without addressing each point separately made by the petitioner, it should suffice to state that the due process objections raised--including commingling of functions in the Regional Administrator, consideration of matters outside the record of the hearing, lack of discovery and subpoena power, and evidentiary rulings by the presiding officer--are not supported by sufficient showings that the petitioners in fact were deprived of opportunities to furnish their own comments and testimony, rebut information and evidence relied upon by the Agency, obtain additional information in the possession of the Agency, and, by all these means, participate fully in the administrative process to protect their interests.

For these reasons, which I do not intend to be a complete analysis of the issues and law involved, I am convinced that the petitioners have not been denied due process under the Constitution.

II. FINDINGS

A. Facilities Involved

The record includes considerable information describing the onshore oil and gas production facilities involved in this proceeding. The following findings proposed by the permittees in a document accompanying their written brief submitted on July 25, 1975, are, with certain exceptions indicated, adopted for purposes of this decision:

1. Cook Inlet is a body of water located near Anchorage, Alaska, lying in a general northeast-southwest direction with its northermost regions touching Anchorage, and its southwestern regions opening to the North Pacific Ocean and is navigable waters of the United States.

2. The facilities for which the NPDES permits were issued on December 28, 1973 are oil/water separating facilities located on or near the shore of Cook Inlet, Alaska, between parallels of North latitude 60^{o} and 61^{o}, approximately 70 miles southwest of Anchorage. The locations of these facilities are identified on demonstrative maps included in the respective "fact sheets," which are exhibits in this case.

3. The facilities are owned, maintained, and operated by various oil companies, and the discharges from the particular facilities involved in these proceedings are also described in the respective "fact sheets."

4. Petitioners operate onshore production facilities in Cook Inlet as follows:

a. Marathon operates the Trading Bay Production Facility located on the West Foreland in Cook Inlet, Alaska. Crude petroleum, produced water and other wastes are pumped through submarine pipelines from three McArthur River Field platforms and one Trading Bay Field platform to the production facility.

The oil is received in an emulsified form and is treated using vessels known as line heaters, flow splitters, and heater treaters. This treating process has a daily capacity of 195,000 barrels of fluid (crude oil, produced water and other wastes). Produced waters, sediments and unbroken emulsion collected from the various vessels are piped to a 10,000 barrel skim tank which provides retention time of about six hours. Oil is skimmed from the skim tank and is recycled. The water is piped to one of three skim pits where it is aerated, retained and syphoned from pit to pit. Oil is removed from the pits and the water is discharged into Cook Inlet. [Sentence intentionally omitted.]

The facilities which pump crude oil and produced water into Trading Bay Production Facility are: Dolly Varden Platform; Monopod Platform; King Salmon Platform; and Grayling Platform.

b. Shell Oil Company operates the East Foreland Production Facility at Cook Inlet for the purpose of treating crude oil and water produced from the Middle Ground Shoal Field, Alaska and removing significant traces of oil from the water prior to discharge into the Inlet. The original deoiling facilities, installed in 1965, consisted of a 2000 barrel retention/

skimmer tank and a 500 barrel oil recovery tank. The deoiling facilities were revised in 1969 and currently consist of: 1) a 2000 barrel retention/skimmer tank; 2) a 450 gallons per minute (14,500 barrels per day) Pollution Control Engineering Company fully pressurized dissolved gas (air) flotation cell system; and 3) a 500 barrel oil recovery tank. The flotation cell was added as a means of increasing the waste oil recovery efficiency of the facilities to a practical maximum. Deoiled effluent is piped into Cook Inlet.

The waste oil, which is removed by the deoiling equipment, is temporarily stored in the 500 bbl oil recovery tank and returned to the oil treating system of the East Foreland Production Facility for additional treatment.

The East Foreland Production Facility is currently treating 6,800 barrels per day of produced water as of September 19, 1974. Based on estimates of Shell engineers the produced water is expected to increase by about 61% between now and January 1978. In addition, the facilities will be treating produced water received from the AMOCO Production Company's (AMOCO) Dillon Platform. The volume of this water is estimated to vary from about 400 to 8,000 barrels per day, depending on the operation being performed by AMOCO on the platform and equipment or operating problems encountered by AMOCO.

c. Atlantic Richfield operates the Granite Point Production Facility located on the west side of Cook Inlet approximately 50 miles WSW of Anchorage, Alaska. Crude petroleum, produced water and other wastes are pumped through submarine pipelines from two production platforms in the North Trading Bay Unit.

The production (oil and water) from the Spark Platform comes ashore through a submarine pipeline and enters the flow splitter, then passes though one Chemelectric heater-treater). Dehydrated crude oil from both heater-treaters flows to the shipping tanks. Produced wastewater from the flow splitter and the two heater-treaters flows to another treater (Chemelectric heater-treater) where the wastewater is subjected to increased heat. From there the wastewater flows through two 5,000 barrel (3-ring, galvanized, bolted API) tanks in series, and then through a trough and channel system (providing aeration) into Cook Inlet. The average flow is approximately 9,000 barrels per day.

The facilities which pump crude oil, produced water and other wastes into Granite Point Production Facility are: Spark Platform, and "A" Platform.

5. Each of the facilities is connected to offshore platforms by means of submarine pipelines lying zero to approximately 120 feet below the surface. These connecting submarine pipelines are typically 8 inches in diameter, except that Atlantic Richfield Company's line is approximately 5.5 inches inside diameter. Approximately 700 to 2,100 pounds per square inch is the typical operating pressure of these pipelines which are approximately 6 to 10 miles long.

6. A liquid called "produced water" is produced on the platforms as a result of extraction activities on the platform from the geological strata lying several thousand feet below each platform.

7. The fluid stream produced from the geological formation is an emulsion consisting primarily of produced water, crude oil and natural gas. The produced water phase is separated for further treatment and contains various dissolved salts, dissolved gases such as carbon dioxide, suspended solids, and natural surface active agents. [Sentence intentionally omitted.]

8. When the produced water is raised to the surface ("wellhead") most of it is typically pumped to the shore through the submarine pipelines at various rates (gallons per minute).

B. Effluent Limitations--Produced Water

The following findings and discussion pertinent thereto relate to the establishment of effluent limitations for produced water discharges from the onshore production facilities. Only those findings necessary to resolve points in controversy in the record are included.

9. The treatability of any waste water depends upon its specific characteristics. The characteristics of produced water vary from one time to another and from location to location, resulting in different effluent concentrations even when exemplary treatment systems are used. Produced water characteristics also vary from strata to strata, from reservoir to reservoir with a field, and from one field to another. Produced waters from different strata, reservoirs, and fields are not necessarily physically and chemically compatible in terms of treatability.

10. The type of operation, waste characteristics, and location are the principal factors affecting subcategorization of the oil and gas extraction industry for the purpose of establishing effluent limitations. Size of facility, climate, and volume of waste generated have little influence on treatment technology. (Exhibit 19, p.I-1).

11. Subcategorization is not needed to account for production field age or brine produced since similar treatment technology is used regardless of the quantity of brine produced. (Exhibit 19, p.IV-4).

12. Existing waste water treatment systems in the Gulf of Mexico and Cook Inlet, Alaska, are subcategorized to allow discharges to the receiving waters. No further subcategorization based on produced water characteristics is justified. (Exhibit 19, p.IV-8).

13. There is a correlation between the treatability of produced water being treated in the coastal waters of Louisiana and that being treated in Cook Inlet, as demonstrated in Mr. Sebesta's testimony and the EPA Draft Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Oil and Gas Extraction Point Source Category, October 1974 (hereafter referred to as the "Draft Development Document"). (Exhibit 19).

14. The Draft Development Document is the most reliable study for determining Best Practicable Control Technology Currently Available (hereafter referred to as "BPT") because it uses the most substantial data base available and considers the age of the facilities, the process employed, engineering aspects, process changes, and non-water quality environmental impact, including energy requirements.

15. Physical/chemical produced water treatment systems consisting of equalization, chemical addition, and gas flotation are the best practicable technology for facilities located in the Gulf of Mexico and coastal Alaska. (Exhibit 19, p.I-2; Exhibit 5, p.3; and Exhibit 1, p.9).

16. Effluent limitations are not based solely on wastewater treatment efficiency, but include the best control measures and practices economically achievable, including process and procedure innovations, operation methods, and other alternatives. (Exhibit 19, p.III-2).

17. The Shell East Foreland onshore production facility has a diffused gas air flotation system for produced water treatment which has been considered an exemplary system for the purpose of establishing effluent limitations. (Exhibit 19, pp. VII-19, IX-7).

18. The record contains two data bases which were analyzed to determine numerical effluent limitations for produced water. The EPA data base

(known as "BRFL data") is presented in the Draft Development Document. The data base presented by Shell (known as "TAFC data" for Total Available Flotation Cell data) includes data from the Shell East Forelands onshore facility.

19. The two data bases in the record are composed of data collected both by grab and composite samples. For purposes of statistical analysis, grab sample data should be transformed to make it more representative of composite sample data since the NPDES permits are based on composite sampling.

20. The BRFL and TAFC data[4/] conform to a three parameter lognormal

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4/ This data base consists of Brown and Root flotation units (BRFLs) 1 thru 41, with the exclusion of the following units for insufficient data.

BRFL unit#	#of data points
18	3
19	3
20	3
21	2
22	3
31	5
35	0
36	2
40	1
41	1

Also excluded from the data base were the following points, for the reasons noted. Where outlier is noted, this is with regard to a statistical test based on the studentized maximum. (See Sarhan, A.E. and Greenberg, B.G. (eds.), "Contributions to Order Statistics," (1962), John Wiley, New York.)

BRFL unit#	#points	Reason
7	3	Outlier
8	1	Outlier
10	2	Outlier
11	5	Start up
27	4	Outlier
28	1	Outlier
38	15	Start up
	4	Heater-treater malfunction

distribution.[5] The data bases were tested for lognormality by using a goodness of fit test.[6]

21. A statistical analysis[7] of both data bases representative of BPT systems for treating produced water indicates that the following equivalent values for oil and grease effluent limitations for produced water, using composite sampling, are attainable: 48 mg/l monthly maximum ("daily average") and 72 mg/l daily maximum.[8]

In determining the produced water effluent limitations set forth in the initial decisions, the Regional Administrator rejected as "not controlling" the proposed effluent limitations described in the Draft Development Document (Exhibit 19) and the operating experience of oil and water separators in the Gulf of Mexico (Exhibits 10 and 11). I believe he should have given weight to both. While he is correct in stating that

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5/ Aitchison, J., and Brown, J.A.C., "The Lognormal Distribution," (1969), Cambridge University Press.

6/ Anderson, T. W., and Darling, D. A., "Test of Goodness of Fit," American Statistical Association Journal, 49 (1954), 765-769.

7/ Both data bases obeyed the same three parameter lognormal distribution, with the parameters of the daily data being; T=10, log mean = 1.54 and log standard deviation = .157. Thus the 99% confidence limit about the mean was Max (daily) = $10^{1.54+2.33X.157} - 10$. The monthly maximum was attained by simulating concentrations from the above distribution, averaging four values and applying the confidence limit methodology above.

8/ These limitations are based on four composite samples per month, where each composite sample is the result of four grab samples on a given day. The terms "monthly maximum" and "daily maximum" are defined, with respect to the foregoing sampling scheme, as follows: (1) "monthly maximum" is the value the monthly average shall not exceed, and (2) "daily maximum" is the value the daily composite sample shall not exceed.

the Draft Development Document is, in fact, only a "draft" and therefore represents the then-current status of EPA efforts to establish effluent guidelines for the oil and gas extraction industry, he dismissed too quickly the vast amount of information and data collected therein. For purposes of this proceeding, it represents the most comprehensive Agency analysis of factors affecting the establishment of effluent limitations for pre-guideline permits in the oil and gas extraction industry. While it may be changed in some respects prior to its publication by the Agency in the form of final effluent guidelines, considerable weight should have been given to the contents of this document.

Similarly, I do not agree with the Regional Administrator that there is no correlation between the Gulf of Mexico data and Cook Inlet data. Although there are some apparent differences in waste characteristics, volume, and other factors affecting treatability, I believe the initial decisions are in error in failing to give weight to the Gulf data analysis in the record.

The evidence cited in the initial decisions as the basis for setting 25/50 effluent limitations for produced water is based on operating experience in Cook Inlet, including Shell data collected during the first 8 months of 1974 averaging less than 11 mg/l and Atlantic Richfield data collected during 1973 averaging less than 4 mg/l. While I cannot disagree with the emphasis placed on analyzing Cook Inlet data, I am not convinced that the pertinent Cook Inlet data were properly analyzed or that the Regional Administrator considered all the pertinent Cook Inlet data available. The

permittees point out in their peititon for review that out of a total of over 6,000 relevant data points (including 178 relating to Cook Inlet production facilities), the initial decisions apparently rely upon only 79 data points relating to the Shell and Atlantic Richfield production facilities.

The final decision in this proceeding concerning produced water effluent limitations should be and is based upon a thorough statistical analysis of relevant Cook Inlet data. Those results should be considered in light of industry experience generally.

C. Upset Provision

The following findings and discussion pertinent thereto relate to the issue of whether an upset provision should be included in the permits pertaining to produced water treatment facilities and discharges, and, if so, the form which an upset provision should take,

22. Control and treatment technology is subject to malfunction caused by formation characteristics, improper operating procedures, equipment failure, or start-up problems. An effective program to investigate the causes of failure and to take corrective action can eliminate the majority of the malfunctions and reduce high variability in effluent concentrations. (Exhibit 19, p.I-2).

23. In determining systems representative of BPT, the Draft Development Document excludes data obtained when treatment units were installed (start-up), when chemical treatment rates were modified, and when significant equipment maintenance was being performed. (Exhibit 19, p.IX-6).

24. Normal operation of oil production facilities includes producing, drilling, reconditioning, acidizing, wire line operations, and other recurring types of operation on or at an oil production facility. (Exhibit 8, p.8).

25. Spent acids and fracturing fluids usually move through the production system and through the waste water treatment systems. The presence of these wastes in the treatment system may cause upsets and higher oil concentrations in the discharge water. (Exhibit 19, p.VII-47; Tr.191).

26. In determining systems representative of BPT, the Draft Development Document includes data collected during normal operation, upset resulting from well workovers, and other recurring operations. (Exhibit 19, pp.IX-3, 6; Tr.192).

27. Upsets and high oil concentration in the waste water treatment system may be quickly detected through the use of a phototester-type of check. (Tr.156-57)

28. Programs for treating sulfate-reducing bacteria problems include injection of bactericide into the system, which may be performed during production. (Tr.1214).

29. All new waste treatment systems must be started and their operations stabilized. During periods of "start-up" and "stabilization" new treatment systems may operate at less than optimum efficiency. Start-up and stabilization of new waste treatment systems have been taken into account in the existing compliance schedule provision. Since most of the equipment items needed to meet BPT requirements are "off-the-shelf" items with which the oil and gas industry has had considerable experience, a 60-day stabilization period following completion of construction is reasonable and has been provided in the permit compliance schedules.

The terms and conditions of the permits may have the effect of inhibiting the installation of new, improved technology because of start-up

and stabilization problems. If necessary, the NPDES regulations provide for the amendment of permits to allow for improvements in technology and other changes as may be appropriate.

30. The efficiency of treatment systems representative of BPT will fluctuate depending upon the volume and variations in the quality of the influents. Upset factors or high variations in effluent concentrations may, under certain circumstances, be an integral component of BPT. High effluent concentrations caused by improper maintenance, careless operation, or inadequate equipment are not inherent in BPT effluent limitations.

31. Low effluent concentration levels are not the only criterion for systems representative of BPT. The equipment also must be reliable, easy to maintain, free from major breakdown, and easy to operate.

32. Equipment malfunctions or failures likely to cause upsets can be minimized through proper maintenance and operation. High effluent concentrations do not necessarily reflect, but might suggest improper operating procedures.

Preventive measures, as well as modifications in the process system and pretreatment, are considered part of BPT. The effluent limitations for produced water were derived from data obtained from facilities having a wide range of maintenance programs, including those which were not exemplary. Improvements in preventive maintenance should result in less variability in effluent concentrations.

33. The record includes little evidence to indicate that the permittees have fully explored or disclosed the various means available to "correct"

upset conditions when they occur or to prevent their occurence. The terms "upset" and "malfunction" are inadequately defined, and statements relating to the duration of such conditions are broad and generalized.

34. In the absence of more detailed and persuasive documentation in the record relating to equipment malfunctions, maintenance, and upsets, and recognizing that the effluent limitations set forth herein are based on data which was obtained during normal operations and includes upset conditions, periods of high effluent concentration, and drilling operations, there is no justification, based on the evidence available, to include an upset provision in the permits pertaining to produced water facilities and discharges.

As indicated above, I find the record cloudy and deficient on the issue of upsets. The permittees have failed to articulate a clear definition of what constitutes an "upset" condition. I understand the term "upset" to mean, generally, any situation during which effluent concentration limitations for a particular discharge are exceeded. The causes of upsets at oil and gas production facilities apparently are diverse and, at times, unpredictable. For that reason, I assume, the permittees hesitate to codify specific events or situations which they would consider as falling within their proposed upset provision. Obviously, they are concerned that an upset might lead to a permit violation, and thus expose them to civil penalties or criminal prosecution under the Act.

As stated in the findings set forth above, I can find no reasonable basis on the record for adopting an upset provision as proposed by the permittees. An open-ended upset provision, quite simply, would invite

abuse and greatly complicate enforcement of the permit terms and conditions. The burden on the EPA regional office charged with enforcing the permits would be compounded. As presently formulated in the final permits, the regional office has a difficult task ahead in monitoring the permits, detecting probable violations, and exercising its enforcement discretion. If the permittees' proposal were adopted, the regional office would be obliged in each case to find that a particular event or situation causing an upset was not beyond the reasonable control of the permittee before initiating any enforcement proceeding. One can imagine that making such a finding, when all the relevant facts are in the exclusive possession of the permittee, would be an exceedingly difficult task. One can also imagine that in most cases the entire enforcement proceeding would then hinge on EPA being able to establish either negligence or intentional misconduct on the part of the permittee as the cause of the permit violation. I do not believe the Act contemplates putting that burden on the Agency.

I am less fearful than the permittees appear to be that EPA's regional enforcement offices will abuse or unreasonably apply their enforcement discretion. I am, therefore, not convinced that any permit provision which would have the effect of diminishing or curtailing the Agency's enforcement responsibility and discretion would be in the best interest of the nation's water pollution control program. At the same time, I am not convinced that the permittees are unnecessarily or unlawfully exposed to the possibility of prosecution for violations not sufficiently set forth in the applicable law and regulations of the Agency.

D. Bypassing Provision

The following findings and discussion pertinent thereto relate to the issue of whether a more liberal bypass provision should be included in the permits pertaining to produced water facilities and discharges, and, if so, the form which a more liberal bypass provision should take, Only those findings necessary to resolve points in controversy in the record are included.

35. In addition to gravity separation and gas flotation for onshore treatment of waste water, it is desirable to have some provision for handling an upset condition (such as a receiving vessel) so that the waste water can be treated at leisure. (Tr.78).

36. Existing treatment systems may be used to treat waste water during start-up and stabilization of new treatment systems. (Exhibit 33, p.22).

37. Storage vessels and holding pits are available at onshore oil production facilities to retain waste water during upsets or other situations which may cause high oil concentrations in the effluent. (Exhibit 3, p.22; Exhibit 6, p.2; Tr. 151, 193).

38. The Shell East Foreland production facility requires about 15 man-hours per month to maintain the deoiling equipment. There is a capability to divert the effluent to temporary storage if concentrations exceed effluent limits. Rapid test methods have been developed to assist the operator in determining the quality of the discharge. (Exhibit 8, p.2; Tr. 151).

39. The evidence presented in this proceeding does not disclose any occasion involving repair or replacement of equipment when bypassing

the treatment system at the Shell East Forelands facility was required, even when major maintenance consisting of replacement of the skimmer blades in the flotation unit recently was undertaken.

40. Cleaning scale from the Marathon Trading Bay facility heater-treater is required to be performed every two months. There is no evidence that bypass of the treatment system has been required during these cleaning operations.

41. Preventive measures, as well as modications in the process system and pretreatment, are considered part of BPT. The assumption that the bypass prohibition in the existing final permits will encourage operators to reduce maintenance of oil-water separation equipment is contrary to the evidence, which shows that preventive maintenance activities do not require bypassing the treatment system. The evidence shows that the majority of the maintenance operations can be performed while the equipment is operating.

42. When replacement or repair of equipment is required, an alternative to bypassing is to retain waste fluids for various lengths of time in different kinds of storage vessels (tanks, lagoons, etc).

43. The permittees have not presented sufficient evidence in the record to indicate that a more liberal bypass provision should be inlcuded in the permits pertaining to produced water treatment facilities and discharges.

44. The findings and discussion in the preceding section relating to upsets, to the extent they affect considerations relating to bypassing, are incorporated by reference in this section of the decision.

As indicated above, I find the record confusing and deficient on the issue of bypassing. The permittees have failed to articulate a clear definition of "bypass" and the events or situations which, in their judgment, may require bypassing. I understand the term "bypass" to mean, generally, any situation where an effluent to be treated before discharge is either wholly or partially routed around the waste treatment facility and is thereby discharged to the receiving water untreated or only partially treated. As with upsets, the events or situations which may lead to a bypass are diverse. The permittees, therefore, I assume, hesitate to specify exactly what events or situations might be regarded as falling within a provision for more liberal bypassing of the treatment facilities. Generally, such events or situations would be associated with maintenance or malfunction of equipment.

The permittees contend that the existing permit provision prohibiting bypass except where necessary to prevent loss of life or severe property damage unnecessarily restricts their ability to perform maintenance and repair of equipment. They contend, moreover, that the concept of BPT inherently involves some provision for upset and bypass situations.

As stated in the findings set forth above, I am not persuaded that the record shows a reasonable basis for liberalizing or expanding the existing bypass provision contained in the final permits. Several alternatives to bypassing are evident, including diversion to temporary storage tanks or lagoons. In the unusual situation where these alternatives are not adequate or feasible, some other provision can be made on an ad hoc basis

in consultation with the EPA regional office. Where the only apparent course of action is to shut down the facility and it is evident that damage to the producing reservoirs would be likely to result, that particular situation might be covered by the existing severe property damage exception to the bypass prohibition clause. These situations are not so frequent that it would impose an onerous burden on the permittee or the EPA regional office to handle them on a case-by-case basis. Such an approach is preferable to a relaxation of the bypass provision, which would invite abuse and unduly complicate enforcement of the permit terms and conditions.

I am aware of the permittees' repeated assertions that they would not intentionally bypass in any case other than where it is absolutely necessary to perform maintenance and make repairs. I believe they,as all responsible companies, would adhere to these assertions. Nonetheless, I do not believe that the effect of a more liberal bypass provision--a diminution of the Agency's enforcement responsibility and discretion--would be in the best interest of the nation's water pollution control program.

E. Compliance Schedules

I am unable to determine on the record any basis for modifying the compliance schedules set forth in the final permits issued by the Regional Administrator, except to the extent necessary and appropriate to account for the passage of time since the inception of the adjudicatory hearing, which may have delayed the implementation of the requirements set forth therein and in this final decision.

III. CONCLUSIONS

Procedural and Jurisdictional Matters

1. Jurisdiction exists in this matter under Sections 301 and 402 of the Act (33 U.S.C.A. §§ 1131 and 1342) and 40 CFR 125.36 et seq.

2. Issues of law certified to the Assistant Administrator for Enforcement and General Counsel were not answered prior to the issuance of the initial decisions, but because 7 of the 8 issues related to questions of constitutional law which the General Counsel felt compelled not to answer the Regional Administrator was justified in assuming the validity and constitutionality of the regulations as a basis for the initial decisions.

3. Permittees' objection relating to the finality of evidentiary rulings by the Presiding Officer is hypothetical in nature and therefore not in issue.

4. The initial decisions set forth sufficient findings of fact and conclusions of law to perceive adequately the essential facts and law upon which the decisions are based.

5. The NPDES permit regulations (40 CFR 125.36 et seq.), as written and as applied to the permittees in this proceeding, meet all the applicable requirements of the Administrative Procedure Act and the fifth amendment to the U.S. Constitution.

6. The applicable standard for review of the initial decisions of the Regional Administrator is whether the findings and conclusions contained therein are supported by the record and are found not be arbitrary and capricious.

Permit Terms and Conditions

7. All evidence presented at the consolidated adjudicatory hearing must be considered in establishing effluent limitations for each permit.

8. The oil and grease effluent limitations concerning produced water in the initial decisions (25/50) are not supported by the record and are not consistent with effluent concentrations attainable through the application of BPT.

9. The oil and grease effluent limitations concerning produced water proposed by the permittees (68/100 for Marathon and Atlantic Richfield, 75/120 for Shell) are not supported by the record and are not consistent with effluent concentrations attainable through the application of BPT.

10. Effluent limitations attainable by the application of BPT to produced water discharges are 48 mg/l monthly maximum ("daily average") and 72 mg/l daily maximum.

11. The record supports the conclusion of the Regional Administrator that the permits should not include an upset provision pertaining to produced water treatment facilities and discharges as proposed by the permittees.

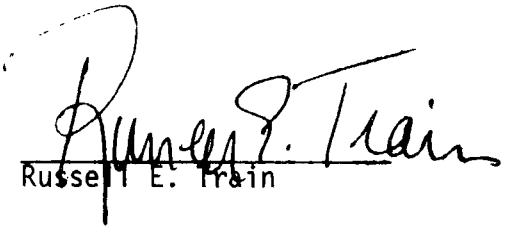
12. The record supports the conclusion of the Regional Administrator that the permits should not include a more liberal bypass provision pertaining to produced water treatment facilities and discharges as proposed by the permittees.

13. The compliance schedules included in the final permits, adjusted as may be necessary and appropriate to take into account any delays in implementation due to the pendency of this proceeding, are affirmed.

14. This decision is uniformly applicable to the three permittees and production facilities involved in this consolidated proceeding.

15. This decision is based solely on the record presented and other considerations relevant to the record of this proceeding, as provided in 40 CFR 125.36(n)(12).

The Regional Administrator, Region X, shall forthwith modify the final NPDES permits subject to this proceeding to conform with this decision.



Russell E. Train

Dated: September 25, 1975

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF: National Pollutant Discharge Elimination System Permits For Orca Cannery (Permit Nos. AK-000030-2 and AK-002372-8) New England Fish Company, Permittee.	)	NPDES Appeal No. 75-8 Notice Denying Petition For Review Of Decisions Of The Regional Administrator, Region X

On September 2, 1975, New England Fish Company("Permittee") transmitted a petition for review of a decision of the Regional Administrator, Region X, issued on June 2, 1975, denying Permittee's request for an adjudicatory hearing and a decision of the Regional Administrator, Region X, issued on August 26, 1975, denying Permittee's request for reconsideration of its prior request for an adjudicatory hearing.

The petition recites that on January 3, 1975, Permittee initially filed a request for an adjudicatory hearing, following the issuance of final permits for the Orca Cannery, Cordova, Alaska, On December 20, 1974. That request noted that the permit requires screening of seafood waste before discharge from Permittee's facility after July 1, 1977, but that a similar facility (Wards Cove Packing Company, Ketchikan) "located in similar ocean flow condition and also near a town declared to be non-remote" had been granted a permit requiring only grinding and controlled discharge.

The January 3, 1975, request stated that these similarities indicate the Orca plant's permit should be revised to require grinding with controlled discharge through June 30, 1979.

The January 3, 1975, request was denied on the ground that the promulgated effluent guideline applicable to "this non-remote facility" requires screening or an equivalent before discharge, and thus the request did not set forth material issues of fact relevant to the question of whether a permit should be issued, denied, or modified.

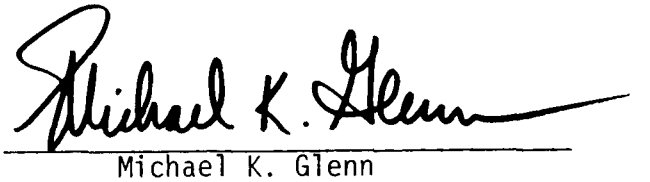
In its subsequent request for reconsideration, Permittee asserted that the definition of "non-remote" (i.e., ". . . located in population or processing centers including but not limited to Anchorage, Cordova, Juneau, Ketchikan, Kodiak and Petersburg . . .") is not sufficiently precise, such that EPA is or should be required to make a factual determination as to whether Permittee's Orca facility is, in fact, non-remote. Permittee points out that the Orca Cannery is not located in the heart of Cordova, but is outside "the population and processing center of Cordova and is, thus, a remote facility."

The request for reconsideration was denied on the ground that it failed to disclose any matter that was not considered at the time of the original denial.

It is clear from the Regional Administrator's original denial of the request for an adjudicatory hearing that he determined the Orca facility to be "non-remote," in fact, pursuant to the applicable guidelines Permittee has not submitted sufficient information to indicate that the Regional Administrator was incorrect in making that determination or that

the matter involves complex factual issues. There is no basis to conclude that an adjudicatory hearing is required to determine what appears to be a very narrow issue of fact.

Accordingly, review of the decisions of the Regional Administrator denying Permittee's requests for an adjudicatory hearing is hereby declined.



Michael K. Glenn
Chief Judicial Officer

Dated: September 29, 1975

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF: National Pollutant Discharge Elimination System Permit For Bethlehem, Pennsylvania Plant (Permit No. PA 0011177) Bethlehem Steel Corporation, Permittee.	NPDES Appeal No. 75-9 Docket No. PA-AH-0058

DECISION OF THE ADMINISTRATOR

On September 3, 1975, Bethlehem Steel Corporation ("Permittee") filed a petition for review of a decision issued on August 21, 1975, by the Regional Administrator, Region III in the above-captioned proceeding.

The petition recites that on December 31, 1974, the Regional Administrator, Region III, issued a National Pollutant Discharge Elimination System (NPDES) permit for Permittee's Bethlehem, Pennsylvania plant, following a public hearing held on December 13, 1974. At the hearing, Permittee proposed a compliance schedule for the completion of some 22 projects involved in designing, purchasing and installing facilities required to meet the permit effluent limitations, which called for the completition of Phase I by January 1, 1979, and Phase II by July 1, 1979. The permit issued on December 31, 1974, however, requires that final permit conditions be met no later than July 1, 1977.

On January 16, 1975, Permittee requested an adjudicatory hearing on the following issue:

> "May the Environmental Protection Agency establish an effective date for final permit conditions later than July 1, 1977 where final permit conditions are based upon the best practicable control technology currently available and on water quality standards."

On May 29, 1975, the foregoing question was referred to the General Counsel of EPA as a certified issue of law, pursuant to 40 CFR 125.36(m)(3). The General Counsel concluded, in a decision issued on July 24, 1975, that Section 301 of the Federal Water Pollution Control Act, as amended (the "Act"):

> ". . . clearly requires the achievement, by July 1, 1977, of effluent reductions based on the more stringent requirements of either section 301(b)-(1)(A) or 301(b)(1)(C) of the Act. The Administrator has no discretion to extend the date of compliance."

The August 21, 1975, decision of the Regional Administrator, Region III, adopted the conclusion of law decided by the General Counsel and found no factual or legal question remaining to be resolved in this proceeding. Accordingly, permittee's requests to modify the permit and/or convene an adjudicatory hearing were denied. The subject petition for review of the Regional Administrator's decision was filed thereafter within the prescribed 10 day period.

Permittee takes exception to the conclusion of the General Counsel (on the same grounds argued in its brief submitted to the Office of General Counsel in connection with the issuance of the General Counsel's decision) in the following particulars: (1) the General Counsel's decision addresses

the "issue" of whether the effluent limitations in the permit were based on effluent guidelines, proposed guidelines, or water quality standards, which Permittee states is not relevant to the issue in controversy, i.e., whether the Administrator may extend the July 1, 1977, compliance date contained in the Act; (2) the General Counsel's decision suggests that Permittee is challenging the effluent guidelines and the dates for compliance set forth therein, rather than the compliance date of July 1, 1977, as set forth in the Act, which they contend is properly reviewable in an adjudicatory hearing since "the compliance date is a condition in the permit as a consequence of the Act and not as a consequence of regulations . . ."; and (3) the General Counsel's decision does not contain an analysis of the legislative history of the Act to determine whether Congress intended that the Administrator have discretion to extend compliance dates for final compliance beyond July 1, 1977. In summary, Permittee contends that the July 1, 1977, compliance date set forth in the Act "is merely an interim date set by Congress for achieving the ultimate objectives and goals by 1983 and 1985," and, as such, may be extended by the Administrator upon a proper showing of inability to comply by that date.

I have examined the language of the Act, as well as its legislative history, and am unable to find any basis to disagree with the conclusion of the General Counsel that, as a matter of law, the Administrator does not have authority or discretion under the Act to extend the July 1, 1977, deadline. The fact that the General Counsel's decision may have addressed other issues which Permittee does not consider relevant to the central issue

raised, does not alter the fact that the central issue--the mandatory July 1, 1977, deadline--also was decided.

That issue being the only matter for which review has been requested by the Permittee, I see no need to prolong this proceeding by requesting additional briefs and argument on possible varying interpretations of the Act which might be offered.

Accordingly, the Decision and Order of the Regional Administrator, Region III, which relied upon the aforementioned decision of the General Counsel, is hereby affirmed and the subject permit, as originally issued, shall take effect immediately with the issuance of this decision.

Russell E. Train

Dated: September 30, 1975

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF:	
National Pollutant Discharge Elimination System	NPDES Appeal No. 75-4
Permit For	N.P.D.E.S. Docket No. AHAL 002
U. S. Pipe and Foundry Company, (Permit No. AL0003247)	
Permittee.	

DECISION OF THE ADMINISTRATOR

This is an appeal pursuant to 40 CFR 125.36(n), et seq. from an initial decision dated April 21, 1975, in the above styled proceeding. The initial decision was rendered by Administrative Law Judge Thomas B. Yost, acting pursuant to a delegation of authority from the Regional Administrator, Region IV. This final decision concerns two issues for which review by the Administrator was granted in a Notice issued by the Chief Judicial Officer on June 18, 1975, in response to petitions for review filed by the Alabama Conservancy, Alabama Wildlife Federation, Bass Angler Sportsman's Society, and several other citizens' groups (hereinafter referred to collectively as the "Alabama Conservancy et al.") on May 12, 1975, and by the State of Alabama, acting through its Attorney General, on May 20, 1975.

The permit under review concerns a manufacturing facility of U.S. Pipe and Foundry Company (hereafter "U.S. Pipe") known as the North Birmingham Complex, which consists of five major manufacturing operations:

a by-product coke plant, a chemical plant, a blast furnace plant, a mineral wool plant, and a cast iron pipe plant. Wastewater from the various plants is discharged to Five Mile Creek, a tributary of the Black Warrior River. The combined effluent includes suspended solids, BOD, COD, oil and grease, ammonia, phenols, and various heavy metals and other substances.

A brief chronology of events related to this proceeding may be helpful. On June 30, 1971, U.S. Pipe filed an application for a waste water discharge permit for its Birmingham facility under the then-existing Federal Refuse Act Permit Program. Thereafter, while the permit application was pending, EPA initiated suit under the Refuse Act against U.S. Pipe and other Birmingham, Alabama area dischargers. From February 1972 through January 1973, EPA and the Department of Justice engaged in settlement negotiations with U.S. Pipe, resulting in a consent decree issued by the U.S. District Court for Alabama on January 5, 1973. The consent decree set forth specific effluent limitations, monitoring requirements, and compliance schedules. It was recognized in the consent decree that U.S. Pipe, subsequent to the entry of the decree, would be required to apply for and obtain a National Pollutant Discharge Elimination System (hereafter "NPDES") permit under Section 402 of the 1972 Amendments to the Federal Water Pollution Control Act, (the "Act") and the decree specifically provided that such NPDES permit will "to the fullest extent possible . . . be consistent with the applicable provisions of this Decree."

On November 15, 1973, public notice of U.S. Pipe's application for an NPDES permit was issued. On February 7, 1974, a public hearing on the application was held in Birmingham. On April 8, 1974, Region IV issued a final NPDES permit to U.S. Pipe. Thereafter, the Alabama Conservancy et al. and the State of Alabama filed requests for an adjudicatory hearing. A public notice of the hearing was issued on June 7, 1974 and, thereafter, U.S. Pipe's request to become a party to the proceeding was granted.

In addition to six issues raised by the parties in their requests for an adjudicatory hearing, four issues of law were identified and certified to the Assistant Administrator for Enforcement and General Counsel (hereafter "General Counsel") by the Administrative Law Judge, pursuant to EPA regulations published on July 24, 1974. Following a prehearing conference, the adjudicatory hearing was held in Birmingham on December 3-6, 1974. On December 30, 1974, the General Counsel issued a decision on the certified issues of law. On March 14, 1975, the Administrative Law Judge certified the record of the hearing to the Regional Administrator, Region IV, and on April 4, 1975, the Regional Administrator designated Administrative Law Judge Yost to make the initial decision in this proceeding. As noted above, the initial decision was rendered on April 21, 1975, and this appeal ensued thereafter.

Among the issues of law decided by the General Counsel and by the Administrative Law Judge which are not under review in this appeal are the following:

1. Whether the 1973 consent decree is binding on the Agency in its consideration of the appropriate limitations, conditions, and terms to be imposed in the NPDES permit to be issued to U.S. Pipe? This issue was decided in the affirmative, subject only to an assessment of comments received pursuant to Sections 401 and 402(a)(1) of the Act.

2. Whether the permit complies with the toxic pollutant standard requirements of Section 307(a)(1) of the Act? It was decided that the permit properly includes conditions limiting or prohibiting the discharge of toxic pollutants prior to the promulgation of toxic pollutant standards and a provision for automatic modification of the permit upon promulgation of toxic pollutant standards under Section 307(a,

3. Whether the permit complies with the goals specified in Section 101(a)(2) of the Act, establishing "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983?" (Referred to sometimes as the "1983 goal" or the "fishable and swimmable waters" goal.) It was decided that the phased requirements contained in the permit applicable until its expiration in 1979 satisfy the requirements of Section 101(a)(2) and other requirements of the Act.

4. Whether Section 301(b)(1)(C) of the Act requires the achievement of effluent limitations more stringent than "best practicable control technology currently available" (hereafter referred to as "BPT") if such limitations are necessary to implement water quality

standards established pursuant to the Act? This issue was decided in the affirmative. The issue of when such more stringent limitations must be complied with is one of the issues under review discussed below.

The two issues under review in this appeal are the following:

1. Are the appropriate water quality standards and effluent limitations to be applied those which were in effect at the time of the initial permit issuance or those which were promulgated after the permit was issued but prior to final action following the adjudicatory hearing?

2. Does Section 301(b)(1)(C) of the Act require that permit limitations be established such that the permittee is required to meet water quality standards promulgated pursuant to Section 303 of the Act by 1977, or only that such limitations implement water quality standards promulgated pursuant to Section 303 by 1977?

Appropriate Water Quality Standards and Effluent Limitations

The 1972 Act for the first time established Federal effluent standards for industrial and municipal waste water discharges to the waters of the United States. This was a departure from previous Federal legislation which had required standards only for the quality of the receiving waters. Prior Federal legislation led to the establishment of receiving water quality standards by the individual States. The State/Federal water quality standards are retained in the 1972 Act, and provide the basis for water pollution controls which are more stringent than those necessary to meet the new effluent standards. Thus, the Act

envisages a dual basis for determining effluent limitations to be included in NPDES permits for point source discharges--(1) where water quality standards and other State or Federal requirements will not be violated, permit effluent limitations for these stream segments or water bodies (so-called "effluent-limited segments") are to be based on the technology standards set forth in Section 301(b) of the Act, i.e. for industrial point sources, "the best practicable control technology currently available," to be achieved not later than July 1, 1977, and "the best available technology economically achievable," to be achieved not later than July 1, 1983; and (2) where necessary to meet water quality standards, treatment standards, or schedules of compliance established pursuant to any State law or regulations or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to the Act, any more stringent permit effluent limitations for these stream segments or water bodies (so-called "water quality-limited segments") are to be based on the requirements of these other laws, regulations, and standards.

The applicability of these tests for determining the effluent limitations to be included in the U.S. Pipe permit is somewhat confused and complicated by several factors including, most important to the issues being considered herein, a series of events relating to the water quality standards of the State of Alabama.

Prior to the occurrence of any of the actions or events pertinent to this permit, the water quality standard for Five Mile Creek, established

by Alabama pursuant to the 1965 Federal water pollution law, was "Treated Waste Transportation," which fixed criteria for the reduction of Biological Oxygen Demand ("BOD"). The consent decree was adopted on January 8, 1973, when this standard was in effect. On September 17, 1973, Alabama adopted a new standard for Five Mile Creek, designated "Fish and Wildlife as a goal." The permit was issued on April 8, 1974, when this standard was in effect. On November 26, 1974, following its earlier disapproval of the "Fish and Wildlife as a goal" standard, EPA published its own "Fish and Wildlife" standard for all streams in Alabama.

The Alabama "Fish and Wildlife as a goal" standard in effect at the time of the initial permit issuance did not specify minimum concentrations of particular pollutants, but required only that the industry meet BPT by July 1977 and BAT by July 1983. At that time, proposed Federal effluent guidelines for the iron and steel industry, although not binding in a legal sense, were available for consideration by the regional EPA office in preparing the permit.

The issue presented here is not whether the permit requires U.S. Pipe to attain BPT effluent limitations by July 1, 1977 (thus meeting the "Fish and Wildlife as a goal" standard as well), but whether the permit should require U.S. Pipe to meet more stringent limitations which would apply under the subsequently adopted "Fish and Wildlife" standard. For the following reasons, I find that the Administrative Law Judge was correct in concluding that permit effluent limitations should be based on water quality standards in effect at the time of the initial permit issuance.

