APR 16 1987

MEMORANDUM

SUBJECT: Permit Implications of Privatization

FROM: Martha G. Prothro, Director
Permits Division (EN-336)

TO: Water Management Division Directors, Regions I X

On June 27, 1985, we sent you a draft document of questions and answers dealing with the NPDES permit and pretreatment implications of transactions that create private interests in municipal wastewater treatment works (i.e., "privatization"). In the draft memorandum we set out our conclusions on the applicable requirements for privatized facilities and discharges into such facilities and requested your comments.

Based on the comments we received, it is clear that there is a good deal of misunderstanding in this area, particularly with respect to the relevant Clean Water Act and NPDES requirements and legal constraints. For example, several commenters did not agree that ownership of the treatment works should be the determining factor in the appropriate limitations and whether pretreatment applied. These commenters suggested that any treatment plant treating primarily domestic waste should be regulated as a POTW (i.e., subject to limits based on secondary treatment, with contributors subject to pretreatment) regardless of whether it is publicly or privately owned. The Clean Water Act, however, does not allow for such an approach. Under the Act, whether a facility is subject to secondary treatment (and its users to pretreatment) requirements or whether other technology-based limits (BAT, BCT) apply depends solely upon whether the plant is publicly or privately owned, and not on the nature of the wastes being treated.

Another area of misunderstanding involves contracts with private parties for operation of POTWs. A couple of commenters questioned whether the private contract operator should be an NPDES permittee, suggesting instead that the POTW be the sole permittee. However, the NPDES regulations are explicit on this point, stating that when the owner and operator of a discharger are different persons, the operator of a facility is required to obtain an NPDES permit. See 40 CFR 122.21(b). We do agree

with several commenters that, although the operator must be a permittee, where the municipality continues to own the treatment works or sewer system, it should be a co-permittee. This policy is reflected in our revisions to the document.

Several commenters also raised questions about our statements that federally owned treatment plants (e.g., those serving military bases) are not POTWs, suggesting instead that we regulate these facilities as POTWs. The legislative history of the CWA indicates that Congress did not intend this to be the case. (See Appendix A of the attachment.) Moreover, EPA's regulatory definition of "POTW" in the general pretreatment regulations includes only plants owned by States and municipalities. See 40 CFR 403.3(o). Thus, these facilities will continue to be regulated as privately owned treatment works.

Attached is the final guidance that incorporates comments received on the earlier draft. Also, since the earlier draft was distributed for comment, the Office of Municipal Pollution Control has prepared a separate memorandum dealing with the construction grants implications of various privatization scenarios (attached). Accordingly, we have dropped the grants-related discussions from our document. If you have any questions, please call me (FTS 475-9545) or have your staff call George Young (FTS 475-9539).

Attachments

cc: James Elder
Susan Lepow
Michael Quigley

QUESTIONS AND ANSWERS ON PERMIT AND PRETREATMENT IMPLICATIONS OF PRIVATIZATION

I. Introduction

"Privatization" of municipal wastewater treatment systems can occur in a variety of ways. The construction of new treatment plants or the upgrading of existing ones may be privately financed. Existing POTWs, or portions thereof, may be sold or leased to private parties. Municipalities may enter into contracts whereby private parties are to operate an existing POTW. Privatization may also result where an existing privately owned facility that was formerly used solely as an industrial discharger's treatment facility is now used to treat a municipality's wastewater. (This is the situation in Golden, Colorado, where a treatment plant owned by the Coors Company, and formerly used to treat the company's brewery waste, is now being used to treat wastewater received from the town of Golden.)

A treatment plant that treats wastes from any source other than the operator of the treatment plant is either a "publicly owned treatment works" (POTW) or a "privately owned treatment works" under EPA regulations. The grouping in which a facility is placed depends solely on the ownership and not on the nature of its influent. POTW is a treatment system that is owned by a State or municipality (for purposes of the NPDES program this includes counties or State sewer districts). "Privately owned treatment works" is defined in 40 CFR 122.2 as "any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a 'POTW'." In other words, a treatment plant that is not a POTW is by definition a privately owned treatment works, even if it is not in fact "privately owned." For example, a federally owned treatment plant serving a military base is not a POTW since it is not owned by a State or municipality, even though the majority of its waste may be domestic sewage from residential base housing. See 40 CFR 403.3(o). */ Conversely, any treatment works that is publicly owned (by a State or municipality) is a POTW, even if it receives most or all of its flow from industrial users.

