



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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MEMORANDUM

SUBJECT: Water Quality-Based and Technology-Based CSO Requirements

FROM: Michael B. Cook, Director
Office of Wastewater Management

Eric Schaeffer, Director
Office of Regulatory Enforcement

TO: Water Division Directors
Regions I-X

Since EPA released the Combined Sewer Overflow (CSO) Control Policy in 1994 (59 FR 18688), questions have arisen concerning the application of the water quality-based and technology-based requirements of the Clean Water Act to CSOs, particularly where enforcement cases are pending or imminent. This memorandum clarifies that:

1. Because CSOs are subject to the technology-based requirements of the Clean Water Act (CWA), permitting authorities must specifically determine best available technology economically achievable (BAT)/best conventional pollutant control technology (BCT) on a case-by-case basis using best professional judgment (BPJ) during the permitting process. Given the protectiveness of properly-applied water quality standards (WQS), we expect the combination of the nine minimum controls (NMC) and water quality-based controls described in the CSO Policy to be generally at least as stringent as any applicable BAT/BCT requirements. Therefore, evaluation of CSO controls beyond the NMC may appropriately focus primarily on water quality issues.
2. Permitting and water quality programs should coordinate closely to reach agreement on the requirements of a long-term CSO control plan (LTCP). Where there is a planned or pending enforcement matter, the enforcement, permitting and water quality programs should all coordinate closely to ensure that the long-term control requirements imposed by a Phase II permit and by a compliance plan are consistent.

Our expectation is that NPDES permitting, enforcement, and WQS staff would work on a cooperative basis with the permittee, following the course described below. This process assumes the collaborative participation of the CSO discharger in the approach to CSO planning described in EPA's policy and guidance.

Water quality-based requirements

The CSO Policy encourages a watershed-based approach to CSO planning. The LTCP should include extensive analysis of current water quality conditions, including the impacts of CSOs and other pollution sources on WQS attainment. It should evaluate the cost, performance, and likely water quality improvements associated with a wide range of CSO control alternatives and evaluate control measures based on cost/performance criteria (as described in EPA guidance) as well as CWA requirements.

Data developed during LTCP development can inform decisions about the attainability of designated uses and the appropriateness of any WQS revisions. State and Federal WQS authorities need to be involved throughout the planning process to ensure that, if the LTCP is based in part on anticipated changes to WQS, those changes are appropriate and satisfy Federal regulatory requirements.

State and Federal NPDES authorities must coordinate throughout the planning process to ensure that, after implementation of the controls in the proposed LTCP, CSOs will not cause or contribute to nonattainment of WQS. Stakeholders, especially groups representing environmental interests, should be encouraged to participate actively during the development of the LTCP, including the consideration of potential WQS revisions.

Technology-based requirements

The CSO Policy calls for all CSO communities to implement the NMC. For each CSO community, the NPDES authority must determine on a best professional judgment (BPJ) basis whether the NMC satisfy the technology-based requirements of the CWA, considering the factors identified at 40 CFR 125.3.¹ The LTCP must include sufficient information concerning these factors to support a BPJ determination by the permitting authority. A BPJ analysis of any potential technology-based controls beyond the NMC would typically be conducted on a system-wide basis, rather than outfall-by-outfall.

We expect that, given the protectiveness of properly-applied WQS, the NMC, combined with water quality-based controls, will generally provide a level of CSO control that meets CWA requirements and is at least as stringent as technology-based controls identified on a BPJ basis. Although the permitting authority must still perform an analysis of technology-based requirements, the evaluation of potential CSO controls beyond the NMC may appropriately focus primarily on water quality issues, as described in EPA guidance.²

1. EPA, 1995. *Combined Sewer Overflows — Guidance for Permit Writers* (EPA 832-B-95-008), p. 3-8.

2. EPA, 1995. *Combined Sewer Overflows — Guidance for Long-Term Control Plan* (EPA 832-B-95-002).

Coordination of enforcement, permitting, and water quality programs in enforcement cases

EPA's CSO policy provides that once an LTCP is completed, the permitting authority should issue a Phase II NPDES permit including "[n]arrative requirements which insure that the selected CSO controls are implemented, operated and maintained as described in the long-term CSO control plan." The CSO policy also provides that NPDES authorities should "incorporate the long-term CSO control plan through a civil judicial action, an administrative order, or other enforceable mechanism..." An enforcement action may be brought before an LTCP is approved, and appropriate interim relief may be sought after consultation with the permitting authority.

The result of this approach is that the Phase II permit and the compliance plan resulting from an enforcement action should impose consistent requirements for long-term CSO control. The coordination necessary to achieve this result is described below.³

When an enforcement action is pending or planned, enforcement, permitting, and WQS staff (both State and Federal) should coordinate closely throughout the CSO planning process, with the goal of reaching consensus on a LTCP that will ultimately meet all water quality-based and technology-based requirements and is consistent with the CSO Policy. Areas of potential disagreement between enforcement, permitting, and WQS staff regarding appropriate water quality and technology-based requirements should be elevated early in the planning process to ensure agreement on the LTCP when it is completed. If a proposed LTCP contemplates WQS revisions and EPA concludes that it will disapprove the anticipated WQS revisions and promulgate federal WQS, then the LTCP should provide for attainment of the expected federal WQS. Similarly, if EPA concludes that it will object to the requirements of a future Phase II CSO permit and issue a federal permit if necessary, then the LTCP should be consistent with the requirements of the federal permit.

Once there is agreement on the LTCP, a schedule would then be negotiated for implementation of the LTCP. Where the schedule is negotiated in the context of an enforcement action, the enforcement program will be responsible for the negotiations, and will consult with the permitting program. If a LTCP assumes future revisions to WQS, the implementation schedule may account for such revisions if there is reasonable confidence that these revisions will become effective in the near future (i.e., that the WQS authority will in fact proceed with such revisions expeditiously, and that EPA will approve them). In such a case the schedule should include a reopener provision in the event that the anticipated revisions do not in fact occur. Such a reopener should require the implementation of specific controls, rather than a return to the planning phase.

If you have questions concerning this memorandum, please contact one of us, or have your staff call John Lyon of the Office of Regulatory Enforcement at (202) 564-4051 or Tim Dwyer of the Office of Wastewater Management at (202) 260-6064.

3. While the LTCP will generally be the basis for the injunctive relief in the enforceable schedule, there may be circumstances where relief beyond the LTCP is appropriate.