As a matter of general policy in the administration of a nationwide permit system, I agree with the arguments put forward by EPA staff counsel and U.S. Pipe that to allow permit limitations and conditions to change according to a "floating" standard or guideline during the pendency of a permit review proceeding would be highly disruptive and counter-productive. The Act clearly contemplates that NPDES permits will be issued "prior to the taking of necessary implementing actions" relating to requirements under 301, 302, and other sections of the Act. In such instances, the Act provides that permit conditions will be determined by the Administrator "as necessary to carry out the provisions of this Act." I recognize that permit review proceedings may consume many months, during which standards and guidelines for determining permit conditions may change (or take on greater specificity). These changes may mean that if the permit was being initially issued today, the conditions might be either more lenient or more stringent. It is not a one-way street.

My view of the adjudicatory hearing process is that it is a procedure for reviewing the record and the basis for final permits issued by the Agency to determine whether errors or omissions have occurred in the preparation of the final permits. The Administrator's review must be based on the record of the adjudicatory hearing and other considerations relevant to the record of the proceedings. Although matters contested in an adjudicatory hearing do not become <u>final</u> for purposes of judicial review until the Administrator has acted on an appeal, the Administrator's review of the original action taken by the Regional Administrator should be based on the standards and guidelines in

existence at the time the original action was taken, and thus, to that extent, finality must be accorded the original action taken. To conclude otherwise would mean that the Administrator would become the sole and final arbiter of every permit limitation where a party (EPA included) might want to gamble on the likelihood of an intervening change in the applicable standards or guidelines. Such a result would be inimical in the extreme to the nation's water pollution control program. As a matter of policy, EPA should do its utmost to avoid problems associated with the "moving target" criticism so often asserted by those subject to the regulatory requirements of this and other government agencies. The standards and guidelines for the preparation of NPDES permits must be fixed at some point in time so permit terms can become final and pollution abatement can proceed. I believe the proper point in time for fixing applicable NPDES standards and guidelines is when the Regional Administrator initially issues a final permit.

Aside from the policy considerations stated above I do not believe, as a matter of fact or law, any different conclusion can be reached in this proceeding. (Part of the basis for this conclusion is discussed in the following section of this decision.) At the time the consent decree was entered on January 5, 1973, the guidance available to the Agency for determining discharge limitations included a preliminary Guidance Document for the iron and steel industry and a state water quality classification for Five Mile Creek of "Treated Waste Transportation." As noted above, the terms of the consent decree were binding to a considerable extent

in establishing the conditions of the final NPDES permit. At the time the permit was initially issued on April 8, 1974, further guidance available to the Agency for determining permit effluent limitations included the proposed effluent guidelines for the iron and steel industry and a state water quality standard for Five Mile Creek of "Fish and Wildlife as a goal," calling for the application of BPT by July 1, 1977 and BAT by July 1, 1983. This standard was approved by EPA on January 29, 1974, even though the standard contained no description of what criteria would be applicable to the standard. On April 19, 1974 (eleven days after the issuance of the permit to U.S. Pipe), Alabama published an amendment to the standard setting forth a description of "Fish and Wildlife as a goal" as consisting of minimum treatment requirements established by Section 301 of the Act (BPT by 1977, BAT by 1983). On April 30, 1974, EPA notified Alabama that the "goal" classification was not consistent with EPA policy or the requirements of the Act and thereafter, on July 17, 1974, EPA published proposed regulations classifying all streams in Alabama as "Fish and Wildlife." These regulations, which were promulgated on November 26, 1974, set forth the minimum water quality criteria necessary to meet the requirements of the Act to protect public health or welfare and enhance the quality of the nation's waters, viz. fish and wildlife and secondary contact recreation.

The State of Alabama argues that EPA never "assented to or accepted" the standard of "Fish and Wildlife as a goal," or it did so only on the assumption that it was identical with the standard of "Fish and Wildlife." By subsequently repudiating the "goal" standard, Alabama contends, "EPA

made it clear that its intention all along was that the relevant streams be classified 'Fish and Wildlife' and that the 'Goal' standard was inconsistent with EPA policy." Even giving a generous benefit of doubt to the Agency's staff, I cannot agree with these assertions. As the record stood at the time the permit was initially issued, the Regional Administrator's determination was consistent with the consent decree, the then-existing Alabama stream standard, and EPA policy.

Compliance with Section 303 Water Quality Standards

As stated above, it appears that the final permit issued by the Regional Administrator in April 1974 was consistent with the consent decree, the then-existing Alabama stream standard, and EPA policy. It is necessary to determine, as well, whether the final permit conforms with the requirements of the Act, particularly Sections 301(b)(1)(C) and 303.

Section 301(b)(1)(C) requires, in pertinent part, that:

> "There shall be achieved...not later than July 1, 1977, any more stringent limitation [than "best practicable control technology currently available"], including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by Section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act." (Emphasis supplied.)

In construing this provision, EPA's regional staff argued and the Administrative Law Judge decided that (1) the consent decree in the Refuse Act proceeding against U.S. Pipe established requirements under "any other Federal law or regulation," which must be met by July 1, 1977, but that (2) if it is not appropriate to meet standards established under

Section 303 by 1977, "there have to be requirements in the permit that will lead to the meeting of the standards or in other words to implement such standards."

Drawing on the foregoing distinction between "meet" and "implement," the Administrative Law Judge concluded that the permit issued to U.S. Pipe "does in fact satisfy the provisions of [Section 301(b)(1)(C)], in so far as it requires the meeting of water quality standards at a date later than July 1, 1977, but contains provisions which demonstrate that the Fish and Wildlife standard is being implemented by 1977 even though such standard will not be met until 1979."

Reasonable people can differ on the practical and technical distinctions between the two key words used in this section of the law. I am persuaded that the distinction is significant. The word "implement," as used in the statute, is a transitive verb which I interpret as meaning to carry something into effect over a period of time, as opposed to the actual realization or fulfilment of an objective. "Implement," as used in some contexts, may mean to fulfil or satisfy a requirement or objective, but such a meaning is more clearly indicated by the use of the word "meet," as in the first part of Section 301(b)(1)(C). "Meet" is commonly understood as meaning to comply with or to fulfil. The experience of this Agency in administering various pollution control laws is that "implementation" commonly means putting programs or requirements into effect, as required by law, which then leads to future attainment, achievement, accomplishment, meeting, or compliance with the standards, objectives, and goals of the applicable law.

Thus, I agree with the conclusion of the Administrative Law Judge that Section 301(b)(1)(C) means that water quality standards established pursuant to Section 303 must be "implemented" (i.e. put into effect) by July 1, 1977, but that such standards need not necessarily be "met" by such date.

The Administrative Law Judge found that,

> "The effluent limitations required by the permit to be met by July 1, 1977, are consistent with the State adopted water quality standards of Fish and Wildlife as a goal as defined above.
>
> The effluent limitations required by the permit to be obtained by 1979 are consistent with the achievement of Fish and Wildlife standards as that term is understood and applied by the Environmental Protection Agency and, therefore, complies with provisions of Section 301(b)(1)(C) in that such effluent limitations implement applicable water quality standards established pursuant to this Act as opposed to those water quality standards established pursuant to State law."

I find no basis on the record to review either of the above findings of fact. These findings, together with other findings set forth in the Initial Decision pertinent to the resolution of the issues discussed above, are adopted and incorporated by reference in this decision.

CONCLUSIONS

1. Jurisdiction exists in this matter under Sections 301 and 402 of the Act (33 U.S.C.A.§§ 1311 and 1342) and 40 CFR 125.36 et seq.

2. The initial decision sets forth sufficient findings of fact and conclusions of law to perceive adequately the essential facts and law upon which the decision is based.

3. Findings of fact and conclusions of law set forth in the initial decision which are not reviewed and discussed in this final decision are not clearly erroneous or an exercise of discretion or policy which the

Administrator should review and, accordingly, such findings and conclusions are hereby affirmed.

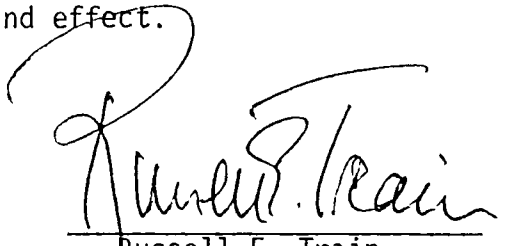
4. The appropriate water quality standards and effluent limitations to be applied to the subject permit are those which were in effect at the time of the initial permit issuance on April 8, 1974.

5. Water quality standards established pursuant to Section 303 of the Act must be implemented or put into effect by July 1, 1977, but such standards need not necessarily be met or fully complied with by such date.

6. The requirements of Section 301(b)(1)(C) of the Act are satisfied by the limitations and conditions set forth in the permit issued on April 8, 1974 to the U.S. Pipe and Foundry Company for its North Birmingham Complex.

ORDER

The inital decision of Administrative Law Judge Yost, rendered on April 21, 1975, is affirmed. The subject permit issued to the U.S. Pipe and Foundry Company on April 8, 1974, is consistent with the requirements of the Federal Water Pollution Control Act, as amended, and is hereby ordered to be in full force and effect.



Russell E. Train

Dated: October 10, 1975

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF: National Pollutant Discharge Elimination System Permit For U.S. Pipe and Foundry Company, (Permit No. AL0003247) Permittee.	NPDES Appeal No. 75-4 (Modifications) N.P.D.E.S. Docket No. AHAL 002

MODIFICATIONS TO DECISION
OF THE ADMINISTRATOR

On October 10, 1975, I issued a final Decision pursuant to 40 CFR 125.36(n) on appeal from an initial decision dated April 21, 1975, in the above-styled proceeding. In that Decision, I affirmed the initial decision of the Regional Administrator, Region IV, concerning the issuance of an NPDES permit to a manufacturing facility operated by U.S. Pipe and Foundry Company and known as the North Birmingham Complex in Alabama.

My October 10 Decision addressed two issues raised by the parties to that appeal, namely:

(1) Are the appropriate water quality standards and effluent limitations to be applied those which were in effect at the time of the initial permit issuance or those which were promulgated after the permit was issued but prior to final action following the adjudicatory hearing?

(2) Does section 301(b)(1)(C) of the Act require that permit limitations be established such that the permittee is required to meet water quality standards promulgated pursuant to section 303 of the Act by 1977, or only that such limitations implement water quality standards pursuant to section 303 by 1977?

As to the former issue, I concluded that the appropriate water quality standards and effluent limitations to be applied are those which are in effect at the time the permit is initially issued; in the case at hand, those which were in effect on April 8, 1974.

As to the second issue, I concluded that water quality standards established pursuant to section 303 of the Act must be implemented by July 1, 1977, but such standards need not necessarily be met or fully complied with by such date.

On further review of the findings and rationale set forth in the Decision I have determined that certain statements made in the text of the Decision were incorrect. Specifically, I am persuaded that the portions of the Decision which are based on the assumption that the water quality standards in effect on April 8, 1974 required nothing more than the achievement of "best practicable technology" (hereafter "BPT") by July 1, 1977, and "best available technology" (hereafter "BAT") by July 1, 1983, and that such standards, as so stated, had been approved by EPA Region IV, are incorrect.

The modifications set forth herein are made pursuant to a general doctrine of administrative law that an agency is free to change its mind, or modify its findings, at least for the period

during which the agency's decision is not yet final or is still subject to judicial review.

A more complete review of the facts surrounding the State of Alabama's adoption of the "Fish and Wildlife as a goal" use classification in September 1973, the State's notification of its equation of this classification with BPT and BAT on April 19, 1974 (11 days after the issuance of the subject permit), and the Agency's subsequent disapproval of this standard and proposal and promulgation of water quality standards for the State of Alabama, has led me to the conclusion that at the date of issuance of this permit EPA did not construe the "Fish and Wildlife as a goal" standard as being identical with BPT and BAT. Rather, it seems to me, the most reasonable interpretation to place upon the succession of events from September 17, 1973 through November 26, 1974, is that at the date of permit issuance (April 8, 1974) the EPA Regional Office believed that the approved water quality standard ("Fish and Wildlife as a goal") required attainment of those criteria normally associated with a "Fish and Wildlife" use classification.

The subject permit is consistent with the water quality standards as so construed, since it requires attainment of limitations on pollutants generally associated with a fish and wildlife standard by 1979. The permit is also consistent with my prior interpretation of the Act, since the existence of the consent

decree makes it appropriate for the subsequently adopted Alabama water quality standards to be met by 1979, rather than 1977.

Thus, I affirm the conclusion of the October 10, 1975 Decision, since the permit is consistent with the Act as interpreted by that Decision. For the sake of clarity and correctness in the findings and rationale set forth therein, however, certain portions the Decision are modified, as follows:

1. On page 7 of the Decision, the following language is deleted:

> Lines 13-14: ". . . but required only that the industry meet BPT by July 1977 and BAT by July 1983.", thus ending the sentence beginning at line 11 with the word "pollutants."
>
> Lines 19-20: ". . . (thus meeting the "Fish and Wildlife as a goal" standard as well). . .", thus eliminating the parenthetical clause in its entirety.

2. On page 10 of the Decision, the following language is deleted:

> Lines 6-7: ". . . calling for the application of BPT by July 1, 1977 and BAT by July 1, 1983.", thus ending the sentence beginning at line 1 with the word "goal."

3. On page 11 of the Decision, the following language is deleted:

> Lines 3-7: "Even giving a generous benefit of doubt to the Agency's staff, I cannot agree with these assertions. As the record stood at the time the permit was initially issued, the Regional Administrator's determination was consistent with the consent decree, the then-existing Alabama stream standard, and EPA policy."

The following language is substituted for the foregoing deletion following the sentence ending at line 3:

> "It appears from the record of events preceding and following the issuance of the subject permit that EPA, at the time the subject permit was initially issued, understood the "Fish and Wildlife as a goal" standard to require attainment of those criteria normally associated with a "Fish and Wildlife" use classification, rather than the subsequently described "criteria" of BPT by July 1977 and BAT by July 1983. The Administrative Law Judge found the terms of the permit to be consistent with the consent decree and the attainment of Fish and Wildlife standards by 1979."

4. On page 11 of the Decision, lines 9-11 are modified to read as follows:

> "As stated above, it appears that the final permit issued by the Regional Administrator in April 1974 was consistent with the consent decree and the then-existing Alabama stream standard, as understood by EPA at the time the permit was issued."

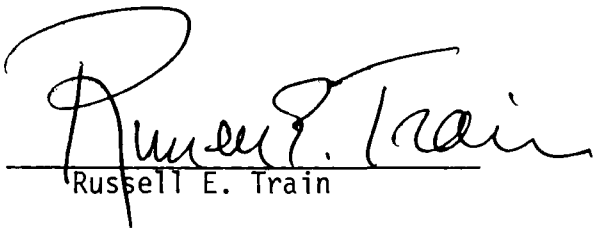
5. On page 13 of the Decision, lines 7-10, quoting from Finding of Fact No. 10 of the initial decision, are deleted. In addition, on page 13, lines 20-23 are modified to read as follows:

> "I find no basis on the record to review the above finding of fact. This finding, together with other findings set forth in the Initial Decision not inconsistent with this Decision, is adopted and incorporated by reference in this Decision."

In view of the foregoing corrections and modifications, it is apparent that Findings of Fact No. 6 and 10 of the initial decision of the Administrative law Judge are in error, since at the time the permit was issued the State of Alabama had not issued its description

of "Fish and Wildlife as a goal" as being the application of BPT by July 1977 and BAT by July 1983, and did not do so until 11 days after the subject permit was issued. Similarly, Conclusion of Law No. 6 of the initial decision is in error insofar as it concludes that at the time the permit was issued Alabama law associated the "Fish and Wildlife as a goal" standard with meeting BPT.

Accordingly, the Decision of the Administrator dated October 10, 1975, is modified as set forth herein.



Russell E. Train

Dated: December 9, 1975

BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C.

IN THE MATTER OF: National Pollutant Discharge Elimination System Permit for Dyecraftsmen, Inc. (Permit No. MA0000612) Taunton, Massachusetts Permittee	NPDES Appeal No. 75-14 Notice Denying Petition for Stay Pending Judicial Review or, in the Alternative, for Administrative Review and Stay Pending Administrative Review.

On October 15, 1975, Dyecraftsmen, Inc. (hereinafter "Dyecraftsmen" or "company") transmitted to the Administrator of the Environmental Protection Agency (EPA) a petition requesting the Administrator to stay the effect of Part I, Section B(1)(b) of Permit MA0000612, issued by the EPA Regional Administrator, Region I, pending judicial review of the permit. In the alternative, Dyecraftsmen requested that the Administrator review the October 9, 1975, decision of the Regional Administrator denying Dyecraftsmen's request for an adjudicatory hearing, and stay the effect of the permit pending such administrative review, pursuant to 40 CFR §125.36(n).

Dyecraftsmen's petition sets forth the following factual background. The Regional Administrator issued a permit to Dyecraftsmen on August 19, 1975, to be effective 30 days later but to expire 30 days from the effective date. The permit was

of short duration because it required Dyecraftsmen to connect into the City of Taunton, Massachusetts sewerage system, thus terminating its direct discharge of pollutants into the Mill River. Dyecraftsmen filed a request, later amended, for an adjudicatory hearing which was denied by the Regional Administrator on October 9, 1975.

The principal objections of Dyecraftsmen to the permit, and the issues it sought to have adjudicated, grow out of the company's disagreements with the City of Taunton over its ordinances and rate structure governing the use of the sewer system. Dyecraftsmen alleges that the city's ordinances and rates assume that (1) the company uses more water than it does and (2) its wastes are more toxic than they in fact are (due to pretreatment practices of the company). Moreover, the company submits that the rates are from two to three times higher than those which would be levied by towns of comparable size. Dyecraftsmen is presently negotiating with the city for appropriate relief, but it believes more time is needed for such negotiations and does not want the permit to require termination of its direct discharge until it has resolved its problems with the city. It sought to question in the adjudicatory hearing whether the permit allowed sufficient time to complete these negotiations.

In denying the request pursuant to 40 CFR s125.36(c), the Regional Administrator stated that the company had made physical connection of its pretreatment facilities with the city sewer system prior to the issuance of the permit so that it could begin to use the sewer virtually immediately upon its agreeing to pay the city's users fee. He also found that the "lawfulness of the City of Taunton's sewer use ordinance is not a material issue of fact appropriately considered at the requested adjudicatory hearing. The company must look to some other forum to preserve its right to challenge this ordinance." Since there were no other issues, the Regional Administrator denied the request.

Dyecraftsmen contends that the issue of the amount of time needed to obtain relief from the alleged unfair and unlawful city ordinances and rate structure is a material issue of fact appropriately considered in an adjudicatory hearing. In addition, it suggests that the question of whether the request for an adjudicatory hearing set forth a material issue of fact is an issue of law which ought to be referred to the General Counsel pursuant to 40 CFR §125.36(m). Finally, the company argues that the decision of the Regional Administrator, by subjecting them to the ordinances and rate structure of Taunton, deprives the company of property without due process of law and is therefore a significant decision that the Administrator in his discretion should review.

A close examination of the papers submitted by Dyecraftsmen does not reveal any issues which merit consideration by the Administrator. The only issue which the company sought to discuss at the hearing related to the length of time required to negotiate more favorable user requirements with the City of Taunton.[1/] Whether the permit should allow Dyecraftsmen more time to finalize its negotiations with the city only becomes a relevant issue if the termination of the direct discharge is dependent on the company's reaching an accommodation with the city.

It appears unquestioned that there is no physical obstacle to Dyecraftsmen diverting its effluent to the city sewer system. The reasonableness of the financial arrangements attendant to hooking up with a sewer system does not, however, appear to be a proper subject for determination by the Federal government; the Regional Administrator, through the permit issuance process, cannot and should not attempt to determine what are appropriate user charges for each individual discharger. It must be assumed that local charges are reasonable or can be negotiated to acceptable levels. The forum for the complaints of the company is with the city or, if necessary, with the State judicial system. The Regional Administrator is in no position to resolve that dispute.

1/ The company has not sought to question the Regional Administrator's finding that a physical connection with the city system had been effected and that the direct discharge to the Mill River could be terminated upon the company's agreement to the user charges. There appears to be no reason to question the Regional Administrator's determination that this element of the permit does not present a material issue of fact.

It does not follow, however, that it is necessary to delay requiring the company to use the system until the issue is resolved. The company has not shown why it would be prejudiced by using the system even though it is still attempting to modify the terms of the user agreement. It can always pay its initial charges under protest and request reimbursement of any payments which later might be determined to be overcharges. To allow the company to continue to discharge when it is within its technical capabilities to terminate that discharge solely to allow additional time to negotiate more favorable economic terms would be inconsistent with the goals of the Federal Water Pollution Control Act and would impose no incentive for reaching agreement with the city. The Regional Administrator's determination is accordingly correct and need not be reviewed by the Administrator.

Finally, Dyecraftsmen's argument that the question of whether the request for an adjudicatory hearing presented material issues of fact should have been certified to the General Counsel is without merit.[2/] The purpose of referring questions of law to the General Counsel is to provide uniform interpretation of the Act and EPA's regulations. The procedure was not established to weigh the validity of factual determinations or resolve Constitutional issues. See General Counsel Opinions 23, 9, 15, 17 and 19. Whether a Regional Administrator incorrectly ruled on the

2/ There is no evidence that this argument was advanced prior to this petition.

existence of a material issue of fact is either a determination for the Administrator through his review under 40 CFR §125.36(n) or for the appropriate United States Court of Appeals pursuant to section 509 of the Act.

Accordingly, review of the decision of the Regional Administrator denying Dyecraftsmen's request for an adjudicatory hearing is hereby declined. The company having made no showing that it is likely to prevail on the merits of any judicial challenge to the permit or that it will suffer irreparable injury by the permit being in effect during the pendency of any such judicial review, its request for a stay pending judicial review is also denied.

G. William Frick
Judicial Officer

Dated: December 3, 1975

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF: National Pollutant Discharge Elimination System Permits For St. Regis Paper Company, Buckport, Maine Mill, (Permit No. ME0002160), and International Paper Company, Jay, Maine Mill, (Permit No. ME0001937), Permittees.	NPDES Appeal No. 75-5 DECISION OF THE ADMINISTRATOR

On May 29, 1975, the Maine Public Interest Research Group, Inc. ("PIRG") of Augusta, Maine, and the Environmental Law Institute, Inc. ("ELI") of Portland, Maine, filed a Petition for Review of the Decision of the General Counsel on Matters of Law pursuant to 40 CFR 125.36(m) in the above-captioned proceeding. The petition sought review of Decision No. 4 of the EPA General Counsel issued on April 4, 1975 (the "OGC Decision"), in response to a PIRG/ELI letter to the Regional Administrator, Region I, dated November 20, 1974, requesting a determination of certain issues of law in connection with the two above-designated National Pollutant Discharge Elimination System ("NPDES") permits issued by Region I on November 4, 1974.

On June 13, 1975, the General Counsel advised PIRG/ELI that the petition for review of the OGC Decision was not properly filed since the Agency's regulations "do not authorize review of a General Counsel's Decision on matters of law referred pursuant to 40 CFR 125.36(n) independent of review of the initial decision of the Regional Administrator in the case to which it applies."

On June 26, 1975, PIRG/ELI refiled the petition for review setting forth reasons supporting their disagreement with the General Counsel's advice on the appropriateness of the petition. Thereafter, on October 2, 1975, the General Counsel's office advised PIRG/ELI that the subsequent refiling of the petition would be considered as a petition for review of the initial decision of the Regional Administrator issued on May 15, 1975, and the matter was referred to the Administrator for review. Acknowledgment of receipt of the petition and a request for briefs was issued by the Chief Judicial Officer on October 10, 1975.

The two issues presented here are as follows: (1) Whether the Administrator can (and, if so, whether he should) review a General Counsel's decision on issues of law independent of a request for an adjudicatory hearing, and (2) Whether the OGC Decision is clearly erroneous, as a matter of law.

A review of the applicable EPA regulations (40 CFR 125.36) and the briefs submitted in response to the October 10 request reveals a certain ambiguity on the point of whether the regulations provide

for review by the Administrator of a General Counsel's decision on matters of law rendered independent of a request for an adjudicatory hearing.

The ambiguity arises from the following provisions of 40 CFR 125.36:

> (b) Requests for adjudicatory hearings and legal decisions. (1) . . . any interested person may submit to the Regional Administrator a request for an adjudicatory hearing pursuant to paragraph (b)(2) of this section or a legal decision pursuant to paragraph (m) of this section . . .
>
> (l) Initial decision by Regional Administrator. . . . (3) Where a legal decision has been requested and no adjudicatory hearing has been granted, the Regional Administrator shall render an initial decision within 20 days after receiving the decision of the Assistant Administrator for Enforcement and General Counsel [now the General Counsel].
>
> (m) Decision of the Assistant Administrator for Enforcement and General Counsel on questions of law. (1) Issues of law, including questions relating to the interpretation of provisions of the Act, and the legality and interpretation of regulations promulgated pursuant to the Act, shall be decided in accordance with this subsection and shall not be considered at the adjudicatory hearing. . . . (3) Where no adjudicatory hearing has been granted, issues of law may be referred by the Regional Administrator to the Assistant Administrator for Enforcement and General Counsel for a decision in the manner specified in paragraph (m)(2) of this section [which provides for referral of issues of law by the Presiding Officer at the hearing and sets forth requirements for briefs] . . . (4) . . . The decision of the Assistant Administrator for Enforcement and General Counsel shall be final with respect to each referred issue of law as it relates to the particular permit in question and shall be relied upon by the Regional Administrator in rendering the initial decision.
>
> (n) Appeal of initial decision of the Regional Administrator. (1) Any party may file a petition for the Administrator's review of the initial decision of the Regional Administrator or the decision of the Assistant Administrator for Enforcement and General Counsel relied upon by the Regional Administrator in rendering the initial decision.

St. Regis Paper Company and International Paper Company (hereafter "Permittees") challenge the propriety of the original PIRG/ELI petition for review, asserting that 40 CFR 125.36 deals with "Adjudicatory Hearings" and that "any legal decision sought under any subsection of 125.36 must be in the context of an adjudicatory hearing, or a request therefor which has been denied." Notwithstanding the language of 125.36(b)(1), which seems to indicate a choice between a request for an adjudicatory hearing or a legal determination, Permittees contend that the only procedure for making a legal determination is that which pertains to "removal of referred issues from the adjudicatory hearing" (125.36(m)(2)) and referral of issues of law "where no adjudicatory hearing has been granted" (125.36(m)(3)).

Permittes argue, further, that subsection (n)(1) permits an appeal to the Administrator only after an "initial decision" has been rendered by a Regional Administrator and that under the regulations an "initial decision" includes only these decisions made after the close of an adjudicatory hearing or following the denial of a request for an adjudicatory hearing. They point out that PIRG/ELI requested a determination of legal issues without requesting an adjudicatory hearing and thus, Permittees argue, there is no "initial decision" from which an appeal to the Administrator can be taken. They also contend that PIRG/ELI is not a "party' to the proceedings, as defined in 125.36(a)(1), since they have not requested an adjudicatory hearing or been made a party to the proceeding.

PIRG/ELI apparently concede that the Administrator may review a decision of the General Counsel only after a Regional Administrator has rendered an "initial decision." They contend, however, that an initial decision does not hinge on the results of an adjudicatory hearing or the denial of a request for an adjudicatory hearing. They argue that an initial decision can be based on the results of a legal decision by the General Counsel alone, without a request for an adjudicatory hearing having been made (and granted or denied). In their view, a May 15, 1975, communication from Region I transmitting the decision of the General Counsel constituted an "initial decision," in compliance with 125.36(m)(4).

PIRG/ELI contend that pursuant to 125.36(b)(1) "any interested person" may request a legal determination by the General Counsel (as an alternative to a request for a hearing) and since the regulations do not provide a method by which such an interested person may become a "party," the reference to "party" in 125.36(n)(1) should be interpreted as referring to an "interested person who has requested a legal determination, which determination (and subsequent decision) is contrary to his interests."

The resolution of this issue turns on an interpretation of the regulations, since the situation presented here appears not to be covered by a specific provision in the regulations. It is clear from paragraph (b)(1) that "any interested person" may submit a request for a legal decision pursuant to paragraph (m) of 125.36, as an <u>alternative</u> to requesting an adjudicatory hearing pursuant to

paragraph (b)(2). It is also clear that where a legal decision has been requested and "no adjudicatory hearing has been granted," the Regional Administrator is required to render an initial decision within 20 days after receiving the decision of the General Counsel (125.36(1)(3)). What is unclear is whether the phrase "no adjudicatory hearing has been granted" (as it is used in paragraphs (1)(3) and (m)(3)) is intended to tie the referral of legal issues and the rendering of an initial decision exclusively to a request for an adjudicatory hearing. The controlling provision, paragraph (b)(1), is ambiguous, since on the one hand it appears to authorize alternative requests for adjudicatory hearings and requests for legal decisions but, on the other hand, refers to the procedures of paragraph (m)(2) [which deals with referrals by the Presiding Officer at the hearing] for the disposition of requests for legal decisions.

The sense of the regulations, as they relate to the determination of legal issues, is that some avenue other than an adjudicatory hearing should be provided for an Agency decision on legal issues where factual issues are not in controversy. The avenue chosen was to provide for direct referral to the Agency General Counsel in those instances where facts are not in dispute and, therefore, an adjudicatory hearing does not appear to be necessary or appropriate. Viewed in this light, it is apparent that the phrase "no adjudicatory hearing has been granted" was intended and should be interpreted to mean any situation where an adjudicatory hearing is not held. That would include, obviously, the situation where no adjudicatory hearing

has been requested because factual issues are not present, as well as where a request for an adjudicatory hearing has been denied. To require that an interested person submit a request for an adjudicatory hearing knowing that there are no material factual issues in dispute, and have the request denied as a prerequisite to entitlement to an appealable initial decision on legal issues, appears to be an unnecessary and unintended interpretation of the regulations.

I find, therefore, that the decision of the General Counsel in this proceeding is reviewable under the regulations. PIRG/ELI is an appropriate "party," since an interested person requesting a legal decision should enjoy the same standing as one requesting an adjudicatory hearing, notwithstanding the more restricted definition of "party" contained in the regulations.

Apart from the question of whether the Administrator can review the OGC Decision (and, thus, the initial decision of the Regional Administrator) is the question of whether he should exercise his discretion to do so.

PIRG/ELI apparently have requested review by the Administrator "because without exhausting all administrative review procedures, it is extremely doubtful that an Appeals Court would hear the case." This posture seems to be dictated by their belief that "it is a distinct probability that the Administrator would find no grounds for reversing the decision, for he would rely on the General Counsel for advice. It is almost absurd to think the General Counsel will reverse his own decision."

It should be pointed out that the Administrator is equipped to make an independent evaluation of the factual and legal issues involved in petitions for review of NPDES permits. The assumption by PIRG/ELI that "he would rely on the General Counsel for advice" is unfounded. Certainly, considerable weight is given to the opinions of the Agency's own counsel, but the Administrator, or a designated Judicial Officer, may determine that a finding of fact or conclusion of law contained in an initial decision "is clearly erroneous or an exercise of decision or policy which is important and which the Administrator should, in his discretion, review" (125.36(n)(3)).

However, after a careful review of the PIRG/ELI petition, the law, and the briefs filed by the various parties in this particular matter, I am unable to find that the initial decision of the Regional Administrator and the OGC Decision on which it relies are clearly erroneous or involve an exercise of decision or policy which the Administrator should review.

The definition of "new source" in Section 306(a)(2) of the Federal Water Pollution Control Act, as amended (hereafter "the Act") is clear in stating its applicability only to sources where construction is commenced "after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated." It is conceded that no new source standard

of performance applicable to Permittees has been proposed under Section 306. It seems obvious, then, that these facilities are not "new sources" within the meaning of Section 306(a)(2).

The contention of PIRG/ELI that, notwithstanding the aforementioned status of new source standards applicable to Permittees' facilities, EPA is nonetheless required to determine "best available demonstrated control technology" for these facilities on a case-by-case basis, is not supported by a reading of the Act as a whole.

Where EPA has not proposed and promulgated a new source standard of performance for a particular category or subcategory of sources, for whatever proper reason, the Act contemplates that such sources will be treated as existing sources subject to the requirement of Section 301(b)(1)(C) ("best practicable control technology currently available," to be achieved by July 1, 1977). Where, as here, regulations under Section 301 and 304 establishing this level of pollutant reduction have not been promulgated, the Act requires in Section 402(a)(1) that permits be issued containing such conditions as the Administrator determines necessary to carry the provisions of the Act (i.e., a case-by-case determination of "best practicable control technology currently available").

Accordingly, I find the OGC Decision to be correct as a matter of law and the initial decision of the Regional Administrator, Region I, which relies upon the OGC Decision, to be the proper

disposition of the matters considered herein. The PIRG/ELI petition for review is denied. The subject permits are consistent with the requirements of the Act and are hereby ordered to be in full force and effect.

Russell E. Train

Dated: December 5, 1975

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF: National Pollutant Discharge Elimination System Permit For Industrial Water Supply Company (Permit No. IL 0000141), Permittee.	NPDES Appeal No. 75-13 NOTICE OF DENIAL OF PETITION FOR ADMINISTRATOR'S REVIEW

On October 7, 1975, Industrial Water Supply Company (hereafter "Petitioner") of Tuscola, Illinois filed a Petition for Administrator's Review, seeking review of a decision of the Regional Administrator, Region V, issued through the Director of the Enforcement Division, on September 26, 1975, denying Petitioner's request for an adjudicatory hearing on the terms and conditions of the above-referenced permit.

Petitioner sets forth, as grounds for review, three alleged errors in the findings of the Regional Administrator, to wit: (1) he improperly interpreted and applied certain Rules (104 and 404) of the Illinois Pollution Control Board in establishing effluent limitations for BOD_5 and suspended solids; (2) he failed to take into account, in establishing effluent limitations for total dissolved solids, Rule 408 of the Illinois Pollution Control Board, in which a less stringent limitation (3500 mg/l) is set forth where solids concentration is caused by recycling or other pollution abatement [illegible] (in the case at hand, cooling towers which increase

concentration by a factor of 5, according to Petitioner); and (3) he failed to take into account, in determining low flow characteristics of the receiving stream, present conditions which include discharges into the receiving stream by the Urbana-Champaign Sanitary District averaging in excess of 3 MGD, as well as the prospect of increasingly greater flows in the future.

Petitioner asserts, in general, that the Regional Administrator erred in finding that "none of the issues raised in the request [for an adjudicatory hearing] constitute material issues of fact relevant to the question of whether the permit should be modified." Appended to the Petition are copies of reports of Petitioner's consulting engineers which, in Petitioner's view, constitute material issues of fact relevant to the question of whether a permit should be issued, denied, or modified. The main report, dated September 12, 1974, describes a water resource and wastewater management program applicable to Petitioner's situation, which essentially involves procurement, treatment, and distribution of treated water to the U.S. Industrial Chemical Processing plant and other nearby users, and recommends discharge limitations for BOD_5, suspended solids, and total dissolved solids in substitution for limitations then included in a draft NPDES permit.

The applicable EPA regulations governing requests for adjudicatory hearings (40 CFR 125.36) do not provide for review by the Administrator of a Regional Administrator's denial of a request for an adjudicatory hearing. The regulations provide, in 125.36(c)(2), that, "If the Regional Administrator determines that the request fails to meet the

requirements of paragraph (c)(1) of this section [i.e., the request is not timely or does not include the various items described in subsection (b), or does not set forth "material issues of fact relevant to the questions of whether a permit should be issued, denied, or modified"], he shall deny the request." Subsection (n) of 125.36, which governs appeals to the Administrator, however, applies only in the case of an "initial decision" of the Regional Administrator (which, under 125.36(1), results from an adjudicatory hearing) or a decision of the Assistant Administrator for Enforcement and General Counsel (now the Office of General Counsel) on issues of law relied upon by the Regional Administrator in rendering the initial decision.

Since neither of the foregoing conditions pertains in this proceeding, however, the applicable EPA regulations do not provide a procedure for review by the Administrator of the September 26, 1975, denial of Petitioner's request for an adjudicatory hearing.

Accordingly, there is no authority in 40 CFR, Part 125 for the review requested by Petitioner. While the Administrator may have inherent authority to review the actions of any Regional Administrator, it does not appear that the decision of the Regional Administrator in this case is clearly erroneous or involves an exercise of decision or policy which is important and which the Administrator should, in his discretion, review.

The Petition for Administrator's Review is denied. The subject permit is hereby ordered to be in full force and effect.

Michael K. Glenn
Chief Judicial Officer

Dated: December 31, 1975

CERTIFICATE OF MAILING

The foregoing is a true and correct copy of a Notice of Denial of Petition for Administrator's Review, dated December 31, 1975, deposited in the U.S. Mail, certified mail, at Washington, D.C., addressed to the following:

James F. Lemna
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James O. McDonald, Director
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Michael K. Glenn
Chief Judicial Officer

Dated: December 31, 1975

DECISIONS

OF THE

GENERAL COUNSEL

NUMBERS 1 THROUGH 36

SEPTEMBER 1974 - DECEMBER 1975

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

DECISION OF THE ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 1

In the Matter of National Pollutant Discharge Elimination System Permit for Marathon Oil Company in Cook Inlet, Alaska (X-74-2), the Presiding Officer has certified two issues of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 FR 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NUMBER I

Question Presented

May the Environmental Protection Agency ("EPA") issue National Pollutant Discharge Elimination System permits ("Permits") pursuant to section 402 of the Federal Water Pollution Control Act, as amended (the "Act"), prior to the promulgation of guidelines pursuant to section 304 of the Act?

Conclusion

Yes. EPA has the authority to issue Permits prior to the promulgation of effluent guidelines pursuant to section 304(b)(1)(A) of the Act.

Discussion

Marathon Oil Company (the "Applicant") urges that since section 402(a)(3) of the Act requires the Administrator to be subject to the same terms and conditions as the States are subject to under subsection (b) of section 402, the Administrator is prevented from issuing Permits until after promulgation of guidelines pursuant to section 304(h)(2). The Applicant confuses guidelines required under section 304(h)(2) and section 304(b)(1)(A). Section 304(h)(2) requires the Administrator to publish guidelines with respect to "the minimum procedural and other elements of any State program...." Such guidelines were in fact promulgated on December 22, 1973 (38 FR 28391) and are codified at 40 C.F.R. Part 124. Since the Permit in question was issued well after the date of promulgation of the guidelines required under section 304(h)(2) of the Act, the Applicant's argument that the Administrator may not issue permits until promulgation of those guidelines is without merit.

Applicant further argues that the legislative history of the Act indicates that guidelines, pursuant to section 304(b)(1)(A), are a prerequisite to the issuance of Permits. The Act, however, clearly contemplates the issuance of Permits prior to the promulgation of guidelines pursuant to section 304(b)(1)(A). Section 402(a)(1) of the Act authorizes the Administrator to issue Permits "upon condition that such discharge will meet either all applicable requirements

under section 301...of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act" (Emphasis added).

In my opinion, the above underscored language gives EPA the authority to issue Permits prior to the final promulgation of guidelines pursuant to section 304(b)(1)(A), which permits the permittee to meet levels of effluent reduction "necessary to carry out the provisions of [the] Act."

While I agree it would be desirable to have promulgated guidelines for permitting any point source, those guidelines are not a necessary precondition. In Natural Resources Defense Council, Inc. v. Train, 6 E.R.C. 1033 (DDC, 1973), the court stated that guidelines should be promulgated by the deadlines set by the statute so they "could be applied meaningfully in the (Permit) system." The court did not hold that Permits could not be issued until promulgation of the guidelines.

ISSUE OF LAW NUMBER II

Question Presented

Does EPA have the authority to issue Permits containing provisions allowing for malfunctions of properly operated and maintained pollution control equipment?

Conclusion

Yes. However, the issuance of a Permit containing such provision is in the discretion of the Administrator or Regional Administrator.

Discussion

Applicant argues that the "position [of EPA] that the Act does not allow for treating equipment malfunctions" is an incorrect statement of EPA's interpretation of the Act. It is our opinion that Permits may be issued containing such conditions as the Administrator or Regional Administrator determines, after opportunity for hearing.

The application of this interpretation to a particular factual situation involves issues of discretion and policy and is therefore not answerable in this proceeding pursuant to 40 CFR §125.36(m).

Dated 9-5-74

Alan G. Kirk II
Assistant Administrator for
Enforcment and General Counsel

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

DECISION OF THE ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 2

In the Matter of National Pollutant Discharge Elimination System Permit for United States Pipe and Foundry Company, Birmingham, Alabama, the Presiding Officer has certified four issues of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NUMBER I

Question Presented

Does a consent decree entered into between U.S. Pipe and Foundry Company and the Department of Justice, acting on behalf of the Environmental Protection Agency, bind the Agency in its consideration of the appropriate limitations, conditions, and terms to be imposed in the permit to be issued to the Company?

Conclusion

The Agency must propose conditions for a permit consistent with the terms of the decree and adopt such conditions in the issued permit unless an Agency assessment of comments received pursuant to

Section 401 and Section 402(a)(1) concludes that conditions inconsistent with the decree should be imposed.

Discussion

The consent decree entered in the Refuse Act case United States v. U.S. Pipe & Foundry, C.A. No. 71-536-S, N.D. Ala., represents an agreement between the United States and the Company in settlement of the case and adopted by the court as a consent judgment.* The requirements of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) do not per se preempt any conditions or requirements imposed on a discharger by a consent decree resulting from a Refuse Act proceeding. The savings

* Three observations (which do not appear applicable to the instant case on the facts cited) may be stated concerning consent decrees of this nature: (1) If the Agency and the Company mutually agree that a term or terms should be modified in the decree, the parties with concurrence of the Department of Justice may petition the appropriate court for a modification of the decree. Paragraph XIX of the decree provides that either party may apply to the Court at any time for such further orders and directions as may be necessary and appropriate. That modification then can be considered in the development of the conditions of a permit. (2) Under consideration in this opinion are only those terms, limitations and conditions specified in the decree. Any requirements in a NPDES permit which are not the specific subject of the decree may be determined in the manner ordinarily followed when permit conditions are being considered.

clause of the 1972 Amendments, Section 4, P.L. 92-500, provides that no action or proceeding commenced by or against the Administrator or any other officer or employee of the United States shall abate by reason of the taking effect of the Amendments to the FWPCA. The savings clause allowed the Refuse Act case commenced against U.S. Pipe and Foundry prior to the 1972 Amendments to be fully prosecuted and resolved. Nor does the savings clause require application of standards in the 1972 Amendments to pending Refuse Act suits. United States v. Rohm & Haas Company, 353 F. 2d 993, 6 ERC 2016, (S.D. Texas, 1974).

