



ASIWPCA

Association of State and Interstate
Water Pollution Control Administrators

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Jim Hanlon
Director
Office of Wastewater Management
U.S. Environmental Protection Agency
Washington D.C. 20460

SUBJECT: PROCEDURAL REQUIREMENTS FOR GENERAL NPDES PERMITS

Dear Mr. Hanlon:

The ASIWPCA Board has reviewed the current state of their general permit programs and has concluded that the membership needs to work with your Office to address the issues administratively and if needed with amendments to the current regulations governing the adoption of general permits. The purpose of these changes would be to make clarifications in light of several recent federal court decisions. Cumulatively, these decisions may severely impact the ability of States to administer the storm water and other programs that rely on general permits. We do not believe that USEPA intended that its general permit program follow the procedural requirements in these court decisions. By amending its general permit program rules, etc. to reflect the realities of regulating thousands of disparate dischargers involved in storm water runoff, dairy operations, and the like, USEPA will allow States to implement strong and enforceable programs regulated by general permits.

BACKGROUND

USEPA regulations specify minimum procedural requirements for adopting national pollutant discharge elimination system (NPDES) permits. (40 C.F.R. Part 124.) States that administer NPDES permits must comply with these minimum requirements. (40 C.F.R. Part 123). The USEPA procedural requirements include public notice of draft permits (section 124.10), receipt of public comments and the opportunity for public hearings (sections 124.11 and 124.12), and approval (issuance) of the permit by the agency with approval to administer the program (section 124.15). There is also a regulation that allows

for administrative extension of expired permits, but only if there is a timely application for a new permit. (Section 122.6). USEPA has adopted regulations approving the issuance of general permits (section 122.28), but this regulation does not specify the procedural requirements for general permits. Instead, the regulation states that the procedural requirements in Part 124 apply. (Section 122.28(b)(1)).

Many general NPDES permits regulate activities that were not historically regulated by permits. These include storm water runoff from municipalities, industry, and construction activities, and runoff from confined animal facilities. In light of the inherent difficulties in regulating such discharges, USEPA originally exempted these from NPDES coverage. Those exemptions were overturned by court action, but the court concluded that regulations could require specific practices in lieu of numeric effluent limitations and that administrative devices such as general permits could be used to overcome the practical difficulties of regulating large numbers of dischargers. (*Natural Resources Defense Council v. Costle* (D.C.Cir. 1977) 568 F.2d 1369).

The Costle decision eventually led to regulation of storm water runoff and confined animal facilities. USEPA and most States have followed the program described in EPA's storm water regulations (40 C.F.R. Part 122.26), by regulating large numbers of entities under permits that focus on requiring "best management practices" (BMPs) at regulated facilities. The dischargers are required to prepare and implement management plans that describe particular BMPs that will achieve the statutory standards. Some of these permits include numeric effluent limitations and others do not, but all require specific BMPs and management plans.

DIFFICULTIES CAUSED BY RECENT COURT DECISIONS

Several recent court decisions have applied procedural requirements from Parts 122 and 124, which were obviously written only for individual NPDES permits, to the BMP based general permits. The result is that administration of these permits has become very unwieldy. Two federal courts of appeal have held that the requirements for notice of permit applications, comment and opportunity for public hearing, and approval of permits, apply to each notice of intent (NOI) to obtain coverage under a general permit and each management plan. (*Environmental Defense Center v. U.S.E.P.A.* (9th Cir. 2003) 319 F.3d 398) and *Waterkeeper Alliance v. USEPA* (2nd Cir. 2005) 399 F.3d 486). In some States, there may be as many as 50,000 storm water dischargers subject to general permits. Each NOI and management plan cannot be reviewed in the same manner as an individual permit application. In a recent district court decision, a federal court in California concluded that an expired general permit cannot be extended administratively because there is no permit application submitted for general permits. (*California Sportfishing Protection Alliance v. Lake Wildwood* (E.D.Cal. 2006) slip op. 2006 WL 2734370). In light of the issues in issuing general permits that apply to thousands of dischargers and that are of great public interest, it is very difficult to ensure timely adoption. It is critical to have the ability to extend the permits.

RECOMMENDATION

In summary, ASIWPCA requests that we undertake a joint effort with your Office to develop and adopt procedural changes by regulations or other appropriate means for general NPDES permits. These changes should address procedural requirements for NOIs and management plans, minimum public participation provisions, and extension of expired permits.

Sincerely,



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ASIWPCA President and
Chief, Bureau of Water, Illinois EPA

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