Whether a treatment plant is a POTW or a privately owned treatment works is important in determining the limits to be contained in the plant's NPDES permit and the requirements (i.e., pretreatment or otherwise) to which contributors to the treatment plant are subject. If a treatment plant is a POTW, its NPDES permit must contain, at a minimum, technology-based limits requiring secondary treatment. See §301(b)(1)(B) of the Clean Water Act (CWA). In addition, contributors to the plant are subject to applicable pretreatment requirements. Privately

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*/ The legislative history of the Clean Water Act indicates that Congress intended to exclude federally owned treatment works from being classified as POTWs. See Appendix A.

owned treatment works, on the other hand, are subject to technology-based limits that require BPT, BAT, BCT and/or NSPS. See CWA, §§301(b)(2), 306. These limits are established based upon applicable effluent limitation guidelines, and, for wastestreams not covered by a guideline, the permit writer's "best professional judgment" (BPJ). */ Contributors to privately owned treatment works are not subject to pretreatment requirements, but instead must comply with any requirements imposed pursuant to 40 CFR 122.44(m). That provision authorizes the permitting authority to include in the privately owned treatment works' NPDES permit "any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this part." Alternatively, the permitting authority may issue separate permits to the treatment works and its users, or require a separate permit application from any user. As noted in the preamble to the consolidated permit regulations (45 FR 33342, May 19, 1980), the discretionary authority provided by §122.44(m) gives the permitting authority "sufficient flexibility to ensure compliance with applicable standards and limitations and to minimize any administrative burdens."

The questions and answers that follow address some of the basic issues that privatization presents in the pretreatment and NPDES contexts, and represent an attempt to resolve these issues within the constraints of the existing statutory and regulatory schemes. Not all of the possible privatization scenarios are discussed, but the general principles set forth should be applicable to most situations that are likely to occur. The first two sets of questions and answers deal with the preliminary issues of how "POTW" is defined for pretreatment purposes and the pretreatment implications where a privately owned treatment works is treating wastewater received through a publicly owned collection system. The remaining questions and answers examine the NPDES and pretreatment implications of specific privatization transactions.

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*/ Of course, for both POTWs and privately owned treatment works, where technology-based limitations are deemed not to be protective of water quality, more stringent water quality-based limitations may need to be established on a case-by-case basis. See CWA, §301(b)(1)(C). In addition, privately owned treatment works (and POTWs not covered by the "domestic sewage exemption" (40 CFR 261.4(a)(1)) or "permit-by-rule" (40 CFR 270.60(c))) that treat, store dispose of hazardous waste, are also subject to applicable requirements under the Resource Conservation and Recovery Act (RCRA).

II. Questions and Answers

Question #1: What is a "POTW" for purposes of triggering pretreatment program requirements?

Answer: Section 307(b) of the Clean Water Act ("the Act") directs EPA to promulgate pretreatment standards for pollutants introduced into "treatment works (as defined in section 212 of this Act) which are publicly owned." Section 212 of the Act defines "treatment works" to include "any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature. . . including . . . sewage collection systems" and "any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste . . . or industrial waste . . . ." This definition includes treatment facilities that treat exclusively municipal or industrial wastes as well as those treating a combination of the two. Assuming a facility is a treatment works, the controlling factor in determining whether the facility is a POTW under §307(b) is public ownership. The nature of the pollutants being contributed to the treatment works is irrelevant.

The General Pretreatment Regulations (40 CFR Part 403) further clarify the statute by defining "POTW" as "a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act)." 40 CFR 403.3(o). This definition also includes

"sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant." "POTW Treatment Plant" is defined as "that portion of the POTW which is designed to provide treatment . . . of municipal sewage and industrial waste." As with the statutory definition, the regulatory definition of "POTW" turns on ownership of the facility and not characterization of its flow as municipal or industrial in nature.