The terms of the decree entered in the Refuse Act proceeding were based on the parties' understanding of the best technical information available at that time. The Agency entered into the agreement to encourage prompt construction of abatement facilities rather than delay an abatement schedule until development of effluent limitations guidelines. The Government assumed the risk that more stringent limitations than those imposed in the decree might be applicable to the company under the FWPCA, while the company chanced that less stringent standards might apply in the future.

Paragraph XIV of the consent decree in question provides that the decree is not a discharge permit nor does it affect the Company's obligation to secure a permit. The provision further provides that subsequent to entry of the decree, a permit will issue, which to the fullest extent possible in light of the requirements of Section 401 and

Section 402(a)(1) will be consistent with applicable provisions of the decree. By this language the Agency was not making an absolute commitment or guarantee that the terms of the decree would be incorporated in any NPDES permit ultimately issued to the company. This language recognizes that the Agency is statutorily obligated by Section 402 to provide an opportunity for comment, by interested persons and the public, on permit conditions which the Agency intends to impose on an NPDES permit holder and to give serious consideration to such comments. It also recognizes that the Agency could not in a consent decree, entered prior to the initiation of the permitting process, waive the rights of a State in which a discharge originates to consider whether to certify that the discharge will comply with certain requirements nor waive the rights of a State whose waters might be affected by the discharge to participate in the formulation of the conditions of the permit. Section 401.

The Agency's obligation under Paragraph XIV is to propose a permit consistent with the terms of the decree. The Agency's commitment in the decree is not a guarantee that the Regional Administrator's determination under 40 C.F.R. §125.35, the initial decision by the Regional Administrator, §125.36(1), or the final decision of the Agency will be consistent with every limitation or condition set forth in the consent decree. The company's obligation is not to oppose any conditions in the proposed permit which are consistent with the terms of the decree.

If during any of the proceedings provided for under the NPDES regulations, 40 C.F.R. §125, a condition in the proposed permit is challenged by an interested person or member of the public, other than the Agency or the discharger, the arguments must be afforded as much consideration in the determination of the condition as would be afforded in any permit proceeding where no consent decree had been agreed to by the Agency and the discharger.

The Environmental Protection Agency will have met its obligation in the consent decree by proposing as acceptable limitations and conditions those set forth in the decree and by adopting those conditions in the issued permit if no opposition to those conditions arises during Section 401 and 402(a) proceedings. Beyond such steps, the Agency is obliged to weigh any comments conflicting with the proposed conditions in a manner consistent with the public interest and issue a permit with conditions different than those proposed if the public interest requires such a modification. Delta Air Lines, Inc. v. CAB, 280 F. 2d 636 (D.C. Cir. 1960).

ISSUE OF LAW NUMBER II

Question Presented

Does Section 301(b)(1)(C) of the Act require the achievement of effluent limitations more stringent than "best practicable control technology" if such limitations are necessary to implement water quality standards established pursuant to the Act?

Conclusion

Yes.

Discussion

By its terms, Section 301(b)(1)(C) requires achievement by July 1, 1977, of effluent limitations more stringent than "best practicable control technology" if such limitations are necessary to implement water quality standards. This conclusion is confirmed by the legislative history in the remarks of Representative Blatnik:

> I also have an answer for those who, because they feel that S. 2770 imposes more stringent controls, would advocate that we adopt S. 2770, as passed by the other body. Read section 303. Read section 301(b)(1)(C). These sections require point sources of the discharge of pollutants to install the 'best practicable control technology currently available' by January 1, 1976. This is consistent with the other body. However, what if such control technology is required by the Water Quality Act of 1965?
>
> H.R. 11896 requires that if the application of 'best practicable control technology currently available' is not sufficient to meet water quality standards, further and more stringent controls must be imposed. This is more restrictive than the requirement of the other body, and it should be recognized as such. The requirements of H.R. 11896, will assure that water quality standards are met, and that even if such 'best practicable control technology currently available' is not sufficient to meet water quality standards, each point source will still be required to be so equipped to further enhance the quality of our waters. In other words we require the upgrading of our waters to a much greater degree than does S. 2770. House Comm. on Public Works, 93 Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 353 (Comm. Print 1973).

The language in H.R. 11896 was adopted in P.L. 92-500.

ISSUE OF LAW NUMBER III

Question Presented

What provisions, if any, may legally be included in permits issued by the Regional Administrator concerning the toxic pollutant standards and prohibitions referred to in Section 307(a) of the Act prior to the time such standards or prohibitions are determined and become effective?

Conclusion

The provision in the presently issued permit or any other similar language providing for automatic modification of a permit upon promulgation of a more stringent toxic standard under Section 307(a) is properly included. 40 C.F.R. §125.22(a)(6) requires the inclusion of this provision. Moreover, prior to promulgation of standards, a permit may include conditions limiting or prohibiting the discharge of toxic pollutants.

Discussion

The Environmental Protection Agency's regulations for the National Pollutant Discharge Elimination System require the Regional Administrator to insure that the terms and conditions of all permits provide for and insure that if a Section 307(a) standard is established for a toxic pollutant which is in a permittee's discharge and the standard is more stringent than the limitation in the permit, the Regional Administrator shall revise or modify the permit in accordance with the toxic standard or prohibition and so notify the permittee. 40 C.F.R. §125.22(a)(6).

Prior to the promulgation of standards under Section 307, the Administrator has the authority under Section 402(a)(1) to issue permits with such conditions as he "determines are necessary to carry out the provisions of the Act." Based on information now available to him, he could condition such permits on effluent limitations consistent with the need to protect the environment from toxic pollutants. The permit conditions on toxic effluents will be superseded when the toxic standards take effect.

ISSUE OF LAW NUMBER IV

Question Presented

Does Section 101(a)(2) of the Act require that a permit issued under Section 402 thereof be written so as to ensure the attainment of the 1983 goal?

Conclusion

The attainment of the 1983 goal is to be accomplished by implementation of the water quality requirements under Section 303 or by establishment of 302 water quality related effluent limitations. A permit issued at the present time and scheduled to expire in 1979 should contain conditions to meet the requirement of Section 301(b)(1)(C) as related to Section 303 standards or to meet effluent limitations established pursuant to Section 302 procedures.

Discussion

As stated in Section 101(a)(2) it is a national goal that "whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."

Although this language is stated in terms of a goal and not a requirement, other sections of the FWPCAA establish enforceable requirements and procedures to implement this goal. Section 301 mandates the application of effluent limitations based on best practicable control technology but in addition requires the application of any more stringent limitation necessary to meet water quality standards "or required

to implement any applicable water quality standard established pursuant to this Act."

The water quality standards established "pursuant to this Act" are those established by Section 303 which provides the following criteria:

> Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.... Section 303(c)(2) (emphasis added.)

The requirements of Section 302 are also directed at that goal.

> Whenever...discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act, would interfere...with the attainment or maintenance of that water quality...which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations...shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

The legislative history ties this section directly to the 1983 goal. "Section 302 [of the Senate bill, adopted in the 1972 Amendments] requires more stringent standards than those required by Section 301 if such effluent limits would interfere with attaining the [1983] interim goal. The interim goal requires a water quality assuring protection and

propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water." House Committee on Public Works, 93d Cong., 1st. Sess., History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 304-305 (Comm. Print 1973).

Clearly, effluent limitations and compliance schedules must be fashioned aiming toward the 1983 interim water quality goal if BPT and BAT limitations are insufficient for that goal. The mechanism for including water quality related conditions in permits is less clear. If Section 303 water quality standards are set at levels consistent with the 1983 goal, the inclusion of more stringent limitations to meet that goal are required by Section 301(b)(1)(C) to be imposed in a permit, such as the instant one, expiring in 1979. If, however, the application of requirements for BPT and water quality standards under Section 301(b)(1) do not aim sufficiently toward that goal, a permit extending beyond 1977 may contain steps beyond the 1977 requirements looking toward compliance with the 1983 goal. First, such a permit may contain compliance steps which will assure a proper implementation of BAT after the BPT requirements are met. Second, Section 302 may be invoked to impose additional compliance steps.

Although Section 302 may be invoked in a present proceeding, subsection (b) states that any stricter limitations and strategies can be required only after a hearing, where the Administrator determines the balance between economic and social costs of achieving the stricter

controls and the social and economic benefits. If a person shows there is no reasonable relationship between these costs and benefits, then the limitation shall be adjusted as it applies to such person. Thus, for these Section 302 effluent limitations to apply to a permittee now seeking a permit, special procedural requirements of that section apply. However, application of limitations derived under Section 302 is not a substitute for compliance with Section 303 water quality standards.

Dated: Dec. 30, 1974

Alan G. Kirk II
Assistant Administrator for Enforcement
and General Counsel

MAR 6 1975

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW
PURSUANT TO 40 C.F.R. §125.36(m)

No. 3

In the matter of National Pollutant Discharge Elimination System Permit for United States Steel Corporation, MO-0000817, Crystal City, Missouri, the Presiding Officer has certified three issues of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NUMBER I

Question Presented

In a situation where effluent limitations and a permit for a point source are based upon guidelines promulgated pursuant to Sections 301 and 304 of the Federal Water Pollution Control Act, as amended, (the "Act"), which are the subject of a pending proceeding for judicial review in which the permittee is a party, can the effluent limitations contained in the guidelines be incorporated into an individual permit or must that portion of the permit be held in abeyance pending the outcome of judicial review?

Conclusion

EPA may issue individual permits based upon regulations which have been promulgated in final form by the Environmental Protection Agency pursuant to Sections 301 and 304 of the Act. This is so even where appellate judicial review of the regulations is pending and where the potential permittee is a party to such appeal.

Discussion

Section 509(b) provides, in pertinent part,

> Review of the Administrator's action...[E] in approving or promulgating any effluent limitation or other limitation under Sections 301, 302, or 306...maybe had by an interested person in the Circuit Court of Appeals of the United States for the Federal Judicial District in which such person resides or transacts business upon application by such person. Any such application shall be made within 90 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 90th day.

This provision in Section 509(b) provides the mechanism, the sole mechanism, by which appeal can be taken of limitations promulgated pursuant to Section 301. Congress, in enacting Section 509(b), contemplated that a potential permittee could pursue two avenues of action in connection with a permit to be issued under an applicable effluent regulation. First, the potential permittee could appeal the promulgation of the regulation pursuant to Section 509(b) where the potential permittee could raise all of the arguments relative

to its promulgation. It is in this action that the permittee should challenge the foundation of the Environmental Protection Agency in promulgating the applicable effluent limitation. The second course of action would concern the application of a promulgated effluent regulation to a particular discharge in an individual permit proceeding. It is in the individual permit proceeding where the applicability of the regulation to a specific discharge is to be challenged. In this latter appeal, the permit applicant could challenge the application of the regulation to his discharge but not the promulgated regulation itself which must be tested under the exclusive provisions of section 509(b)(1)(E).

This statutory structure allows a permit applicant to challenge EPA's foundation in establishing effluent limitations on an industry wide basis within 90 days of promulgation. This litigation would, of course, concern itself solely with the validity of the promulgated regulation as applied industry wide. It would not, normally, include questions of applicability of the regulation to specific point source discharge. Should a permit applicant in the process of receiving his permit also be challenging the effluent regulation, he may, of course, petition the court reviewing that regulation for a stay in either the effectiveness of the regulation or an injunction precluding the Environmental Protection Agency from issuing a permit based upon it.

To do this, of course, would require the permit applicant to demonstrate a substantial likelihood of success on the merits and irreparable harm.

The Act permits the Administrator, after opportunity for public hearing, "to issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding Section 301(a), upon condition that such discharge will meet either all applicable requirements under Sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act." (§402) Should an applicable effluent regulation, for example, be overturned, the Administrator would remain in a position to issue a permit under Section 402. In such a situation, the Administrator would make a determination concerning the discharge and, where there were no applicable requirements under Section 301, through an effluent limitation and guideline promulgated pursuant to that section and Section 304, the Administrator could nevertheless issue a permit containing such conditions as the Administrator determines are necessary to carry out the intendment of the Act.

Section 402 states clearly that if there are applicable requirements under Section 301, the Administrator may issue a permit based upon those requirements. The fact that regulations imposing such requirements may be modified by a court or further Agency

proceeding is irrelevant. The fact remains that the regulations were promulgated pursuant to Section 301 and are effective rules of the Agency. Accordingly, the Agency may issue its point source discharge permits based on such regulations so long as they remain in effect. Even if a stay were issued by a court, the Administrator still has the authority to issue a permit pursuant to section 402 of the Act.

Permittee's argument that review of the regulations establishing effluent guidelines and limitations could not have been obtained pursuant to the pending appeal prior to the time a permit became final and no longer subject to judicial review is therefore without merit.

ISSUE OF LAW NUMBER II

Question Presented

Where an effluent guideline is subject to pending judicial review, is a permit applicant entitled to an adjudicatory hearing with regard to the effluent standards incorporated in a permit and derived from the effluent guideline?

Conclusion

Yes, the permit applicant is entitled to an adjudicatory hearing to consider all legitimate issues of fact concerning the applicability of the regulation to the particular facility.

A permit applicant is clearly entitled to challenge the applicability of a promulgated regulation to his facility and his particular discharge. See 40 C.F.R. §125.36. However, as expressed in response to question number 1 above, the regulation itself is not subject to review in the adjudicatory hearing since Section 509 provides the exclusive vehicle for review in the Circuit Courts of Appeal. At an adjudicatory hearing considering the issuance of a permit, the applicant may adduce and introduce evidence concerning the discharge limitations in his permit as derived from the regulation.

A permit applicant may show, at an adjudicatory hearing, facts which would lead to the conclusion that the regulations are not applicable to its facility, but the applicant may not elicit or produce evidence alleging a lack of foundation for those regulations. As indicated in response to Issue I above, all challenges to the regulations issued under Sections 301 and 304 must be made under the exclusive provisions under §509(b), and may not be raised in a permit proceeding under 40 C.F.R. Part 125.

ISSUE OF LAW NUMBER III

Question Presented

Must permits which are issued based upon guidelines subject to pending litigation contain a provision requiring modification of such

permit should any modification of the guidelines occur as a consequence of judicial review?

Conclusion

No, the Administrator is not required by applicable law to include such a condition in a permit. However, exercising its discretion, the Agency will consider requests for modification of a permit where modification of a regulation issued under Sections 301 and 304 results from court order in the manner specified in the attached memorandum from the Assistant Administrator for Enforcement and General Counsel dated December 23, 1974.

Robert V. Zener
General Counsel (EG-330)

Attachment

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

DEC 23 1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM

TO: Regional Administrators
Regional Enforcement Directors

FROM: Assistant Administrator for Enforcement and General Counsel

SUBJECT: Impact of Effluent Guidelines Litigation Upon Issued NPDES Permits

As you know, almost all of the section 304(b) industrial effluent guidelines (22 of the 27 industrial categories for which effluent guidelines have been promulgated) are being challenged in court pursuant to section 509(b). This litigation has raised the question of what effect, if any, will a modification of effluent guidelines following a remand or adverse court decision have upon issued NPDES permits? Our policy for revision of issued NPDES permits following a modification of applicable effluent guidelines as the result of a court order is as follows:

If, following final promulgation of a court modified effluent guideline, any NPDES permittee can demonstrate he has permit requirements based upon effluent guideline requirements which were subsequently modified by court order, he may request a revision of his permit. A modification by court order would include situations where the court remands to the Agency for further consideration or explanation, and, as a result of this review, EPA determines that the regulation should be modified. As will be provided in the preamble to the modified effluent guidelines, the request for permit revision must be made in writing within 90 days of the date of promulgation of such modified guidelines. EPA will not, absent a timely and specific written request, revise any issued NPDES permit pursuant to this policy. No requests for permit revision on the basis of a court ordered modified effluent guideline will be accepted prior to the final promulgation of the applicable modified effluent guideline.

Only those permit conditions and limitations based upon promulgated effluent guidelines which were subsequently modified as the result of a court order or remand may be revised pursuant to this policy. This permit revision policy does not apply to permit effluent limitations based upon effluent guidance considerations, proposed effluent guidelines, water quality standards or any other requirements other than a promulgated effluent guideline. For all permit conditions and effluent limitations not based upon promulgated effluent guidelines which are subsequently modified as the result of court order or remand, the permittee's failure to exercise his right to appeal during the section 509(b) 90 day period is conclusive.

Procedures for the revision of NPDES permits based upon court ordered modified effluent guidelines will be those specified in 40 CFR Part 125. Public notice shall be provided for each proposed permit revision. Any interested party may request an adjudicatory hearing on the Regional Administrator's tentative determination to grant or deny a request for permit revision.

If other permit requirements are based upon effluent limitations which are revised pursuant to this policy, those other requirements may have to be adjusted accordingly. For example, a revised, less stringent effluent limitation may be achievable in a shorter period of time than had been allowed in the original permit schedule of compliance. If so, the schedule should be shortened in accordance with the shortest, reasonable period of time principle specified in the NPDES regulations. Similarly, it may be appropriate in some cases to revise monitoring requirements with respect to revised effluent limitations.

It must be emphasized that the possibility of court ordered modifications in the guidelines cannot be allowed to interfere with abatement programs established in permits. Rigorous enforcement of construction schedule requirements and other existing conditions is essential regardless of whether some revision in final effluent limits could take place.

It must also be emphasized that to minimize delays, confusion, and duplication of effort, permit revisions based on guideline changes must be granted as sparingly as possible. In many cases, for example, effluent limits for dischargers who would appear to be covered by a guideline were actually established by analogy to the guideline because the discharger did not actually fit within the described category. In these situations, of course, a court

ordered modification of the guidelines would not justify a permit revision since the discharger could have pursued an individual remedy at the time the permit was originally issued.

If you have any questions with respect to this memorandum, please contact Rick Johnson, Bill Brick or Brian Molloy.

Alan G. Kirk II

cc: State Directors of
approved NPDES programs

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 4

In the matter of National Pollutant Discharge Elimination System Permits for St. Regis's Paper Co., M.E. 0002160 and International Paper Co., M.E. 0001937, the Regional Administrator has certified three issues of law to the General Counsel for decision pursuant to 40 C.F.R §125.36(m) (39 F.R.27078. July 24, 1974). The parties and interested persons, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

"Due to the failure of EPA to propose standards of performance for new sources under section 306(b)(1)(B) of the Act, at the time mandated by the Act for such standards (i.e., January 1974), is the Environmental Protection Agency required to implement the policies and requirements of section 401 and 306 using its best professional judgement to determine best available demonstrated control technology in the issuance of permits to new sources in fact?"

CONCLUSION

EPA may issue permits requiring compliance with a standard of performance only when such standard has been promulgated pursuant to section 306 of the Act. Pending promulgation of new source standards for a category of sources, effluent limits should be based upon section 402(a)(1) of the Act, which authorizes the Administrator to impose all conditions which he determines to be necessary to carry out the provisions of the Act. In cases where, as here, no new source standard of performance has been proposed for a particular category of sources, the permit conditions should be based upon an individual assessment of the degree of effluent control which represents the best practicable control technology currently available for the individual source in question in order to meet the deadline set forth in §301 of the Act. Further, since the permit may be effective beyond such deadline, a compliance schedule necessary to achieve the 1983 standard set forth in §301 may be included.

DISCUSSION

Section 306(a) provides, in pertinent part:

> "(2) The term 'new source' means any source the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated....

* * *

> (3) The term 'source' means any building, structure facilities or installation from which there is or may be the discharge of pollutants.
>
> * * *
>
> (5) The term 'construction' means any placement, assembly, of installation of facilities or equipment (including contractual objections to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises."

All interested persons concede that no new source standard of performance has been proposed under section 306 which would be applicable to the subject point sources. Hence, it is quite clear that they cannot constitute "new sources" within the meaning of section 306(a)(2).

Nevertheless, the requestor Environmental Law Institute (ELI), urges that the Administrator should fashion new sources standards for these plants on a case-by-case basis, the standards themselves reflecting the Administrator's best judgment of the requirements of section 306 as applied in the individual circumstances of these cases. The contention is premised on the view that failure to promulgate new source performance standards applicable to plants in these subcategories of the pulp and paper industry represents a violation of the Administrator's statutory obligation to do so and that this failure should not insulate essentially new plants from

pollution control standards to which they would be subject had the statutory deadline been adhered to. */

The Agency does not accept the contention that Natural Resources Defense Council, Inc. v. Train, _____F. Supp. _____, 6ERC 1033 (D.D.C. 1973), rev'd in part _____ F. 2d _____, 7 ERC 1209, (D.C. Cir. 1974), the case relied upon by ELI, is necessarily dispositive of its statutory obligation to issue new source standards for the relevant categories of pulp and paper mills by January 18, 1974. Even were this to be conceded, however, it would not compel the conclusion that section 306 is the sole provision of the Act to which reference should be made in determining the appropriate effluent limits for the mills in question.

Section 306 clearly requires that a new source performance standard be promulgated before permits are to be issued based on the Agency's nationwide assessment of what constitutes the "best available demonstrated control technology" for new sources in a

*/ Section 306(b)(1)(A) requires the Administrator to publish a list of classes and categories of sources for which new sources are to be proposed within 90 days after passage of the 1972 Amendments for the FWPCA. The list, including the category "pulp and paper mills", was published on January 16, 1973. Section 306(b)(1)(B) requires the Administrator to publish proposed standards of performance for each category on the list within one year thereafter, and to promulgate them within 120 days after proposal. Standards of performance for several subcategories within the pulp & paper manufacturing category, but not for the categories of mills presently in issue, were proposed and subsequently were promulgated on May 29, 1974.

specified industrial category. It is equally clear that prior to the proposal of such standards no source whose construction, as defined in section 306(a)(5), has already commenced may be deemed a new source subject to the subsequently promulgated standards.

Such plants would, instead, be existing sources subject to the requirement in section 301(b)(1)(A) that effluent limits reflecting the application of the best practicable control technology currently available be achieved by July 1, 1977.

In this case, the Administrator has not yet promulgated regulations pursuant to sections 301 and 304 establishing this level of pollutant reduction. Accordingly, pursuant to section 402(a)(1), permits issued to these discharges should contain such conditions as are determined to be necessary to carry out the provisions of the Act.

While we do not speculate as to the specific effluent limitations and conditions which the Regional Administrator may deem necessary in this instance, we do observe that the age of facilities in question is an appropriate consideration in fashioning effluent limitations on an individual basis during the interim before regulations under sections 301, 304 and 306 are promulgated. Where, as appears to be the case here,

major new construction is taking place, considerable flexibility may exist in the installation of pollution control technology. Such flexibility should be a factor considered in the determination of effluent limitations achievable by the best practicable control technology.

ISSUES OF LAW NO. II AND III

Having resolved question I above, and finding that it is necessary for a new source performance standard to be at least proposed pursuant to section 306 of the Act in order for a source to be a new source within the meaning of section 306, the remaining two questions certified are no longer releyant to these proceeding.

Dated: APR 4 1975

Robert V. Zener
General Counsel

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW
PURSUANT TO 40 C.F.R. §125.36(m)

No. 5

In the matter of National Pollutant Discharge Elimination System Permits for Marathon Oil Company, Union Oil Company of California, Atlantic Richfield Company, and Mobil Oil Corporation, the Presiding Officer has certified seven issues of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NUMBER I

QUESTION PRESENTED

"Do the [NPDES] regulations provide for an adequate separation of the judicial function from other Agency functions, or do they mix the judicial function with other functions by requiring the Regional Administrator, rather than the Presiding Officer, to render the initial decision in connection with the adjudicatory hearing?"

CONCLUSION

The referral of issues of law to the General Counsel, provided for in 40 C.F.R. Part 125, is to insure that provisions of the Federal Water Pollution Control Act and implementing regulations issued thereunder are applied uniformly in permit issuance proceedings conducted in the several Regional Offices. The intent of 40 C.F.R. 125.36(m) is to enable questions concerning the interpretation of that Act and pertinent regulations, as well as the consistency of the Agency's regulations with the statutory requirements, to be resolved in this office. The issue of law presented herein, on the other hand, involves a question of Federal constitutional law. As such, the issue is more appropriately presented to a United States Court of Appeals on appeal from final Agency action on the permits.

ISSUE OF LAW NUMBER II

QUESTION PRESENTED

"May the Regional Administrator consider issues outside the record of the adjudicatory hearing in reaching his decision, and, if so, would such consideration deny the PERMITTEES due process of law?"

CONCLUSION

The provision of the NPDES regulations referred to by the requestors, 40 C.F.R. 125.36(n)(12), authorizes the Administrator to decide appeals from the initial decision of the Regional Administrator on the basis of the record presented and other considerations he deems relevant. The

regulations do not expressly authorize consideration of matters outside the record of the adjudicatory hearing by the Regional Administrator.

The question of whether consideration of material outside the record of the hearing by the Regional Administrator would deny a permit applicant "procedural due process" is a matter of constitutional law properly addressed in the Courts of Appeals.

ISSUE OF LAW NUMBER III

QUESTION PRESENTED

"May the Administrator consider matters outside the record of the adjudicatory hearing in reaching this decision, and, if so, would such consideration deny the PERMITTEES due process of law?"

CONCLUSION

As indicated in the response to the foregoing question, the NPDES regulations authorize the Administrator, in determining appeals from initial decisions of the Regional Administrators, to take into account relevant considerations not included in the record of the adjudicatory hearing. 40 C.F.R. §125.36(n)(12). The constitutionality of the regulation is beyond the scope of issues referrable to the General Counsel.

ISSUE OF LAW NUMBER IV

QUESTION PRESENTED

"Do the regulations deny the PERMITTEES due process of law by requiring the Presiding Officer to admit all relevant, material evidence without giving the PERMITTEES discovery and subpoena power sufficient to enable the PERMITTEES to determine what evidence under the Agency's control exists and may be relevant and material?"

CONCLUSION

The Federal Water Pollution Control Act contains no authority for the Agency to issue subpoenas in connection with the issuance or modification of permits under Section 402 of the Act. Thus the Agency's ability to obtain information from applicants is confined to the authority conferred by Section 308 and it has no greater authority than applicants to compel production of evidence from third parties. Applicants, of course, have available to them the provisions of the Freedom of Information Act, 5 USC §552, to discover documents within the Agency's custody.

Whether the absence of subpoena power for permit applicants in the Act and the regulations constitute a denial of due process is a question beyond the scope of issues of law referrable to the General Counsel.

ISSUE OF LAW NUMBER V

QUESTION PRESENTED

"Does the fact that the regulations place the burden of proof and of going forward with the evidence upon the Requestors (PERMITTEES) without providing for discovery, subpoena of witnesses and other procedures normally allowed in administrative proceedings to insure a fair hearing deny the PERMITTEES due process of law?"

CONCLUSION

The issue, raising as it does constitutional issues, is beyond the scope of issues referrable to the General Counsel.

ISSUE OF LAW NUMBER VI

QUESTION PRESENTED

Was the Agency's action in denying the PERMITTEES' motion to have Presiding Officer William J. Sweeney appointed a Judicial Officer with power to make findings and conclusions improper?

CONCLUSION

40 CFR §125.36(a)(4)(iii) provides that the Administrator may delegate any of his authority, including that of making findings of fact, to a Judicial Officer. Delegation is, under the regulation, a matter within the discretion of the Administrator. Whether a delegation or a refusal

to delegate these functions in a particular proceeding is an abuse of discretion is a factual question, rather than an issue of law properly referrable to the General Counsel. In any event, there are no facts available to us which indicate whether or not the refusal to appoint the Presiding Officer as a Judicial Officer was proper.

To the extent that issue of law number VI purports to present constitutional issues, the proper forum for its disposition is a Federal Court of Appeals.

ISSUE OF LAW NUMBER VII

QUESTION PRESENTED

"Is the Regional Administrator bound by the Presiding Officer's rulings on the admission of evidence?"

CONCLUSION

No. 40 CFR 126.36(i)(6) provides:

> The rulings of the Presiding Officer on the admissiblity of evidence, the propriety of cross-examination, and other procedural matters shall be final and shall appear in the record.

This provision is intended to establish procedural rulings as final for the purposes of the hearing and to prevent interlocutory review of the Presiding Officer's decisions. Given its limited purpose and the fact that it is not meant to preclude substitution of the Regional Administrator's judgment for that of the Presiding Officer, the Regional Administrator is not thereby barred from modifying rulings of the Presiding Officer and

taking appropriate action, including a remand for the purpose of introducing evidence initially excluded.

Robert V. Zener
General Counsel

Dated: APR 4 1975

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

DECISION OF THE GENERAL COUNSEL ON MATTER OF LAW PURSUANT TO 40 CFR §125.36(m)

No. 6

In the matter of NPDES Permit WV 0001279, E. I. duPont de Nemours & Co., Washington Works, Parkersburg, West Virginia (duPont), a legal issue has been referred to the General Counsel for decision pursuant to 40 CFR §125.36(m) (39 FR 27078, July 24, 1974). DuPont has not submitted a brief concerning this issue within twenty days of the referral (40 CFR §125.36(m)(2)), but has requested that ruling on the issue be deferred until the Agency acts on duPont's request that the referral be expanded in scope or that the Regional Office reverse its decision denying an adjudicatory hearing on the well disposal at issue.

The decision whether to grant or deny an adjudicatory hearing is a matter of discretion for the Regional Administrator. 40 CFR §125.36(c). This decision is not reviewable either by the appeal procedure set forth in 40 CFR §125.36(n) or by the procedure for decisions on issues of law under 40 CFR §125.36(m). Moreover, the decision to grant or deny an adjudicatory hearing on factual issues (40 CFR §125.36(c)(ii)) has no bearing upon the referred legal issue. If the Regional Administrator determines that the opinion of the General Counsel is required on additional issues, he may refer them in his discretion. There is, however, no reason to delay issuance of this decision.

QUESTION PRESENTED

Does the Environmental Protection Agency have the authority to regulate the injection of industrial waste by NPDES permits?

CONCLUSION

The Environmental Protection Agency has authority to control well injection through conditions in NPDES permits issued for discharges into navigable waters.

DISCUSSION

The Office of General Counsel concluded, in an opinion of law dated December 13, 1973 (attached), that disposal of pollutants into wells is subject to regulation through conditions in an NPDES permit issued for an associated surface water discharge. See 40 CFR §125.26. The only question which requires consideration here is whether this conclusion must be altered in light of the decision of the District Court for the Southern District of Texas in United States v. GAF, Civ. Action No. 74-G-150.

In the GAF case, the United States sought a temporary restraining order, and temporary and permanent injunctive relief, to prevent the drilling of subsurface wells for disposal of organic chemical wastes. From the opinion, it does not appear that GAF had received a permit for any associated surface water discharge. The court held that "The disposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters does not constitute a discharge of a pollutant . . . ."

The court's conclusion has little relevance to the issue of the Agency's authority to include conditions in a permit for disposal into surface navigable waters which would control associated well discharge. The court was, in fact, careful to draw this distinction in its opinion:

> Plaintiff has not complained of a violation of 'any permit condition or limitation' by defendant. Indeed, there is no allegation that the Administrator has found such a violation by defendant. This Court's jurisdiction depends, therefore, on whether the Administrator could have found that the defendant is 'in violation of section 1311, 1312, 1316, 1317, or 1318' of Title 33.

The court, in other words, rested its holding in relevant part* upon whether or not a discharge of a pollutant into underground waters itself constituted a discharge into navigable waters invoking the regulatory requirements of the FWPCA. It specifically declined to address the range of discretion which the Act confers upon the Administrator in establishing conditions in permits for discharges into surface navigable waters. Similarly, the provisions of EPA's NPDES regulations which require control of well disposal in connection with NPDES permits for surface water discharges were not considered by the court, and their validity was not at issue.

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* The court also concluded that a discharge of a pollutant into navigable waters without a permit is not, of itself, a violation of the Act, unless applicable effluent limitations and standards have been established by the Administrator. This portion of the opinion has no relevance to the instant question.

Accordingly, we conclude that the GAF opinion does not modify the opinion of December 13, 1973, and that opinion is reaffirmed.

Like any Federal agency, EPA is bound to follow its own regulations. See, e.g., Service v. Dulles, 354 U.S. 363 (1959); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). EPA must continue to apply the provisions of 40 CFR §125.26 until that rule is judicially struck down or administratively revoked, modified, or suspended.

General Counsel

Dated: APR 8 1975

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

#590

Dec. 13, 1973

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM

TO: Regional Counsel, Region IX

FROM: Acting Deputy General Counsel

SUBJECT: Applicability of NPDES to Disposal of Pollutants into Wells

Question:

Would disposal of pollutants into wells in each of the following situations be covered by the NPDES?

(a) The discharger has an existing surface water discharge. He proposes as part of an abatement program to divert a portion of his waste stream to a well, while continuing to discharge the remainder to the surface water.

(b) The discharger has an existing surface water discharge. He proposes as part of an abatement program to discontinue his surface water discharge and divert his entire waste stream to a disposal well.

(c) The discharger has an existing surface water discharge and also currently disposes of a portion of his waste stream into a well. He proposes to continue this practice.

(d) The discharger has an existing surface water discharge and also currently disposes of a portion of his waste stream into a well. He proposes as part of an abatement program to discontinue his surface water discharge and divert his entire waste stream to a disposal well.

(e) The discharger currently has no surface water discharge and disposes of all his waste waters into a well. He proposes to continue this practice.

(f) The discharger currently has no surface water discharge and disposes of all of his wastewaters into a well. He now proposes to divert a portion of his waste stream to a surface water discharge.

(g) The discharger has no existing discharge and proposes to commence a new discharge. He intends to dispose of all his wastewaters into a well.

(h) The discharger has no existing discharge and proposes to commence a new discharge. He intends to dispose of a portion of his wastewaters into a well and discharge the remainder to a surface water.

Answer:

If a State NPDES program has been approved, the State would be required to control the well disposal in all the listed situations. Prior to State NPDES program approval, in all the listed situations except (e) and (g), the Regional Administrator must establish conditions in the NPDES permit for discharge into navigable water. Such conditions must prohibit the well disposal, or must control such disposal in order to prevent pollution of ground and surface water resources and to protect the public health and welfare.

Discussion:

In your memorandum of November 20, you set forth the eight hypothetical situations listed above. In all cases, if a State permit program has been approved, Subpart I of EPA's State Program Guidelines (40 CFR §124.80) would be applicable. If no State program has been approved, the Administrator's authority is set forth in 40 CFR Part 125.

Jurisdiction over a permittee is based upon §301 of the Act, which provides that the "discharge of a pollutant" is unlawful except as in compliance with the regulatory provisions of the Act. Section 402 authorizes the Administrator to issue a permit "for the discharge of a pollutant." Under §502(12) the term "discharge of a pollutant" is defined so as to include only discharges into

navigable waters (or the contiguous zone or the ocean). Discharges into ground waters are not included. Accordingly, permits may not be issued, and no application is required, unless a discharge into navigable waters is proposed or is occurring.

Section 125.26(a) of the NPDES regulations requires the Regional Administrator to formulate and apply permit conditions to prevent pollution of surface and underground water resources whenever disposal into wells is contemplated as part of a program to comply with effluent limitations and other requirements in an NPDES permit. This provision cannot, of course, extend EPA's jurisdiction to cover disposal into wells not in connection with discharges into navigable waters. However, whenever a permit is issued for a discharge into navigable waters, §125.26(a) requires controls to be applied to associated discharges into wells.

Thus, with respect to your specific questions, application of the principles set forth above indicates that an NPDES permit would be required in all cases where there is now, or is proposed, a discharge into navigable waters. In all such cases, 40 CFR §125.26(a) requires permit conditions to prohibit well disposal, or to control such disposal in order to prevent pollution of ground and surface water resources and to protect the public health and welfare. Only in cases (e) and (g) in your memorandum is there no discharge into navigable waters. Thus, in these cases, no Federal NPDES permit would be required, and the Regional Administrator would have no authority to impose conditions concerning well disposal.

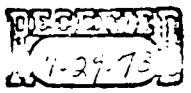
/s/

Robert V. Zener

cc: Rick Johnson
Bert Printz
All Regional Counsel
AWEckert:dwk:12/12/73

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT



Memorandum ENVIRONMENTAL PROTECTION AGENCY REGION IX

TO : Robert Zener, Attorney
Office of General Counsel

DATE: November 20, 1973

FROM : Cassandra Dunn, Regional Counsel
Region IX

SUBJECT: Applicability of NPDES to Disposal of Pollutants Into Wells

Section 402(b)(1)(D) of the FWPCA requires that a state must be able to issue permits to control the disposal of pollutants into wells before the Administrator may approve its program for participation in NPDES. According to 402(a)(3) the permit program of the Administrator shall be subject to the same terms and conditions as apply to a State permit program. Consequently 40 CFR 125, governing the issuance of NPDES permits by EPA, provides at Part 125.26(a) that the Regional Administrator shall specify additional terms and conditions in a permit if an applicant proposed to dispose of pollutants into wells as part of a program to meet the requirements of an NDPES permit.

In view of the foregoing, we wish to request an opinion from the Office of General Counsel as to whether the disposal of pollutants into wells in each of the following cases would be covered by NPDES:

(a) The discharger has an existing surface water discharge. He proposes as part of an abatement program to divert a portion of his waste stream to a well, while continuing to discharge the remainder to the surface water.

(b) The discharger has an existing surface water discharge. He proposes as part of an abatement program to discontinue his surface water discharge and divert his entire waste stream to a disposal well.

(c) The discharger has an existing surface water discharge and also currently disposes of a portion of his waste stream into a well. He proposes to continue this practice.

(d) The discharger has an existing surface water discharge and also currently disposes of a portion of his waste stream into a well. He proposes as part of an abatement program to discontinue his surface water discharge and divert his entire waste stream to a disposal well.

(e) The discharger currently has no surface water discharge and disposes of all his waste waters into a well. He proposes to continue this practice.

(f) The discharger currently has no surface water discharge and disposes of all of his wastewaters into a well. He now proposes to divert a portion of his waste stream to a surface water discharge.

(g) The discharger has no existing discharge and proposes to commence a new discharge. He intends to dispose of all his wastewaters into a well.

(h) The discharger has no existing discharge and proposes to commence a new discharge. He intends to dispose of a portion of his wastewaters into a well and discharge the remainder to a surface water.

We would appreciate advice as soon as possible. Thanks so much.

CASSANDRA DUNN
REGIONAL COUNSEL

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

DECISION OF THE GENERAL COUNSEL ON MATTERS
OF LAW PURSUANT TO 40 C.F.R. §125.36(m) No. 7

In the matter of National Pollutant Discharge Elimination System Permit for Central Illinois Public Service Company (CIPSC), No. IL0000108, Coffeen Lake, Illinois, the Regional Administrator has certified one issue of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 FR 27078, July 24, 1974). The requestor and other interested persons, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

ISSUE OF LAW

Question Presented

"Does either the Federal or State Government have power to regulate discharges into Central Illinois Public Service Company's private lake when the water which escapes intermittenly from the lake over the spillway is not polluted?"

CONCLUSION

EPA may regulate discharges into any private lake, when such lake constitutes "navigable waters" as that term is defined in §502(7) of the Federal Water Pollution Control Act, as amended (the "Act").

DISCUSSION

Section 502(7) of the Act defines "navigable waters" as "the waters of the United States, including the territorial seas." It is clear that the intent of Congress in adopting this definition of "navigable waters" was to broaden the concept of navigable waters to "portions thereof, tributaries thereof...and the territorial seas and the Great Lakes." [Emphasis added.] United States v. Holland, 373 F. Supp. 665, 671 (M.D. Fla. 1974). Recent court decisions indicate that traditional concepts of navigability have been abolished as a controlling factor in determining whether a body of water constitutes "waters of the United States" and that Congress intended to assert jurisdiction under the Act over all waters to which its power extends under the commerce clause of the Constitution. U.S. v. Ashland Oil and Transportation Co., (6th Cir. 1974) 504 F 2d 1317 , 7 ERC 1114; U.S. v. G.A.F., F. Supp. (S.D. Texas) No. 74-G-150, Feb. 5, 1975; NRDC v. Callaway, F. Supp. , (D.D.C.) No. 74-1242, March 27, 1975.

The Agency has promulgated regulations implementing the statutory definition of navigable waters to include:

> (1) All navigable waters of the United States; (2) tributaries of navigable waters of the United States; (3) interstate waters; (4) intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; (5) intrastate lakes, rivers, and streams from which fish or shell fish are taken and sold in interstate commerce; and (6) intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

40 C.F.R. §125.1(p)

The requestor agrees that Lake Coffeen was formed by the construction of an earthen dam, spillway, and appurtenances across the McDavid Branch of the East Fork of Shoal Creek. Part of the water in the lake apparently comes from McDavid Branch, part from direct runoff of rainfall falling upon the McDavid Branch Watershed. Waters from Lake Coffeen are used as cooling water for CIPSC's turbine condenser and are returned to the lake. Periodic overflow from the spillway to the McDavid Branch below the impoundment occurs during times of heavy rainfall. CIPSC states that McDavid Branch is an intermittently flowing, narrow and shallow stream. Further, the facts appear to indicate that McDavid Branch may be a tributary of a larger stream which flows (albeit intermittently) to waters which even the requestor would agree constitute "waters of the United States."

The above cited regulation, 40 C. F. R. §125.1 defines "navigable waters" to include "tributaries of navigable waters." Thus, it appears that McDavid Branch may well be determined by the finder of fact in this case to be within the definition of "navigability" contained in the regulation and the Act. The mere fact that CIPSC owns all of the land surrounding the impoundment and excludes the public from the use of the impoundment for recreational purposes would in no way affect the determination that McDavid Branch is includable within the definition of "waters of the United States." If McDavid Branch, prior to impoundment, was "waters of the United States" within the meaning of the Act, then the lake formed by impounding a segment of the stream remains "waters of the United States."

