

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 31

Date Signed: August 10, 1987

MEMORANDUM

SUBJECT: Supplemental Guidance on the Issuance of Administrative Orders in the PWSS and UIC Programs

FROM: Paul Baltay, Director (signed by John R. Trax)
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TO: Regional Water Supply Branch Chiefs
Regional Counsels

Last month, pursuant to our policy of reviewing the first three proposed and final administrative orders (AO) issued by each Region, Region III submitted a proposed AO to headquarters for our review and comments. This AO was different from any we had previously reviewed and raised several policy questions. Working together, we have reached an agreement on these issues and we believe that the issues and their resolution should be shared with all the Regions. While this AO was issued in the PWS program, the resolutions apply to the UIC program as well.

The proposed AO was to be issued to a large public water system for violations of the turbidity MCL. The proposed AO required the system to:

- (1) Within 30 days of the effective date of the AO, submit the name of a consultant or an engineer who had been hired to conduct a feasibility study of the water system to determine alternatives for achieving full compliance with the requirements of the Safe Drinking Water Act;
- (2) Within 60 days of the effective date of the order, submit copies of any existing reports or studies that may have been prepared since May 1980, to determine the safety and reliability of the existing water supply;
- (3) Within 120 days of the effective date of the order, submit the results of the feasibility study. At a minimum the study was asked to propose one of four alternatives for achieving compliance, for example, design,

construction, and operation of a permanent water filtration plant or design, construction, and operation of a permanent interconnection with another water system. The feasibility study was required to contain a schedule for obtaining compliance with the turbidity MCL and the schedule was to include both interim milestones and a date for final compliance.

- (4) Within 60 days of acceptance by EPA or the State agency of the results of the feasibility study, enter into an enforceable consent agreement which was to specify a schedule for obtaining compliance with the Safe Drinking Water Act.
- (5) Report to EPA monthly on its compliance status and its progress towards each of the requirements of the AO and to identify any event which caused or might cause a delay or other noncompliance with the requirements of the AO.

The major policy issues raised by this proposed AO are discussed below:

- Specifying a Time for Compliance

Existing AO issuance guidance states that a "reasonable time for compliance" may be stated in the findings section of the proposed AO. The "reasonable time" stated or specified is the time required for final compliance with the MCL or other regulation. It is perfectly acceptable for EPA to issue a proposed AO specifying a "best guess" date for achieving final compliance. EPA can refine that "best guess" date in the final order using information obtained from the system or other parties as part of the public hearing and comment process. In any event, including a deadline date for final compliance will greatly strengthen the enforceability of the administrative order.

- Interim Milestones

A date for compliance set in the future due to the need for construction or other substantial improvements to the system, raises the issue of what assurances EPA has that a system will take necessary interim steps to come into compliance by the required final date. This is where interim milestones may be used effectively to help obtain compliance. Setting milestones may help you to monitor the progress of the system in returning to compliance and to target further Federal action where progress is insufficient.

Whether or not interim milestones would be appropriate or useful depends on the particular circumstances of the case; for example, how long it will take the system to come into compliance. Such a determination is best left to the discretion of the Regional office. If you decide that interim milestones would be appropriate, you should design them from the standpoint that the more closely they are related to end necessary for achieving final compliance, the more likely they are to be enforceable. Basically, the milestones should be the steps along the critical path to final compliance.

You should set out milestones and associated milestone dates in the proposed AO. Even if you are not certain of what the exact milestones or dates should be, they should appear in the proposed AO so that the system, the State, or the public (if there is a public hearing) may comment upon them. This process allows you to modify the proposed milestones based on the information you receive as a result of issuing the proposed AO. The outcome of this process should be a set of milestones which are reasonable and thus defensible.

- Enforceability of Interim Milestones

OECM wishes to counsel that the enforceability of any interim compliance milestones may be challenged given that the statutory language only expressly authorizes EPA to require compliance with the statute or regulations. However, OECM recognizes the legitimate interest in using schedules with interim milestones to help obtain compliance. Therefore, as we stated above, the milestones should be as closely related and necessary to achieving final compliance as possible. This will increase the likelihood that the milestones themselves may be enforceable independent of any violations of the AO requirement for final compliance (particularly where EPA can show that missing an interim milestone will clearly result in a system owner/operator missing the final compliance deadline).

- Requirement to Enter into an Enforceable Consent Agreement

We do not believe that this is an appropriate requirement in an Administrative Order. The compliance schedule which the Region was trying to obtain by this mechanism will be set out in the proposed AO for comment by the system, the State, and the public, as discussed above.

- Monthly Reporting Requirement

We have advised the Region that this is an appropriate mechanism for tracking the actions the system is taking to return to compliance.

We hope that this guidance is helpful to you. If you have any questions, please contact Patricia Mott, OECM at FTS 475-8320 or Betsy Devlin, ODW at FTS 382-2303.

***Needs to be updated to take out reference to proposed orders.**