



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

AUG 14 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: National Policy Regarding Whole Effluent Toxicity
Enforcement

FROM: Robert Van Heuvelen, Director
Office of Regulatory Enforcement
for Michael Cook, Director
Office of Wastewater Management

TO: Water Management Division Directors, Regions I-X
Regional Counsels, Regions I-X
State NPDES Directors

The purpose of this joint memorandum is to clarify National policy with regard to the two most common issues raised by the regulated community involving the enforcement of whole effluent toxicity (WET) requirements in NPDES permits: 1) single exceedances of WET limits, and 2) inconclusive toxicity reduction evaluations (TRES).

Single Exceedances

Section 309 of the Clean Water Act (CWA) states that any violation of a permit condition or limitation is subject to enforcement. Through EPA's "Enforcement Management System" (EMS) guidance, the EPA Regional or State enforcement authority is encouraged to initiate an appropriate enforcement response to all permit violations. EPA's overall approach to enforcement applies to all parameters--once a facility has been identified as having an apparent permit violation(s), the permitting authority reviews all available data on the seriousness of the violation, the compliance history of the facility, and other relevant facts to determine whether to initiate an enforcement action and the type of action that is appropriate. The EMS recommends an escalating response to continuing violations of any parameter.

EPA does not recommend that the initial response to a single exceedance of a WET limit, causing no known harm, be a formal enforcement action with a civil penalty. The "Whole Effluent Toxicity Basic Permitting Principles and Enforcement Strategy"



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issued by the Office of Water on January 25, 1989 states that any violation of a WET limit is of concern and should receive an immediate, professional review. It does not necessarily require that a formal enforcement action be taken--the enforcement authority has discretion on selecting an appropriate response.

Guidance on enforcement responses to WET violations was added to the EMS in 1989. For example, EPA's recommended response to an isolated or infrequent violation of a WET limit, causing no known harm, is issuance of a letter of violation or an Administrative Order (AO), which does not include a penalty. As with violations of any parameter, the EMS recommends an escalating enforcement response to continuing violations of a WET limit.

The regulated community has expressed concern about the potential for third party lawsuits for single exceedances of WET limits. Citizens cannot sue a permittee on the basis of a single violation of a permit limit. Under § 505(a) of the CWA, citizens are allowed to take a civil action against anyone who is alleged "to be in violation" of any standard or limit under the CWA. In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987), the Supreme Court held that the most natural reading of "to be in violation" is "a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation--that is, a reasonable likelihood that a past polluter will continue to pollute in the future."

Inconclusive TRES

The 1989 "Whole Effluent Toxicity Basic Permitting Principles and Enforcement Strategy" states on page 9:

"In a few highly unusual cases where the permittee has implemented an exhaustive TRE plan, applied appropriate influent and effluent controls, maintained compliance with all other effluent limits, compliance schedules, monitoring, and other permit requirements, but is still unable to attain or maintain compliance with the toxicity-based limits, special technical evaluation may be warranted and civil penalty relief granted. Solutions in these cases could be pursued jointly with expertise from EPA and/or the States as well as the permittee."

EPA is committed to providing technical support in the "highly unusual cases" described above and is in the process of determining the number of facilities nationwide that fit in this category. As the WET program has grown and evolved, sources for this type of technical support have shifted to EPA Regions, States, and Tribes. In a conference call with Regional permits and enforcement staff in April and feedback from the annual

Biological Advisory Committee in May, the Regions requested support from Headquarters in helping to establish national WET technical expertise to address issues such as inconclusive TRES. There has been a national mechanism for this type of support in the past, as a complement to Regional and State/Tribal efforts (e.g., the National Effluent Toxicity Assessment Center). A national vehicle for this type of effort is currently being evaluated with a view toward providing additional support for the national WET program.

EPA believes that the science behind the WET program and test procedures is sound and continually improving, and fully supports the mid-course evaluations that are being planned and executed through an upcoming WET workshop, as well as other planned or ongoing studies. The September 1995 workshop is being organized by the Society for Environmental Toxicology and Chemistry (SETAC) as part of their Pellston workshop series, through partial funding from EPA and other groups. The purpose of the workshop is to assess where we are in the WET program-- i.e., identify technical issues that have been resolved and need no further work as well as explore associated technical issues that do need further research, clarification, or resolution. Because participation in the workshop is by invitation only, an open forum will be held soon after the workshop to discuss the results with all interested parties.

Please call us or have your staff call Kathy Smith (ORE) at 202-564-3252 or Donna Reed (OWM) at 202-260-9532 if you have any questions regarding this matter.

cc: Tudor Davies (OST)
NPDES Branch Chiefs, Regions I-X