Further, if the McDavid Branch is "waters of the United States", the lake clearly falls within the definition of cooling lake as that term is defined in the Steam Electric Power Generating Plant Source Category Effluent Guidelines and Standards, 40 C.F.R. Part 423, 30 F.R. 36186, October 8, 1974. A "cooling lake" is defined in such regulations as any man made water impoundment which "impedes the flow" of a navigable stream. (40 CFR §423.11(n)) McDavid Branch may be "a water of the United States", and if so, is a navigable stream within the meaning of 40 CFR Part 423.

Therefore, EPA may have jurisdiction to issue a permit regulating discharges of pollutants into Coffeen Lake should the finder of fact, applying the statutory and regulatory test to the facts of this case, so determine.

We express no view as to the validity of the Illinois statute defining "waters of the State". This issue is presently before the Illinois Appellate Court and it would be inappropriate for us to comment on it at this time. Further, "waters of the State" is not a term used in the Act and we have no particular expertise in its interpretation.

Dated: APR 8 1975

Robert V. Zener
General Counsel

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO
40 C.F.R. Section 125.36(m)

No. 8

In the matter of National Pollutant Discharge Elimination System permit for Jones & Laughlin Steel Corporation, Hennepin Works Division, Hennepin, Illinois, NPDES Permit No. IL-0002631, Case Number NPDES-V-011 (AH), the Presiding Officer has certified two issues of law to the Office of General Counsel for decision pursuant to 40 C.F.R. Section 125.36(m) (39 FR 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NUMBER I

QUESTION PRESENTED

"Should the permit include a "force majeure" clause which would excuse the discharger from responsibility if it failed to meet any of the permit requirements due to factors beyond its control?"

CONCLUSION

EPA has statutory authority, under the Federal Water Pollution Control Act, to issue a permit containing such a provision, but the exercise of this authority is a matter within the discretion of the

Regional Administrator or, in the case of appeal under 40 CFR § 125.36(n), the Administrator.

As indicated in the Decision of the Assistant Administrator for Enforcement and General Counsel No. 1 (September 5, 1974), permits may be issued containing such conditions as the Administrator or Regional Administrator determines, after opportunity for a public hearing. The application of these principles in a particular permit proceeding involves issues of fact and policy beyond the scope of matters of law referable pursuant to 40 CFR §125.36(m).

ISSUE OF LAW NUMBER II

QUESTION PRESENTED

"Is the use of deep well disposal systems a proper subject for regulations by NPDES permits?"

CONCLUSION

Disposal of pollutants into wells is subject to regulation through conditions in an NPDES permit issued for an associated surface water discharge. See 40 CFR §125.26(a).

The issue is discussed in the Decision of the General Counsel No. 6 (April 8, 1975), a copy of which is attached.

Dated: APR 14 1975

Robert V. Zener
General Counsel

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

DECISION OF THE ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 9

In the matter of National Pollutant Discharge Elimination System Permit for North American Coal Corporation, Seward, Pennsylvania, (NPDES Permit Nos. PA 0002119, PA 0002117), the Regional Administrator has certified one issue of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 FR 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

ISSUE OF LAW NUMBER I

Question Presented

"Should EPA hold coal industry permits in abeyance until national standards are promulgated for the coal industry?"

Conclusion

This question is not a question of law, but rather is a question relating to the discretion of the agency. EPA has the

clear statutory authority to issue permits prior to the promulgation of effluent regulations pursuant to Section 304(b)(1)(A) of the Act.

Discussion

This question has previously been answered in Decision of the Assistant Administrator for Enforcement and General Counsel No. I, Issue of Law No. 1, copy attached.

Date APR 25 1975

Robert V. Zener
General Counsel

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

DECISION OF THE GENERAL COUNSEL ON MATTERS
OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 10

In the matter of National Pollutant Discharge Elimination System Permit for Western Kraft Corporation, LA-0020800, the Regional Administrator has certified one issue of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m)(39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

ISSUE OF LAW NO. I

Question Presented

"Will existing, effective permits be amended automatically to reflect any changes in the guidelines resulting from the resolution of the pending guideline litigation?"

Conclusion

No. The Administrator is not required by applicable law to amend permits, and will not automatically amend permits, to

reflect changes in effluent limitations and guidelines resulting from resolution of pending litigation challenging those effluent regulations. However, as a matter of sound discretion, the Agency will consider requests for modification of a permit where modification of a regulation issued pursuant to Sections 301 and 304 results from a court order in the manner specified in the attached memorandum from the Assistant Administrator for Enforcement and General Counsel, dated December 23, 1974.

Dated: MAY 2 1975

Robert V. Zener
General Counsel

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF
LAW PURSUANT TO 40 C.F.R. Section 125.36(m)

No. 11

In the matter of National Pollutant Discharge Elimination System permit for Christopher Coal Company, Consolidation Coal Company Inc. #93 Jordan Mine, Hagans Shaft Pump, Osage, West Virginia, NPDES Permit No. WV 0004057, the Presiding Officer has certified one issue of law to the Office of General Counsel for decision pursuant to 40 C.F.R. Section 125.36(m) (39 FR 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

QUESTION PRESENTED

"Should final compliance be achieved by July 1, 1977 rather than September 16, 1974, the effective date of the permit?"

CONCLUSION

The Agency has statutory authority to impose, as a condition of an NPDES permit, a compliance date prior to July 1, 1977. The propriety of the compliance date in this, or any other particular permit, however, is a question of fact rather than a matter of law.

DISCUSSION

In section 301(b) of the Federal Water Pollution Control Act Amendments of 1972, Congress provided that:

> In order to carry out the objective of this Act there shall be achieved -- (1)(A) not later than July 1, 1977, effluent limitations...which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act,.... (Emphasis added.)

To implement this requirement, the Administrator is authorized to issue National Pollutant Discharge Elimination System permits "upon the condition that such discharge will meet ... all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act...." Section 402(a)(1). Prior to the promulgation and taking effect of the effluent limitations described in section 301(b)(1)(A) representing "best practicable control technology" the Administrator may issue permits with "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." Section 402(a)(1).

Whether the permits which the Administrator issues contain effluent limitations derived from regulations promulgated pursuant to Sections 301 and 304 or, prior to promulgation of applicable effluent limitations, conditions determined to be

necessary to carry out the provisions of the Act, it is clear that Congress contemplated the July 1, 1977 date set out in Section 301(b)(1)(A) for best practicable treatment as the outside deadline. All point sources must achieve the level of treatment specified in section 301(b)(1)(A) by that date but the Administrator is empowered to require earlier compliance where possible.

The legislative history of the 1972 Act, as well as the clear statutory language, supports the Administrator's authority to impose earlier compliance than 1977.

Senator Muskie, during the Senate consideration of the conference reports explained:

> As far as uniformity and finality are concerned, the conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on "best practicable" technology no later than July 1, 1977. This does not mean that the Administrator cannot require compliance by an earlier date; it means that these limitations must be achieved no later than July 1, 1977, that they must be uniform, and that they will be final upon the issuance of a permit under section 402 of the bill. (Emphasis added.)

Committee on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 at 162 (Comm. Print 1973).

Accordingly, it is my opinion that the Administrator may in a proper case (as, for example, if the applicant for an NPDES permit were already achieving the effluent limitations specified as attainable by regulations defining "best practicable technology currently available") impose a compliance schedule requiring attainment of effluent reduction to the level specified in section 301(b)(1)(A) prior to July 1, 1977.

Robert V. Zener
General Counsel

Dated: MAY 7 1975

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 12

In the matter of National Pollutant Discharge Elimination System Permit for the Greater Anchorage Borough, John M. Asplund Facility, Anchorage, Alaska, NPDES Permit No. AK-002244-1, the Presiding Officer has certified one issue of law to the Office of General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

QUESTION PRESENTED

"Should the effluent limitation for the Greater Anchorage Area Borough municipally owned domestic waste treatment system which discharges directly to the ocean (Cook Inlet) include that minimum level of secondary treatment as defined in 40 C.F.R., Part 133?"

CONCLUSION

An NPDES permit issued to a municipally owned domestic waste treatment system such as the permittee's facility must contain effluent limitations representing attainment not later

than July 1, 1977 of secondary treatment as defined by the Administrator in 40 C.F.R., Part 133. The fact that the permittee discharges into the ocean does not exempt the facility from this requirement found in section 301(b)(1)(B) of the 1972 Act.

DISCUSSION

The Federal Water Pollution Control Act, section 301(b)(1)(B) provides that there shall be achieved "for publicly owned treatment works in existence on July 1, 1977,...effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act." In 40 C.F.R., Part 133, the Administrator has defined those parameters and limitations representing secondary treatment which are applicable to publicly owned treatment works under section 301(b)(1)(B). All parties agree that the Greater Anchorage Borough's John M. Asplund facility is a publicly owned treatment works.

No exception from the requirements of secondary treatment as thus defined may be made for facilities which, as does the permittee's, discharge into the ocean.

First, the regulations defining the requirements of secondary treatment (40 C.F.R. Part 133) do not provide for variations in the minimum level of treatment based on the location

of the treatment works or the characteristics of the receiving waters. The Agency, of course, is bound by its own regulations and, hence, may not authorize ad hoc deviations from them. See e.g., Service v. Dulles, 354 U.S. 363 (1959).

Second, the Act does not authorize the Agency either to grant individual exemptions from the required application of secondary treatment, based on the "assimilative capacity" of the receiving waters, or to distinguish in the regulations themselves between municipal plants located on oceans and those located elsewhere.

Both the Act and its legislative history show that the standards of "best practicable control technology currently available" (applicable to industrial discharges) and "secondary treatment" (applicable to municipal plants) are to be technology based rather than based on water quality effects. The Report accompanying the Senate version of the 1972 Amendments makes this clear:

> The application of Phase I technology to industrial point sources is based on the control technologies for those sources and to publicly-owned treatment works is based upon secondary treatment. It is not based upon ambient water quality considerations. Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1461 (Comm. Print 1973) (hereinafter Leg. Hist.).

In addition, §304(d)(1) requires the Administrator to define "the degree of effluent reduction attainable through the application of secondary treatment." This language, like the language of §304(b)(1) (requiring the Administrator to define "the degree of effluent reduction attainable through the application of the best practicable control technology currently available"), is basically tied to finding a level of technology rather than a level of ambient harm.

Secondary treatment has had an understood meaning in the trade and this meaning relates to levels of pollutant reduction in the effluent, not to levels of ambient water quality. Congress' use of the term "secondary treatment" in section 304(d)(1) reflects this understood meaning. For example the Senate Committee Report quoted above states:

> In primary treatment of sewage, between 30 percent and 50 percent of organic pollution is removed. With secondary treatment, between 50 and 90 percent is removed. Leg. Hist. at 1474.

Moreover, the Committee Report accompany the House bill (H.R. 11896) states:

> ***Secondary treatment as considered in the context of a publicly-owned treatment works is generally concerned with suspended solids and biologically degradable, oxygen demanding material (BOD). (Leg. Hist. at 788.)

As a technology-based standard secondary treatment regulations must be nationally uniform. The following discussion in the Conference Committee Report concerning "best practicable" and "best available" limitations is equally applicable to the regulations governing municipal facilities:

> Except as provided in section 301(c), the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under [section 304(b)] so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.
> Leg. Hist. at 309.

As with the corollary requirement of best practicable control technology, secondary treatment is a minimum, to be varied only where additional levels of treatment are necessary to meet water quality standards.*

* Section 403 of the Act, which provides for the establishment of ocean discharge guidelines and for consideration of these guidelines in the issuance of permits under Section 402, appears to be analogous in its effect to water quality standards. That is, permit conditions more stringent than those required under Sections 301, 304 and 306 may be imposed in particular permits on the basis of Section 403 guidelines (for example, those on mercury or cadmium - 40 CFR 227.22). However, less stringent limitations contained in the ocean dumping guidelines do not authorize deviations from secondary treatment anymore than do lenient water quality standards.

It might be observed that the case against a blanket requirement of secondary treatment was ably made to the Congress by Mr. Charles V. Gibbs, Executive Director, Municipality of Metropolitan Seattle, during the original Senate hearings on S. 523, one forerunner of the present legislation. His testimony shows a clear understanding of the distinction between primary and secondary treatment, and the impact which a requirement of secondary treatment would have:

> ...We have four primary treatment plants discharging chlorinated effluent into Puget Sound through deep ocean outfalls.... If a national effluent standard necessitating secondary treatment is established, Seattle Metro would have to spend $38 million in construction costs and another $1.25 million per year for operating costs (based on 1970 costs)....

Despite Mr. Gibbs' arguments, the Congress did, in fact, in §301(b)(1)(B), and in §304(d)(1), establish a uniform national requirement of secondary treatment for municipal waste water treatment plants. Because these arguments were rejected by the Congress, the Environmental Protection Agency has no discretion to reverse this decision.

Robert V. Zener
General Counsel

Dated: MAY 7 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20460

DECISION OF THE GENERAL COUNSEL
ON MATTERS OF LAW PURSUANT
TO 40 C.F.R. §125.36(m)

No. 13

In the matter of National Pollutant Discharge Elimination System Permit for Commonwealth Edison Company, IL-0003042, the Regional Administrator has certified one issue of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m)(39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

ISSUE OF LAW NO. I

Question Presented

"Was the permit limitation of 0.2 mg/l total residual chlorine legally applied on the basis of Illinois law and regulations?"

Conclusion

Yes, if there is an adequate factual basis to support the Regional Administrator's determination that the limitation is necessary to meet Illinois water quality standards.

Discussion

Though the question presented in this request concerns the Agency's authority to impose a specific limitation for a specific parameter, the fundamental issue raised by the parties is the general authority of the Administrator to interpret and apply State water quality standards. Both parties argue that a correct interpretation of Illinois law and regulations, as well as available scientific evidence, support their position. Both parties address, to some extent, the question of State interpretation of its own laws and regulations.

Section 401 of the Federal Water Pollution Control Act affords States an opportunity to prescribe the applicability of State law to discharges which require a Federal license or permit, including permits issued by the Administrator under section 402 of the Act. Section 401 provides for certification by a State after public notice and, where appropriate, public hearing, that the discharge for which a permit is sought will comply with sections 301, 302, 306, and 307 of the Act. Section 301(b)(1)(C) requires dischargers to achieve by 1977 effluent limitations necessary to meet State water quality standards. Section 401(d) provides that certifications shall set forth "effluent limitations and other limitations, and monitoring requirements" necessary to assure that the applicant complies with the requirements of the Act and that such limitations

shall become a condition on any Federally-issued permit. Sections 301(b)(1)(C) and 401 thus insure that States may require inclusion of limitations, in permits issued by the Agency under section 402, necessary to meet applicable State water quality standards.

The provisions of section 401 have been implemented in regulations appearing at 40 C.F.R. Part 123. Section 123.2 specifically defines the required contents of a certification. It is not clear from the record before me whether a certification requiring limitations on total residual chlorine exists in this case. The existence of such a certification is a matter of fact appropriately established by presentation of appropriate documentary evidence in a fact-finding hearing. If such a document, purporting to be a certification, and including effluent limitations and other limitations, exists in accordance with the provisions of section 401 of the Act and 40 C.F.R. Part 123, then the Administrator must adopt those limitations and include them as a condition in the subject permit pursuant to section 401(d).

Where such a document does not exist, however, the Administrator must himself, pursuant to section 301, interpret and apply State water quality standards. Section 301(b)(1)(C) requires the achievement, by 1977, of "any more stringent limitation, including those necessary to meet water quality standards, . . . established pursuant to any State law or regulations . . . or required to implement any applicable water quality standard established pursuant to this Act."

Section 402 of the Act requires inclusion of conditions in permits to assure that the requirements of section 301 will be met.

In applying water quality standards in the absence of a State certification, the Administrator is entitled to presume the validity of State established regulations and to assume that such regulations have the substantive content that appears from the plain language of the provisions. Section 203 of the Illinois regulations quite unambiguously declares that all waters of the State shall be free from "matter in concentrations or combinations toxic or harmful to human, animal, plant or aquatic life of other than natural origin." 1/ Further, in subsection (h), it unambiguously defines the level of toxicity as 1/10 of the concentration at which 1/2 of the test specimens die after a 48-hour bioassay. 2/ There is nothing on the face of the regulations which requires extensive resort to its "legislative history" or to suggest, as the permittee argues, that they should be given no substantive effect at all.

The Illinois regulations thus appear to be clear on their face and may be applied by the Administrator. Whether or not the specific limitation of 0.2 mg/l total residual chlorine has been lawfully applied in this proceeding, however, is not a question of law but of fact, which is properly the subject of an adjudicatory hearing.

1/ Chapter 3, Rules and Regulations of the Illinois Pollution Control Board, Rule 203(a).

2/ "Any substance toxic to aquatic life shall not exceed one-tenth of the 48-hour median tolerance limit (48-hour TLM) for native fish or essential fish food organism." Id., Rule 203(h).

At such a hearing, the applicant may adduce evidence that chlorine discharges need not be limited to a concentration of 2 mg/l total residual chlorine in order to avoid harm to humans, animals, plants or aquatic life in accordance with Section 203 of the Illinois Water Quality Standards.

Robert V. Zener
General Counsel

Dated: MAY 19 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS
OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 14

In the matter of National Pollutant Discharge Elimination System permit for Indianapolis Power and Light Company, Petersburg, Indiana (NPDES Permit No. IN0002887), the presiding officer has certified one issue of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m)(39 F.R. 27078, July 24, 1974). The parties and other interested persons, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

ISSUE OF LAW NO. I

Question Presented

"Whether EPA has authority to require conditions in the subject permit more stringent than those provided in the EPA Effluent Guidelines and Standards?" This question consists of three particular issues which the staff of EPA characterizes as follows:

(1) Does the permit unreasonably impose discharge limitations at outfall 0001 for oil and grease which are more stringent than those contained in U.S. EPA's Effluent Guidelines and Standards?

(2) Issues 2 and 3 present the same question with respect to total suspended solids and chlorine respectively.

Conclusion

EPA has not only the authority but the obligation to include conditions in permits more stringent than those provided in Effluent Guidelines and Standards promulgated by the Agency under sections 301, 304 and 306 of the Federal Water Pollution Control Act where such conditions are required by the terms of a State certification provided pursuant to section 401 or required to implement any applicable water quality standard established pursuant to the Act.

Discussion

This question is perhaps best addressed by a review of Exhibit A attached to the brief submitted by EPA Region V and the legal effect of the attachment both under sections 301 and 401 of the Act. The subject attachment is a letter from the State of Indiana, State Board of Health to the Environmental Protection Agency, Region V. The

letter in pertinent part states: "[e]nclosed is a summary of the permit limitation guidelines the Industrial Waste Disposal Section intends to follow in drafting NPDES permits. Some industrial categories will be exceptions (i.e. stone mills and coal mines). Special consideration will be given to the 5 mg/l limit on BOD and suspended solids depending on the individual stream and type of waste discharged."

Appended to the Indiana letter was a list of varying permit limitations including limitations on BOD, fecal coliform, pH, phosphorus, oil and grease and thermal effluent. It indicated that specific limitations on toxic substances and heavy metals would follow. (A copy of the attachment to the Indiana letter is attached hereto).

Neither the letter nor its attachment from the State Board of Health purports to be a certification pursuant to section 401 of the Act. The letter does not, as is required by section 401, "set forth any effluent limitations and other limitations and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [applicable requirements]." Further, the letter states clearly that the permit limitations are

mere guidelines and do not refer to either technology based limitations or water quality standards. At best, it is an interpretation by the State of Indiana of either its water quality or technology standards, which may be used by the Environmental Protection Agency to assist it in determining limitations required to implement any more stringent standards, pursuant to section 301(b)(1)(C).

While the State of Indiana has expressed to the Environmental Protection Agency an interpretation of its water quality or technology standards, such interpretation has not, in the cited letter, been presented to the Agency in the form of a certification pursuant to section 401 of the Act. Thus, EPA is not required to include such conditions in its permits. Rather, the Agency must make an independent determination of what permit limitations are to be required in an individual permit proceeding in order to implement applicable water quality standards. This, of course, entails factual determinations, applying the laws of the State of Indiana to the circumstances of the particular discharge in question. Thus, with respect to all three subquestions within this legal question,

the requestor is entitled to an adjudicatory hearing to determine whether any more stringent limitations pursuant to section 301(b)(1)(C) are required in order to implement water quality standards and, if so, what the substance of those limitations should be.

Robert V. Zener
General Counsel

Dated: MAY 21 1975

INDUSTRIAL WASTE SECTION - Permit Limitations

Final Limits

1. BOD and Suspended Solids

Receiving Stream Dilution	Daily Average	Daily Maximum
$\leq$ 1:1 and flow < 1 MGD	10 mg/l	15 mg/l
$\leq$ 1:1 and flow $\geq$ 1 MGD	5 mg/l	10 mg/l
$\leq$ 3:1 but > 1:1	10 mg/l	15 mg/l
> 3:1	20 mg/l	30 mg/l

2. Fecal Coliform

   A. Sewage Treatment Facility

      Limit to 0.5 ppm Cl_2 until July 1, 1977, then limit fecal coliform to 200/100 ml daily average and 400/100 ml daily maximum

   B. Industrial Discharge - 1000/100 ml daily average and 2000/100 ml daily maxim

3. pH - 6.0 to 9.0

4. Phosphorus

   If "P" discharge is $\geq$ 10 lbs. daily to a lake or within 40 miles upstream of a lake or reservoir, then "P" limits must be 1 mg/l daily maximum or 80 percent reduction, whichever is more stringent.

   Otherwise, no "P" limits should be applied unless at our discretion to protect the stream or guidelines specify P limits.

5. Oil and Grease

   A. Cooling water discharge or other discharge where oil is accidentally introduced.

      Use - 10 mg/l daily maximum

   B. Process Oil

      Limit to 10 mg/l daily average and 15 mg/l daily maximum

6. Thermal

   Apply no thermal limits unless necessary to protect water quality standards. Should consider cooling through lengths of underground sewer etc. Thermal problems will normally be most critical in summer and fall low flow periods.

7. Toxic Substances - heavy metals

   To follow

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 15

In the matter of National Pollutant Discharge Elimination System Permit for Heinz, U.S.A., Muscatine, Iowa (IA-0001741), the Presiding Officer has certified two issues of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m)(39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

"Must the permit provide for a means of excepting the Company for punitive action should an accident or spill occur which is beyond the control of the company?"

Conclusion

EPA has statutory authority, under the Federal Water Pollution Control Act, as amended (the "Act"), to issue a permit containing such a provision, but the exercise of this authority is a matter within the discretion of the Regional Administrator or, in the case of appeal

pursuant to 40 C.F.R. §125.36(n), the Administrator. As indicated in Decision of the Assistant Administrator for Enforcement and General Counsel No. 1 (September 5, 1974) and Decision of the General Counsel No. 8 (April 14, 1974), permits may be issued containing such conditions as the Administrator or Regional Administrator determines, after opportunity for hearing. The application of these principles to particular permit proceedings involve issues of fact and policy beyond the scope of matters of law referrable to pursuant to 40 C.F.R. §125.36(m).

ISSUE OF LAW NO. II

Question Presented

"Must the permit state that data submitted by the Company through its monitoring program and statements submitted by the Company to EPA will not be used as evidence against Company in a civil court proceeding?"

Conclusion

The Act neither specifically authorizes nor prohibits the use of such data in enforcement proceedings. However, it is a reasonable interpretation of the relevant provisions of the Act to conclude that EPA may use such data in enforcement proceedings under section 309 of the Act.

Discussion

Both sections 309 and 402 of the Act are silent with regard to the specific question raised. However, section 402(a)(2) of the Act permits the Administrator to include conditions in permits "on data and information collection, reporting, and such other requirements as deems appropriate." Section 402(a)(3) provides that the permit program of the Administrator "shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder...." Section 402(b) set forth the terms, conditions and requirements that apply to State programs. Section 402 (b)(2)(A) requires that authority exist to issue permits which "apply, and insure compliance with, all applicable requirements of section 308" while section 402(b)(2)(B) requires authority to "inspect, monitor, enter, and require reports to at least the same extent as required in section 308..." Section 402(b)(7) requires authority to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." Further, section 308(a) of the Act provides that:

> [w]henever required to carry out the objectives of this Act, including but not limited to... (2) determining whether any person is in violation... of this Act... (A) The Administrator shall require the owner or operator of any point source to

> (i) establish and maintain such records, (ii) make such reports, (iii) install, use and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods) (iv) sample such effluent (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require ...

Section 309, the federal enforcement provision of the Act, provides that "whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of sections 301, 302, 306, 307, or 308 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a state, he shall [take appropriate enforcement action]." Section 309(a)(3).

Thus, the statute clearly establishes the right of the Administrator to gather data and require reports from dischargers and establishes the Administrator's obligation to take enforcement action whenever he finds, on the basis of any information available to him, a person in violation of the Act.

Clearly, Congress, which gave to the Administrator the right to require the submission of data and take enforcement action on the basis of any information, intended that required data submissions would be includable within the term "any information" usable by the Administrator to both find violations and take enforcement action. To require a permit condition as demanded by Heinz would render the gathered data useless for one of its intended purposes, to determine whether a person is in violation of the Act (section 308), a result which could not have been intended.

Robert V. Zener
General Counsel

Dated: ~ 1975

JUL 1 1975

MEMORANDUM

To: Regional Administrator
Region V

From: General Counsel

Subject: General Counsel Decision No. 16

On May 30, 1975, I issued an opinion of law pursuant to 40 C.F.R. §125.36(m) concerning NPDES Permit No. IL 0000701, Illinois Power Company, Wood River Generating Station. It has since come to my attention that the questions of law presented in the documents transmitted to me were not intended by the Region to be referred for decision pursuant to 40 C.F.R. 125.36(m), and that the permittee's request for an adjudicatory hearing was subsequently granted. It appears that the failure of either party to submit briefs in accordance with 40 C.F.R. §125.36(m)(2) resulted directly from the belief by the parties that the issues had not been referred.

I believe that this absence of a briefing opportunity constitutes a procedural defect justifying withdrawal of the opinion and the opinion is hereby withdrawn. General Counsel Opinion No. 16 need not therefore be relied upon by you as provided in 40 C.F.R. §125.36(m)(4). I should point out, however, that the principles expressed in General Counsel Decision No. 13 continue in effect.

R. V. Zener

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20460

DECISION OF THE GENERAL COUNSEL
ON MATTERS OF LAW PURSUANT
TO 40 C.F.R. §125.36(m)

No. 16

In the matter of National Pollutant Discharge Elimination System Permit No. IL 0000701 for the Illinois Power Company, Wood River Generating Station, the Director of the Enforcement Division has certified one issue of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974).[1/] The parties having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

ISSUE OF LAW NO. 1

Question Presented

"Can the Agency impose a maximum limitation of 0.2 mg/l total chlorine residual when that limitation is not provided for by the Federal Water Pollution Control Act, as amended, or by the Federal Regulations which provide for a maximum concentration of 0.5 mg/l free available chlorine?"

1/ Subsequent to the referral of the issue of law in connection with Permit No. IL 0000701, the Regional Enforcement Director advised Illinois Power Company that the identical issue would be referred in a second case, Permit No. IL 0001554, upon receipt of the Company's concurrence. So far as appears, concurrence was not received and no formal referral appears in the file. Nevertheless, while this Decision governs only Permit No. IL 0000701, the principle applies to proceedings in connection with Permit No. IL 0005144.

Conclusion

Yes, in accordance with the principles set out in General Counsel Decision No. 13, May 19, 1975. Neither of the parties to this proceeding submitted briefs in support of their position. There is thus no indication in the documents before me as to the basis for the proposed limitation, or, other than the fact that it differs from the chlorine limitation contained in the applicable Federal effluent guidelines (40 C.F.R. Part 423), the basis of the Requestor's objection. The question, however, is virtually identical to the one posed in Decision No. 13. It involves the same type of industrial facility (an electric generating plant) and precisely the same limitation (0.2 mg/l) on the same pollutant (total residual chlorine). The facilities are both located in the same State. In these circumstances, it appears reasonable to assume that the issues raised in the two proceedings are also the same. It is therefore my opinion that the principles set forth in Decision No. 13 should also be followed here.

Robert V. Zener

Date MAY 30 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 17

In the matter of National Pollutant Discharge Elimination System permit for United States Steel Corporation, Joliet Works, Joliet, Illinois (NPDES permit No. IL-0002674), the presiding officer has certified two issues of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 CFR §125.36(m)(39 F.R. 27078, July 24, 1974). The parties and other interested persons, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

"Whether the effluent limitations and monitoring requirements of the Water Pollution Control Regulations issued by the Illinois Pollution Control Board must, as a matter of law, be incorporated as conditions of the National Pollutant Discharge Elimination

System (NPDES) permit issued to United States Steel Corporation-Joliet Works, and if such provisions must, as a matter of law, be incorporated as conditions of the permit, must other provisions of said Regulations and the statutes on which they are based (the Illinois Environmental Protection Act, Ill. Rev. Stat. Ch. 111 1/2 §1001, et seq.) also be incorporated as conditions of the permit, and does that preclude the introduction of evidence relating thereto?"

Conclusion

EPA is obligated to include conditions in permits more stringent than those which would be provided pursuant to the technology requirements of either section 402(a) of the Federal Water Pollution Control Act, as amemded (the Act), or Effluent Guidelines and Standards promulgated by the Agency pursuant to sections 301, 304, and 306 of the Act, where such more stringent conditions are required by the terms of a State certification provided pursuant to section 401 of the Act or required to implement any applicable water quality or technology standard properly established by the State. If such effluent limitations and monitoring requirements are set forth to EPA in a certification by the State pursuant to section 401, section 401(d) provides that they shall "become a condition on any Federal license or permit" without any further Federal action or review. In the absence of a State certification pursuant to

section 401 of the Act, EPA must, in lieu of the State, itself interpret and apply relevant State regulations and statutes pursuant to sections 301 and 402 to determine the appropriate effluent limitations to be contained in a permit. In such an event, evidence concerning the application by EPA of the State statutes or regulations may be taken at an adjudicatory hearing held pursuant to 40 CFR §125.36.

Discussion

This question is essentially the same as the questions raised and addressed in decisions of the General Counsel on Matters of Law, No. 13 (May 19, 1975) and No. 14 (May 21, 1975).

We have concluded that in the absence of a State certification pursuant to section 401, containing with specificity those requirements of State law properly subject to certification, this Agency's regulations require that an adjudicatory hearing, if requested, be held at which evidence may be introduced concerning the application by EPA of such State law or regulation.

With regard to the issue of "procedural due process" raised by the requestor, this is a matter of Constitutional law properly addressed in the Circuit Courts of Appeal and not in this proceeding.

ISSUE OF LAW NO. II

Question Presented

"Must EPA, as a matter of law, include in all permits those conditions that the Corps of Engineers considers to be necessary to insure that navigation and anchorage will not be impaired?" The parties have stipulated that such a condition is included in the permit at the request of the Corps of Engineers.

Conclusion

The Secretary of the Army, acting through the Chief of the Engineers, determines what conditions are necessary in NPDES permits to insure that anchorage and navigation will not be substantially impaired as a result of permit issuance pursuant to section 402(b)(6) of the Act. The Administrator must, pursuant to that section and regulations promulgated by this Agency, include those conditions specified by the Chief of the Engineers in permits issued by him.

Discussion

Section 402(b)(6) of the Act provides that "no permit will be issued if, in the judgment of the Secretary of the Army, acting through the Chief of Engineers, after consultation with the Secretary of the Department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby." This Agency has promulgated regulations concerning permit conditions which will be included in permits issued by EPA. 40 CFR §125.22(b) provides: "permits shall contain such other conditions as the District Engineer of the Corps of Engineers considers to be necessary to insure that navigation and anchorage will not be substantially impaired." Clearly, the statutory language which grants to the Secretary of the Army the right to prevent a permit from being issued also includes the right to take a less drastic step: the imposition of conditions on permits designed to prevent the occurence of events which would justify exercise of an absolute veto. Thus, section 402 contemplates, and regulations of the Environmental Protection Agency require, that the permit contain any conditions furnished to this Agency by the District Engineer which, in his opinion, are necessary to insure that navigation and anchorage will not be substantially impaired.

To the extent that the requestor claims that the relevant regulations are invalid or deprive the requestor of due process, before EPA, these questions are outside the scope of the legal referral procedure and are best addressed in the Circuit Courts of Appeal and not in this proceeding. To the extent the requestor claims that the Secretary of the Army has deprived him of procedural due process in the establishment of the specific conditions, EPA is not a proper party to that dispute nor may EPA's administrative forum be used to determine issues not relevant to the considerations before this Agency. The requestor has adequate remedies available against the Secretary of the Army pursuant to the Administrative Procedure Act.

Robert V. Zener
General Counsel

Date: JUN 16 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL
ON MATTERS OF LAW PURSUANT
TO 40 C.F.R. §125.36(m)

No. 18

In the matter of the National Pollutant Discharge Elimination System permits for Bethlehem Steel Corporation, Burns Harbor Plant, Case No. NPDES-V-030(AH), permit number IN-0000175, and United States Steel Corporation, Gary Works, Case No. NPDES-V-027(AH), permit number IN-0000281,* the presiding officer has certified an issue of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties and other interested persons, having had the opportunity to provide written briefs in support of their respective position, present the following issue:

ISSUE OF LAW

"Does the Federal Water Pollution Control Act, as amended (the Act), grant to the Administrator the authority to control or regulate discharges into deep wells through an NPDES permit issued pursuant to Section 402 of the Act?"**

Conclusion

This matter is disposed of by the Decision of the General Counsel No. 6, dated April 8, 1975. That Decision concluded that "the Environmental Protection Agency has authority to control well injection

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* The cases have been consolidated for purposes of this Decision.

** The parties in these cases have formulated the issue in slightly varying terms. I believe the foregoing statement accurately presents the issue.

through conditions in NPDES permits issued for dischargers into navigable waters." 40 C.F.R. §125.26 requires that conditions be included to control well injection in such cases. Accordingly, although the reasonableness of the requirements imposed is properly considered in an adjudicatory hearing, the conditions complained of are required by the applicable regulations.

Bethlehem Steel Corporation, in its brief, argues that 40 C.F.R. §125.26, which requires control of disposable pollutants into wells through conditions in an NPDES permit issued for an associated surface water discharge, is contrary to law. While this is a legal question, it is beyond the scope of the legal referral procedure established under 40 C.F.R. §125.36(m).

The purpose of the legal referral procedure is to provide guidance to the presiding officers at hearings and to Regional Administrators concerning points of regulatory or statutory construction on which the Agency's position is not clear and which require prompt resolution before a decision can be rendered in the NPDES permit issuance proceedings. The General Counsel has no authority to strike down duly promulgated regulations of the Administrator. The purpose of my review of the case of United States v. GAF, in Opinion No. 6, was not to pass judgment on the Administrator's regulation, but to determine whether the court's order by its terms invalidated that regulation. I concluded that it did not, and it remains my view that the regulation must be followed.

To the extent that the Requestor claims that 40 C.F.R. §125.26 is beyond the Agency's authority under law, this question must be addressed in the appropriate United States Court of Appeals on review of the Administrator's action in issuing the permit.

Robert V. Zener
General Counsel

Date: JUN 25 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 19

In the matter of National Pollutant Discharge Elimination System Permit No. MD-0021008 for the Greenbriar Sewage Treatment Plant, Maryland, the presiding officer has certified two legal issues to the General Counsel for decision pursuant to 40 CFR §125.36(m) F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

"Does the Administrator or his designee have the authority under the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500, October 18, 1972) to impose general condition #18 for the Greenbriar Sewage Treatment Plant for a point of discharge to an unnamed tributary of Beaver Dam Creek."

General condition #18 provides that: "there shall be at all times one qualified operator on the treatment site who is certified by the State of Maryland as a Class A Superintendent."

Conclusion

Pursuant to section 402(a)(2) of the Federal Water Pollution Control Act, as amended ("The Act"), EPA is authorized to include in NPDES permits those conditions reasonably determined by the Regional Administrator to be necessary to ensure compliance with sections 301, 302, 306, 307, 308 and 403 of the Act. Furthermore, under section 402(a)(1), the Agency may, "prior to the taking of necessary implementing actions relating to all such requirements" (i.e., sections 301, 302, 306, 307, 308 and 403), include "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." Under either of these provisions of section 402, EPA may include permit conditions requiring personnel adequately trained and qualified to perform the operating, maintenance and testing functions necessary to achieve compliance with the effluent reduction requirements of section 301 and the monitoring requirements of section 308.

Discussion

Section 402(a)(1) of the Act authorizes the Agency to issue permits upon condition that applicable requirements of other enumerated sections are met. Section 402(a)(2) sets forth the conditions which are to be included in NPDES permits. It requires that EPA impose conditions "to assure compliance with the requirements" of paragraph (a)(1) which includes the requirements of sections 301 and 308 of the Act. 40 CFR §125.22(b) provides that permits are to include "such special conditions as are necessary to insure compliance with applicable effluent limitations."

In my opinion these provisions of the statute and implementing regulations authorize operating conditions, including conditions on treatment plant personnel, which are found to be necessary to assure compliance with the cited provisions.

Greenbriar Associates argues that the purpose of the Act is to control the discharge of polluted effluent and that so long as a facility is complying with the effluent limitations in its permit, the Agency has no legitimate interest in the employment qualifications of a discharger's personnel. The contention overlooks the Agency's interest in avoiding violations of restrictions on effluent, an interest given statutory recognition

by the provision of section 402(a)(2) authorizing imposition of conditions which assure compliance with those limitations. So long as there is a rational connection between the condition and the assured attainment of the effluent limitations, there is statutory authority to impose it. The relationship between plant operators and the plant's assured compliance with effluent limits would appear to be sufficiently direct that I cannot say, as a matter of law, that the Agency has no authority to insist on employment of qualified personnel. I note, for example, the memorandum dated March 28, 1974 from the then Assistant Administrator for Enforcement and General Counsel and the then Acting Assistant Administrator for Air and Water Programs concerning permit conditions for privately owned treatment facilities primarily utilized to treat domestic waste. The memorandum states that "[e]xperience demonstrates that privately-owned sewage facilities are prone to declining performance due to poor operations and maintenance. Special operations and maintenance requirements should therefore be included in the permit to assure sustained plant performance. These conditions shall require the permittee to: ...
(b) Provide an adequate operating staff which is duly qualified to carry out the operation, maintenance and testing functions

required to ensure compliance with permit conditions..." (1)

Greenbriar Associates also contend that the provision in section 402(a)(2) authorizing the Administrator to impose "such other requirements as he deems appropriate" does not

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(1) There appears to be considerable dispute concerning whether the treatment plant is publicly or privately owned. Apparently the facility was privately constructed to serve a large privately-owned residential complex. Subsequently the developer-owner entered into an Operating Agreement with the Washington Suburban Sanitary Commission under which the Commission undertook to operate the plant and the developer to pay the full cost of operation. Still later, in exchange for ten dollars, the developer transferred it to the Commission by means of a deed entitled "Fee Simple Determinable" for so long as the plant was used as a temporary on-site sewage treatment facility upon termination of which title is to revert to the grantor.

I do not believe that it is necessary to resolve the precise legal status of ownership of the treatment facility for purposes of this decision. If the facility is publicly-owned the analysis set forth above would govern. If it were privately-owned, the pertinent provision would be 402(a)(1) which provides that prior to taking all necessary implementing actions (in this case, promulgation of effluent limitations guidelines for privately-owned treatment facilities) the Administrator may impose conditions necessary to carry out the provisions of the Act. The scope of the authority under these provisions is identical. Moreover, the nature and circumstances of the conveyance of a property interest in the facility would not appear to render the considerations addressed in the memorandum of March 28, 1974 of any less force in this case.

extend his authority beyond that granted by preceding provisions of that section which relate to compliance with specified sections of the Act. I do not believe it necessary to address the effect of the quoted portion of section 402(a)(2) since I have concluded that other elements of that section confer sufficient authority to impose conditions of the type in question.

Finally, Greenbriar Associates argue that the condition is an unnecessary waste of valuable manpower. This question, as well as other questions regarding the necessity and appropriateness of the condition, are factual matters which are properly determined at an adjudicatory hearing.

ISSUE OF LAW NO. II

Question Presented

"Whether general condition #18 was inserted into the subject permit in violation of the applicable [NPDES] regulations regarding notice and of the due process clause of the Fifth Amendment [to the United States Constitution]?"

Conclusion

Questions as to the constitutionality of Agency regulations or procedures are not properly referred under 40 CFR §125.36(m). They may appropriately be presented to the Courts of Appeal on review of the final Agency action in connection with the permit.

The Agency's regulations authorize the Regional Administrator to amend permit conditions contained in a proposed permit at any time provided that all persons are afforded an opportunity for a hearing on the revised permit conditions.

Discussion

40 CFR section 125.36(e)(8)(v) provides "the proposed permit may be amended by the Regional Administrator prior to or after the adjudicatory hearing and any person interested in the particular proposed permit must request to be a party in order to preserve any right to appeal the final administrative determination." Amendment of the proposed permit would entitle affected persons to a right to be heard on material issues of fact related to the amendment. Such a hearing may be provided by an adjudicatory hearing held pursuant to 40 CFR §125.36. The permittee and members of the public who submitted comments on the proposed permit will receive actual notice of the change.

40 CFR §125.35(b)(1). Once an adjudicatory hearing is granted, notice of the hearing will be provided pursuant to 40 CFR §125.36(c)(4), and the contested provisions of the permit, including any amended provisions, are stayed pending final agency action in the adjudicatory hearing proceeding. 40 CFR §125.35(c).

Accordingly, I conclude that the Regional Administrator is not required to provide for notice and a second opportunity for a public hearing before changing the terms of a proposed permit, since an adjudicatory hearing is available to contest the provisions of the permit when issued.

