

Date) July 1, 1994



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

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MEMORANDUM

SUBJECT: Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits

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TO: Regional Administrators
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Recently, questions have been raised regarding EPA's interpretation of the scope of the "shield" associated with National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). Section 402(k) of the CWA -- the "shield" provision -- provides that compliance with an NPDES permit shall be deemed compliance, for purposes of section 309 and 505 enforcement, with sections 301, 302, 306, 307 and 403 of the CWA (except for any standard imposed under section 307 for toxic pollutants injurious to human health). This policy statement describes EPA's position on the scope of the authorization to discharge under an NPDES permit, and the shield thus associated with the permit authorization.

Individual NPDES Permits

As part of an application for an individual NPDES permit, EPA requires that an applicant provide information on its facility. In the case of industrial permit applications, this includes specific information about the presence and quantity of a number of specific pollutants in the facility's effluent, as well as on all waste streams and operations contributing to the facility's effluent and the treatment the wastewater receives. Applications for municipal discharges focus primarily on the operation and treatment processes at the municipal treatment works. See 40 C.F.R. § 122.21.

Historically, EPA has viewed the permit, together with material submitted during the application process and information in the public record accompanying the permit, as important bases

for an authorization to discharge under section 402 of the CWA. The availability of the section 402(k) shield is predicated upon the issuance of an NPDES permit and a permittee's full compliance with all applicable application requirements, any additional information requests made by the permit authority and any applicable notification requirements. See 40 C.F.R. §§122.41(1) and 122.42 Also see, 45 Fed. Reg. 33311-12, 33522-23 (May 19, 1980).

A permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, waste streams and operations that have been clearly identified in the permit application process when discharged from specified outfalls:

- 1) Pollutants specifically limited in the permit or pollutants which the permit, fact sheet, or administrative record explicitly identify as controlled through indicator parameters;¹
- 2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified as present in facility discharges during the permit application process; and
- 3) Pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified during the permit application process.²

With respect to subparts 2 and 3 of the permit authorization described above, EPA recognizes that a discharger may make changes to its permitted facility (which contribute pollutants to the effluent at a permitted outfall) during the effective period of the NPDES permit. Pollutants associated with these changes (provided they are within the scope of the operations identified in the permit application) are also authorized provided the discharger has complied in a timely manner with all applicable notification requirements (see 40 C.F.R. §§ 122.41(1) and 122.42(a) & (b)) and the permit does not otherwise limit or prohibit such discharges.

¹ Of course, authorization is only provided to discharge such pollutants within the limits and subject to the conditions set forth in the permit.

² The permit, of course, may explicitly prohibit or limit the scope of such discharges.

Notwithstanding any pollutants that may be authorized pursuant to subparts 1 and 2 above, an NPDES permit does not authorize the discharge of any pollutants associated with wastestreams, operations, or processes which existed at the time of the permit application and which were not clearly identified during the application process.

General NPDES Permits

Section 402(k) also shields discharges of pollutants authorized under a general permit. EPA's position is that general permits authorize the discharge of all pollutants within the specified scope of a particular general permit, subject to all pollutant limits, notification requirements and other conditions within a particular general permit so long as the permittee complies with all EPA application requirements for the general permit.

EPA regulations provide the circumstances for which discharges may be authorized for a general permit. See 40 C.F.R. §122.28. To obtain authorization to discharge under a general permit (and consequently, the protection of the shield), in most cases, the prospective permittee must submit either a written notice of intent to be subject to the general permit or a permit application as appropriate. General permittees are also subject to the notification provisions of 40 C.F.R. §§ 122.41 and 122.42.

Spills

While NPDES permits may authorize the discharge of pollutants associated with intermittent flows, permits do not generally authorize the discharge of pollutants associated with spills. There may be limited circumstances where anticipated spills are fully disclosed to EPA and considered during the permitting process as documented in the public record consistent with applicable NPDES regulations. In such circumstances, the discharge of pollutants from such spills would be authorized so long as the permit does not otherwise limit or prohibit such discharges and such a spill does not violate any statutory or regulatory provision.

CERCLA

Finally, there also has been some question regarding the relationship of the NPDES permit shield and the "federally permitted release" exemption under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

EPA's position is that the scope of federally permitted releases under CERCLA section 101(10)(A), (B) and (C) is currently defined by the regulations at 40 C.F.R. § 117.12, which implement language in section 311 of the CWA that is very similar to the federally permitted release definitions. Thus, the Agency takes the position that the NPDES permit shield outlined above in no way expands the scope of the federally permitted releases under CERCLA.

Next Steps

The Office of Water has established two regulatory workgroups which are working on revisions to the NPDES permit application regulations for municipal and industrial dischargers. We want the regulations to ensure the applicant has the responsibility to more fully characterize the nature of its effluent, and the contributions of the effluent to the receiving water. In addressing this issue, we will review EPA's position on the scope of the shield provided by §402(k). In addition, we will consider changes to related NPDES permit regulations, including whether to revise the requirements for: facilities to notify EPA (or the State) of modifications to its operations or processes; facilities to notify EPA (or the State) of changes in the discharge; notification to the public of the nature of the discharge limitations a permittee is held responsible for; and the use of indicator pollutants.

We encourage the Regions to actively participate in the development of these updated regulations. The current schedule calls for proposal of the changes to the municipal application requirements in 1994 and promulgation of the revised regulations in 1996. Our new schedule for changes to the industrial application requirements, for which there is more interest in permit shield issues, is proposal of the regulation changes in FY 1995.

If you have any questions on these issues, please contact us or have your staff contact, Cynthia Dougherty in the Office of Water at 202 260-9545, David Hindin in the Office of Enforcement at 202 501-6004, or Richard Witt in OGC at 202 260-7715.

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