

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

OCT 28 1988

OFFICE OF
WATER

MEMORANDUM

SUBJECT: POTW Contract Operations

FROM: James R. Elder, Director
Office of Water Enforcement & Permits

TO: Addressees

On May 13, 1988, I sent you the attached memorandum discussing the potential liability of private operators of POTWs as National Pollutant Discharge Elimination System (NPDES) co-permittees. The purpose of the memorandum was to solicit your comments on four options we developed to address this issue. Briefly, the four options were:

- o Change the NPDES regulations to require that the POTW be the sole permittee even when the plant is operated by a private concern.
- o Make POTWs and private operators co-permittees, but specify in the permit that either permittee may claim as an affirmative defense that the other permittee caused a violation.
- o Pursue the regulatory changes in the first option and encourage use of the affirmative defense option as an interim measure.
- o Retain current policy of making the private operator a co-permittee with the POTW.

A number of the commenters who responded to my memo believed that the POTW should be the sole permittee. These commenters generally believed that the ultimate responsibility for compliance should rest with the POTW and that adding another party as a co-permittee might unnecessarily complicate enforcement policy. Other commenters preferred the co-permitting policy. None of the commenters preferred using the affirmative defense option, either permanently or as an interim measure.

After reviewing all comments and investigating the legal and policy aspects of this issue, we have decided to provide clarifying guidance in today's memorandum to supplement 40 CFR §122.21(b) and Martha Prothro's "privatization" memo of April 15, 1987. This guidance is applicable only to POTWs.

Section 122.21(b) imposes the duty to apply for a permit on the "operator" of a facility. EPA's intent in adopting this provision was to ensure that permits would be issued to the person or persons with true operational control over the facility. To be consistent with this intent, Martha Prothro's memorandum of April 15, 1987, suggested that all private parties operating POTWs under contracts with municipalities should be NPDES co-permittees, along with the POTW. However, Martha's memo was intended to address those situations where contract operators exercise primary management and operational decision-making authority. We have received information suggesting that most parties conducting contract activities for POTWs do not exert such control over POTWs. In such instances, the municipality or sewage authority should be the sole permittee.

It should be emphasized that parties involved in POTW operations who are not permittees may nevertheless be subject to civil and criminal enforcement actions where their activities result in violations of a POTW's permit.

If you have any further questions or comments on this issue, please feel free to contact me at (FTS) 475-8488 or have your staff contact Ephraim King at (FTS) 475-9539.

Attachment

Addressees:

Water Management Division Directors, Regions I-X
Susan Lepow, Office of General Counsel
Kathy Summerlee, Office of Enforcement and
Compliance Monitoring