Robert V. Zener
General Counsel

Dated: JUN 2 7 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 20

In the matter of National Pollutant Discharge Elimination System Permits for Marathon Oil Company, Atlantic Richfield Company, and Shell Oil Company, (X-74-18C), the Presiding Officer has certified eight issues of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 CFR §125.36(m) (39 F.R. 27078, July 24, 1974.) The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUES OF LAW NUMBERS I THROUGH VII

Conclusion

These questions are identical to those raised by Marathon Oil Company and Atlantic Richfield Company in an earlier permit proceeding. The decisions rendered on those seven questions control the resolution of these seven questions and need not

have been certified by the Presiding Officer. (See Decision of the General Counsel on Matters of Law, No. 5, April 4, 1975).

ISSUE OF LAW NUMBER VIII

Question Presented

"Must the findings of fact be based on substantial evidence?"

Conclusion

The question of the standard of review of administrative actions involves neither an interpretation of the Federal Water Pollution Control Act, as amended, nor rules and regulations promulgated thereunder and is therefore improperly certified. The question does involve an interpretation of the Administrative Procedure Act dealing with the judicial standard of review for administrative actions. Thus, the question is more properly addressed in the Circuit Courts of Appeals.

Robert V. Zener
General Counsel

Dated: JUN 27 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20460

DECISION OF THE GENERAL COUNSEL
ON MATTERS OF LAW PURSUANT
TO 40 C.F.R. §125.36(m)

No. 21

In the matter of National Pollutant Discharge Elimination System Permits numbered ID-002135-1, Riverside Irrigation District, Ltd.; ID-002209-0, Nampa & Meridian Irrigation District; ID-002173-3, Boise Project Board of Control; ID-002194-6, Drainage District No. 2; ID-002159-8, South Board of Control; ID-002168-7, Farmers Cooperative Irrigation Company, Ltd.; ID-002167-9, Farmers Union Ditch Company, Ltd.; ID-002169-5, Black Canyon Irrigation District; ID-002209-8, A & B Irrigation District; ID-002193-8, Aberdeen-Springfield Canal Company; ID-002143-1, Twin Falls Canal Company; ID-002148-2, American Falls Reservoir District No. 2, and Big Wood Canal Company; ID-002166-1, Minidoka Irrigation District; ID-002112-2, Idaho Irrigation District; ID-002213-6, Farmers Friend Irrigation Company, Ltd.; ID-002172-5, New Sweden Irrigation District; ID-002170-9, Pioneer Irrigation District, the Regional Administrator has certified seventeen issues of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The questions referred are attached as Appendix A to this Decision. They have been consolidated into four major issues for purposes of clarity. The parties, having had an opportunity to provide written briefs in support of their respective positions, present issues falling into four general categories of questions:

ISSUE OF LAW NO. 1

Question Presented

Do the proposed permits meet constitutional standards providing for due process and equal protection of the law and for the protection against self-incrimination?

Conclusion

This question incorporates referred questions of law numbers 3, 9, 10 and 16. The referral of issues of law to the General Counsel, provided for in 40 C.F.R. Part 125, is to insure that provisions of the Federal Water Pollution Control Act and implementing regulations issued thereunder are applied uniformly in the permit issuance proceedings conducted in the several Regional offices. The intent of 40 C.F.R. 125.36(m) is to enable questions concerning the interpretation of the Act and pertinent regulations, as well as the consistency of the Agency's regulations with the statutory requirements, to be resolved in this office. The issues of law presented herein, on the other hand, involve questions of Federal constitutional law rather than interpretations of the Federal Water Pollution Control Act. As such, these issues are more appropriately presented to a United States Court of Appeals on appeal from final Agency action on the permits.

ISSUE OF LAW NO. 2

Question Presented

Is irrigation return flow a properly permittable source within the meaning of sections 301 and 402 of the Act?

Conclusion

This question incorporates referred questions of law numbers 1, 4, 6 and 14, concerning whether these irrigation activities result in

identifiable discharges of pollutants from a point source that is subject to the prohibition of section 301 of the Act. It is my opinion, based on the plain language of the Act and its legislative history, that the subject activities may result in point source discharges that were intended by the Congress to be covered by the NPDES program.

Section 502(6) of the Act defines the term "pollutant" as

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. (Emphasis added.)

In section 502(14), the term "point source" is defined as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged.

And section 502(12) defines the terms "discharge of a pollutant" and "discharge of pollutants," in pertinent part, as "any addition of any pollutant to navigable waters from any point source."

Section 301 of the Act incorporates the above definitions, prohibiting, except as in compliance with several substantive and procedural provisions of the Act (including the section 402 permit provision), the "discharge of any pollutant by any person." If the irrigation activity results in pollutants being discharged from a discernible, confined and discrete conveyance (such as a ditch) to waters of the United States, then it must be permitted under section 402 of the Act or be in violation of the proscription of section 301.

The definition of "pollutant" specifically includes "agricultural waste." That this term was intended to include material present in irrigation return flow is clear from the legislative history of the Act. In hearings on agricultural pollution held before the Senate Public Works Committee, there was discussion of pollution problems resulting from sediment, salinity, and agricultural chemicals and pesticides that reach the Nation's waters as a result of farming activities.1/ In supplemental views added by Senator Dole of Kansas to the Senate Report on the bill (S. 2770) which became the FWPCA,2/ the Senator discussed agricultural pollution as concerning, for example, sedimentation, fertilizers, and pesticides, fungicides and herbicides, noting that "management and control of these factors are essential to the maintenance of environmental quality while providing food and fiber products in abundant quantity."3/

On the House side, the existence of pollution in irrigation waters in particular was pointed out by Representative Waldie in his discussion of an amendment offered by Representative Roncalio which would have removed irrigation return flow from coverage of the permit program.4/ It is clear from these and other discussions5/ that the wastes in water used for irrigation are "pollutants" within the meaning of section 502 of the Act.

1/ Hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works, United States Senate, Ser. No. 92 H11, 92nd Cong., 1st Session, Part 6, Agricultural Runoff, April 2, 1971, at 2518, 2524-5, 2575-8, 2686-98.

2/ "A Legislative History of the Water Pollution Control Act Amendments of 1972," Serial No. 93-1, Senate Committee on Public Works, 1513-17 (1973). (Hereinafter "Legislative History.")

3/ Id., at 1513.

4/ Legislative History at 652-3.

5/ See, for example, Legislative History at 220.

The House debate on and rejection of the Roncalio amendment also makes it abundantly clear that discharges of irrigation water are point source discharges required to be permitted under section 402. In attaching a statement to the Report on the House Bill (H.R. 11896) concerning the failure of that bill to exempt irrigated agriculture from its requirements, Representative Roncalio noted the possible technical and administrative difficulties attendant on the regulation of this activity.6/ He later sought, on the House floor, to amend the definition of "pollutant" to exclude irrigation water. The debate on the amendment, engaged in largely by Representatives Roncalio and Waldie, focussed specifically on the characterization of the irrigation drain (as opposed to discharges from individual farms) as a point source required to be permitted. Representative Waldie, in particular, expressed his concern that under the proposed amendment hundreds of thousands of farmers would be discharging into a pipe that would in turn discharge into the waterway, without this source of pollution being subject to controls of a permit. He characterized this as a "dangerous" possibility and urged rejection of the amendment. It is my opinion that the subsequent rejection by the House of the Roncalio amendment makes it clear that the Congress intended the Administrator to treat these sources as point sources and to issue them permits pursuant to section 402.

This construction is also, of course, supported by the plain language of section 502(14), which defines a "point source" as a "discernible, confined and discrete conveyance," including a pipe or ditch. Elsewhere, in the consideration of the Senate bill, Senator Muskie, addressing the question of agricultural "point" and "nonpoint" sources, indicated that

6/ Legislative History at 860-861.

"if a man-made drainage ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a 'point source.'"7/

The subject activity therefore is clearly subject to the permit requirements where the finder of fact determines that it meets the Act's requirements concerning the existence of pollutants in water that is discharged from a "discernible, confined and discrete conveyance" such as a pipe or a ditch. It is further my opinion that authority exists under section 402 of the Act to regulate this activity as a discharge into navigable waters.8/ Section 502(7) of the Act defines "navigable waters" as "the waters of the United States, including the territorial seas." It is clear that the intent of Congress in adopting this definition of "navigable waters" was to broaden the concept of navigable waters to "portions thereof, tributaries thereof . . . and the territorial seas and the Great Lakes." [Emphasis added.] United States v. Holland, 373 F. Supp. 665, 671 (M.D. Fla. 1974). The conference report accompanying the agreed upon bill reflects the Congressional intention that the term be broadly interpreted, noting that "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation."9/ Recent court decisions also indicate that traditional concepts of navigability have been abolished as a controlling factor in determining whether a body of water constitutes "waters of the United States" and that Congress intended

7/ Legislative History at 1298-9. See also Supplemental views of Senator Bob Dole, Legislative History at 1513-14.

8/ Note that section 301 prohibits the "discharge of any pollutant"; section 502(12) defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."

9/ Legislative History at 778. See also Legislative History at 250,327.

to assert jurisdiction under the Act over all waters to which its power extends under the commerce clause of the Constitution. See, e.g., U.S. v. Ashland Oil and Transportation Co., 504 F 2d 1317, (C. A. 6 1974). U.S. v. Phelps/Dodge, F. Supp. (D. Ariz.), 7 ERC 1823, April 8, 1975; NRDC v. Callaway, F. Supp. (D.D.C.), 7 ERC 1784, March 27, 1975; PFZ Properties v. Train, F. Supp. (D.D.C.), 7 ERC 1930, April 30, 1975.

The Agency has promulgated regulations (at 40 C.F.R. §125.1 (p)) implementing the statutory definition of navigable waters. As defined, the term includes:

> (1) All navigable waters of the United States; (2) tributaries of navigable waters of the United States; (3) interstate waters; (4) intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreation or other purposes; (5) intrastate lakes, rivers, and streams from which fish or shell fish are taken and sold in interstate commerce; and (6) intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

It thus appears that the waters that are the subject of these permits may well be determined by the finder of fact, applying the statutory and regulatory test to the facts of these cases, to be navigable waters within the definition in the Act.

Requestors have argued that irrigation return flow canals cannot constitute both navigable waters and point sources and that the breadth of the definition of navigable waters precludes the issuance of an NPDES permit to the irrigation district. The clear tenor of the legislative history, however, is that the broad definition of "navigable waters" serves to expand the application of the Act and the permit program, not

narrow it, as several of the Requestors suggest. Moreover, to define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary.10/ Further, it should be noted that what is prohibited by section 301 is "any addition of any pollutant to navigable waters from any point source." It is therefore my opinion that, even should the finder of fact determine that any given irrigation ditch is a navigable water, it would still be permittable as a point source where it discharges into another navigable water body, provided that the other point source criteria are also present.

Neither the provisions of section 208 or 305 in any way impact on the applicability of the section 402 program. Both of these provisions were intended to be complementary to the point source permit program and to guide the Congress and the Administrator, working with States, in developing long-range pollution control and resource management programs.11/ It would be completely contrary to the purposes of the Act to construe either of these sections so as to impede the implementation of provisions that were clearly to be carried out vigorously and expeditiously.12/

With regard to section 208 planning requirements, it is clear on its face that this section is to provide a mechanism for developing information and regulatory programs for dealing with some of the more complex and perplexing water pollution problems resulting from nonpoint sources, including

10/ See discussion supra at 4-5.

11/ See, for example, the explanation of Senator Boggs on the Senate floor, that information from the section 305 study "should enable Congress, within a few years, to pinpoint with greater accuracy the date and cost for achieving a no-discharge goal, together with the enforcement mechanism necessary to achieve it." Legislative History at 1266.

12/ See, Legislative History at 812, 1460, 1482, 1490.

those associated with agricultural activities. It is also clear, however, from both the plain language of the Act and its legislative history discussed supra, at 4-6, that Congress recognized that some agriculture activities result in point source discharges which should be subject to sections 301 and 402 of the Act. There is nothing in either the Act or its legislative history to indicate that regulation of these sources was to await completion of section 208 planning efforts. In fact, the deadlines and schedules set out in the Act itself support a contrary inference.13/

Similarly, section 305 of the Act provides for a water quality inventory and identification of point sources of discharge into navigable waters. It provides for a report to be submitted to Congress for its use in reviewing long range pollution control goals.14/ There is no indication at all that the prohibition of section 301 was intended to be limited only to those sources identified and inventoried pursuant to section 305. It is therefore my opinion that where the finder of fact determines that the subject source meets the criteria established in the Act and implementing regulations for definition of a point source, the source is permittable under sections 301 and 402 without regard to the existence or non-existence of a section 305 point source inventory.

13/ Sections 208(a) and (b) establish a schedule that would result in completed planning efforts probably no earlier than mid-1976. Section 402(k) contemplated permit issuance by the end of 1974.

14/ See discussion supra, at 8.

ISSUE OF LAW NO. 3

Question Presented

Is there authority under the Federal Water Pollution Control Act to issue an NPDES permit to irrigation and drainage districts such as Requestors?

Conclusion

This question incorporates referred questions of law numbers 2, 5, 15 and 17. Section 301 of the Act provides that, except as in compliance with specified sections of the Act (including section 402), "the discharge of any pollutant by any person shall be unlawful." Emphasis added. We have already discussed, supra, under Issue of Law No. 2, the authority of the Agency to determine that irrigation activities result in the "discharge of any pollutant" which is prohibited by section 301. Section 502(5) of the Act defines the term "person" as an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." In the Report accompanying the Senate bill, this already broad definition is further clarified as meaning "all entities which are capable of suing or being sued."15/ Idaho Code 43-2901 and 43-307 specifically provide that irrigation districts have the legal status to sue and be sued. The Requestors, therefore, would appear to be "persons" within the meaning of the Act.

The permit program for irrigation return flow discharges is implemented in regulations at 40 C.F.R. §124.11, which provide for issuance of permits controlling

15/ Legislative History at 1494.

> Discharges of irrigation return flow (such as tailwater, tile drainage, surfaced groundwater flow or bypass water), operated by public or private organizations or individuals, if: (i) There is a point source of discharge (e.g., a pipe, ditch, or other defined or discrete conveyance, whether natural or artificial and; (ii) the return flow is from land areas of more than 3,000 contiguous acres, or 3,000 non-contiguous acres which use the same drainage system . . . .

The regulation thus implements the requirement that there be an identified point source of discharge by a "person" (i.e., a "public or private organization or individuals"), providing further that permits will be required only for discharges that originate from land areas of more than 3,000 contiguous acres or 3,000 noncontiguous acres which use the same drainage system.16/ The preamble to the final promulgation establishing section 125.11 adds clarification to the permit requirements for irrigation return flow, indicating that "it is the individual or organization who actually has control of or responsibility for the discharge of irrigation return flow that must apply for the permit." (38 F.R. 18001, July 5, 1973.) Emphasis added.

It is therefore my opinion that if the finder of fact determines that Requestors are persons within the meaning of the Act, who are responsible for discharges from point sources of return flow emanating from a land area of 3,000 acres or more drained by the same system, then issuance of permits to Requestors is consistent with the authority and responsibility imposed on the Administrator by the Act.

16/ The latter proviso has been the subject of litigation in the District Court for the District of Columbia, Natural Resources Defense Council, Inc. v. Train (Civ. Action No. 73-1629). In a memorandum opinion dated March 24, 1975, the Court found that the exclusion of any point (cont.)

Requestors also have raised several issues in which they assert that claimed deficiencies in State law and their own enabling authority constitute impediments to the issuance of NPDES permits since they are said to preclude their ability to comply with such permits. As was indicated in the discussion of Issue No. 1, supra, at 2, the referral of issues to this office is to enable questions concerning the interpretation of provisions of the Act and pertinent regulations to be resolved by the General Counsel and to ensure their uniform application in permit issuance proceedings. It is not considered the prerogative of this office to interpret either State law, or as is discussed supra, Federal Constitutional law.

I have expressed my opinion that the Federal Water Pollution Control Act establishes authority and responsibility in the Administrator to issue NPDES permits controlling discharges of irrigation return flow and that the legislative history supports a determination to issue permits to the parties to this proceeding. While I would note that in the case of conflict between State and Federal law the generally held principle is that State law cannot impede or obstruct the implementation of Federal law,17/ it is my view that the question of supremacy of the Federal

16/ (cont.) sources (such as irrigation return flow from land areas of less than 3,000 acres) from the obligation to secure a permit under section 402 is contrary to the requirements of the Act. It should be noted here that neither of the primary parties argued, nor did the court adopt, a reading of the Act that would exclude all agricultural sources as non-point sources. The court's final judgment, entered on June 10, 1975, requires that EPA promulgate regulations extending the NPDES permit system to all point sources in the agriculture and silviculture categories. However, the court also provided that until the Agency has promulgated such regulations, the current provisions of 40 C.F.R. Parts 124 and 125 excluding certain sources in these categories shall remain in full force and effect. It is my view that the regulation at issue continues as the controlling guidance pending final promulgation of the required amendments to 40 C.F.R. Parts 124 and 125.

17/ Article 6, Clause 2 of the United States Constitution provides that "this Constitution and the Laws of the United States which shall be (cont.)

statute is a matter of Federal constitutional law that is more appropriately presented to a United States Court of Appeals on appeal from final Agency action on the permits.

ISSUE OF LAW NO. 4

Question Presented

May the Administrator include in the permit several specifically defined permit conditions?

Conclusion

The conditions in question require various monitoring, information collection and evaluation and treatment requirements. It is my opinion that the Agency has statutory authority to impose conditions of this nature in NPDES permits. The reasonableness of the particular conditions established in the permits involved, however, is a factual matter which must be determined on the basis of the record of an adjudicatory hearing.

17/ (cont.) made in Pursuance thereof; ... shall be the supreme Law of the Land; ... ." In Davidowitz v. Hines, 312 U.S. 52 (1941), the Supreme Court affirmed a lower court injunction against enforcement of a Pennsylvania statute concerning alien registration and identification cards. Ruling that "when the national government by treaty or statute has established rules and regulations touching the rights, privileges or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, ..." 312 U.S. at 66-7. Noting the variety of approaches to the application of the Supremacy doctrine, the Court indicated that "in the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. (Citations omitted. Emphasis added.)

The Court has, since the Hines case, applied the principle set out above to cases involving a variety of State/Federal law concepts. See, e.g., U.S. v. Ga. Public Service Commission, 371 U.S. 285, 292-3 (1963), Sperry v. Florida, 373 U.S. 379, 384-5 (1963), Maryland v. Wirtz, 392 U.S. 183, 195-6 (1968), Perez v. Campbell, 402 U.S. 637, 649-56 (1971). (cont.)

The Act vests in the Administrator a broad and comprehensive authority to establish permit conditions necessary to carry out its principal regulatory provisions.18/

Section 402(a)(1) authorizes the Administrator to issue permits upon condition that applicable requirements of other enumerated sections are met. It also provides that "prior to the taking of all necessary implementing actions relating to such requirements" (in this case the promulgation of effluent limitations guidelines governing irrigated agriculture), the Administrator may issue permits with "such conditions as [he] determines are necessary to carry out the provisions of the Act."

In addition, section 402(a)(2) requires that the Administrator prescribe such conditions to assure compliance with the requirements of 402 (a)(1) - which includes the requirements of sections 301 and 308 of the Act. These conditions include those relating to data and information collection, reporting, and "such other requirements as he deems appropriate." 40 C.F.R. §125.22(b) provides that permits are to include "such special conditions as are necessary to ensure compliance with applicable effluent limitations."

17/ (cont.) The Court has also held that "when a federal statute condemns an act as unlawful, the extent and nature of the condemnation, though left by the statute to judicial determinations, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Sola Electric Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942). (Emphasis added.) See also, Deitrick v. Greaney, 309 U.S. 190, 200-1 (1940).

Given the relatively recent emergence of environmentally protective statutes such as the FWPCA which impose affirmative burdens on States and state-chartered entities, there appears to be no Supreme Court ruling specifically applying the supremacy doctrine to such situations. It is my view, however, that the principles consistently enunciated by the Court are entirely apposite where, as here, a Federal statute has made an Act unlawful and state law is presented as an obstacle to full implementation and enforcement of the Federal law.

18/ See, Legislative History at 178.

In my opinion, these provisions of the statute and implementing regulations authorize permit terms requiring treatment of pollutants in irrigation return flow which reflect the peculiar characteristics of pollutants associated with irrigation operations. It is also my opinion that conditions relating to collection of data and information, and monitoring of flows and pollutant loadings, are authorized if they may reasonably be found to be "necessary to carry out the provisions of the Act." As indicated above, the propriety of the particular conditions at issue is a factual, not a legal, matter.

Robert V. Zener
General Counsel

Date: JUN 2 7 1975

1. Do the areawide planning provisions of FWPCA § 208 [33 USCA § 1218] conflict with and/or preclude issuance of the instant NPDES pemits to irrigation districts and canal companies?

(See X-74-30, Supplement, page 1, paragraph 1 (A))

2. If each user-consumer of the water supplied by an irrigation district or canal company, owns or controls less than 3000 acres to be serviced by such water, is all the acreage so supplied by the irrigation district or canal company thereby exempted from NPDES permit requirements by 40 CFR § 125.4? Conversely, is the total acreage serviced by water supplied by an irrigation district or canal company the figure to be aggregated and used in determining exclusion or inclusion under 40 CFR § 125.4(j)(4)?

(See X-74-32, Supplement, page 1, paragraph 1 (B)(I)).

3. Were the instant permittees denied due process of law or equal protection of the law by the fact that dischargers with return flows from land amounting to less than 3000 acres are excused under 40 CFR § 125.4 from obtaining NPDES permits?

(See X-74-32, Supplement, page 1, paragraph 1 (C)).

4. May these NPDES permits be issued prior to the completion of the study or actions specified in FWPCA § 305(a)(2) [33 USCA § 1315(a)(2)]

(See X-74-30, Supplement, page 2, paragraph 1 (D)).

5. If an irrigation district or canal company does not own or control the land supplied by its canals, and if the canal water is simply extracted by users and thereafter discharged by them as runoff into waters of the United States from point sources on the users' lands, has the irrigation district or canal company nevertheless participated sufficiently in the water supply-use-discharge process so as to be held jointly and severally responsible with each such user to obtain an NPDES permit covering each user's point source discharges? Under such circumstances is an irrigation district or canal company engaged in the "discharge of any pollutant" within the meaning of FWPCA § 402(a) [33 USCA § 1342(a)]?

(See X-74-30, Supplement, page 2, paragraph 1 (j) and page 4, Paragraph 2 (A)).

Exhibit A

6. Is the wastewater which results from diversion of natural water onto fields for irrigation and subsequent return discharge into waters of the United States, a "pollutant" under FWPCA § 502(6) [33 USCA § 1362(6)], and does that process constitute the discharge of pollutants under any provision of FWPCA, as amended.

(See X-74-22, Supplement, page 2, paragraph 5 (C)).

7. May the permit terms (e.g. Special Condition 1) properly require permittees to evaluate the supply water patterns and return flow patterns and to propose monitoring locations representative of the quality of water before and after its use for irrigation purposes?

(See X-74-30, Supplement, page 2, paragraph 1.(G)).

8. May the permit terms (e.g. Special Condition 4) properly require a permittee to expend funds and perform the task of inventorying "...all significant non-irrigation sources... or other discharges of pollutants...that materially affect the quality of the irrigation water.." in the irrigation return flow canals.

(See X-74-30, Supplement, page 2, paragraph 1 (G) and FWPCA § 305(a)(2) [33 USCA § 1315(a)(2)].

9. Are the words "significant" and "materially" in Special Condition 4 of the permits unconstitutionally imprecise, vague or indefinite in view of the civil and criminal penalties which can result from permit violations?

(See X-74-30, Supplement, page 3, paragraph 1 (J), (K), and (L)).

10. Are the phrases "...problems in need of correction..." and "...or other acquatic life..." in permit special conditions 5 and 6 unconstitutionally imprecise, vague or indefinite in view of the civil and criminal penalties which can result from permit violations?

(See X-74-30, Supplement, page 3, paragraph 1 (M)).

11. Under FWPCA § 402(a) [33 USCA § 1412(a)] may the Administrator properly require (Special Condition 6) the permittees to render non-toxic (prior to discharge into waters of the United States) all irrigation return flow water to which acquatic weed control chemicals have been added?

(See X-74-30, Supplement, page 3, paragraph 1 (M)).

12. Is Special Condition 7 of the permits (requiring removal of moss and debris from canals and ditches) arbitrary, capricious and unreasonable, assuming that such moss and debris become present in a canal by the acts of third persons who are not agents or employees of the permittee irrigation district or canal company?

(See X-74-30, Supplement, page 3, paragraph 1 (O)).

13. Under FWPCA § 402(a) [33 USCA § 1342(a)] may the Administrator properly require a permittee to perform the studies, provide the information, and make the determinations set forth in Special Condition 3 of the permit?

(See X-74-30, Supplement, page 5, paragraph 4 (B)).

14. May the Administrator properly require an irrigation district or canal company to obtain an NPDES permit to cover its discharge when such discharge is only into the canal system of another irrigation district or canal company which in turn controls ultimate discharges into waters of the United States?

(See X-74-28, Amendment and Supplement, page 6, paragraph 4 (D)).

15. If an irrigation district (such as Minidoka X-74-32) is merely engaged in the collection of irrigation runoff or return water, and the transporting of that wastewater for discharge to waters of the United States (so that it may constitute a "drainage district" under Idaho State law) does such status under State law exempt it from applying for and obtaining an NPDES permit?

(See X-74-32, Amendment and Supplement, page 4 and 5, paragraph 2 (F)).

16. Is General Condition 15 of the permits (requiring the reporting of any additional monitoring done by the permittee) unconstitutional as being violative of the self-incrimination or other provisions of the Fifth Amendment to the Constitution of the United States?

(See X-74-22, Supplement, page 9, paragraph (i)).

17. Do the instant permits impose duties upon Idaho irrigation districts which the directors of such districts presently do not have the authority under Idaho State law to perform? If so, may the instant permits nevertheless properly impose such duties on such districts?

(See X-74-37, Supplement, page 2, paragraph 2).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 22

In the matter of National Pollutant Discharge Elimination System permit for United States Steel Corporation, South Works (permit No. IL-0002691), State of Illinois, the Presiding Officer has certified six issues of law to the Assistant Administrator for Enforcement and General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

"Whether the effluent limitations, monitoring requirements, and compliance schedule contained in the NPDES permit for United States Steel Corporation's South Works must, as a matter of law, be no less stringent than those contained in the 'Order and Stipulation' entered into in consolidated cases People of the

State of Illinois, ex rel. William J. Scott, Attorney General of Illinois, Plaintiff, vs. United States Steel Corporation, No. 69 CH 3334, and The Metropolitan Sanitary District of Greater Chicago, Plaintiff, vs. United States Steel Corporation, No. 67 CH 5772, in the Circuit Court of Cook County, Illinois, County Department, Chancery Division on January 18, 1970?"*

Conclusion

The effluent standards, monitoring requirements and compliance schedule now contained in the subject permit, which have been abstracted from the "Order and Stipulation," need not be conditions of the permit unless such conditions are necessary to implement section 301(b)(1)(C) of the Federal Water Pollution Control Act, as amended (the Act) or unless the State has issued a certification, pursuant to section 401 of the Act, containing a requirement that provisions of the "Order and Stipulation" constitute conditions on the permit.

Discussion

Section 402(b)(1)(A) of the Act requires that NPDES permits "apply, and insure compliance with, any applicable requirements of section[s] 301. . ." Section 301(b)(1)(C) provides that there shall

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* A copy of the Order and Stipulation are attached as Appendix A to this Decision.

be achieved "not later than July 1, 1977, any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any water quality standard established pursuant to this Act." The "Order and Stipulation" is quite obviously not itself either a water quality standard established pursuant to the Act or a limitation established pursuant to other Federal laws or regulations. Nor does it purport to be a generally applicable statutory or regulatory requirement promulgated by the State of Illinois pursuant to authority preserved by section 510 of the Act. Rather it constitutes an agreement entered into among the State, the permittee and a local public agency* in order to resolve litigation then pending in a State court in a manner acceptable to all parties. While some of the restrictions on discharges from permittee's plant which are contained in the "Order and Stipulation" may constitute limitations derived from generally applicable State laws, it is impossible to determine which, if any, in fact are based directly on specific requirements of such State laws or regulations rather than on some collateral consideration.

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* EPA was not a party to the Stipulation. Hence, this case is distinguishable from the situation addressed in the Decision of the Assistant Administrator for Enforcement and General Counsel No. 2 (December 30, 1974) which involved a consent decree to which the Agency was a party.

The permittee contends in its brief that the recycle system required by the "Order and Stipulation" is not predicated on a State statute or regulation and it is not implausible that a negotiated settlement would include provisions not directly related to statutory requirements. Unless a showing is made that this was not the case, the "Order and Stipulation" may represent merely a compromise between the parties rather than a declaration of their rights and obligations under state law. See United States v. International Building Company, 345 US 502, 73 S.Ct. 807 (1953).

It should be noted that paragraph 8 of the "Stipulation and Order" provides "Nothing contained in this stipulation... shall be deemed in any way whatsoever a waiver by defendant of its legal positions taken in this proceeding, including but not limited to its denial of both plaintiffs' right and authority to maintain this action..." Thus, the parties have expressly negated any inference that the permittee considered the terms of the "Order and Stipulation" as a resolution of the merits of the case brought against it.

Moreover, while consent decrees and stipulated agreements may, in some cases, represent binding declarations of state law, only those limitations which are more stringent than otherwise applicable federal limitations are to be imposed pursuant to section 301(b)(1)(C).

Certain of the provisions of the "Order and Stipulation" appear to be less stringent than those which would otherwise be imposed. Paragraph 6 of the "Order and Stipulation", for example, contains provisions for delays in the date by which the limitations are to be achieved for a variety of contingencies - many of which would be unacceptable under the federal standards. Each limitation in a consent decree must be read in light of other provisions of the decree or of state law in determining whether or not it is in fact more stringent than the corresponding limitation which would be required under federal law. Since each limitation in the Order is subject to the potential for delays allowed by Paragraph 6, its presence raises a question as to whether the terms of the "Order and Stipulation" are indeed more stringent overall than those which would otherwise be required.

Accordingly, I conclude that the limitations of the "Order and Stipulation" which are more stringent than the limitations otherwise applicable to the permittee's discharge need not be included in its NPDES permit pursuant to section 301(b)(1)(C) of the Act solely by virture of their presence in that "Order and Stipulation".

There remains the question of whether the terms of the "Order and Stipulation" which are more stringent attach to the permit pursuant to section 401 of the Act.

If the terms of the "Order and Stipulation" have been forwarded to this Agency pursuant to a certification under section 401 of the Act, as conditions necessary to implement section 301, then those more stringent provisions in the certification contained in the "Order and Stipulation" would attach to the permit by operation of law whether or not they are physically included in the permit. (See Decision of the General Counsel on Matters of Law, No. 17 June 16, 1975). However, it does not appear that the Environmental Protection Agency has received a certification from the State containing as such requirements, provisions of the "Order and Stipulation." Rather, EPA has determined that some of the conditions in the "Order and Stipulation" are more stringent "limitations established pursuant to State law" required by section 301 to be included within the permit, a conclusion I have held to be incorrect.

The Agency has an obligation to determine whether more stringent State standards exist and, if so, to include them in the permit in lieu of limitations which would apply under section 301(b)(1)(A) or 402(a)(1). Evidence may be adduced at the hearing concerning EPA's and other parties' interpretations of the requirements of State law or regulations and the "Order and Stipulation" may be found to be relevant to that determination.

ISSUE OF LAW NO. II

Question Presented

"If the answer to Issue I is in the affirmative, must all the terms and conditions of the "Order and Stipulation also, as a matter of law, be incorporated in the permit?"

Conclusion

Having answered the inital question in the negative, this issue need not be addressed.

ISSUE OF LAW NO. III

Question Presented

"Or in the alternative, if the answer to Issue I is in the affirmative and the answer to Issue II is in the negative, must the

Administrator, as a matter of law, consider all terms and conditions of the "Order and Stipulation" in determining the terms and conditions of the permit?"

Conclusion

Having answered the initial question in the negative, this issue need not be addressed.

ISSUE OF LAW NO. IV

Question Presented

"Whether the effluent limitations, thermal limitations, and monitoring requirements, of the Water Pollution Control Regulations issued by the Illinois Pollution Control Board must, as a matter of law, be incorporated as conditions of the NPDES permit, and if such provisions must, as a matter of law, be incorporated as conditions of the permit, must all other provisions of said regulations and statutes (the Illinois Environmental Protection Act, Ill. Rev. Stat. Ch. 111 1/2, §1001, et seq.) on which they are based also be incorporated as conditions of the permit and does that preclude the introduction of evidence relating thereto?"

Conclusion

This question has previously been answered in the Decision of the General Counsel on Matters of Law No. 17 (June 16, 1975) in a proceeding involving the same permit applicant and therefore need not be addressed here.

ISSUE OF LAW NO. V

Question Presented

Paragraph 15 of USSC's Request for Adjudicatory Hearing "...objects to the provisions of Part III on page 16 of the Permit which includes a new requirement relating to possible dredging at the request of or with the approval of the U.S. Army Corps of Engineers."

A. It is USSC's position "...that Part III on page 16 of 18 (of the Permit) relating to the requirements of the U.S. Army Corps of Engineers pertaining to navigation should be deleted because there are adequate provisions of the law for the protection of navigation and said provision is overly vague and burdensome and would deprive the Company of due process of law contrary to the provisions of the 5th Amendment of the Constitution."

B. It is the EPA's position "...that it must, as a matter of law, include in all permits those conditions that the (Corps of Engineers) considers to be necessary to insure that navigation and anchorage will not be impaired. EPA states that the Part III requirement regarding dredging is included in (permit) at the instance of the Corps of Engineers."

10

Conclusion

This question has previously been answered in the Decision of the General Counsel on Matters of Law No. 17 (June 16, 1975) in a proceeding involving the same permit applicant and therefore need not be addressed here.

ISSUE OF LAW NO. VI*

Question Presented

"Whether as a matter of law and policy the terms and conditions of that certain agreement entered into between the United States Environmental Protection Agency by Alan G. Kirk II, Assistant Administrator for Enforcement and General Counsel, and Charles Corkin II, Counsel for Administrative Litigation, and USSC by Earl W. Mallick, Vice President, on December 16, 1974 (the "Agreement"), together with the attached form of permit are a binding obligation on the part of the United States Environmental Protection Agency to issue all permits to USSC in accordance with said form and subject to the attached agreement?"**

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* This issue was not included in the issues referred by the Presiding Officer. However, it has been briefed by both the permittee and by the intervenor, Business and Professional People for Public Interest, and the Region has not objected to its resolution in this proceeding.

** A copy of this Agreement is attached as Appendix B to this Decision.

Conclusion

The Agency may only be bound to propose conditions for a permit consistent with the terms of the Agreement and to adopt such conditions in the issued permit unless it concludes, on the basis of the record of the individual permit proceeding before it, that such provisions are inconsistent with the requirements of the Act. The Agency must consider issues raised by public comments on the proposed permit or at an adjudicatory hearing on the issued permit concerning the application of the Agreement to the specific permit.

Discussion

The principles enunciated in the Decision of the Assistant Administrator for Enforcement and General Counsel on Matters of Law No. 2 (December 30, 1974) control the resolution of this issue. The Agency is not free to make absolute commitments or guarantees, in agreements entered into in advance of NPDES permit proceedings, that the terms of such agreements will be included in the permit as ultimately issued, regardless of comments submitted by interested persons or evidence adduced by parties to adjudicatory hearings. A contrary conclusion would vitiate the Act's requirements for public participation in the permit process. Sections 101(e), 402(a)(1), 402(b)(3).

The Agency will have met its legitimate obligations under the agreement by proposing as acceptable limitations and conditions those

set forth in the Agreement and by adopting those conditions in the permit if, after having given serious consideration to public comments received during the proceedings required by 40 CFR Part 125, it concludes that such conditions are compatible with the requirements of the Act.

Robert V. Zener
General Counsel

Dated: JUL 3 1975

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

South Works — Order 3 pp Stipulation 11 pp. JS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS, ex.rel. WILLIAM J. SCOTT, Attorney General of Illinois, Plaintiffs vs. UNITED STATES STEEL CORPORATION, a foreign corporation, Defendant	No. 69 CH 3334 CONSOLIDATED
METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, a Municipal corporation, Plaintiff vs. UNITES STATES STEEL CORPORATION, a foreign corporation licensed to do business in the State of Illinois, Defendant	No. 67 CH 5772
UNITED STATES STEEL CORPORATION, a foreign corporation, licensed to do business in the State of Illinois, Defendant-Counterclaimant vs. WILLIAM J. SCOTT, Attorney General of Illinois; THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, a Municipal Corporation; and FRANKLIN D. YODER, WILLIAM L. RUTHERFORD, JOHN W. LEWIS, WILLIAM F. CELLINI, A. L. SARGENT and C. S. BORUFF, comprising the SANITARY WATER BOARD OF ILLINOIS, Counter - Defendants	

ORDER

EXHIBIT: A

O R D E R

This matter coming on to be heard; the parties appearing by their counsel; it appearing that the parties having duly entered into a stipulation dated January 18, 1971 (Stipulation) which provides for disposition of this case, the original of said Stipulation having been filed with the Court and a copy being attached hereto and incorporated herein by reference; and the Court having considered said Stipulation and the other documents heretofore filed herein and finding it to be reasonable, having heard argument of counsel, and being fully advised in the premises;

IT IS THEREFORE ORDERED:

1. That all pending proceedings relating to violations of the temporary injunction heretofore entered in cause number 67 CH 5772 are dismissed without costs to any party.
2. That all other proceedings in these causes are stayed until further order of Court entered in accordance with the terms of this order and the Stipulation between the parties.
3. That upon the completion of "Step III" as set forth in the Stipulation, all other proceedings in these actions shall be dismissed without costs to any party, provided however, that the Court shall thereafter retain jurisdiction of the parties for the sole purpose of enforcing the

rights and obligations of the parties under the terms of Stipulation and this order.

DATED: January 18, 1971

ENTER:

JUDGE

WE AGREE TO THE FORM, SUBSTANCE AND ENTRY OF THE ABOVE ORDER.

Attorney for Plaintiff-Counter-Defendant, THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO

WILLIAM J. SCOTT
Attorney for the Plaintiff-Counter-Defendant, People of the State of Illinois

HACKBERT, ROOKS, PITTS, FULLAGAR AND POUST
Attorneys for Defendant-Counterclaimant,
UNITED STATES STEEL CORPORATION

By _____

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

USS South Works

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS, ex. rel. WILLIAM J. SCOTT, Attorney General of Illinois, Plaintiffs vs. UNITED STATES STEEL CORPORATION, a foreign corporation, Defendant	No. 69 CH 3334 CONSOLIDATED
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FILED
JAN 18 1971
MATTHEW J. DANAHER, Clerk

STIPULATION

Plaintiffs, People of the State of Illinois through Attorney General William J. Scott and The Metropolitan Sanitary District of Greater Chicago together with the Defendant, United States Steel Corporation, agree that the following statements form the basis for the mutual agreement between the parties which is embodied in this document.

1. On October 26, 1967, The Metropolitan Sanitary District of Greater Chicago, an Illinois municipal corporation (hereinafter referred to as "District") commenced an action in the Circuit Court of Cook County, Illinois, No. 67 CH 5772 against United States Steel Corporation (hereinafter referred to as "Defendant") which owns and operates a steel manufacturing plant (known as its "South Chicago Works") within the City of Chicago, Illinois, adjacent to Lake Michigan and the Calumet River. The District sought an injunction under Illinois Revised Statutes, 1967, Ch. 42, Section 326aa restraining Defendant from alleged pollution of the waters of Lake Michigan and an injunction under Illinois Revised Statutes, 1967, Ch. 42, Section 326, restraining the Defendant from allegedly polluting the waters of the Calumet River.

2. On March 22, 1968, following a hearing held after the District filed a supplemental petition, a temporary injunction was entered in said cause restraining Defendant from discharging any oil or oily substances into the waters of Lake Michigan, which oil or oily substances would be visibly floating on the surface of said waters, which injunction was thereafter affirmed by the Supreme Court of Illinois upon interlocutory appeal.

3. On or about September 18, 1969, William J. Scott, Attorney General of the State of Illinois (hereinafter referred to as the "Attorney General"), commenced an action in the Circuit Court of Cook County, No. 69 CH 3334, on behalf of the People of the State of Illinois against Defendant, United States Steel Corporation, seeking an injunction against alleged pollution by South Chicago Works of Lake Michigan and other waters in Cook County, Illinois. The Attorney General brought the action under Public Law 76-205, effective July 1, 1969.

4. On October 7, 1969, the Attorney General's suit and the District's suit were consolidated for trial before this court.

5. On October 9, 1969, Defendant filed a motion to dismiss the Attorney General's complaint. After the submission of briefs by the Defendant and the Attorney General and oral argument, this Court on November 21, 1969, upheld the power of the Attorney General to seek judicial abatement of water pollution under Public Law 76-205. On Defendant's motion the Court held that the Attorney General did not possess independant authority to seek fines under the Illinois Sanitary Water Board Act, Ill. Rev. Stat., Ch. 19, Section 145.1 et. seq. or to seek enforcement of the Illinois Public Nuisance Act, Ill.Rev.Stat.,1967, Ch. 100-1/2. Defendant thereupon filed an answer to the complaint.

6. On October 30, 1969, Defendant filed a motion to add necessary parties and a motion for leave to file a counterclaim against Plaintiffs for injunctive and declaratory relief. This Court granted these motions on November 21, 1969.

7. Throughout these proceedings, Defendant has contended, inter alia, that Plaintiffs have no right or authority to maintain the instant actions and that Defendant has not violated any legal obligations. Both Plaintiffs have contended the contrary.

8. At the suggestion of the Court, the parties engaged in extensive pre-trial discussion which included the exchange of substantial factual information between technical experts acting on behalf of the parties. These pre-trial discussions took place on July 23 and 24, 1970; October 14, 1970; November 24, 1970; December 15, 1970; December 23, 1970; and December 30, 1970. During the intervals between these discussions, the parties' experts evaluated the information obtained and prepared responses.

9. As a result of the technical information developed at these discussions, each party believes that the public interest will be best served by resolution of this controversy without trial under the terms and conditions herein provided.

