

Dear State Water Program Directors:

The purpose of this letter is to transmit to you the final Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. The policy addresses issues relating to the type of effluent limitations that are most appropriate for National Pollutant Discharge Elimination System storm water permits to provide for the attainment of water quality standards. Since this policy only applies to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgement, that are incorporated into storm water permits. With this policy, the Office of Water is seeking to fulfill objectives of the 1996-1997 National Water Program Agenda for the Future (January 16, 1996), including reducing the threat of wet weather discharges to water quality, providing States and local governments with greater flexibility to solve wet weather problems, and identifying and taking appropriate steps to reduce the existing burden of the Storm Water Phase I program.

Numerous parties were involved in preparing this policy. In addition to receiving significant input from the Urban Wet Weather Flows Advisory Committee, EPA also consulted with State and Regional Storm Water Coordinators.

If you have questions regarding this policy, please contact William Hall at (202) 260-1458 or Bill Swietlik at (202) 260-9529. I thank you for your assistance.

Sincerely,

Robert Perciasepe
Assistant Administrator

Enclosure

MEMORANDUM

SUBJECT: Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits

FROM: Robert Perciasepe, Assistant Administrator

TO: EPA Water Management Division Directors

The purpose of this memorandum is to transmit to you the final Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits. The policy addresses issues relating to the type of effluent limitations that are most appropriate for National Pollutant Discharge Elimination System storm water permits to provide for the attainment of water quality standards. Since this policy applies only to water quality-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgement, that are incorporated into storm water permits. With this policy, the Office of Water is seeking to fulfill objectives of the 1996-1997 National Water Program Agenda for the Future (January 16, 1996), including reducing the threat of wet weather discharges to water quality, providing States and local governments with greater flexibility to solve wet weather problems, and identifying and taking appropriate steps to reduce the existing burden of the Storm Water Phase I program.

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Attachment

INTERIM PERMITTING APPROACH FOR WATER QUALITY-BASED EFFLUENT LIMITATIONS IN STORM WATER PERMITS

In response to recent questions regarding the type of water quality-based effluent limitations that are most appropriate for National Pollutant Discharge Elimination System (NPDES) storm water permits, the Environmental Protection Agency (EPA) is adopting an interim permitting approach for regulating wet weather storm water discharges. Due to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass), EPA will use an interim permitting approach for NPDES storm water permits.

The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations. Since the interim permitting approach only addresses water quality-based effluent limitations, it also does not affect technology-based effluent limitations, such as those based on effluent limitations guidelines or developed using best professional judgement, that are incorporated into storm water permits.

Each storm water permit should include a coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits. Such a monitoring program may include ambient monitoring, receiving water assessment, discharge monitoring (as needed), or a combination of monitoring procedures designed to gather necessary information.

This interim permitting approach applies only to EPA; however, EPA also encourages authorized States and Tribes to adopt similar policies for storm water permits. This interim permitting approach provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges for the protection of water quality. This interim permitting approach may be modified as a result of the ongoing Urban Wet Weather Flows Federal Advisory Committee policy dialogue on this subject.

Qs & As FOR INTERIM PERMITTING APPROACH FOR WATER QUALITY-BASED EFFLUENT LIMITATIONS IN STORM WATER PERMITS

QUESTION 1: Must EPA require that storm water dischargers, industrial or municipal, be subject to numeric water quality-based effluent limitations (expressed as concentration and mass) in order to attain water quality standards (WQS)?

ANSWER 1: No. Although National Pollutant Discharge Elimination System (NPDES) permits must contain conditions to ensure that water quality standards are met, this does not require the use of numeric water quality-based effluent limitations. Under the Clean Water Act (CWA) and NPDES regulations, permitting authorities may employ a variety of conditions and limitations in storm water permits, including best management practices, performance objectives, narrative conditions, monitoring triggers, action levels (e.g., monitoring benchmarks, toxicity reduction evaluation action levels), etc., as the necessary water quality-based limitations, where numeric water quality-based effluent limitations are determined to be unnecessary or infeasible.