Under the General Pretreatment Regulations, a facility must be owned by a State or municipality in order to be a POTW. Contributors to facilities meeting this criterion are subject to any and all applicable statutory and regulatory pretreatment requirements.

Federally owned treatment plants (such as those serving some military bases or Forest Service operations) are not POTWs (since they are not owned by a State or municipality), and are therefore regulated as privately owned treatment works. Thus, they are subject to permit limits based on BPT, BAT, BCT and/or NSPS (see Introduction, p. 2). Because these plants are classified as privately owned treatment works, contributors to them are subject to any requirements imposed under 40 CFR 122.44(m) (see Introduction, p. 2).

Contributors to sewerage systems that do not lead to a POTW treatment works similarly are treated as contributors to a privately owned treatment works. These discharges are not covered by pretreatment standards (although they would be if a treatment works were later constructed), but instead are subjec to direct discharger standards applied under 40 CFR 122.44(m).

Question #2: What are the pretreatment implications where a treatment plant is privately owned but the collection system is publicly owned?

Answer: Where a treatment plant is privately owned but the collection system leading to it is publicly owned, the collection system does not meet the regulatory definition of "POTW" since it does not convey wastewater to a publicly owned treatment plant. See 40 CFR 403.3(o). Therefore, contributors to the system are not subject to Federal pretreatment requirements. */ As contributors to a "privately owned treatment works," however, they (and the public entity whose collection system discharges into the treatment plant) may be subject to requirements imposed under 40 CFR 122.44(m), which allows the Director to regulate such contributors, either as co-permittees with the owner/operator of the treatment plant or under separate permits (see Introduction, p. 2).

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*/ There may, however, be local sewer use ordinance limitations, similar to the prohibited discharge limitations in 40 CFR 403.5(a) and (b), that apply to contributors as a result of previous construction grant funding requirements (if Federal construction grants were used to construct the collection system). These limitations would generally be contained in a municipal ordinance covering discharges to the public sewer system.

Question #3: What are the pretreatment implications where a POTW is sold to a private party?

Answer: Where the entire treatment plant is sold, pretreatment requirements no longer apply since there is no longer any introduction of pollutants into a POTW (i.e., the treatment plant is now privately owned). This is true whether or not the collection system remains in public ownership. In the case of a partial sale of a POTW, the pretreatment implications depend upon which portion is sold. For example, if all system components located between an industrial user's outfall and the POTW's headworks (i.e., the sewer lines connecting the industrial user's facility to the public treatment plant) are sold to the industrial user, pretreatment requirements continue to apply since the industrial user is still introducing pollutants into a POTW (i.e., the treatment plant is still publicly owned). The only change is the point at which these requirements apply. Instead of applying where the industrial user's effluent enters the sewer, they now apply where the effluent enters the treatment plant (i.e., the headworks), since this is the point of introduction to the POTW. */

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*/ If other industrial users discharge to the now privately owned sewer upstream of the treatment plant, and any of the wastewater in the sewer is subject to a categorical pretreatment standard, the applicable limits where the effluent enters the treatment plant will be derived using the same flow-proportioning calculation required for individual industrial users who combine wastestreams after treatment. See 51 FR 21461-21462 (June 12, 198

Where part of the treatment plant is sold but the collection system remains in public ownership, whether industrial contributors to the collection system are subject to pretreatment requirements depends upon whether the treatment plant can still be characterized as "publicly owned." This in turn depends upon the nature and extent of private ownership. If the public and private entities are co-owners of the entire facility, it is still a POTW and pretreatment would apply. If, however, the different entities own distinct portions of the facility a case specific analysis tracing the waste would be required. If an industrial user's waste flows through <u>any</u> treatment process that is publicly owned, then the plant is considered a POTW and the contributor is subject to pretreatment. For instance, where the industrial user's waste flows sequentially through treatment processes that are owned by the public and private entities pretreatment would apply. This result derives from the fact that the waste is treated, even though only partially, by a publicly owned treatment works. If, however, complete treatment trains are distinct, though possibly identical and adjacent, the result would be different. The waste treated at the publicly owned portion would, of course, be subject to pretreatment requirements. The waste treated solely by the privately owned facility would not, but would instead be subject to requirements under 40 CFR 122.44(m).