10. In these discussions, Defendant has represented that as of December 31, 1970, it completed construction of its Waste Water Control Program Step II designed, among other things, to eliminate all direct discharge of process waste water to Lake Michigan. (Process water is defined as water used in the process which, in the normal course of operation, picks up chemical, liquid or solid contaminants through contact, with production materials or materials created as incidents of production.)

11. The subject of "thermal pollution" is not within the scope of this stipulation.

ON THE BASIS OF THE ABOVE STATEMENTS, IT IS HEREBY STIPULATED AND AGREED between Plaintiff, The Metropolitan Sanitary District of Greater Chicago, Plaintiff, People of the State of Illinois

through William J. Scott, Attorney General of the State of Illinois, and Defendant, United States Steel Corporation, by the respective attorneys for the parties hereto, as follows:

1. Subject to the commitments of the respective parties contained herein, which commitments are express conditions precedent to the Defendant's obligations and subject to the contingencies outlined in paragraph six (6) below, Defendant agrees to construct the following waste control facilities at its South Chicago Works at the completion of which no process water shall be discharged to Lake Michigan or any other public waters:

a. A system which will recycle all process water on the so-called "old line" or "South" blast furnaces. (As part of a previous waste control program of Defendant, Step II, the "new line" or "North" blast furnace process water was recycled). The recycle system for the "old line" blast furnaces shall be called Step III. Upon completion of the recycle system for the old line furnaces, there will be a total elimination of liquid blast furnace waste discharges from the South Chicago Works. Construction of this system shall be completed no later than October 31, 1972, and Defendant agrees to make a good-faith effort to complete such construction by June 30, 1972. A period of two months after the date set for completion of construction is allowed for start up and testing of the facility resulting in satisfactory operation.

b. A system which will recycle all process water from the mill operations at the South Chicago Works. This involves recycling all treated water from the Step II Central Treatment Plant and shall be called Step IV. At the completion of Step IV, the only process water discharged from the plant will consist of "blow down" from the Step IV recycle system. (A recycle system can be defined as the continuous reuse of process waters. Rather than "once through" discharge of process water, a recycle system reuses the process water. As the process water is recycled, a build-up of dissolved solids occurs which, if not diminished, will hamper or prevent the operation of both production and waste control facilities. To avoid such build-up, relatively small amounts of process water, normally comprising 5 to 12 percent of the waste water volume of a "once through" discharge system, known as "blow down", must be removed from the system and replaced by fresh water.) As a result of the reuse systems described herein total process water discharge volume will be reduced from current volume of 70,000 gallons per minute (GPM) to an amount not to exceed 3700 gallons per minute (GPM).

The Step IV recycle system for the mill operations shall be completed in three stages:

(i) Step IVa, the recycle construction for the south side mills, will be completed not later than October 31, 1974. A period of two months after the date set for completion of construction is allowed for start up and testing resulting in satis-

factory operation of the facility.

(ii) Step IVb, the recycle construction for the north side mills and other facilities, will be completed not later than April 30, 1975. A period of two months after the date set for completion of construction is allowed for start up and testing resulting in satisfactory operation of the facility.

(iii) Step IVc, the recycle construction for the west side mills, shall be completed not later than October 31, 1975. A period of two months after the date set for completion of construction is allowed for start up and testing resulting in satisfactory operation of the facility.

2. Pending completion of Step IVc and connection to the District sewerage system, Defendant shall achieve the following results:

(a) At the end of Step IVa, treated process water volume will have been reduced from a current 70,000 GPM, to 42,000 GPM, and shall contain no more than 16 milligrams per liter (mg/l) of suspended solids and 5 mg/l of hexane soluble material at point of entry to the Calumet River.

(b) At the end of Step IVb, treated process water volume will have been reduced to 24,000 GPM, and shall contain no more than 16 mg/l of suspended solids and

5 mg/l of hexane soluble material at point of entry to the Calumet River.

(c) The blow down at the end of Step IVc shall be discharged to and accepted by the District and shall be of a total volume not to exceed 3700 GPM, and shall contain no more than 20 milligrams per liter suspended solids, no more than 10 mg/l hexane soluble material, and no more than 2,000 mg/l dissolved solids.

The parties anticipate, based on representations made by the Defendant, that the annual hourly average discharge of process water blow down will be 2100 GPM. This final effluent, or "blow down", from the plant shall not be deposited in either the Calumet River or Lake Michigan but shall, instead, be deposited into the sewerage system of the District and shall be accepted for treatment thereby. Nothing herein contained shall relieve Defendant from any existing or future legal obligation for payment to the District for the cost of treating effluent which the Defendant's South Chicago Works shall deposit in the District's sewerage system.

Nothing herein contained, however, shall preclude the Defendant from modifying the program herein described so long as the volume and effluent criteria set forth herein are met by the dates stated, and so long as at the completion of the program no process waste waters are discharged in Lake Michigan or any other public waters. In the event of any substantial modification of the program, Defendant shall notify the Plaintiffs in advance.

3. The District agrees to accept for treatment at the conclusion of Step IVc and thereafter the effluent (blow down) described above. The agreement of the District to accept said effluent is expressly contingent upon Defendant either, (a) being granted, by all appropriate agencies, an allocation for diversion of water from Lake Michigan in the form of the said 3700 GPM maximum effluent (blow down) or, (b) the issuance by a court of competent jurisdiction of an Order or the issuance by the executive branch of Illinois of a ruling or opinion binding upon state officials that such allocation is not necessary as a matter of law. Defendant agrees to pursue alternative (a) or (b), or both.

4. As long as Defendant is not in material default herein, the Plaintiffs agree to support any application by Defendant made under paragraph 3 above, as well as any application to any arm of the federal, state and municipal governments for a permit to connect to existing sewer systems or which is essential to the construction and operation of the waste control facilities contemplated herein.

5. During the period of carrying out the completion of the waste program described herein, Defendant will furnish Plaintiffs with quarterly reports of the work progress of the program and submit effluent data to Plaintiffs on a regularly scheduled monthly basis.

6. Should Defendant be obstructed or delayed in the commencement, prosecution or completion of the work hereinabove referred to by any act or delay of either Plaintiff, or by inability, with the exercise of due diligence, to obtain necessary railroad and transportation facilities, or by unavoidable acts or delays on the part of transportation companies in transporting, switching or delivering material for said work, or by any act or delay of agencies of the

federal, state or municipal authorities, or by acts of public authorities, or by riot, insurrection, war, pestilence, fire, lightning, earthquake, cyclone, work slowdown, work stoppage or strike, or through any delays or defaults of other parties under contract with Defendant or due to unavoidable delays in obtaining the specified materials or equipment for said work or by delays hereinbefore specified which results in performing work under abnormal weather conditions beyond such as usually occur during the times specified herein or due to other causes beyond the control of the Defendant, then the time fixed for the completion of said work may be extended by this Court on application of any of the parties for a period equivalent to the time lost by reason of any of the aforesaid causes.

7. (a) If the program shall become unlawful in the opinion of the Defendant, and Defendant wishes to cease its obligations hereunder, Defendant shall make application to this Court to cease obligations hereunder and if this Court determines that the program is unlawful, Defendant's obligations shall thereupon cease. If the Court determines that the program is lawful, Defendant's obligations shall continue subject to its right to appeal such determination. However, if the Court fails to make such determination within 20 days from application, Defendant's obligations shall be suspended pending determination by this Court.

(b) If Defendant's operations at South Works shall terminate as a result of the application of a federal, state or municipal law or regulation, or as a result of an administrative order, or an order or decree of Court, or for any other reason, all obligations of Defendant hereunder shall cease.

8. Nothing contained in this stipulation or in any other document filed with the Court herein, or stated in any meeting or hearing

attended by representatives of the Plaintiffs and Defendant shall be deemed in any way whatsoever a waiver by Defendant of its legal positions taken in this proceeding including but not limited to its denial of both Plaintiffs' right and authority to maintain this action, and nothing contained in this stipulation or any other document filed with the court herein, or stated in any meeting or hearing attended by representatives of the Plaintiffs and Defendant, shall be deemed in any way whatsoever a waiver by either Plaintiff of its respective legal positions taken herein, provided however, that this provision shall not be deemed to be in derogation of the obligations created hereunder.

9. On the signing of this Stipulation and the filing thereof with the Court, and upon the Court's approval, an Order shall be entered dismissing without costs, to any party, all pending proceedings relating to violations of the temporary injunction entered herein and staying all other proceedings. Upon the completion and satisfactory operation of Step III all other proceedings herein shall be dismissed, without costs to any party, the court retaining jurisdiction thereafter for the sole purpose of enforcing the remaining rights and obligations created hereby.

DATED: Chicago, Illinois

January 18, 1971

100 East Erie Street
Chicago, Illinois

THE METROPOLITAN SANITARY DISTRICT
OF GREATER CHICAGO

By _____
Its Attorney

160 North La Salle Street
Chicago, Illinois

WILLIAM J. SCOTT, Attorney General of
the State of Illinois

Hackbert, Rooks, Pitts,
Fullagar and Poust
208 South La Salle Street
Chicago, Illinois

UNITED STATES STEEL CORPORATION

By _____
Its Attorney

A G R E E M E N T

U.S. STEEL CORPORATION - U.S. ENVIRONMENTAL PROTECTION AGENCY

United States Steel Corporation (the Permittee) and the United States Environmental Protection Agency (the Agency) hereby stipulate and agree to the provisions set forth herein. Any NPDES permit issued heretofore or hereafter under the Water Pollution Control Act Amendments of 1972 (the Act) for facilities of Permittee by the U.S. Environmental Protection Agency, shall be considered to be subject to the terms and provisions of this Agreement notwithstanding any contrary provisions contained in such permit.

1. The Agency believes that the Federal Water Pollution Control Act Amendments of 1972 authorizes the Agency to include in an NPDES permit a condition authorizing modification of an issued NPDES permit in order to include conditions to ensure compliance with any toxic standard established under Section 307 of the Act if such standard is more stringent than any limitation in the permit.

2. The Permittee believes that the Act authorizes the modification of an issued NPDES permit to include such standard only in the case of a toxic pollutant injurious to human health.

3. The Permittee shall not raise with U.S. Environmental Protection Agency this issue of the Agency's authority under Sections 402 and 307 until such time as (1) toxic standards are established and, (2) the Agency seeks to modify a permit issued to the Permittee in order to include such toxic standards. This paragraph 3 shall in no way limit Permittee's right under Section 509 of the Act to contest the promulgation of any toxic standard.

EXHIBIT: B

4. On the matter of toxic pollutants, all U.S. Steel permits shall be subject to the following provision. If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in the permit, and the Agency seeks to revise or modify the permit in accordance with the toxic standard or prohibition, the Permittee shall have notice and opportunity for hearing, with right of appeal, on the method of application of the toxic standard or prohibition if such application requires the use of discretion, judgment or calculation by the permitting Agency.

5. If the Agency seeks to modify an NPDES permit in order to impose a toxic standard established under Section 307 of the Act, the Permittee shall have the right at that time to raise in an administrative and judicial review of such matter the issue of whether the Act authorizes the Agency to so modify an issued NPDES permit. The Permittee may petition for a stay while seeking any administrative and judicial review hereunder.

6. The Permittee believes that the following clause is necessary to carry out the provisions of the Act and should be inserted in an NPDES permit:

> "The Agency stipulates that the Permittee retains the right to raise force majeure defenses such as an act of God, strike, flood, material shortage or other event over which the Permittee has little or no control."

7. The Agency believes that the insertion of a "force majeure" clause in an NPDES permit such as that noted in clause 6 above is not necessary to carry out the provisions of the Act.

8. If the Agency seeks to enforce any provision of any NPDES permit issued to the Permittee by any permitting Agency the Permittee may raise at that time the question of whether it is entitled to such "force majeure" defenses under the constitution, statute, or decisional law.

9. The Agency does not stipulate that such "force majeure" defenses exist under the constitution, statute, or decisional law.

This Agreement shall supercede the Agreement signed by Messrs. Mallick, Kirk and Corkin dealing with the same subject matter and dated August 13, 1974, July 31, 1974, and September 17, 1974, respectively.

Dated by the last signatory hereto: December 16, 1974

Alan G. Kirk II
Assistant Administrator for
Enforcement and General Counsel
U.S. Environmental Protection Agency

Charles Corkin II
Counsel for Administrative Litigation
U.S. Environmental Protection Agency

Earl W. Mallick
Vice President
U.S. Steel Corporation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW
PURSUANT TO 40 C.F.R. Section 125.36(m)

No. 23

In the matter of National Pollutant Discharge Elimination System Permits for United States Steel Corporation, PA 0004472, Clairton Works; PA 0004073 Edgar Thomson-Irvin Works; PA 0004481 Homestead Works; PA 0004464 National-Duquesne Works, the Presiding Officer has certified seven issues of law to the Office of General Counsel for decision pursuant to 40 C.F.R. 125.36(m) (39 F.R. 27078, July 24, 1974). The parties and intervener, Western Pennsylvania Water Company, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

"Is an adjudicatory hearing the proper forum for challenging guidelines promulgated pursuant to Section 304 of the Federal Water Pollution Control Act as amended?"

Conclusion

No. Challenges to effluent guideline limitations are to be brought

only in a judicial forum and may not be raised in administrative proceedings such as an adjudicatory hearing.

Discussion

The question of the scope of the adjudicatory hearings is discussed in the Decision of the General Counsel No. 3 (March 6, 1975). In that Decision we concluded that challenges to the technical and legal sufficiency of effluent limitations guidelines were to be brought exclusively in the United States Courts of Appeals pursuant to Section 509(b)(1)(E) of the Act. Since that date the United States Court of Appeals for the Eighth Circuit has ruled that judicial review of effluent limitations guidelines is properly sought in the district courts under the Administrative Procedure Act rather than directly in the Courts of Appeals. CPC International, Inc. v. Train (8th Cir. May 5, 1975) ____F.2d____, 7 ERC 1887.

Even though the General Counsel's Decision No. 3 was issued prior to CPC International the principle it ennunciated remains valid, i.e., challenges to the guidelines are to be brought in a judicial forum and may not be raised in the NPDES administrative proceedings. The only effect of CPC International, if its holding were to be followed by the other Circuit Courts which have the question before them, is to alter the judicial forum from appellate to district courts.

In similar circumstances the Supreme Court has upheld the denial of

an adjudicatory hearing on issues which were governed by a substantive rule of general applicability. United States v. Storer Broadcasting Company, 351 US 192, 100 L.Ed. 1081, 76 S. Ct. 763 (1956). See also National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

Rulemaking, as these cases recognize, is designed to increase the efficiency, expedition, and certainty in an agency's regulatory programs It does so by reducing the issues which must be resolved in the application of a broad statutory standard to the facts of particular cases. If each regulatee were permitted to raise in individualized hearings the very questions addressed by the regulation, then, as the court in Storer observed, "the rule would no longer be a rule" and its principle advantage would be eliminated.

Efforts to challenge the basis for effluent guidelines are, in essence, attempts to reopen, on a case by case basis, the levels of effluent reduction attainable by the "best practicable control technology currently available." The intended function of the guidelines, however, and their very justification for existence is to preclude the necessity of such ad hoc determinations in every case. Storer and National Petroleum support the Agency's conclusion that this is not required. Of course, the question of which guideline applies to a particular plant, what limits are appropriately derived from the guideline, and whether a plant is entitled to a variance from the guideline are proper subjects for adjudicatory hearings.

Moreover, opening the adjudicatory hearing to challenges to the regulations themselves would produce absurd results. The initial decision of the Regional Administrator is reviewable by the Administrator under 40 CFR 125.36. Were issues of the guidelines' validity to be decided by the Regional Administrator, these would then be reviewable by the Administrator. In effect, the Administrator would then be required to pass repeatedly upon the validity of regulations which he himself had recently promulgated.

ISSUE OF LAW NO. II

Question Presented

"Where effluent limitations in a permit for a point source are based upon guidelines promulgated pursuant to Sections 301 and 304 of the FWPCA Amendments of 1972 which are the subject of a pending proceeding for judicial review in which applicant is a party, must that portion of the permit based on the guidelines be stayed pending the outcome of judicial review?"

Conclusion

No. That portion of a permit based on effluent limitations/guidelines promulgated pursuant to Sections 301 and 304, which is the subject of a pending proceeding for judicial review, need not be stayed by EPA pending the outcome of the judicial review.

Discussion

As it was discussed in Decision of the General Counsel No. 3 (March 6, 1975), Section 509(b)(1)(E) allows a permit applicant to

challenge EPA's foundation in establishing effluent limitations on an industry-wide basis within 90 days of promulgation. This litigation would, of course, concern itself solely with the validity of the promulgated regulation as applied industry wide.[1/] It would not, normally, include questions of applicability of the regulation to a specific point source discharge. Should a permit applicant in the process of receiving his permit also be challenging the effluent regulation, he may, of course, petition the court reviewing that regulation for a stay in either the effectiveness of the regulation or an injunction precluding the Environmental Protection Agency from issuing a permit based upon it. To do this, of course, would require the permit applicant to demonstrate a substantial likelihood of success on the merits and irreparable harm.

The Act permits the Administrator, after opportunity for public hearing, to "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding Section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act."(Sec. 402) Should an applicable effluent

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As would judicial review of the regulations in the district courts, under the holding of CPC International, supra.

regulation, for example, be overturned, the Administrator would remain in a position to issue a permit under Section 402. In such a situation, the Administrator would make a determination concerning the discharge and, where there were no applicable requirements under Section 301, through an effluent limitation and guideline promulgated pursuant to that section and Section 304, the Administrator could nevertheless issue a permit containing such conditions as the Administrator determines are necessary to carry out the intent of the Act.(See Decision of the General Counsel No. 4, April 4, 1975)

Section 402 states clearly that if there are applicable requirements under Section 301, the Administrator may issue a permit based upon those requirements. The fact that regulations imposing such requirements may subsequently be modified by a court or by further Agency proceeding is irrelevant. The fact remains that the regulations were promulgated pursuant to Section 301 and are effective rules of the Agency. Accordingly, the Agency may issue point source discharge permits based on such regulations so long as they remain in effect. Even if a stay were issued by a court, the Administrator still has the authority to issue a permit pursuant to Section 402 of the Act.

Given EPA's authority to issue permits independent of guideline limitations regulations as well as the need for their existence to effect the general objectives of the Act enunciated in Section 101(a) there is ample justification for continuing to enforce challenged sections of permits pending their ultimate judicial resolution.

ISSUE OF LAW NO. III

Question Presented

"Where effluent limitations in a permit for a point source are based upon guidelines promulgated pursuant to Sections 301 and 304 of the FWPCA Amendments of 1972 which are the subject of a pending proceeding for judicial review in which applicant is a party, should applicant's individual permit be revised to provide that any modification of the point source category guidelines as a consequence of judicial review or administrative action will be incorporated into its permit subject to applicant's right to request an adjudicatory hearing at that time concerning the application of such guidelines to its permit?"

Conclusion

No. The Administrator is not required by applicable law to include such a condition in a permit. However, exercising its discretion, the Agency will consider requests for modification of a permit where modification of a regulation issued under Sections 301 and 304 results from court order in the manner specified in the memorandum from the Assistant Administrator for Enforcement and General Counsel dated December 23, 1974 ("Subject: Impact of Effluent Guidelines Litigation Upon Issued NPDES Permits"). The memorandum is attached to the Decision of the General Counsel No. 3 referred to above.

ISSUE OF LAW NO. IV

Question Presented

"Where effluent limitations in a permit for a point source are based upon guidelines, promulgated pursuant to Sections 301 and 304 of the FWPCA Amendments of 1972 which are the subject of a pending proceeding for judicial review in which applicant is a party, should applicant's individual permit be revised to provide that any modification of the point source category guidelines as a consequence of judicial review or administrative action will be incorporated into its permit subject to the applicant's right to request a variance from such guidelines at such time as the guidelines become final?"

Conclusion

No. As explained in answer to issue III, there is no necessity for individual permits to incorporate a provision requiring revision of the permit to reflect modifications in the effluent limitations guidelines resulting from later judicial review of those guideline regulations. Where those regulations are so modified, requests for permit modification will be considered in accordance with the December 23, 1974, memorandum referred to above.

The applicant's right to request a variance from the modified regulations depends, of course, upon whether the regulations as modified contain a provision authorizing variances comparable to that now included in most effluent regulations.

ISSUE OF LAW NO. V

Question Presented

"If the portion of the individual permit based on the guidelines is stayed pending judicial review of the guidelines or if applicant's permit is revised to provide that any modification of the guidelines as a result of judicial review or administrative action will be incorporated into its permit, should any effluent limitations finally incorporated into applicant's permit be consistent with the amount of time applicant will have remaining prior to July 1, 1977, in which to install additional control equipment?"

Conclusion

Procedures for the revision of NPDES permits based upon court ordered modified effluent guidelines will be those specified in 40 CFR Part 125. Public notice shall be provided for each proposed permit revision. Any interested party may request an adjudicatory hearing on the Regional Administrator's tentative determination to grant or deny a request for permit revision.

If other permit requirements are based upon effluent limitations which are revised pursuant to this policy, those other requirements may have to be adjusted accordingly. For example, a revised, less stringent effluent limitation may be achievable in a shorter period of time than had been allowed in the original permit schedule of compliance. If so, the schedule should be reduced in accordance with the shortest reasonable period of time principle specified in the NPDES regulations.

Similarly, it may be appropriate in some cases to revise monitoring requirements with respect to revised effluent limitations.

Whatever permit revisions the court ordered effluent limitations modifications might require, the Environmental Protection Agency has no authority under Section 402(a) of the Act to issue a permit which would authorize the installation of the required control equipment, necessary to meet the requirements of "best practicable control technology," after July 1, 1977.

ISSUE OF LAW NO. VI-A

Question Presented

"Are the regulations for the National Pollutant Discharge Elimination System in 40 C.F.R. Part 125, as subsequently amended, unlawful because they deny permittee due process of law and violate the Administrative Procedure Act by placing upon permittee the burden of proof and of going forward with the evidence?"

Conclusion

The referral of issues of law to the General Counsel, provided for in 40 C.F.R. Part 125, is to insure that provisions of the Federal Water Pollution Control Act and implementing regulations issued thereunder are applied uniformly in permit issuance proceedings conducted in the several Regional Offices. The intent of 40 C.F.R 125.36(m) is to enable questions concerning the interpretation of the Act and pertinent regulations to be resolved in this office. The issue

of law presented herein, on the other hand, involves a question of Federal constitutional law. As such, the issue is more appropriately presented to a United States Court of Appeals on appeal from final Agency action on the permits.

ISSUE OF LAW NO. VI-B

Question Presented

"Are the regulations for the National Pollutant Discharge Elimination System in 40 C.F.R. Part 125, as subsequently amended, unlawful because they deny permittee due process of law and violate the Administrative Procedure Act by limiting permittee to written testimony submitted prior to the hearing?"

Conclusion

The issue, raising as it does constitutional issues, is beyond the scope of issues referrable to the General Counsel.

ISSUE OF LAW NO. VI-C

Question Presented

"Are the regulations for the National Pollutant Discharge Elimination System published in 40 C.F.R. Part 125, as subsequently amended, unlawful because they deny permittee due process by providing no discovery or subpoena rights to permittee?"

Conclusion

The Federal Water Pollution Control Act contains no authority for the Agency to issue subpoenas in connection with the issuance or modification of permits under Section 402 of the Act. The Agency's ability

to obtain information from applicants is confined to the authority conferred by Section 308 and it has no more authority than applicants to compel production of evidence from third parties. Applicants, of course, have available to them the provisions of the Freedom of Information Act, 5 USC Section 552, to discover documents within the Agency's custody.

Whether the absence of subpoena power for permit applicants in the Act and the regulations constitute a denial of due process is a question beyond the scope of issues of law referrable to the General Counsel.

ISSUE OF LAW NO. VI-D

Question Presented

"Are the regulations for the National Pollutant Discharge Elimination System published in 40 C.F.R. Part 125, as subsequently amended, unlawful because they deny permittee due process of law by binding the Regional Administrator to the Presiding Officer's rulings on the admission of evidence?"

Conclusion

The Regional Administrator is not bound by the Presiding Officer's rulings on the admission of evidence despite the language of 40 C.F.R. 126.36(i)(6). This conclusion follows because this provision is intended to establish procedural findings as final for the purposes of the hearing and to prevent interlocutory review of the Presiding Officer's decisions. Given its limited purpose and the fact that it is not meant

to preclude substitution of the Regional Administrator's judgment for that of the Presiding Officer, the Regional Administrator is not thereby barred from modifying rulings of the Presiding Officer and taking appropriate action, including a remand for the purpose of introducing evidence initially excluded.

ISSUE OF LAW NO. VI-E

Question Presented

"Are the regulations for the National Pollutant Discharge Elimination System published in 40 C.F.R. Part 125, as subsequently amended, unlawful because they deny permittee due process of law by placing the final decision of which issues submitted by the parties should be classified as issues of law upon the Presiding Officer?"

Conclusion

This issue, raising as it does constitutional issues, is beyond the scope of issues referrable to the General Counsel.

ISSUE OF LAW NO. VI-F

Question Presented

"Are the regulations for the National Pollutant Discharge Elimination System published in 40 C.F.R. Part 125, as subsequently amended, unlawful because they deny permittee due process of law and violate the Administrative Procedure Act by preventing the Presiding Officer from rendering the initial decision?"

Conclusion

No. Assuming that the Administrative Procedure Act, 5 U.S.C. 551 et seq, applies to the issuance of NPDES permits, it is clear that the requirements of 5 U.S.C. 554(d) concerning the Presiding Officer's obligation to issue an initial decision do not apply in cases such as this which constitute initial licensing. See 5 U.S.C. 554(d)(A), 5 U.S.C. 557(b).

To the extent that this question raises constitutional issues, it is beyond the scope of issues referrable to the General Counsel.

ISSUE OF LAW NO. VI-G

Question Presented

"Are the regulations for the National Pollutant Discharge Elimination System published in 40 C.F.R. Part 125 as subsequently amended, unlawful because they permit the Regional Administrator and the Administrator to consider issues outside the record of the adjudicatory hearing in reaching their decisions?"

Conclusion

The provision of the NPDES regulations referred to by the requestors, 40 C.F.R. 125.36(n)(12), authorizes the Administrator to decide appeals from the initial decision of the Regional Administrator on the basis of the record presented and other considerations he deems relevant. The regulations do not expressly authorize consideration of matters outside the record of the adjudicatory hearing by the Regional Administrator.

The question of whether consideration of material outside the record of the hearing by the Administrator would deny a permit applicant "procedural due process" is a matter of constitutional law properly addressed in the Courts of Appeals.

ISSUE OF LAW NO. VI-H

Question Presented

"Are the regulations for the National Pollutant Discharge Elimination System published in 40 C.F.R. Part 125 as subsequently amended, unlawful because they deny permittee due process of law by permitting the Administrator to decline to review a permittee's appeal from the decision of the Regional Administrator?"

Conclusion

This issue, raising as it does constitutional issues, is beyond the scope of issues referrable to the General Counsel.

ISSUE OF LAW NO. VII

Question Presented

Whether the Agency is authorized to impose the condition set forth in Section 10 of the permit entitled "Additional Monitoring by Permittee."

Conclusion

No facts or arguments were submitted to aid response to this question and the requestor did not address it. For those reasons no attempt has been made to respond to the question.

Robert V. Zener
General Counsel

Date: JUL 3 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW
PURSUANT TO 40 C.F.R. Section 125.36(m)

No. 24

In the matter of National Pollutant Discharge Elimination System Permit for United States Steel Corporation, PA 0004081, Christy Park Works, the Presiding Officer has certified seven issues of law to the Office of General Counsel for decision pursuant to 40 C.F.R. 125.36(m) (39 F.R. 27078, July 24, 1974). The parties and intervener, Western Pennsylvania Water Company, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUES OF LAW NUMBERS I THROUGH VI

Conclusion

These questions are identical to those raised by United States Steel Corporation in an earlier permit proceeding. The decisions rendered on those six questions control the resolution of these six questions. (See Decision of the General Counsel on Matters of Law, No. 23, July 3, 1975).

ISSUE OF LAW NUMBER VII

Question Presented

Whether the effects of storm water run-off may be considered

in determining violations of an NPDES permit.

Conclusion

This question is ambiguous in scope and was not addressed by the requestor or the intervener in their briefs. For those reasons no attempt has been made to respond to the question.

Robert V. Zener
General Counsel

Dated: JUL 22 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 25

In the matter of National Pollutant Discharge Elimination System permits for Wheeling-Pittsburg Steel Corporation, WV0004502 and WV0004499, the Presiding Officer has certified one issue of law to the General Counsel for decision pursuant to 40 CFR §125.36(n) (39 F.R. 27078, July 24, 1974). The parties, [1] having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

"Is the Environmental Protection Agency required to hold a hearing on the question whether an effluent limitation or other permit condition proposed by a State is arbitrary, capricious, unreasonable or not in accordance with law before including such limitation or condition in a federal permit and making it federally enforceable?"

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1 FMC Corporation, was granted the opportunity to file a brief amicus in this proceeding. The amicus brief was received and considered in my conclusion and discussion of this issue of law.

Conclusion

EPA is neither authorized nor required to hold an adjudicatory hearing on questions involving conditions of a permit required by the terms of a State certification provided pursuant to section 401 of the Act. Where effluent limitations, monitoring requirements and other appropriate state requirements are set forth to EPA in a certification from a State pursuant to section 401, section 401(d) provides that they shall "become a condition on any federal license or permit" without any further federal action or review.

Discussion

This specific issue was addressed in Decision of the General Counsel on Matters of Law Nos. 13, 14, and 17. The discussions contained therein will not be repeated here. The permit applicant in this case has argued an analogy to the Clean Air Act exists in that State implementation plans, which must be approved by this Agency, may not be approved without independent consideration by EPA of whether the state standards are arbitrary, capricious, or not consistent with relevant regulations under federal law.

Saint Joe Minerals Corporation v. EPA, 508 F.2d, 743 (3d Cir. 1975); Buckeye Power, Incorporated v. EPA, 481 F.2d, 162 (6th Cir. 1973); Duquesne Light Company v. EPA, 481 F.2d, 1 (3d Cir. 1973) and Appalachian Power Company v. EPA, 477 F.2d, 485 (4th Cir. 1973).

We disagree with the conclusion that the cited cases are controlling here. In those cases the Administrator was required by statute (§110 Clean Air Act) to approve or disapprove the state plan. Certifications received pursuant to section 401 however, are not subject to EPA approval or review and, therefore, the above cases dealing with the federal action in approving state standards are not relevant. Section 401(d) provides that conditions furnished by a state pursuant to a section 401 certification "become a condition on any federal license or permit." While each such permit limitation would become a limitation on any permit issued by the Environmental Protection Agency and would thereby be enforceable pursuant to federal law, such a result was clearly intended by Congress in its not providing for a substantive federal review of the state action. Further, there is no requirement contained in section 401 that the Administrator even include such conditions in his permit. EPA's act

of including such conditions in permits is purely a ministerial act involving no substantive federal action. This being the case, it is our conclusion that no federal hearing is required on these issues, because the decision maker in an NPDES proceeding has no substantive role in determining whether or which conditions in a certification become conditions on the permit and no useful purpose would be served by allowing evidence relating to the certification to be introduced in the proceeding. If a permit applicant believes a state certification to be invalid, for whatever reason, his recourse is against the state certifying agency.

Robert V. Zener
General Counsel

Dated: JUL 22 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D. C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 CFR §125.36(m)

No. 26

In the matter of National Pollutant Discharge Elimination System for Bethlehem Steel Corporation, Bethlehem, Pennsylvania (PA 0011177), the Presiding Officer has certified one issue of law to the General Counsel for decision pursuant to 40 CFR §125.36(m) (39 FR 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

ISSUE OF LAW NO. I

Question Presented

"May the Environmental Protection Agency establish an effective date for final permit conditions later than July 1, 1977, where final permit conditions are based upon the best practicable control technology currently available and on water quality standards?"

Conclusion

Section 301, subsections (b)(1)(A) and (b)(1)(C) of the Federal Water Pollution Control Act, as amended (the "Act"), while representing an interim step in the achievement of the goals of the Act set forth in section 101, clearly requires the achievement, by July 1, 1977, of effluent reductions based on the more stringent requirements of either section 301(b)(1)(A) or section 301(b)(1)(C) of the Act. The Administrator has no discretion to extend the date of compliance.

Discussion

The applicant urges that the requirements of section 301(b)(1)(A) and (C) are merely interim steps in achieving the ulitmate goals of the Act set forth in section 101, and that in view of the Administrator's delay in the implementation of certain provisions of the Act [1], the "Act does not arbitrarily establish July 1, 1977 as the compliance date for all sources or the Act is an unconstitutional deprivation of due process." (Brief of Bethlehem Steel, page 8). The applicant does not state which conditions in its permit derive from effluent regulations promulgated pursuant to sections 301 and 304, which from water quality or other considerations of 301(b)(1)(C), or which have been derived ad hoc pursuant to section 402(a)(1).

1] The delay alluded to concerns the promulgation of the "Phase II" effluent regulations for the Iron & Steel Manufacturing Point source category.

The gravamen of the applicant's complaint here is that due to administrative delays, it will be unable to achieve the effluent reductions required by section 301, as implemented in the permit, by July 1, 1977 and that it should therefore be permitted to achieve the required effluent reductions in 1978 or 1979. I cannot agree with this conclusion.

First, the Agency has promulgated effluent regulations applicable to a portion of the applicant's discharge. 40 CFR §420.40 et seq. [2] These regulations set forth, as of the date of their promulgation, a definition of the reductions in discharge which must be achieved by July 1, 1977 in order to constitute the "best practicable control technology." The permit applicant here does not appear to be challenging the promulgated regulation applicable to its discharge but only the date by which it must be met. The regulation, however, merely defines, for particular industrial subcategories what Congress has directed to be achieved by that date. Thus, insofar as this question relates to the achievability of the effluent regulations by July 1, 1977, the argument must be viewed as a challenge to the regulation itself rather than the date by which it is to be achieved.

2] The "Phase I" Iron & Steel regulations were promulgated on June 28, 1974 (39 Fed Reg 24114). Applicant has challenged these regulations in the U.S. Court of Appeals for the Third Circuit and has requested that the Court stay their applicability. Bethlehem Steel Corporation et al v. EPA, No. 74-1642.

Getty Oil Company v. Ruckleshaus, 467 F.2d 349 (3rd Cir. 1972), cert. den. 93 S. Ct. 937 (1973). We have previously held that this proceeding is not available as a forum to challenge promulgated effluent regulations. See Opinions of the General Counsel Numbers 3 (March 6, 1975) and 23 (July 3, 1975).

With respect to those portions of the permit which may have been derived from requirements imposed pursuant to section 301(b)(1)(C), Opinions of the General Counsel Numbers 13 (May 19, 1975) and 14 (May 21, 1975) conclude that EPA is required to include conditions in its permits requiring compliance with section 301(b)(1)(C) by July 1, 1977.

To the extent portions of the permit neither have been derived from effluent regulations promulgated pursuant to sections 301 and 304 nor required pursuant to section 301(b)(1)(C), Opinions of the General Counsel Numbers 1, (September 5, 1974) and 3 (March 6, 1975), conclude that in issuing permits prior to the promulgation of effluent regulations pursuant to section 304, a determination of what constitutes best practicable control technology is a factual issue to be resolved in the administrative process pursuant to section 402(a)(1).

Thus, section 301 compels that its substantive requirements be achieved by July 1, 1977. This is the clear language and meaning of the statute. "If the language admits of not more than one meaning, the duty of interpretation does not arise..." Caminetti v. United States, 242 U.S. 470, 485 (1917). There is, accordingly, no need to refer to the legislative history.

Robert V. Zener
General Counsel

Dated: JUL 24 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 27

In the matter of the National Pollutant Discharge Elimination System Permit for Inland Steel Company, Indiana Harbor Works, NPDES Permit No. IN-0000094, Hearing Docket No. NPDES-V-026 (AH), the presiding officer has certified eight issues of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. 1

Question Presented

Whether it is permissible to utilize a Load Allocation Summary, generated for purposes of Section 303(d) of the Act, to set discharge limitations in a permit or under Section 301(b)(1)(C).

CONCLUSION

It is permissible to use a Load Allocation Summary in establishing discharge limitations to comply with water quality standards.

DISCUSSION

Section 301(b)(1)(C) of the FWPCA requires the achievement of limitations to meet, inter alia, "water quality standards . . . established pursuant to any State law . . . ." As I have stated previously,

if such limitations are included in a State certification under §401 of the Act, they must be included in a permit without further Federal action or review. In the absence of a State certification, EPA must itself interpret and apply relevant State regulations and statutes. Decisions of the General Counsel on Matters of Law No. 13, May 19, 1975; No. 14, May 21, 1975; and No. 17, June 16, 1975. Neither the statement of referred issues nor the briefs of the parties indicate that a certification exists. Accordingly, I assume for the purposes of this opinion that no certification exists and that EPA must evaluate itself the requirements of State water quality standards.

Absent a certification, the determination of the limitations necessary to comply with water quality standards must be made by the Administrator on the basis of the factual record. Although a Load Allocation Summary prepared pursuant to §303(d) is not conclusive under the law, as is a certification, such allocation is clearly entitled to weight in the Administrator's determination. Section 303(d)(1)(C), requiring the State to establish a maximum daily load for suitable pollutants, 1/ provides that "such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety . . . ." In the absence of a certification, such a summary would be relevant evidence concerning the limitations required to implement water quality standards.

1/ The failure of the Administrator to identify, pursuant to §304(a)(2), those pollutants for which daily load calculation is suitable does not preclude the State from performing that function voluntarily, even though the State would only be required to perform the calculation for those pollutants identified by the Administrator.

ISSUE OF LAW NO. II

Question Presented

Whether conditions with respect to deep wells are proper permit conditions in an NPDES permit issued by the EPA.

CONCLUSION

Such conditions are proper.

DISCUSSION

This issue has been decided previously (Decision on Matters of Law No. 6, April 8, 1975; No. 8, April 14, 1975; No. 18, June 25, 1975) and need not have been referred.

ISSUE OF LAW NO. III

Question Presented

Whether a schedule of compliance is authorized by the Act.

CONCLUSION

Schedules of compliance are required to be included in NPDES permits, in accordance with 40 C.F.R. §125.23.

DISCUSSION

40 C.F.R. §125.23 sets forth the circumstances under which the Regional Administrator is required to include schedules of compliance in issued NPDES permits. Subsection (b) of that section provides that "In any case where the period of time for compliance specified in paragraph (c) of this section exceeds 9 months, a schedule of compliance shall be specified in the permit which will set forth interim requirements and the dates for their achievement . . . ."

The term "schedule of compliance" is defined in the regulations (40 C.F.R. §125.1(aa)) precisely as that term is defined in the statute (§502(17)), to mean "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard."

The permittee (Inland) has limited its objection to the "interim planning or construction deadlines" set forth in the permit schedule of compliance. Inland claims that although the permit may set a date for final compliance with effluent limitations, it may not require "submitting various plans and reaching various plateaus in the course of construction." The permittee further argues that failure to meet a compliance schedule (other than the final date for compliance with limitations) has no potential effect on the environment, and that the permittee should have the option of doing nothing to abate its discharge and simply shutting down facilities one day before the ultimate compliance date.

The permittee's arguments turn the Act on its head. Section 301 makes it clear that no one has a right to continue discharging pollutants until July 1, 1977. See S. Rept. No. 92-414, 92d Cong., 1st Sess. at 40. An NPDES permit is merely a license to continue discharging which is conditioned upon taking remedial steps as quickly as feasible to arrive at statutorily mandated reduced levels of discharge. A discharger who planned to do nothing to clean up

might well be refused this license. Moreover, failure to meet a compliance date could result in failure to meet the ultimate limitations. As the Senate Report notes, "The Committee has added a definition of schedules and time-tables of compliance so that it is clear that enforcement of effluent limitations is not withheld until the final date required for achievement." S. Rept. No. 92-414, supra at 77. Because "effluent limitations" are defined (§502(11)) to include "schedules of compliance", it is clear that the intermediate actions and operations leading to compliance with the ultimate limitations are just as enforceable as the ultimate limitations themselves. (See also the discussion in Decision of the General Counsel No. 19, June 23, 1975, (Issue of Law No. I).

ISSUE OF LAW NO. IV

Question Presented

Whether Paragraph B.5, Toxic Pollutants, is unreasonable and contrary to the intent of the Act in that it requires a permittee to accept toxic pollutant standards which the permittee might be otherwise contesting pursuant to its rights under the Act.

CONCLUSION

The provision is properly included.

DISCUSSION

This issue is clearly resolved by Decision of the Assistant Administrator for Enforcement and General Counsel on Matters of Law No. 2, December 30, 1974 (Issue of Law No. III), and need not have been referred.

ISSUE OF LAW NO. V

Question Presented

Whether the intake monitoring condition on page 40 of 44 is a proper NPDES permit condition under Section 402 of the Act.

CONCLUSION

A permit condition is proper which requires intake structure effects studies, where related to a determination under §316(b) of the Act.

DISCUSSION

Discussion of the disputed permit condition is necessarily hypothetical, because neither the parties' briefs nor the letter of referral from the Administrative Law Judge include the provision in question. The brief submitted by the EPA Regional Office states that the condition requires the discharger "to make studies to determine the effect of its intake structures and to implement the best technology available for such structures." The permittee's brief objects only to "the inclusion of [an intake] study as a condition of its NPDES permit." 2/

2/ "The permittee does not object to intake studies per se; they are expressly governed by §316(b)." Section 316(b) provides:

> (b) Any standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

Section 402(a)(1) authorizes the Administrator to issue a permit upon condition that a discharger comply with "sections 301, 302, 306, 307, 308, and 403 of this Act . . . ." Section 308, in turn, authorizes the Administrator, "Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation . . . [to] require the owner or operator of any point source to . . . make such reports, . . . install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), . . . and . . . provide such other information as he may reasonably require . . . ." The only limitations upon this broad grant of authority are that the monitoring provisions must be "reasonably" required by the Administrator, and must be "required to carry out the objective of this Act".