ANALYSIS:

A. The Clean Water Act does not require numeric effluent limitations.

Section 301 of the CWA requires that discharger permits include effluent limitations necessary to meet State or Tribal WQS. Section 502 defines "effluent limitation" to mean any restriction on quantities, rates, and concentrations of constituents discharged from point sources. The CWA does not say that effluent limitations need be numeric. As a result, EPA and States have flexibility in terms of how to express effluent limitations.

B. EPA's regulations do not always require numeric effluent limitations.

EPA has, through regulation, interpreted the statute to allow for non-numeric limitations (e.g., "best management practices" or BMPs, see 40 CFR 122.2) to supplement or replace numeric limitations in specific instances that meet the criteria specified at 40 CFR 122.44(k). This regulation essentially codifies a court case addressing storm water discharges. *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In that case, the Court stated that EPA need not establish numeric effluent limitations where such limitations were infeasible.

C. EPA has interpreted the statute and regulations to allow BMPs in lieu of numeric limitations.

EPA has defended use of BMPs as a substitute for numeric limitations in litigation involving storm water discharges (*CBE v. EPA*, 91-70056 (9th Cir.)(brief on merits)) and in correspondence (Letter from Michael Cook, EPA, to Peter Lehner, NRDC, May 31, 1995). EPA has found that numeric limitations for storm water permits can be very

difficult to develop at this time because of the existing state of knowledge about the intermittent and variable nature of these types of discharges and their effects on receiving waters. Some storm water permits, however, currently do contain numeric water quality-based effluent limitations where adequate information exists to derive such limitations.

QUESTION 2: Has EPA provided guidance on a methodology for deriving numeric water quality-based effluent limitations?

ANSWER 2: Yes, but primarily for continuous wastewater discharges at low flow conditions in the receiving water, not intermittent wet weather discharges during high flow conditions. Regulations at 40 CFR 122.44(d) specify the requirements under which permitting authorities establish water quality-based effluent limitations when a facility has the "reasonable potential" to cause or contribute to an excursion of numeric or narrative water quality criteria. In addition, EPA guidance in the Technical Support Document for Water Quality-Based Toxics Control (TSD) and the NPDES Permit Writers Training Manual, supplemented with total maximum daily load (TMDL) and modeling guidance, supports issuing permits that include numeric water quality-based effluent limitations. This guidance was based on crafting numeric water quality-based effluent limitations using TMDLs, or calculations similar to those used in developing TMDLs, and wasteload allocations (WLAs) derived through modeling. EPA expects the Urban Wet Weather Flows Federal Advisory Committee (60 FR 21189, May 1, 1995) will review this issue at greater length and may provide recommendations on how to proceed.

QUESTION 3: Why can numeric water quality-based effluent limitations be difficult to derive for storm water permits?

ANSWER 3: Storm water discharges are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex. The water quality impacts of storm water discharges are related to the uses designated by States and Tribes in their WQS, the quality of the storm water discharge (e.g., conventional or toxic pollutants conveyed to the receiving water) and quantity of the storm water (e.g., erosion and loss of habitat caused by increased flows and velocity). Uses may be impacted by both water quality and water quantity. Depending on site-specific considerations, some of the water quality impacts of storm water discharges may be more related to the physical effects (e.g. stream bank erosion, streambed scouring, extreme temperature variations, sediment smothering) than the type and amount of pollutants present in the discharge. For municipal storm water discharges in particular, the current use of system-wide permits and a variety of jurisdiction-wide BMPs, including educational and programmatic BMPs, does not easily lend itself to the existing methodologies for deriving numeric water quality-based effluent limitations. These methodologies

were designed primarily for process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in receiving waters. Using these methodologies, limitations are typically derived for each specific outfall to be protective of low flows in the receiving water. Because of this, permit writers have not made wide-spread use of the existing methodologies and models for storm water discharge permits. In addition, wet weather modeling is technically more difficult and expensive than the simple dilution models generally used in the permitting process.

QUESTION 4: Has EPA previously recognized the technical difficulty in deriving numeric water quality-based effluent limitations for storm water discharges?

ANSWER 4: Yes. EPA recognized the technical difficulty in deriving numeric water quality-based effluent limitations for wet weather discharges in its brief on the merits in *Citizens for a Better Environment (CBE) v. United States Environmental Protection Agency*, 91-70056 (9th Cir.) and in the Great Lakes Water Quality Guidance (58 FR 20841, April 16, 1993).