Question #4: What are the NPDES permit implications where a POTW is sold to a private party?

Answer: Under the NPDES regulations, it is the "operator" of a facility who must apply for and comply with a permit. See 40 CFR 122.21(b). Thus, where a POTW is sold to a private party who also operates the plant, that party must apply for, and comply with, an NPDES permit. The permit limitations for the facility are no longer based on secondary treatment, but on BPT, BAT, BCT and/or NSPS (see Introduction, p. 2). If only a portion of the plant is sold, and the plant can still be characterized as a POTW (see Answer to Question #3, above), the permit limits would then be based on secondary treatment. In these cases, as in any case where the facility is still considered a POTW, the public entity also should be a co-permittee with the operator of the facility.

Where the treatment plant is sold but the collection system remains in public ownership, pretreatment requirements no longer apply. All contributors to the system are now subject to any requirements imposed under 40 CFR 122.44(m), which applies to privately owned treatment works. Under that provision, the Director may issue one permit under which some or all contributors are co-permittees or may issue separate permits. The publicly owned collection system is now a contributor to a privately owned treatment works and, as such, may also be made a co-permittee.*/ This will help to ensure that the collection

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*/ For example, the permit night contain a condition requiring the municipality to notify the privately owned treatment works operator of any significant change in the nature or volume of pollutants being discharged into the collection system.

system will continue to be operated as an integral part of the treatment system, thereby maximizing efficiency and avoiding conflicting interests between public and private parties.

Question #5: What are the pretreatment and NPDES implications where a POTW is leased to a private party?

Answer: Since a lease does not transfer ownership, it does not affect a facility's status as a POTW and therefore should not affect the application of pretreatment requirements. Contributors to the POTW must comply with pretreatment standards under §307(b) of the CWA. As in the case of mixed public-private ownership (see Answer to Question #4 above), the public entity should be a co-permittee even though the lessee is now the operator of the treatment works. With respect to permit limits, secondary treatment (or more stringent requirements under §301(b)(1)(C)) of the CWA) applies since the facility is still a POTW.

Question #6: What are the pretreatment and NPDES permit implications of a municipality contracting with a private party to operate a POTW?

Answer: Since an operating contract does not transfer ownership, it does not change the facility's status as a POTW. Therefore, the facility's NPDES permit limits will continue to be based on secondary treatment (at a minimum) and any industrial contributors will still be subject to applicable pretreatment requirements.

The NPDES regulations impose the duty to apply for a permit on the "operator" of a facility. 40 CFR 122.21(b). Historically, though, municipal NPDES permits have been issued to the municipality even where a private party operates the plant under a service contract. EPA's intent in adopting this requirement was to ensure that the permit would be issued to the person(s) with operational control over the facility. To be consistent with this intent, all private parties operating POTWs under contracts with municipalities should be NPDES permittees. As where there is mixed public-private ownership or the POTW is leased to a private party, since the facility is still a POTW the municipality also should be a co-permittee.

Question #7: What are the pretreatment and NPDES implications where a private party finances improvements to an existing POTW?

Answer: Pretreatment requirements will continue to apply if the upgraded facility can still be characterized as a "POTW." This will depend upon the nature of the privately financed improvements (see Answer to Question #3, above). If the private party also operates the plant, it must apply for an NPDES permit. If the plant remains a POTW, the municipality must also be made a co-permittee (see Answer to Question #7, above). In addition, secondary treatment (at a minimum), and pretreatment standards for industrial users, continue to apply.

Where the plant can no longer be characterized as "publicly owned," it will be regulated as a "privately owned treatment works" and thus will be subject to permit limits based on BPT, BAT and/or BCT (see Introduction, p. 2). This would occur where the private party owns the new treatment works or separate treatment train. Industrial contributors to the plant will be subject to any requirments imposed upon them under 40 CFR 122.44(m) (see Introduction, p. 2).