Section 316(b) requirements must be implemented though §§301 and 306. They are thus "other limitation[s]" and "standard[s] of performance" within the meaning of §308(a). Even if this were not so, however, the Administrator has broad discretion under §308(a) to determine data and information-gathering requirements necessary to "carry out the objective of [the] Act . . . ." Accordingly, there is ample authority in §308 for the requirement that a discharger carry out studies necessary to implement §316(b).

The permittee does not appear to contest the reasonableness of the studies, nor does it argue that they are not required to implement

§316(b). Instead, the permittee's brief states that since §316(b) is not mentioned in §402(a)(1), intake monitoring studies may not be required by NPDES permit conditions. The authority to require such studies derives directly not from 316(b), but from §308, as I have previously indicated. Since §308 is listed in §402(a)(1), conditions required to comply with that section may clearly be included in NPDES permits, including reasonable intake study requirements.

ISSUE OF LAW NO. VI

Question Presented

Whether a condition relating to dredging by Inland at the request and with the approval of the U.S. Army Corps of Engineers is a proper permit condition.

CONCLUSION

EPA is required to include conditions specified by the Chief of Engineers in NPDES permits.

DISCUSSION

This question is essentially the same as the question raised and addressed in Decision of the General Counsel on Matters of Law No. 17, June 16, 1975.

ISSUE OF LAW NO. VII

Question Presented

Whether, to the extent that permit discharge limitations are based on Phase I BPCTCA Guidelines, those limitations must be conditioned to account for the judicial modification of the guidelines, specifically:

i) Whether the effectiveness of that portion of a permit based on guidelines promulgated pursuant to §§301 and 304 of the Act, which are the subject of judicial review, must be stayed pending such review.

ii) Whether where a portion of a permit is based on guidelines promulgated pursuant to §§301 and 304 of the Act, and the permittee is party to a proceeding for judicial review of the guidelines, the permit should provide that any modification of the guidelines be incorporated into the permit and the permittee be given an opportunity to request an adjudicatory hearing or a variance concerning the application of the guidelines to the permit.

iii) Whether where a permit condition is stayed pending judicial review of effluent guidelines or is revised to incorporate guidelines [sic] or is revised to incorporate guidelines modifications into the permit, the final effluent limitations incorporated into the permit should be consistent with the amount of time remaining prior to January [sic] 1, 1977 to install additional control equipment.

CONCLUSION

As to the first and second issues, EPA must issue permits based upon effluent regulations under §§301 and 304, even though those regulations are undergoing judicial review. Moreover, the Regional Administrator is not required to include in the permit conditions requiring modification of the permit if the guidelines are amended

following judicial review. However, the Agency will consider requests for such permit modifications in its discretion.

As to the third issue, procedures for the revision of NPDES permits based upon court ordered modified effluent guidelines will be those specified in 40 CFR Part 125. Public notice shall be provided for each proposed permit revision. Any interested party may request an adjudicatory hearing on the Regional Administrator's tentative determination to grant or deny a request for permit revision.

If other permit requirements are based upon effluent limitations which are revised pursuant to this policy, those other requirements may have to be adjusted accordingly. For example, a revised, less stringent effluent limitation may be achievable in a shorter period of time than had been allowed in the original permit schedule of compliance. If so, the schedule should be reduced in accordance with the shortest reasonable period of time principle specified in the NPDES regulations. Similarly, it may be appropriate in some cases to revise monitoring requirements with respect to revised effluent limitations.

Whatever permit revisions the court ordered effluent limitations modifications might require, the Environmental Protection Agency has no authority under Section 402(a) of the Act to issue a permit which would require the installation of control equipment necessary to meet the requirements of "best practicable control technology," after July 1, 1977. There is, of course, no statutory bar to the issuance of a permit requiring such installation after January 1, 1977, but before July 1, 1977.

DISCUSSION

The first and second issues were decided in Decision of the General Counsel on Matters of Law No. 3, March 6, 1975; and No. 10, May 2, 1975. The third issue was also previously resolved, in Decision No. 23, July 3, 1975.

ISSUE OF LAW NO. VIII

As raised in issues 8A, 13A, 19A, 19B, 28A, 28B, 30A, and 30B relating to discharges from the blast furnace, 24" Bar Mill sedimentation basin, blast furnace gas scrubber, hot and cold mill treatment facility, BOF gas cooling and grit water, respectively, whether the application of discharge limitations and monitoring requirements internally to process discharges, rather than externally to outfalls, is proper, particularly:

i) Whether such internal application violates Sections 301 and 304 of the Act.

CONCLUSION

Limitations upon internal process discharges are proper, if such discharges would ultimately be discharged into waters of the United States, and if such limitations are necessary to carry out the principal regulatory provisions of the Act. These are determinations involving the application of law to the facts, properly to be determined on the basis of the record of an adjudicatory hearing.

DISCUSSION

Because the permit itself was not referred to me, this discussion is necessarily hypothetical. It is, for example, not clear from the

briefs to what extent compliance with applicable effluent regulations under §§301 and 304 of the Act would require separate monitoring and control of internal waste streams. Nor is it clear whether dilution of pollutants by other streams could render determination of compliance with limitations on, for example, cyanide discharges, difficult to measure.

The prohibition of §301 of the Act against the "discharge of any pollutant by any person" except in compliance with the Act's regulatory provisions clearly applies only to the addition of pollutants to waters of the United States from point sources. See §§502(12), 502(14). Thus, the NPDES permit system extends only to those wastes which are discharged in that manner. This does not, however, resolve the question of how and where controls may be applied to regulate such discharges.

Section 301 of the Act requires the achievement of certain "effluent limitations". That term is defined in §502(11) to mean "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." Nothing in this definition restricts to the outfall pipe the point in the plant at which such pollutants are monitored for compliance. While there may be problems in some instances in determining that the pollutants in question

are in fact "discharged from point sources", particularly if such pollutants are treated after the monitoring point, controls may properly be established at other points than the actual outfall pipe.

Section 402(a)(1) of the Act authorizes the Administrator to issue discharge permits "upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act." Pursuant to §402(a)(2), the Administrator may prescribe "such . . . requirements as he deems appropriate" to "assure compliance with the requirements" of §402(a)(1). Depending upon the facts, such requirements may well involve controls applied at points other than the ultimate point of discharge.

Accordingly, the ultimate question is a factual question: are the permit requirements complained of here "appropriate" to "assure compliance" with the regulatory provisions of the Act? Numerous circumstances exist when such requirements are clearly appropriate. For example, if a permit limited the quantity of cyanide allowed to be discharged, it would be appropriate to measure the cyanide after treatment, but before mixing with other streams, particularly where such mixing might dilute the cyanide concentration to levels too low to measure accurately, or where other compounds could interfere with detection and measurement of cyanide levels. Other hypothetical

examples could be given. However, the application of these principles to the instant permit cannot be determined in the abstract, but must be decided upon the record of an adjudicatory hearing.

Robert V. Zener
General Counsel

Dated: AUG 4 1975

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. Section 125.36(m) No. 28

In the matter of National Pollutant Discharge Elimination System permit for Itmann Coal Company, Consolidation Coal Company, Itman Mine #3, Wyoming County, West Virginia (NPDES Permit No. WV 0025968), the Presiding Officer has certified an issue of law to the Office of General Counsel for decision pursuant to 40 C.F.R. Section 125.36(m) (39 F.R. 27078, July 24, 1974). The parties and other interested persons have had the opportunity to provide written briefs in support of their respective positions.

QUESTION PRESENTED

"Does the Environmental Protection Agency have the power and authority to include in the final permit, terms and conditions relating to non-point sources when said terms and conditions have been imposed by the Corps of Engineers as necessary to prevent the impairment of anchorage and navigation?"

CONCLUSION

The question certified as an issue of law does not appear, on the record before me, to be actually an issue in the permit proceeding because the condition required by the Corps was not the condition included in the permit and because it does not itself appear to require any conditions relating to non-point sources of discharge. The question actually

presented by this case is whether the NPDES permit may contain conditions, relating to the Corps' concern for anchorage and navigation, which go beyond the scope of the conditions requested by the Corps. In my opinion the NPDES permit may do no more than incorporate the conditions proposed by the Corps, since Section 402(b)(6) of the Act is a grant of authority to the Secretary of the Army to protect anchorage and navigation when an NPDES permit is proposed and does not confer any such responsibility or authority on EPA. Likewise, the NPDES regulation at 40 C.F.R. §125.22(b) provides that the conditions imposed in permits to protect anchorage and navigation are those considered by the Corps of Engineers, not EPA, to be necessary to protect anchorage and navigation. Accordingly, I conclude that the condition presently contained in the permit is improper but that the condition initially requested by the Corps must be included. The question referred would not actually be raised unless the condition required by the Corps explicitly imposed conditions relating to non-point sources.

DISCUSSION

The answer to this referral pursuant to §125.36(m) is particularly dependent on the undisputed factual situation presented in the briefs of the parties. The Corps of Engineers, after considering the proposed issuance of the NPDES permit for the permittee, recommended that such permit "must contain conditioning" as follows:

> Should this discharge result in sufficient deposition of solids material to create a hazard to anchorage or navigation on any

> navigable water, such deposits will be removed by the permittee without expenses to the United States Government. Further, the time and manner of such removal, as well as the location and manner of its disposal, must receive the prior written approval by the District Engineer of the Corps of Engineers.

The permit condition which appeared in response to this request was as follows:

> The permittee agrees to undertake erosion control practices which utilize proper sedimentation control measures in order to minimize resultant sedmentation [sic] in navigable waters which occur as a result of discharges from both point and non-point sources connected with his overall operation.... The Regional Administrator shall have the right to inspect the sediment control measures being undertaken by the permittee and direct, following consultation with the District Engineer, any additional measures which he deems appropriate.
>
> The permittee further recognizes that these sediment control measures may not result in complete elimination of sedimentation which may substantially affect navigation as a result of his overall operation, and therefore agrees to reimburse the U. S. Army Corps of Engineers for those expenses incurred in the removal of these materials from the navigable waterway....

The permittee disputed the inclusion of the conditions, characterizing the question raised by these terms as whether the 1972 act authorizes the Administrator to include in an NPDES permit, terms and conditions relating to non-point sources which have been made a condition to certification by

the Corps. The question which the Presiding Officer has referred pursuant to Section 125.36(m) is whether EPA has authority to include in the final permit, conditions relating to non-point sources when said conditions have been imposed by the Corps of Engineers as necessary to prevent impairment of anchorage and navigation.

Although the responsibility of the General Counsel under 40 C.F.R. 125.36(m)(4) is to "provide the Regional Administrator, the Presiding Officer, and each party with a written decision with respect to each referred issue of law" (emphasis added), the General Counsel cannot render such decision without regard to the factual setting of the referred issue. In order to provide an "interpretation of provisions of the Act" and "interpretation of regulations promulgated pursuant to the Act," issues of law must be raised as actual disputes and not merely speculative inquiries. In the instant proceeding the Corps' recommended condition was that if "this discharge result[s] in sufficient deposition of solids material to create a hazard to anchorage and navigation on any navigable water, such deposits will be removed by the permittee without expenses to the United States Government." This request seems clearly to relate the condition to the point source discharge which was the subject of the permit. The condition written into the permit by EPA expanded this condition to include erosion controls on point and non-point sources. Therefore, I find that the issue of law should be properly framed as follows: Is EPA authorized to include conditions beyond those specified by the Corps to prevent impairment of anchorage and navigation?

In Decision No. 17 of the General Counsel, I have already determined the question whether, as a matter of law, EPA is obligated to include in NPDES permits those conditions that the Corps considers to be necessary to insure that navigation and anchorage will not be imparied. As discussed in that Decision, Section 402(b)(6) of the Act provides that "no permit will be issued if, in the judgment of the Secretary of the Army, acting through the Chief of Engineers, after consultation with the Secretary of the Department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby." This Agency's promulgated regulations concerning permit conditions which will be included in permits issued by EPA provide in part:

> Permits shall contain such other conditions as the District Engineer of the Corps of Engineers considers to be necessary to insure that navigation and anchorage will not be substantially impaired. 40 C.F.R. §125.22(b)

The statutory language which grants to the Secretary of the Army the right to prevent a permit from being issued also clearly includes the right to take the step of imposing conditions on permits, so that events will not occur which may justify the exercise of an absolute veto. Thus, Section 402 contemplates, and the regulations of the Environmental Protection Agency require, that the permit contain any conditions furnished to the Agency by the District Engineer which, in his opinion, are necessary to insure that navigation and anchorage will not be substantially impaired.

The Corps' request in the present case, that a condition imposing responsibility for removal of deposits by permittee if deposits of solid material from this discharge created a hazard to navigation, must be included in the NPDES permit. The requested condition does not purport to require actions unrelated to the point source which is the subject of the permit. However, the NPDES permit was proposed with conditions relating to anchorage and navigation beyond the scope of the condition which the Corps asked to be imposed. There is no claim by EPA in this record that the disputed conditions are imposed independently of the Corps' request for protective conditions.

I find no authority in the Act which allows EPA to expand upon or modify the Corps' conditions. Obviously, for the sake of clarity or consistency, the permit issuer may find it necessary to restate the phraseology of the Corps' condition, but he is not authorized to modify the substantive effect of the Corps' condition. Section 402(b)(6) and the NPDES regulation interpretative of that section of the Act, 40 C.F.R. 125.22(b), speak to the authority and responsibility of the Secretary of the Army, acting through the Corps of Engineers, to protect anchorage and navigation. If "in the judgment of the Secretary of the Army...anchorage and navigation of any of the navigable waters would be substantially impaired" by the issuance of a permit, that permit "shall contain such...conditions as the District Engineer of the Corps of Engineers considers to be necessary...." No similar authority or responsibility is given to the

Environmental Protection Agency by the Act or regulations to condition a permit to prevent impairment of anchorage or navigation, irrespective of whether these conditions are phrased in terms of point or non-point sources.

In accordance with 40 C.F.R. 125.36(m)(4), this determination shall be relied upon by the Regional Administrator in rendering the initial decision on the permit issuance pursuant to 40 C.F.R. 125.36(1)(3). To the extent the issue in this case is whether EPA must include the conditions proposed by the Corps, as we have stated in Decision No. 17, the validity of the NPDES regulation 40 C.F.R. 125.22(b) and the issue of whether they afford due process before EPA, are outside the scope of the legal referral procedure and are properly addressed to the Circuit Court of Appeal. Similarly, any issue regarding the observance of due process by the Secretary of the Army in establishing such conditions, is not an issue for which EPA's administrative forum is to be used. The permittee has adequate remedies against the Secretary of the Army pursuant to the Administrative Procedure Act.

Robert V. Zener
General Counsel

Dated: AUG 11 1975

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF
LAW PURSUANT TO 40 CFR §125.36(m) No. 29

In the matter of National Pollutant Discharge Elimination System permits for Peabody Coal Company, Universal Mine, Universal, Indiana, IN-0002984, IN-0025305, the Presiding Officer has certified four issues of law to the General Counsel for decision pursuant to 40 CFR §125.36(n) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

"Does the Administrator, in issuing a federal NPDES permit under Section 402(a) of the Act, have the authority to require the Permittee to submit monitoring or other reports to the state water pollution control agency, to allow entry of a representative of the state water pollution control agency onto the Permittee's premises, or to impose any other requirements of state law upon the Permittee as a condition to such federal permit absent an appropriate state certification under Section 401(d) which expressly requires such conditions?"

Conclusion

The authority of the Administrator to require the Permittee to submit monitoring reports or other reports to the state water pollution control agency and to allow entry of a representative of the state water pollution control agency onto the Permittee's premises is set forth in 40 CFR §125.22(a)(3), promulgated pursuant to the provisions of the Federal Water Pollution Control Act, as amended (the "Act"). We have previously stated that the purpose of the legal referral procedure is to provide guidance to Presiding Officers at hearings and Regional Administrators in the permit process concerning points of regulatory or statutory construction on which the Agency's position is not clear and which require prompt resolution before a decision can be rendered in the NPDES permit issuance proceedings. The General Counsel is without authority to strike down duly promulgated regulations of the Administrator. To the extent that the Permittee here claims that 40 CFR §125.22(a)(3) is beyond the Agency's authority under law, this question must be addressed in the appropriate United States Court of Appeals on review of the Administrator's action in issuing the permits.

With regard to the question of the Administrator's authority to impose any other requirements of state law upon the Permittee as a condition to such federal permit absent an appropriate state certification under section 401(d) this issue has, we feel, been adequately addressed in Decisions of the General Counsel, Nos. 13 (May 19, 1975), 14 (May 21, 1975), 17 (June 16, 1975) and 25 (July 22, 1975).

Without knowledge of what conditions have been imposed in the permit required to implement provisions of State law, I am unable to expand upon the discussions contained in the above cited Decisions. In the absence of a certification by a State setting forth those requirements necessary to assure compliance with appropriate requirements of State law, EPA is obligated, pursuant to Sections 402 and 301 of the Act, to assure compliance with State law or regulations under the authority preserved to the States by Section 510 of the Act.

ISSUE OF LAW NO. II

Question Presented

"Prior to proceeding with the presentation of its case in an adjudicatory hearing is the Permittee entitled, as a matter of law, to require the Administrator to produce, for the Permittee's use in preparing its presentation, the entire administrative record which resulted in the issuance of the permit which is the subject of the adjudicatory hearing?"

Conclusion

It is unclear from this question and the brief filed by the Permittee exactly what is meant by the "entire administrative record which resulted in the issuance of the permit." In any event, provisions of relevant law provide the Permittee with the opportunity to obtain essentially all information in the possession of the Agency except that which would be unavailable under court process. (See 5 U.S.C. §551 et seq.; 40 CFR §125.35). To the extent that this question involves an allegation of lack

of due process under the United States Constitution, this question is beyond the scope of this proceeding and must be addressed in the appropriate United States Court of Appeals on review of the Administrator's action in issuing the permit. In addition, since the Permittee's argument here appears to be made in abstract terms without any showing or allegation that it has been denied any information in the Agency's possession, it thus appears that this question may merely be hypothetical and, as a matter of policy, we will not answer in this proceeding hypothetical questions.

ISSUE OF LAW NO. III

Question Presented

"Is the issuance of a Permit lawful in the absence of a finding of fact on the record that the waters into which the permitted discharge will occur are 'navigable waters' within the meaning of Section 502(12) of the Federal Water Pollution Control Act Amendments of 1972?"

Conclusion

The applicable NPDES regulations provide that the Presiding Officer shall "identify disputed issues for consideration at the hearing," 40 CFR §125.36(h)(4)(iii), and that the "Regional Administrator shall include a statement of findings and conclusions including the basis therefore. All issues ... submitted by the parties in proposed findings and conclusions ... shall be addressed in the initial decision of the Regional

Administrator." 40 CFR §125.36(e)(2). Whenever there is a dispute in a permit proceeding concerning the issue of "navigability", these provisions must be complied with.

Discussion

This issue warrants little discussion. The answer is clear that if the issue of jurisdiction (i.e. discharge to navigable waters) has been raised by a party, the Regional Administrator must, pursuant to the above section, make findings on that issue. The regulations do not permit, as urged by the Regional Office, an inferred finding on a disputed issue.

ISSUE OF LAW NO. IV

Question Presented

"Are the regulations governing adjudicatory hearings (40 CFR §125.36) in excess of the authority conferred by the Act to the extent that they authorize the participation, as parties in adjudicatory hearings, persons other than the Permittee and the United States Environmental Protection Agency?"

Conclusion

NPDES permits are issued pursuant to Section 402 of the Act, which provides that "the Administrator may, after opportunity for public hearing, issue a permit..." Further, section 101(e) of the Act provides that "Public participation in the development, revision and enforcement of any regulation, standard, effluent limitation, plan, or program established... under this Act shall be provided for, encouraged, and assisted by the Administrator..."

These sections of the Act, and the associated legislative history (see, e.g., Leg. Hist. at pp. 108, 249, 255, 362, 432, 1430) establish a Congressional mandate that the public be afforded an opportunity to participate in the permitting process. The regulations promulgated by this Agency have been designed to encourage public participation. In addition, in many cases the public may have an interest which may be affected by the Agency's action in the issuance of a discharge permit and, thus, would have a clear right to become a party in the Agency's proceedings.

The permittee has made no argument and cited no authority in support of its position in its brief. Since this question also appears to be hypothetical and seeks to challenge a promulgated regulation of this Agency, no further discussion appears warranted.

Robert V. Zener

Dated SEP 4 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 30

In the matter of National Pollutant Discharge Elimination System permit for City of Ely, Nevada, Docket No. 141-24(w), the Presiding Officer has certified an issue of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

Whether the discharge from the City of Ely, Nevada sewage treatment plant into Murry Creek constitutes a discharge into "navigable waters" as that term is defined in §502(7) of the Federal Water Pollution Control Act.

Answer

Based upon the facts presented in the stipulation agreed to by EPA's Regional Office, Region IX, and the City of Ely, 1/ the discharge in question is not a discharge into "navigable waters."

Discussion

The term "navigable waters" is defined in Section 502(7) of the Federal Water Pollution Control Act as "waters of the United States,

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1/ A copy of the stipulation is attached as an appendix to this Decision.

including the territorial seas." That term was explained in an earlier opinion of this office as meaning "that pollution of waters covered by the bill must be capable of affecting interstate commerce". EPA, A Collection of Legal Opinions, Vol. I at 295 (1975). 2/ This basic test was elaborated somewhat in 40 C.F.R. §125.1(o):

> (o) The term "navigable waters" includes:
>
> (1) All navigable waters of the United States;
>
> (2) Tributaries of navigable waters of the United States;
>
> (3) Interstate waters;
>
> (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
>
> (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and

2/ See Leslie Salt v. Froehlke, 7 ERC 1311, 1314 (N.D. Cal. 1974):

> We conclude that the Congress, enacting the FWPCA, was exercising its powers under the commerce clause to combat pollution of the nation's waters; that water pollution unquestionably affects interstate commerce and that, therefore, it was a proper exercise of the commerce power to require permits for dredging or filling which are potential causes of pollution of waters of the United States . . . .

Accord, United States v. Holland, 6 ERC 1388, 1392-93 (M.D. Fla. 1975); of course, the statute does not require proof that "a particular discharge or stream has a discernable [sic] interstate effect." United States v. Ashland Oil, 6 ERC 1991 (W.D. Ky. 1973) aff'd, 504 F. 2d 1317, 7 ERC 1114 (6th Cir. 1974). The possibility of such an effect is sufficient.

> (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by interstate commerce.

This definition is inclusive rather than exclusive. Accordingly, there may be "waters of the United States" which are not specifically included within its scope. However, the definition provides a useful starting point.

The relevant facts are as follows: the City of Ely operates a sewage treatment plant on the Georgetown Ranch, north of Ely, Nevada. The plant discharges into Murry Creek, which is directed into irrigation ditches immediately downstream from the discharge plant. Under normal conditions, no water from the irrigation ditches leaves the Georgetown Ranch, and is unlikely to do so even during snowmelt or heavy rainfall. There is nothing in the stipulation to indicate that even were any water to flow off of the Georgetown Ranch property during such an event it would thereafter enter another body of water. Occasionally, part of Georgetown Ranch is leased to farmers for cattle grazing, and cattle from Utah have grazed on the ranch and subsequently been returned to Utah.

None of the tests in 40 C.F.R. §125.1(o) appear to be met by this factual situation. The facts indicate that Murry Creek is not navigable in fact, nor is it a tributary of any waters, navigable or otherwise. It crosses no State lines. The Stipulation does not indicate that fish or shellfish are present in Murry Creek or if so, that they are taken from the Creek and sold in interstate commerce. The waters

downstream of the discharge point are not used for any industrial purpose. 3/ Finally, I do not think that cattle from Utah are the sort of "interstate travelers" the regulation drafters had in mind, even were they (the cattle) to refresh themselves regularly with draughts of City of Ely sewage effluent.

Apart from the regulation, it could be argued that the pasturage of interstate cattle could affect commerce. While this possibility exists, the potential effect is remote indeed. More importantly, this argument ignores the character of the irrigation network as a land disposal system. All the effluent from the plant is contained entirely on the Georgetown Ranch, which appears to be owned by the City of Ely.4/ If

3/ A number of the facts in the stipulation relate to the character and uses of Murry Creek upstream from the discharge point. These facts are irrelevant to the legal determination because, except in stagnant water (which Murry Creek is not), discharges of pollutants do not affect commerce upstream from the discharge point. Thus our decision here is confined to the discharge in question and the portion of Murry Creek downstream of that discharge. We express no opinion as to the legal status of Murry Creek from its origin to its entry onto the Georgetown Ranch property.

4/ The fact that ownership of land surrounding a body of water is consolidated in one legal entity is not in itself dispositive of the issue of whether that water constitutes "waters of the United States" within the meaning of Section 502(7). What is significant here is that the water is contained on the property (i.e., there is no discharge from the water on the Georgetown Ranch to another stream or lake) and the absence of any of the uses of the water described in 40 C.F.R. §125.1(o)(4), (5) or (6).

the Utah cattle were sufficient to turn this irrigation/land disposal scheme into navigable waters, then by analogy, if a farmer allowed fishermen from another State to fish his small farm pond, the pond would become "navigable waters." Although EPA should give the term "navigable waters" its "broadest possible constitutional interpretation",5/ neither law nor reason supports extension of that term to cover these facts.

Dated: SEP 18 1975

General Counsel

5/ Conference Rept. on S.2770, Rept. No. 92-1236, 92d Cong., 2d Sess, at 144 (1972).

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

In the Matter of CITY OF ELY, NEVADA under Section 402 (a), Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Sec. 1342 (a); 40 CFR 125.36 (m)	Docket No. NV0020036

S T I P U L A T I O N

IT IS HEREBY STIPULATED by and between the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IX, and the CITY OF ELY, White Pine County, State of Nevada, acting by and through the undersigned, as follows:

1. The Environmental Protection Agency, Region IX, issued National Pollutant Discharge Elimination System (NPDES) Permit No. NV0020036 to the City of Ely, Nevada, on November 14, 1974, to become effective on December 14, 1974, and to expire on May 1, 1977, authorizing the City of Ely to discharge to Murry Creek from the City of Ely Sewage Treatment Plant, said plant being located north of the City on the City-owned Georgetown Ranch.

2. The City of Ely requested an adjudicatory hearing on NPDES Permit No. NV0020036 on November 24, 1974, as amended on December 17, 1974, setting forth as the only reason for the request that Murry Creek was not a water of the United States in that it was not navigable in fact or in law.

3. This request satisfying the requirements of 40 CFR 125.35(b),

EPA, Region IX, granted the request of the City of Ely on January 6, 1975, stating that it was not clear whether the issue presented was one of fact or law, and that in the event that the issue was determined to be a question of law, said issue would be certified for decision to General Counsel, pursuant to 40 CFR 125.36(m).

4. Therefore, the Environmental Protection Agency and the City of Ely, Nevada, hereby agree to the following set of facts concerning Murry Creek, and seek a decision of General Counsel as to whether Murry Creek is navigable within the meaning of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Sec. 1321 et seq., and regulations promulgated thereunder, and therefore that the City of Ely, Nevada, is required to obtain, and abide by, an NPDES permit.

5. MURRY CREEK

a. The source of waters of Murry Creek is from springs situated and being on land owned by the City of Ely. These springs are situated at the south end of the City limits. The flow from the springs approximates four (4) second feet. The waters flow north through the City, described infra, thence outside city limits, to the Georgetown Ranch.

b. These springs are the source of the City's water supply, the waters therefrom being conducted by pipeline through a chlorination plant, from there a part of the waters, via a pipeline, go to storage tanks located on the hill just opposite the County Courthouse near the County Park, a distance of approximately one-half (1/2) mile.

Of the waters not piped to the storage tanks, part of the spring water flows through the City of Ely via Murry Creek in its natural channel, and is picked up in underground pipelines extending to the County Park, where these overflow waters join the overflow waters from storage tanks, and then course on through underground drain culverts (described in d. below) and the natural channel to the Georgetown Ranch.

c. The remaining part of the water is diverted by a pipeline installed by Kennecott Copper Corporation 46 years ago, which pipeline supplies water, thus diverted, to the Ruth-McGill Water Company for the needs of its domestic and commercial customers at Ruth, Nevada, which domestic and commercial customers' needs have the first priority to such waters as are diverted through the pipeline, pursuant to Compliance Order and Certificate of Public Convenience and Necessity issued by the Public Service Commission of the State of Nevada, certifying the Ruth-McGill Water Company as a public utility to furnish water to the needs of its domestic and commercial customers. Any remainder of such water, if such there be, then becomes available for the use of Kennecott Copper Corporation's office and shop personnel. For reference a copy of the Compliance Order and Certificate of Public Convenience and Necessity are attached hereto and made a part hereof for all purposes.

Prior to the issuance of the Compliance Order and Certificate of Public Convenience and Necessity by the Public Service Commission

of the State of Nevada, Kennecott Copper Corporation furnished, through its pipeline, waters to its employees living at Ruth, Nevada, for domestic and culinary purposes. Since the date of the issuance of the Compliance Order and Certificate of Public Convenience and Necessity, the furnishing of such water supply is incumbent upon the Ruth-McGill Water Company. The transmission of this water for domestic and commercial uses at Ruth, Nevada, is solely dependent on any surplus waters being available over and above the needs of the residents of the City of Ely.

d. The waters of Murry Creek join with (1) overflow from the storage tanks, and (2) waters, if any, in Gleason Creek (described infra) at Eighth Street in the City and enter an underground conduit, approximately thirty (30) inches in diameter. These culverts traverse approximately Fifty Percent (50%) of the length of Murry Creek channel, which is approximately One and one-half (1 1/2) miles from the springs to the Georgetown Ranch.

e. The other Fifty Percent (50%) of the length of Murry Creek, which is not served by culverts, consists of the natural channel, averaging approximately four (4) square feet in cross section, and ending at the Georgetown Ranch.

f. Situated upon the Georgetown Ranch in its southwest corner is the City of Ely Sewage Treatment Plant, said plant discharging into Murry Creek as the creek flows past the plant in a northerly direction. Murry Creek is then diverted into a system of irrigation ditches; the first diversion therefor being approximately One Hundred Twenty-five feet (125') in a northerly direction from the outflow

of the waters from the Plant and is thereafter diverted into irrigation ditches at various intervals and thereafter through the central portion of the ranch. No water from the irrigation canals leaves the ranch property, nor is any water likely to leave the ranch property in the event of a storm or snowmelt.

g. The lands where the springs arise and the waters flowing therefrom are City-owned. The lands through which Murry Creek flows are all subject to drainage easements, through which the water has flowed from time immemorial.

h. A small portion of the Murry Creek Channel, referenced above, conveys water from the springs in an open concrete ditch for approximately One Hundred (100) feet adjacent to the Plaza Hotel and in front of the White Pine County High School, from which it enters the underground storm drain culvert. These openings are fenced off, and are not used for any recreational purposes.

i. Except in the summer season when the flow rate is reduced Fifty Percent (50%), the flow rate in the culvert and the channel as it flows out to the Ranch is approximately two (2) second feet of water.

j. The City of Ely leases part of the Georgetown Ranch to a local resident, who in turn leases the land, during the summer growing season, to farmers to pasture their cattle upon the forage which grows on the Ranch. On two (2) occasions cattle from the State of Utah have been pastured upon the Ranch during the summer growing season, and were returned by the owner of the cattle to the State of Utah after the summer growing season ended.

During the five (5) year period that these lands have been under lease from the City to the individual person, intermittent pasturage has been rented, i.e., actually during only two (2) years out of the five (5), to a cattleman in the State of Utah, who has transported his cattle to the Georgetown Ranch and returned them by his own transportation to the State of Utah at the end of the summer growing season.

6. GLEASON CREEK

a. Gleason Creek is located west of the City of Ely, at a distance of approximately Eighteen (18) miles.

b. Gleason Creek is a small bubbling spring, the waters flowing intermittently, and even then are dependent upon the amount of precipitation.

c. Gleason waters, in and of themselves, at no time reach anywhere near the City of Ely. The Gleason Creek on occasion does drain, from the surrounding areas, waters received from early spring thaws or thunderstorms, and on occasion, in the past, has caused flood situations to the City of Ely.

d. There is a U.S.G.S. measuring station west, but within, the City limits, which was installed for the purpose of measuring any flood waters from Gleason Creek. Only in the event of heavy spring snowmelt or summer thunderstorm do Gleason Creek waters flow into the City and merge with Murry Creek at Eighth (8th) Street

where the creek enters the underground culverts.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY-REGION IX

By _____

Date: 14 July 75

Matthew S. Walker
Chief, Proceedings Branch
Enforcement Division
100 California Street
San Francisco, California 94111

CITY OF ELY, NEVADA

By _____

Date: 5-29-75

Attorney-City of Ely
777 Aultman Street
Ely, Nevada 89301

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO
40 C.F.R. Section 125.36(m)

No. 31

In the matter of National Pollutant Discharge Elimination System Permits Numbered NV0020095, Sierra Pacific Power Company, Frank A. Tracy Generating Station, and NV0020109, Sierra Pacific Power Company, Fort Churchill Generating Station, the Regional Administrator has certified one issue of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1975). The parties having had an opportunity to provide written briefs in support of their respective positions, present the following issues:

Question Presented

> "Whether EPA has legal authority to modify a permit that it has issued so as to include in the permit a provision for a "zone mixing', when the state in which the permittee is located has adopted a regulation that permits a state to grant 'zones of mixing' but said regulation has not been submitted to nor approved by EPA pursuant to 33 U.S.C. §1313 as part of the approved water quality standards for such state."

Conclusion

No.

Discussion

A mixing zone is a provision in water quality standards that recognizes that the standards may not be met in an area of water in the

immediate vicinity of a discharge point and which, in effect, sanctions this deviation by specifying alternative standards for the area of the zone or specifying that standards must be met at the edge of the zone. In its 1968 Report on "Water Quality Criteria," the National Technical Advisory Committee recognized and specifically authorized the inclusion of mixing zones in standards designed to protect both freshwater and marine fish populations. At 30. The EPA adopted and followed the recommendations of the NTAC in implementing the water quality standards program under the Water Quality Act of 1965. In extending and expanding the water quality standards procedure initiated in the 1965 Act, and continuing in effect the standards established pursuant to that Act, the Congress gave no indication of its intent to preclude use of this mechanism in appropriate situations under the Federal Water Pollution Control Act Amendments of 1972 (the Act). The EPA, in fact, in developing its "Guidelines for Developing or Revising Water Quality Standards" under the 1972 Act recognized the continued viability of the use of mixing zones. At 25.

Moreover, the Congress specifically recognized the availabity of the mixing zone concept as a mechansism for dealing with thermal discharges pursuant to section 316(a) of the Act. During the House debate on the Conference Report, Representative Wright, a member of the Conference Committee, stated:

> Section 316(a) in effect recognizes the temporary localized effects a thermal component may have as well as the potential beneficial effects. It encourages the

> consideration of alternative methods of control, including mixing zones, so long as the controls assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife." (A Legislative History of the Water Pollution Control Act Amendments of 1972, at 264 (1973)).

Representative Johnson, another conferee, remarked:

> "The Administrator, or if appropriate the State, shall consider all alternatives for dissipating heat, including once-through cooling and mixing zones, so long as the protection of fish can be assured." (Id., at 267).

It is thus my opinion that mixing zones are consistent with the requirements of the Act both in the context of water quality standards approved or promulgated pursuant to section 303 of the Act, and as established in connection with proceedings under section 316(a) of the Act. In both of these contexts, however, the mixing zone is recognized as an exception to an otherwise applicable effluent limitation, which exception is to be established through defined procedures. Although the mixing zone requested by Permittee has been adopted by the State of Nevada, it has not been submitted to the EPA for review and approval as to its consistency with the requirements of the Act. Nor would the Nevada mixing zone provision, since it establishes an exception to the stream standards for the affected streams, be a more restrictive state standard required to be applied pursuant to sections 510 and 301(b)(1)(C) of the Act. Nor, apparently, has a section 316(a) proceeding been completed for the Tracy Generating Station or requested for the Fort Churchill Generating Station. It is therefore my opinion that the Regional Administrator is required,

pursuant to section 301(b)(1)(C) of the Act, to establish effluent limitations to meet the more stringent state water quality standards; permit modification to take account of unapproved mixing zone provisions is not authorized.

Robert V. Zener
General Counsel

Dated: OCT 14 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW
PURSUANT TO 40 C.F.R. SECTION 125.36(m)

NO. 32

In the matter of National Pollutant Discharge Elimination System Permit for Youngstown Sheet & Tube Co., IN-0000205, Indiana Harbor Works, the Presiding Officer has certified three issues of law to the Office of General Counsel for decision pursuant to 40 C.F.R. Section 125.36(m) (39 F.R. 27078, July 24, 1974). The parties having had an opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

Pending a determination in the United States Circuit Courts of Appeals of the validity of the "Iron and Steel Effluent Guidelines," is the imposition of interim and final effluent limitations based on said guidelines arbitrary, capricious and a deprivation of the Permittee's right to due process of law and contrary to the FWPCA amendments of 1972?

i. Must the final effluent limitations and compliance schedule in the permit, as a matter of law, be no less stringent than the limitations contained in the "Effluent Guidelines and Standards -- Iron and Steel Manufacturing Point Source Category," 40 C.F.R. Part 420, published at 39 Federal Register 126 (June 28, 1974),

when said "Effluent Guidelines and Standards" are currently the subject of petitions for review by Permittee and others in the United States Court of Appeals pending a determination of the validity of said "Effluent Guidelines and Standards?"

ii. Assuming the answer to Issue (i) is in the negative, is it proper for the Administrator to issue final effluent limitations and monitoring requirements in the permit upon said "Effluent Guidelines and Standards" when said "Effluent Guidelines and Standards" are currently the subject of petitions for review by Permittee and others in the U.S. Court of Appeals pending a determination of the validity of said "Effluent Guidelines and Standards?"

Conclusion

EPA may issue individual permits based upon regulations which have been promulgated in final form by the Environmental Protection Agency pursuant to sections 301 and 304 of the Act. This is so even where appellate judicial review is pending and where the potential permittee is a party to such appeal. Limitations based on such final regulations must reflect the application of limitations no less stringent than those established in such guidelines.

Discussion

Permittee's first argument that the effluent guidelines are guidance only, allowing the establishment of less stringent limitations, amounts to a challenge to the technical and legal sufficiency of the effluent limitations guideline itself, and is basically the same as the argument

made by Permittee and the other petitioners in the United States Court of Appeals for the Third Circuit. As has been discussed in General Counsel Opinions No. 3 (March 6, 1975) and 23 (July 3, 1975), it is my conclusion that such challenges to the technical and legal sufficiency of effluent limitations guidelines are to be brought exclusively in a judicial forum and may not be raised in the NPDES administrative proceedings. Further, as discussed in General Counsel Opinion No. 23, Permittee's citation of the Eighth Circuit Court of Appeals decision in CPC International, Inc., v. Train (8th Cir. May 5, 1975, ___. F.2d __, 7 ERC 1887) is inapposite. The court in CPC International did not rule on either the merits of permittee's substantive arguments or the issue of an administrative, versus a judicial, forum for review of the effluent limitations guidelines. The only effect of the holding in CPC International, if it were to be followed by the other Circuit Courts which have the question before them, is to alter the judicial forum from appellate to district courts.

Permittee's second argument, that permits based on the effluent limitations guidelines should not be developed pending judicial review of the guidelines, has also been reviewed in earlier opinions from this office. I ruled in Opinion No. 23, for example, that "that portion of a permit based on effluent limitations/guidelines promulgated pursuant to Sections 301 and 304, which is the subject of a pending proceeding for judicial review, need not be stayed by EPA pending the outcome of the judicial review." At 4. Permittee's attempt to bolster its argument by resort to the EPA's representations in the Third Circuit Court of Appeals distorts both the content of the EPA argument and the law applicable to judicial consideration of stay request. Contrary to Permittee's assertion,

the Agency opposed a judicial stay of the effluent guidelines precisely to ensure that they be taken into consideration in the permitting process. AISI, et al., v. EPA, C.A. 3, Nos. 74-1640, 74-1642, 74-1692, 74-2006, Respondent's Memorandum in Opposition to Motion for a Stay of Effluent Guidelines and Standards, June 16, 1975, at 5-6. EPA argued that since the effect of the national regulations as to a particular plant is stayed pending completion of the administrative process within the Agency (40 CFR §125.35(d)(2), 125.36(n)(4), (n)(6) and (n)(7)) the showing of imminent and irreparable harm necessary to justify a stay had not been made. The Court has thus far declined to grant a stay of the subject regulations. The regulations were promulgated pursuant to Sections 301 and 304 of the Act and thus continue as effective rules of the Agency. Accordingly, the Agency may develop its point source discharge permits based on such regulations so long as they remain in effect.

ISSUE OF LAW NO. II

Question Presented

Should Part I.B. be further modified to contain provisions which provide that discharges from the plant which are caused by or result from force majeure or other causes beyond the Permittee's control should not constitute violations of the terms and conditions of the permit. More specifically: (a) must a force majeure clause such as that requested by Permittee be included in an NPDES permit? (b) may a force majeure clause such as that requested by Permittee be included in an NPDES permit? and (c) must the Permittee be allowed to introduce evidence at an NPDES adjudicatory hearing to support its request for a force majeure clause?

Conclusion

The Regional Administrator may, in his discretion, include a force majeure clause in a permit, but is not required to do so. The Permittee must be allowed to present evidence at an adjudicatory hearing to support its request for a force majeure clause.

Discussion

Adoption of permit conditions relating to discharges resulting from factors beyond the Permittee's control (such as equipment malfunction, acts of God, and accident) has been addressed in General Counsel Opinions No. 1 (September 5, 1974), 8 (April 14, 1975), and 15 (May 30, 1975). In each of these opinions, I indicated that EPA has the statutory authority, under the Federal Water Pollution Control Act, as amended, to issue a permit containing provisions for such discharges, but that the exercise of this authority is a matter within the discretion of the Regional Administrator. I also indicated in each of those opinions, that determinations as to inclusion of such provisions in a particular permit involve issues of fact and policy that should be resolved only after opportunity for public hearing.

No nationally applicable policy regarding inclusion of force majeure clauses has been developed. In the absence of such a policy, it is my view that they should be reviewed within the factual context of particular permit proceedings. While inclusion of such a clause is a matter of discretion, the exercise of this discretion must be within the bounds of administrative process applied to each case, rather than an across-the-board rulemaking type of determination with no public process. That is, EPA Regions (not having been delegated rulemaking authority in this area) may not simply adopt a policy against the inclusion of force majeure clauses and then exclude all consideration of arguments and evidence as to such a provision from all permit proceedings.

Opportunity for public hearing on the question of inclusion of such a provision must necessarily involve the right of the Permittee to present evidence in support of its request.

ISSUE OF LAW NO. III

Question Presented

Should Part III. B of the Permit "Intake Structures" be deleted from the Permit, assuming as Permittee claims, that the present intakes of its Indiana Harbor Works already meet the requirements of best cooling water technology available, and that, therefore, the provisions of Section 316(b) of the FWPCA do not properly apply to the subject facility?

Conclusion

No.

Discussion

Section 316(b) of the FWPCA provides "Any standard established pursuant to section 301 or section 306 of the Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."

Permittee initially argues, though the argument is not comprehended within the scope of the issue of law referred, that the requirements of section 316(b) apply only to steam electric powerplants. In support of this contention, it relies on one statement made during the House debate on the Conference Report which does refer to steam electric generating plants as regulated by section 316(b). A Legislative History of the Water Pollution Control Act Amendments of 1972. Remarks of Representative Clausen. At 264. (1973).)

I do not find the argument persuasive. There can be no doubt that Congress recognized that steam electric powerplants are the largest users of industrial cooling waters and, hence, present a substantial environmental threat through withdrawal of cooling water, as well as from the discharge of heated water (addressed in section 316(a) of the Act). But the statement referred to does not purport to describe in comprehensive terms the applicability of section 316(a) or to confine it exclusively to steam electric powerplants.

Second, even if it could be so construed, legislative history cannot take precedence over clear statutory language to the contrary. And in this instance the language of the statute is clear. Section 316(b) refers to "any standard established pursuant to section 301 or section 306. . . ." Had Congress intended for the requirements of section 316(b) to apply only to steam electric powerplants, it certainly would not have used such encompassing language. Hence, I conclude that section 316(b) is applicable to all industrial plants, including steel mills, for which standards have been established pursuant to sections 301 and 306.

Permittee next argues that the permit condition (which apparently requires it to undertake studies designed to determine the effect of its intake structure on the aquatic environment) is inappropriate because its structure already reflects the best technology available for minimizing adverse environmental impact. I cannot agree.

Section 402(a)(2) of the Act requires the Administrator to prescribe conditions in all permits to assure compliance with each of several enumerated sections of the Act (including sections 301 and 306), and to

impose conditions for "data and information collection, reporting, and such other requirements as he deems appropriate." Section 402(b)(2)(A) (made applicable to permits issued by the Administrator by section 402(a)(3)) requires that permits insure compliance with section 308 of the Act. Section 308, in turn, provides in pertinent part, that "Whenever required to carry out the objective of this Act. . . (A) the Administrator shall require the owner or operator of any point source to. . . (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), . . . and (v) provide such other information as he may reasonably require."

These provisions afford ample authority for the inclusion of study and monitoring requirements directed to the effects of the Permittee's intake structure. Of course, the scope and nature of these conditions are appropriate subjects for an adjudicatory hearing. The permittee may introduce evidence as to the historical and present effects of its cooling water system and such evidence would be relevant to the appropriateness of elements of the monitoring program required by the condition in question. However, even were the Permittee to demonstrate that the biological effects had been minimal, this would not, as a matter of law, require the deletion of all requirements as to future effects. First, there may be uncertainty as to the adequacy or scientific rigor of previous monitoring. And, second, a requirement of additional monitoring would be appropriate to confirm the continued compliance of the structure with section 316(b).

Robert V. Zener
General Counsel

Dated: OCT 14 1975

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

NO. 33

In the matter of the National Pollutant Discharge Elimination System Permit for Blue Plains Sewage Treatment Plant, Permit No. DC0021199, Washington, D. C., the presiding officer has certified seven issues of law to the General Counsel for decision pursuant to 40 C.F.R. 125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. 1

QUESTION PRESENTED

"May the permit legally contain immediately applicable provisions governing the disposition of the sludge generated by the subject facility? A. May the permit legally prohibit disposal of sludge by incineration? B. May the permit legally require that sludge disposal and waste water disposal be carried out on land?"

CONCLUSION

Pursuant to §402(a)(2) of the Federal Water Pollution Control Act, as amended (the "Act"), EPA is authorized to include in NPDES permits those conditions reasonably determined by the Regional Administrator to be necessary to insure compliance with §§301, 302, 306, 307, 308 and 403 of the Act. In addition, under §402(a)(1), the Agency may, "prior to the taking of necessary implementing actions relating to all such requirements", (i.e. §§301, 302,

306, 307, 308 and 403), include "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." Under either of these provisions of §402, EPA may include permit conditions directly relating to sludge disposal if such conditions are shown to be necessary to the attainment of the effluent limitations that are included as conditions of the permit.

Such sludge-related conditions which are necessary to the attainment of effluent limitations imposed pursuant to §301(b)(1)(B) and 40 C.F.R. §133 or other applicable effluent requirements may be applied immediately. Moreover, any implementing steps shown necessary to meet the 1983 requirements of §301(b)(2)(B) or water quality related requirements of Section 302 may also be imposed in a presently issued permit, scheduled to expire beyond 1977.

DISCUSSION

Section 402(a)(1) of the Act authorizes the Agency to issue permits upon the condition that applicable requirements of other sections are met. Section 402(a)(2) requires that EPA impose conditions to assure compliance with the "requirements" of paragraph (a)(1). 40 C.F.R. §125.22(b) provides that permits are to include "such special conditions as are necessary to assure compliance with applicable effluent limitations".

In my opinion, as a general rule, these provisions of the statute and implementing regulations authorize a broad category of conditions including conditions on the operating procedures of a facility which are necessary to assure compliance with the enumerated statutory provisions. The Agency has

an interest in assuring that violations of restrictions on effluent discharge do not occur, an interest given statutory recognition by provisions of §402(a) authorizing imposition of conditions which assure compliance with those limitations. So long as there is a rational connection between the condition and the assured attainment of the effluent limitation, there is statutory authority to impose it. See Decision of the General Counsel, No. 19.

The present permit, I presume, principally focuses on the requirements of §301(b)(1)(B), i.e., secondary treatment for municipal facilities. As defined in 40 C.F.R. §133, secondary treatment requires the imposition of limitations on BOD, suspended solids, pH and fecal coliform.1/ If effluent limitations of a more stringent nature are required to attain applicable water quality standards, they must also be included pursuant to §301(b)(1)(C). Conditions must also be included in the permit to meet state certification requirements pursuant to §401. Finally, any other conditions may be imposed deemed necessary to comply fully with §§301, 302, 306, 307, 308 and 403 of the Act. Therefore, if a basis for an effluent limitation under any of these sections is found, any conditions necessary to implement such effluent limitation may also be included.

It is my view that if certain sludge handling conditions could be shown to influence the attainment of BOD, suspended solids or other permit limitations, such provisions are proper conditions in the permit. For example, if sludge disposal or handling at the facility adds to or, conversely, decreases pollutant loadings, conditions on that sludge disposal method may be incorporated in a permit if necessary to assure that effluent limita-

1/ Proposed amendments to 40 C.F.R. 133 would modify the pH limitation and eliminate the coliform limitation. See 40 Fed. Reg. 34522, August 15, 1975.

tions contained in the permit are met. However, I am doubtful that a factual nexus can be found between the levels of pollutant discharge at the Blue Plains facility and a requirement that sludge must be disposed of either by incineration or by land disposal or that waste water must be disposed on land. What is clear is that there is no independent basis in §402 or elsewhere in the FWPCA which authorizes the Regional Administrator to prohibit the disposal of sludge by incineration. Likewise, there is no independent authority which authorizes the Regional Administrator to include a condition that sludge disposal and waste water disposal must be directly carried out on land. A sludge-related condition specifying that disposal will not be permitted at the Blue Plains facility because of resulting contributions to the level of BOD or suspended solids discharged might be permissible, but a condition specifying where outside the confines of the Blue Plains facility that sludge disposal is to take place is not authorized.2/

There are other statutory grounds upon which sludge conditions may become issues in permit proceedings, although these grounds have not been raised in the referred question. For example, a state may attempt to require sludge disposal conditions for section 401 certification or such conditions may be proposed for consistency with a section 208 plan or for meeting requirements imposed pursuant to section 402(b)(6) by the Corps of Engineers. This opinion is not intended to resolve whether sludge conditions under these provisions would be appropriate.

2/ The question certified concerns the basis of authority for requiring land disposal of sludge. There is no indication that permittee has requested or may be subject to a Section 405 permit for present or planned sewage sludge activities which "would result in any pollutant from such sewage sludge entering navigable waters...." Section 405(a).

In the question certified, emphasis is placed on the word "immediately". I assume that the issue raised is whether conditions relating to disposal of sludge may be imposed in the permit which anticipate requirements of the Act which have not, as yet, taken effect.

I have previously concluded, in General Counsel Opinion, No. 2, that conditions may be imposed in a permit expiring beyond 1977 which are framed to insure compliance with §301(b)(2)(A). The equivalent 1983 level for municipal facilities is the requirement of §301(b)(2)(B) that there shall be achieved "not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in Section 201(g)(2)(A) of this Act." Therefore, I conclude that conditions may be included in a presently issued permit with an extended expiration date (i.e., post July 1, 1977) which are necessary to comply with the §301(b)(2)(B) "best practicable waste treatment technology" requirements.

The starting point for assessing conditions necessary to implement §301(b)(2)(B) is the formulation of "best practicable waste treatment technology" (BPWTT). As presently proposed the requirements of BPWTT are as follows:

> Publicly-owned treatment works employing treatment and discharge into navigable waters shall, as a minimum, achieve the degree of treatment attainable by the application of secondary treatment as defined in 40 C.F.R. 133 (Appendix C). Requirements for additional treatment, or alternative management techniques, will depend on several factors, including availability of cost-effective technology, cost and the specific characteristics of the affected receiving water body. ...Publicly-owned treatment works employing land application techniques and land utilization practices which result in a discharge to navigable waters shall meet the criteria for treatment and discharge.... "Alternative Waste Management Techniques for Best Practicable Waste Treatment", Proposed for Public Comment, U.S. EPA, March 1974.

The requirements of BPWTT apply to applicants for construction grant funds authorized by §201. Applicants for grants for municipal systems must have evaluated alternative waste treatment management techniques and selected the technique which will provide for the application of best practicable waste treatment technology. Alternatives must be considered in three broad categories: treatment and discharge into navigable waters; land application; and utilization practices and reuse of treated waste water. Thus, the choice of a particular disposition technique is dependent principally on grant fund authorization under §201 of the Act. Once all the alternatives have been explored and the method of treatment determined, then certain criteria must be met by the particular treatment method chosen. For example, if the Blue Plains facility were to choose to continue to discharge directly, in addition to secondary treatment, requirements for additional treatment or alternative management techniques depending on several factors including availability of cost effective technology, cost and specific characteristics of the affected receiving water body, might be imposed.

In order for conditions, including those related to the disposition of sludge, to be imposed in a presently issued permit, the conditions must be determined to be necessary to implement §301(b)(2)(B) or, alternatively, to achieve the water quality related goals of §301(b)(1)(C) and §302. Thus, if the applicable §303 water quality standards are set at levels consistent with the interim 1983 goal of water of sufficient quality to provide for

protection of fish, shellfish and wildlife and recreation in and on the water (§102(a)(2)), more stringent limitations are to be included in order to meet those standards (§301(b)(1)(C)). If, however, neither the limits based on BPWTT (§201(g)(2)(A) and §301(b)(2)(B)) nor those based on water quality standards (§301(b)(1)(C) and §303) will achieve that goal, then a permit now issued but expiring post-1977 may include conditions necessary to achieve that goal only if the procedural and substantive standards of §302 are satisfied. In either event, the legality of conditions relating to sludge disposal would depend, as I have stated above, upon the finding of a factual nexus between sludge disposal techniques and effluent quality.

ISSUE OF LAW NO. 2

QUESTION PRESENTED

"May the permit legally contain a moratorium to limit new growth to emergency needs pending achievement of water quality standards, in other words, a sewer-hookup ban?"

CONCLUSION

The permit may not require a sewer-hookup ban. However, the permit may contain provisions requiring an orderly or planned system of new sewer connections.

Second, the permit may contain a notice that under given conditions §402(h) would be implemented by the Administrator by seeking a court sanctioned ban on sewer-hookups in the event of violations of the permit.

Finally, provisions may be included in a permit implementing §402(b)(8) and 40 C.F.R. §125.26(b) which would require the publicly-owned treatment works to provide notice to the Administrator when there were any new additions of pollutants into the treatment works from a new source, that is, a source which would be subject to §306 of the Act if such source were directly discharging pollutants, or any new introduction of pollutants which exceed 10,000 gallons in any one day into such treatment works from a source which would be subject to §301 of the Act if it were direct discharger, or any substantial change of pollutants from a source introducing pollutants to the treatment plant at the time of issuance of the permit.

DISCUSSION

Section 402(h) of the Act provides that "in the event any condition of a permit for discharges from a treatment works (as defined in Section 212 of this Act) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated." This section provides authority to the Administrator, after a violation has occurred, to seek injunctive relief against any further pollutants being introduced into the public system which is in violation of its permit. This provision does not give direct authority to EPA to include in the permit a ban on future connections to the Blue Plains treatment system prior to violations of the permit. When the permit is being developed, conditions are to be imposed relating to

development of treatment capacity in order to meet secondary treatment requirements and water quality requirements to accommodate pollutant loadings.3/

However, on the basis of the §402(a)(2) provision requiring the imposition of conditions necessary to insure compliance with a permit, it is my opinion that the Administrator has authority to include in the NPDES permit conditions requiring orderly planning of new connections and management of connections to the system. The conditions might call for careful planning, engineering and management of new connections. For example, where the permittee had control upon the new connections to its system a general overall management system or comprehensive planning would be a legitimate condition to assure compliance with the effluent limitations in the permit.

Section 402(a)(2), as well as the potential responsibilities imposed on the Administrator in Section 402(h), authorizes the inclusion of a notice provision indicating to the permittee that the permitted system may be subject to injunctive relief to curtail additional contributions to the system once a violation of the permit has occurred.

Moreover, pursuant to 40 C.F.R. §125.26(b), as patterned after Section 402(b)(8), "if the permit is for a discharge from a publicly-owned treatment works, the Regional Administrator should require the permittee to

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3/ Thus the permit must contain limitations sufficient to insure that applicable water quality standards are met by July 1, 1977. Attainment of these water quality standards may entail restrictions in the amount of pollutants discharged. This may be attained either by a partial diversion of the effluent to land disposal, a higher level of treatment afforded the effluent or a ban on any new introduction of pollutants or some combination of these alternatives. Moreover, it is conceivable that the secondary treatment requirements for BOD, suspended solids, etc. may not be attainable without direct restrictions on flow from the treatment facility. Conditions directed at a controlled flow are clearly permissible permit requirements. These requirements may have the effect of a ban on new connections. The choice is up to the permittee. Not until the permit conditions are violated does EPA have the authority to insist that a ban be imposed.

provide notice to the Regional Administrator of the following: (1) any new introduction of pollutants into such treatment works from a source which would be a new source as defined in §306 of the Act if such source were discharging pollutants; (2) any new introduction of pollutants which exceeds 10,000 gallons on any one day into such treatment works from a source which would be subject to §301 of the Act if such source were discharging pollutants, and (3) any substantial change of volume or character of pollutants being introduced into such treatment works by a source introducing pollutants into such works at the time of issuance of the permit."4/

ISSUE OF LAW NO. 3

QUESTION PRESENTED

"May the permit legally prohibit the use of ferric chloride and alum in the sewage treatment process? That is, may the permit proscribe certain treatment methods?"

CONCLUSION

Pursuant to §402 of the Act the Regional Administrator has authority to include conditions limiting the discharge of ferric chloride and alum if these limitations relate to compliance with applicable water quality standards or are determined by the Regional Administrator to be pollutants, in addition to those regulated by the secondary treatment standards, requiring control and treatable in the municipal treatment plant by secondary treatment. He may not, however, prohibit them simply as an attempt to circumvent a particular treatment technique.

4/ Residences and other sources of domestic sewage are sources which are not publicly owned treatment works and therefore are subject to Section 301 and 306 requirements when they are direct dischargers.

DISCUSSION

As discussed previously, in accordance with §402(a) the Regional Administrator has authority to impose conditions which will insure compliance with §301, §302, §306, §307, §308 and §403 of the Act including conditions to prevent violations of water quality standards.

The basic parameters of secondary treatment are, as set forth in 40 C.F.R. §133, BOD, suspended solids, pH and fecal coliform. Neither ferric chloride nor alum are regulated. Therefore, limitations on either of these parameters must arise from a different statutory authority. For example, pursuant to Section 301(b)(1)(C) water quality standards might warrant provisions limiting or prohibiting ferric chloride and alum.

The preamble to the proposed secondary treatment standards provides that:

> . . .it is intended that permits will be issued to publicly owned treatment works which may impose effluent limitations applicable to pollutants other than biochemical oxygen demand, suspended solids, pH, and fecal coliform. Such limitations will reflect and take into consideration pretreatment requirements that may be imposed upon specific discharges pursuant to section 307, and such pretreatment requirements will take into account levels of reductions which will be attainable by a given municipal treatment plant by secondary treatment.
> 39 Fed. Reg. 10642 (April 30, 1973)

Thus, if the Regional Administrator finds that these pollutants are not within the established secondary treatment standards, he may, pursuant to his authority under Section 402(a), establish limits on these additional

pollutants. In so establishing these limits he must give consideration to such factors as the reduction levels attainable by a given municipal treatment plant by secondary treatment, as discussed in the proposed regulations.

However, the Act does not authorize the prohibition of the use of ferric chloride and alum as a means of specifying a particular sewage treatment process. The Congressional history demonstrates that EPA is not to prescribe any technologies. EPA is to set effluent limitation guidelines after identifying applicable treatment technologies capable of attaining those effluent limits.

> The Committee expects that the identification will be in objective terms and will set out actual perfarmance [sic] levels for the classes and categories of point sources rather than prescribing specific control techniques, processes, or equipment . . ..
>
> [T]he Committee intends that the degree of reduction be specified in objective terms and that the incorporation of a specific process shall not be required. This means

> that the Administrator shall not prescribe a specific design or process in order to meet the requirements of best available demonstrated control technology but instead shall set out effluent limitations which are consistent with such best available demonstrated technology. Leg. Hist. 794-95.

Although this legislative history is directed at the development of industrial effluent limitations and guidelines pursuant to §304, Congress indicated that secondary treatment regulations were to be developed, as industrial limits were, based on available technology.

> The application of Phase I technology to industrial point sources is based on the control technologies for those sources and to publicly-owned treatment works is based upon secondary treatment. It is not based upon ambient water quality considerations. (Leg. Hist. p. 1461.)

Therefore, it is not within authority of the Regional Administrator to define particular treatment methods.

ISSUE OF LAW NO. 4

QUESTION PRESENTED

"Should the permit require that daily sewage flows to the Blue Plains plant be diverted to a land treatment system or a sewage farm?"

CONCLUSION

EPA has made a determination in defining "best practicable waste treatment technology" that land treatment systems and sewage farms are alternative treatment techniques. The appropriate treatment alternative is a determination

to be made pursuant to Section 201 of the Act. Once that choice has been made, conditions may be imposed on implementation of the chosen technique. A present permit may not require diversion to land treatment unless there is a direct nexus between that treatment and effluent limitations required in the permit.

DISCUSSION

As discussed supra, EPA is not authorized, except through the grant provisions of §201, to dictate what sewage method disposal a particular plant should follow. As provided in the BPWTT provisions, EPA may only insist on certain criteria once an alternative has been explored and selected to ensure that that treatment alternative will work sufficiently.

A requirement that sewage be diverted to land treatment is more pervasive than simply assuring that effluent limitations will be met at the Blue Plains facility under the 1977 permit. It would, in effect, dictate which treatment technique should be used by Blue Plains. It does not implement the effluent requirements at the facility. As indicated above, EPA is not authorized to prescribe which treatment technique should be used by a particular facility except in terms of future requirements under BPWTT.

ISSUE OF LAW NO. 5

QUESTION PRESENTED

"Should the permit specify that the existing facilities at Blue Plains be used to entrap and treat the combined storm and sanitary sewer flows which occur during rainstorms?"

CONCLUSION

The present NPDES permit may not specify that the facilities at Blue Plains must entrap and treat combined storm and sanitary sewer flows. However, limitations and requirements may be imposed in combined sewer flows which ultimately might have the effect of diverting combined sewer flows to the treatment facility.

DISCUSSION

Pursuant to §301 and §402 the point sources from which the combined storm and sewage flows occur are subject to permit issuance and effluent limitations. In addition, water quality standards, §401 state certification requirements, §208 plans, or §402(b)(6) Corps of Engineers requirements, may necessitate the placing of various limitations, including zero discharge requirements, on combined sewer flows. Attainment of such limitations may entail the indirect treatment of combined sewer flows at a municipal plant such as Blue Plains. However, the method by which the permittee chooses to treat these combined sewage overflows may not be a subject of a specific provision in the Blue Plains permit. Permittee may not be required to divert these flows to Blue Plains. Such a provision is an attempt to require a specific treatment technique. The Regional Administrator may not, as indicated above, specify treatment techniques for particular discharges.

ISSUE OF LAW NO. 6

QUESTION PRESENTED

"May the permit legally contain a compliance schedule reflecting standards which would ensure the safe use of the Potomac estuary as a source of potable water supply, assuming that the existing water quality standards do not contain a drinking water standard?"

CONCLUSION

Such a condition or compliance schedule may be included in a permit

if it is premised on attaining §302 effluent limitations but such conditions would have to meet both the substantive and procedural requirements of §302, as indicated in the Opinion of General Counsel No. 2.

DISCUSSION

A condition in the NPDES permit in question related to a potable water supply cannot be based on existing water quality standards, according to the question presented. Moreover, compliance schedules directed at a viable water supply may not be extrapolated from the secondary treatment requirements. However, §302 provides that

> Whenever...discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under Section 301(b)(2) of this Act, would interfere...with the attainment or maintenance of that water quality...which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations... shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

As I indicated in Opinion of General Counsel, No. 2, the legislative history ties §302 directly to the 1983 goal that "whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." Section 101(a)(2). We concluded there that effluent limitations and compliance schedules may be fashioned in a permit presently issued but expiring after July 1977 which aim toward the 1983 interim water quality goal if BPT and BAT limitations, or in this case secondary treatment and BPWTT limitations, are insufficient for that goal. Thus, a permit extending beyond the 1977 date may contain conditions beyond the 1977 requirements directed toward compliance with the 1983 goal.

Such a permit may contain compliance steps that would assure proper implementation of BAT after the BPT requirements are complete and, secondly, §302 may be invoked to impose additional compliance steps. However, §302 provides for certain administrative proceedings prior to imposition of water quality related effluent limitations, i.e., it provides that stricter limitations can be required only after a hearing in which the Administrator determines the balance between economic and social cost of achieving the stricter controls and the social and economic benefits. Thus, in order for the present permit to contain as a condition a schedule of compliance aiming toward a future adequate water supply, the special procedural requirements of §302 must be observed.

ISSUE OF LAW NO. 7

QUESTION PRESENTED

"May the permit legally contain effluent limitations for viruses, refractory organics, heavy metals, chlorinated hydrocarbons, and other toxic substances?"

CONCLUSION

The pollutant parameters at issue may be restricted by effluent limitations either because they violate water quality standards or because they are deemed toxic pollutants for which conditions are set on a case-by-case basis prior to promulgation of standards under §307 if the Regional Administrator determines that they are necessary to achieve compliance with the Act.

DISCUSSION

As indicated above, there are several bases on which effluent limitations may be required for pollutants which are not regulated under the secondary treatment requirements. For example, if these substances violate water quality standards, they must be regulated.

Moreover, prior to the promulgation of standards under Section 307(a), the Administrator has the authority under Section 402(a)(1) to issue permits with such conditions as he "determines are necessary to carry out the provisions of the Act." Based on information now available to him, he could include in permits conditions on effluent discharge consistent with the need to protect the environment from toxic pollutants. The permit conditions on toxic effluents would be superseded when toxic standards for such pollutants take effect. See Opinion of General Counsel, No. 2.

Dated: 10/21/75

Robert V. Zener
General Counsel

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

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW
PURSUANT TO 40 CFR §125.36(m)

No. 34

In the matter of National Pollutant Discharge Elimination System Permit for Public Service Company of Indiana, Inc. (PSI) Gallagher Generating Station, IN-0002798, New Albany, Indiana, the Presiding Officer has certified three issues of law to the General Counsel for decision pursuant to 40 CFR §125.36(m). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NUMBER I

Question Presented

"Does section 125.36(h)(4)(viii) of the Administrator's regulations authorize a Presiding Officer to strike an issue from an adjudicatory hearing when that issue raises an objection to a specific limitation set forth in the permit and the requestor contends that a less stringent limitation is required to carry out the intendment of the Act?"

Conclusion

Yes. The Presiding Officer, pursuant to 40 CFR §125.36(h)(4)(iii) and (viii) is authorized to "Identify disputed issues for consideration at the hearing" and to "Strike issues not material or not relevant to the question of whether a permit should be issued and what conditions to such permit would be required to carry out the intendment of the Act."

Whether or not the identification or striking of such an issue is justified in the particular case depends, of course, upon the specific facts involved.

Discussion

The question above can be answered only after consideration of the basis of the requestor's objection. In the facts of this case, the permit limitation in question is based upon applicable effluent regulations promulgated on October 8, 1974, pursuant to Sections 301 and 304 of the Federal Water Pollution Control Act, and found at 40 CFR Part 423.

Several types of issues may be raised in adjudicatory hearings which relate to the establishment of less stringent effluent limitations. For example, if PSI alleges facts which would show that "factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines" (upon which the permit limitation is based), then the discharger would be entitled to an adjudicatory hearing on the question of whether more or less stringent limitations should be established for such discharger under the so-called "variance clause," 40 CFR §423.32(a). Factual issues related to a variance request might well raise issues "material...[and] relevant to the question of whether a permit should be issued and what conditions to such permit would be required to carry out the intendment of the Act." Such issues may not properly be excluded from an adjudicatory hearing.

Other types of factual issues may be raised in connection with a permit based upon effluent regulations. For example, a discharger might raise factual issues concerning whether or not the Regional Administrator has properly applied the regulations to his facility,

or has correctly determined the proper subcategory for the facility.

However, an objection to applicable limitations based on a general, unspecific challenge that a less stringent limitation is required to carry out the intendment of the Act, where the requestor, in effect, acknowledges that he cannot make a showing of fundamentally different factors, is not allowable under the regulations cited above. As stated in Decision of the General Counsel Number 23, "the question of which guideline applies to a particular plant, what limits are appropriately derived from the guidelines, and whether a plant is entitled to a variance from the guidelines are proper subjects for adjudicatory hearings." The "intendment of the Act" and implementing regulations is to limit consideration of questions relating to application of effluent guidelines in permits to such questions as fall within those categories described in the Opinion above.

If it is clear that permit applicant's operations fall within the applicable guidelines, then an objection to the limitation based on permittee's interpretation of the intendment of the Act is simply a challenge to the basis of the guideline themselves. I have repeatedly concluded that such challenges are to be heard exclusively in the Circuit Courts of Appeal pursuant to section 509(b) of the Federal Water Pollution Control Act. See Opinion of the General Counsel No. 3, March 6, 1975; No. 23, July 3, 1975; No. 32, October 14, 1975.

Question Number II

"Is there jurisdiction under 40 CFR 125.36 et seq. to consider evidence that is submitted to demonstrate that a plant is entitled to a less stringent limitation under 40 CFR 423.32(a)?"

Answer

Yes.

Discussion

40 CFR §423.32, entitled "Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available," is divided into two subsections. Subsection (b) sets specific effluent limitations as determined by the Agency; subsection (a) provides for modification of these limitations where factors relating to a discharger's operation are "fundamentally different" from the factors considered in setting the limitations. Given the repeated intent of Congress that "effluent limitations applicable to individual point sources within a given category or class be as uniform as possible," 1/ the "fundamentally different" standard is a stringent one designed to allow for the truly exceptional situation, while maintaining the integrity of the regulations as a whole.

Where a Regional Administrator finds, in connection with permit issuance proceedings, that a variance should be denied (or granted with the Administrator's concurrence), any interested party has, under 40 CFR §125.36, the right to request an adjudicatory hearing to consider factual

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1/ S. Report No. 92-1236, 92d Cong., 2d Sess. 126 (1972)

issues underlying this finding. Such hearing should be granted if it raises "material issues of fact relevant to the questions of whether a permit should be issued, denied, or modified." 40 CFR §125.36(c)(1)(ii). Of course, after an adjudicatory hearing is granted, the Presiding Officer has authority to determine issues to be considered at such hearing. 40 CFR §125.36(h)(4)(iii).

Question Number III

"Does a permittee have the right under the Federal Water Pollution Control Act and 40 CFR §125.36 to submit evidence at an adjudicatory hearing to demonstrate that, in the facts of the particular case, it would be arbitrary and capricious to require compliance with a particular limitation in the permit that was derived from effluent limitations guidelines promulgated by EPA?"

Answer

No.

Discussion

In support of its position on this point, PSI presents an argument for some measure of flexibility in the application of agency rules based on National Petroleum Refiners Assn. v. F.T.C., 482 F.2d 672 (1973), and WAIT Radio v. F.C.C., 418 F.2d 1153 (1969). The variance procedure provided by 40 CFR §423.32(a), discussed above, provides for just such flexibility in the exceptional case. Where the requisite extraordinary circumstances do not exist, the regulations of 40 CFR §423.32(b) supply the rule.

If PSI is arguing that the regulations have been, by their own terms, improperly applied, that question may be raised in permit issuance proceedings. If, on the other hand, PSI is claiming that the regulations, as properly applied, should not apply to their facility, they are simply attempting to raise in another guise a challenge to the regulations themselves. This, as I have stated above, is impermissible in permit issuance proceedings.

At page 13 of its brief, counsel for PSI states that their argument rests "... not on the regulations of the Administrator, but rather on an interpretation of the Federal Water Pollution Control Act which assures consistency with the requirements of the Administrative Procedure Act and the due process clause of the Constitution." It has consistently been my position that the General Counsel will not consider constitutional challenges in these opinions. Such challenges must be raised before the Courts of Appeal.

Robert V. Zener

Date: NOV 20 1975, 1975

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

DECISION OF THE GENERAL COUNSEL
ON MATTERS OF LAW PURSUANT
TO 40 C.F.R. §125.36(m)

No. 35

In the matter of National Pollutant Discharge Elimination System Permit No. ID-002194-6, City of Ketchum, Idaho, the Regional Administrator has certified nine issues of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (30 F.R. 27078, July 24, 1974). The parties, having had an opportunity to provide written briefs in support of their respective positions, present two types of issues.

Issues of Law Nos. 1, 2, and 7 raise constitutional questions. As I have previously determined, the General Counsel will not deal with constitutional issues in these opinions; such issues must be raised before and decided by the courts of Appeals.

The remaining issues are discussed below:

ISSUE OF LAW NO. I

Question Presented

"Do the proposed permit conditions conflict with Section 208 of FWPCA (Public Law 92-500) in as much as an areawide plan has been commenced and may, when completed, dictate conditions and requirements in contravention of those contained in NPDES permit number ID-002028-1?"

Conclusion

No.

Discussion

Section 208 of the Act provides for the States to prepare and to carry out areawide waste treatment management plans. That section requires approved plans to be put into effect under the other provisions of the Act. Relevant here is §208(e), which states:

> No permit under section 402 of this Act shall be issued for any point source which is in conflict with a plan approved pursuant to subsection (b) of this section. (Emphasis supplied.)

This provision is relied upon by the applicant for the proposition that no permit may be issued until completion of the "Blaine County Waste Water Facility Plan."

The applicant concedes that this plan is not a §208 plan, but "may well be expanded or appropriately designated as a Section 208 plan." Applicant's brief at 8. But even if it were a draft §208 plan, §208(e) has no applicability to a draft plan, but applies on its face only to a plan "approved [by the Administrator of EPA] pursuant to subsection (b) of this section." Since the plan described by the permittee has not been so approved, it can have no effect upon the issuance of this permit.

If the requestor is arguing that no permit can be issued until a §208 plan for an area is completed, it has misconstrued the Act. As was stated in Decision of the General Counsel No. 21:

> There is nothing in either the Act or its legislative history to indicate that regulation of these sources was to await completion of section 208 planning efforts. In fact, the deadlines and schedules set out in the Act itself support a contrary inference.

See also §402(k) of the FWPCA.

ISSUE OF LAW NO. II

Question Presented

"Is the issuance of NPDES permit number ID-002028-1 an unlawful attempt to obligate the City of Ketchum to inventory and make quantative [sic] and qualitative analysis of pollutants which the Congress has directed the Administrator, in cooperation with the states and the assistance of appropriate federal agencies, to prepare under FWPCA Section 305 (33 U.S.C.A. Section 1315)?"

Answer

No.

Discussion

This issue incorporates referred issues numbers 4 and 9. The requestor argues that "No authority can be found in the Federal Water Pollution Control Act for that portion of NPDES permit number ID-002028-1 which purports to obligate the City of Ketchum to inventory, and make quantative [sic] and qualitative analysis of pollutants discharged into the Big Wood River." Such authority may be found in Section 308 of the Act, which

authorizes the Administrator to require any point source to "install, use, and maintain . . . monitoring equipment or methods" and to "sample . . . effluents (. . . in such manner as the Administrator shall prescribe)", and to "provide such other information as he may reasonably require . . .." Conditions to implement §308 may be included in NPDES permits. §402(a)(1).*

The mere fact that the Administrator is directed by Section 305 of the Act to inventory water quality and point sources in no way precludes him from gathering monitoring information by permit conditions. In the first place, such conditions may clearly be established for determining whether the applicant is "in violation of any . . . effluent limitation" under the Act. §308(a)(2). Moreover, the Administrator is specifically authorized by §308(a)(4) to require point sources to monitor and report the results whenever required in "carrying out [Section] 305 . . . of this Act." Thus, even if the monitoring in question were being carried out in order to implement §305, the requestor may clearly be required to carry out such monitoring under §308.

ISSUE OF LAW NO. III

Question Presented

"Is Section 509 of the Federal Water Pollution Control Act in conflict with 40 C.F.R. §125.36(b) in as much as the latter purports to

* The Act contains no support for the requestor's argument that monitoring conditions are limited to those necessary to ensure compliance with water quality requirements, nor has the requestor cited any such authority.

obligate the requestor to provide witnesses at the expense of the requestor when the former Section infers [sic] that said cost should be at the expense of the United States."

Answer

The requestor's question challenges a duly promulgated regulation of the Administrator as unlawful. Such challenges must be brought before the appropriate Federal court.

Discussion

See Decisions of the General Counsel No. 5, April 4, 1975; No. 18, June 25, 1975; No. 21, June 27, 1975; No. 29, September 4, 1975.

ISSUE OF LAW NO. IV

Question Presented

"Do the procedures utilized for implementing the Federal Water Pollution Control Act (Public Law 92-500) encourage the drastic minimization of paperwork and interagency decision procedures, with the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government in accordance with Section 101(f) of the Act."

Conclusion

This provision has no applicability to the instant permit.

Discussion

The requestor's argument appears to be that since there is a plan in preparation which is expected to recommend water pollution control measures for the area including the requestor's treatment works, no permit should be issued until the completion of such plan, and that issuance of the permit now would cause "facility duplication and wasteful expenditures of money proscribed by Section 101 of the Act."

To the extent that this argument challenges the procedures set forth in 40 C.F.R. Part 125, it is not to be considered here. See Discussion of Issue III, supra. Other than that, the requestor's argument founders upon the same shoals as its argument based upon the absence of a §208 plan. As previously indicated, the target dates in the Act for permit issuance underscore Congress' intention that permit issuance proceed as quickly as possible. Delay occasioned by completion of planning processes was simply not contemplated or authorized. It is a strange construction whereby a provision specifically inserted to prevent "red tape", H. Rept. No. 92-911, 92d Cong., 2d Sess. at 79 (1972), could be applied so as to encourage delay in permit issuance.

ISSUE OF LAW NO. V

Question Presented

"May an NPDES permit be issued prior to completion of a study as specified in Section 305(a)(2) of the Federal Water Pollution Control Act Amendments of 1972?"

Conclusion

Yes.

Discussion

This issue was resolved by Decision of the General Counsel No. 21, June 27, 1975, where I stated:

> It would be completely contrary to the purposes of the Act to construe [Section 305] so as to impede the implementation of provisions that were clearly to be carried out vigorously and expeditiously.

Dated:

General Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO
40 C.F.R. Section 125.36(m)

NO. 36

In the matter of National Pollutant Discharge Elimination System, Permit Number PA0002208, for St. Joe Minerals Corporation, Monaca, Pennsylvania, the Presiding Officer has certified one issue of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m). The parties, having had an opportunity to provide written briefs in support of their respective positions, present the following issue:

QUESTION PRESENTED

"In a situation where a permittee was issued a permit which was not based on point source category effluent guidelines and was granted an adjudicatory hearing with regard to said permit, may said permittee be prevented from offering evidence of appropriate effluent limitations at the adjudicatory hearing on the ground that guidelines were promulgated subsequent to its request for adjudicatory hearing?"

CONCLUSION

No.

DISCUSSION

At the outset, a brief review of the chronology of events of this proceeding may be useful to an understanding of the issue presented and my conclusion.

The facts which are agreed to by St. Joe Minerals Corporation (St. Joe) and the Region, are as follows. On December 16, 1974, EPA issued an NPDES permit to St. Joe for a zinc smelter which it operates at Monaca, Pennsylvania. The permit contained limits on the discharge of zinc, applicable after July 1, 1977, of 62.5 lbs. daily average and 187 lbs. daily maximum. St. Joe filed a request for an adjudicatory hearing in which it sought more lenient limitations - 110 lbs. of zinc as a daily average and 440 lbs. daily maximum. The request was granted and a public notice of the hearing issued on February 18, 1975. Shortly thereafter, on February 27, 1975, EPA published interim final regulations for the primary zinc subcategory of the nonferrous metals manufacturing point source category. 40 C.F.R. 421.80 et seq., 40 Fed. Reg. 8514 et seq. The Region asserts that application of those regulations to the St. Joe Smelter would result in zinc limitations of 62.5 lbs. daily average and 125 lbs. as a daily maximum

St. Joe contends that because its permit was not based on the provisions of 40 C.F.R. Part 421, it should be permitted to offer evidence at the adjudicatory hearing in support of its claim that the limits contained in the permit do not in fact represent the "best practicable control technology currently available" (Section 301(b)(1)(A) and in support of its proposed more lenient limitations.

The Region contends that because nationally applicable effluent limitations have now been promulgated for the pertinent industrial subcategory, limitations derived from those regulations should govern, absent a showing by St. Joe that "fundamentally different factors" obtain at its Monaca facility justifying a modification of the limitations in Part 421, pursuant to the variance procedure set out in 40 C.F.R. 421.82.

Neither party has cited any authority for its respective position. Regardless of how I might resolve the issue, as a matter of first impression, the question has been authoritatively determined by the Administrator in a prior Decision on an appeal pursuant to 40 C.F.R. 125.36(n).

In the Administrator's Decision in U.S. Pipe & Foundry Company (NPDES Docket No. AHAL002, October 10, 1975), the Administrator ruled that the appropriate water quality standards and effluent limitations to be applied in an NPDES permit are those which are in effect at the time the permit is issued, rather than those which are promulgated after issuance of the permit but prior to final action following an adjudicatory hearing.

The Administrator stated :

> "The Act clearly contemplates that NPDES permits will be issued 'prior to the taking of necessary implementing actions' relating to requirements under sections 301, 302 and other sections of the Act. In such instances, the Act provides that permit conditions will be determined by the Administrator 'as necessary to carry out the provisions of this Act.' I recognize that permit review proceedings may consume many months, during which standards and guidelines for determining permit conditions may change (or take on greater specificity). These changes may mean that if the permit was being initially issued today, the conditions might be either more lenient or more stringent. It is not a one-way street... .
>
> The standards and guidelines for the preparation of NPDES permits must be fixed at some point in time so permit terms can become final and pollution abatement can proceed. I believe the proper point in time for fixing applicable NPDES standards and guidelines is when the Regional Administrator initially issues a final permit."

I believe the principle announced in U.S. Pipe & Foundry is dispositive of the issue presented here. The permit in question, having been issued prior to the promulgation of national effluent regulations, was based on the

Regional Administrator's "individual assessment [pursuant to section 402(a)(1)] of the degree of effluent control which represents best practicable control technology currently available for the individual source in question in order to meet the deadline set forth in §301 of the Act." Decision of the General Counsel, No. 4, April 4, 1975.1/ Since the subsequently promulgated regulations in 40 C.F.R. Part 421 do not govern as a matter of law, the permittee is entitled to introduce evidence at the adjudicatory hearing relevant to the correctness of this individual assessment. By the same token, of course, the Region is also free to introduce evidence in support of its determination reflected in the issued permit. And, while the provisions of 40 C.F.R. Part 421 are not automatically binding, they (and the information contained in the Development Document associated with them), do constitute evidence relevant to the correctness of the Region's determination and thus to the propriety of the effluent limitations contained in the permit.

Robert V. Zener
General Counsel

Date: DEC 12 1975

1/ The conclusion reached in Decision No. 4 has been affirmed in a recent Decision of the Administrator, St. Regis Paper Company, December 5, 1975.