In the CBE case, EPA explained why it was technically infeasible to derive numeric water quality-based effluent limitations for the discharge of metals in storm water into South San Francisco Bay and asserted that a water quality-based effluent limitation could take the form of a narrative statement, such as a BMP, if it was infeasible to derive a numeric limitation. In explaining its arguments in the CBE case, EPA cited 40 CFR 122.44(k)(2), which provides that BMPs may be imposed in NPDES permits "to control or abate the discharge of pollutants when ... (2) [numeric effluent limitations are infeasible."

In the Great Lakes Water Quality Guidance, EPA did not extend the method for calculating wasteload allocations, the basis for numeric water quality-based effluent limitations, to storm water or combined sewer overflow (CSO) discharges because the varying nature of these discharges is inconsistent with the assumptions used in developing the guidance. The Great Lakes Water Quality Guidance defers to national guidance and policy on wet weather and does not seek to establish a separate and distinct set of wet weather requirements. EPA expects the Urban Wet Weather Flows Advisory Committee to provide recommendations about how to address the broader technical issues involved in achieving compliance with WQS in a wet weather context.

QUESTION 5: What are the potential problems of using standard methodologies to derive numeric water quality-based effluent limitations for storm water permits?

ANSWER 5: Correctly derived numeric water quality-based effluent limitations provide a greater degree of confidence that a discharge will not cause or contribute to an exceedance of the WQS, because numeric water quality-based effluent limitations are derived directly from the numeric component of those standards. In addition, numeric water quality-based effluent limitations can avoid the expense associated with overly protective treatment technologies because numeric water quality-based effluent limitations provide a more precisely quantified target for permittees. Potential problems of incorporating inappropriate numeric water quality-based effluent limitations rather than BMPs in storm water permits at this time are significant in some cases. Deriving numeric water quality-based effluent limitations for any NPDES permit without an adequate effluent characterization, or an adequate receiving water exposure assessment (which could include the use of dynamic modeling or continuous simulations) may result in the imposition of inappropriate numeric limitations on a discharge. Examples of this include the imposition of numeric water quality criteria as end-of-pipe limitations without properly accounting for the receiving water assimilation of the pollutant or failure to account for a mixing zone (if allowed by applicable State or Tribal WQS). This could lead to overly stringent permit requirements, and excessive and expensive controls on storm water discharges, not necessary to provide for attainment of WQS. Conversely, an inadequate effluent characterization could lead to water quality-based effluent limitations that are not stringent enough to provide for attainment of WQS. This could result because effluent characterization and exposure assessments for discharges with high variability of pollutant concentrations, loadings, and flow are more difficult than with process wastewater discharges at low flows.

QUESTION 6: How are water quality-based effluent limitations developed for combined sewer overflow (CSO) discharges?

ANSWER 6: The CSO Control Policy issued by EPA on April 19, 1994 (59 FR 18688) provides direction on compliance with the technology-based and water quality-based requirements of the CWA for communities with combined sewer systems. The CSO Policy provides for implementation of technology-based requirements (expressed as "nine minimum controls") by January 1, 1997.

In addition, under the CSO Policy, communities are also expected to develop long-term control plans that will provide for attainment of WQS through either the "presumption approach" or the "demonstration approach." Under the presumption approach, CSO controls would be presumed to attain WQS if certain performance criteria are met. A program that meets the criteria specified in the CSO policy is presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA, provided the permitting authority determines that such presumption is reasonable based on characterization,

monitoring, and modeling of the system, including consideration of sensitive areas. Under the demonstration approach, the permittee would demonstrate that the selected CSO controls, when implemented, would be adequate to meet the water quality-based requirements of the CWA.

The CSO Policy anticipates that it will be difficult in the early stages of permitting to determine whether numeric water quality-based effluent limitations are necessary for CSOs, and, if so, what the limitations should be. For that reason, in the absence of sufficient data to evaluate the need for numeric water quality-based effluent limitations, the Policy recommends that the first phase of CSO permits ("Phase I") contain a narrative requirement to comply with WQS. Further, so-called "Phase II" permits would contain water quality-based effluent limitations, as provided in 40 CFR 122.44(d)(1) and 122.44(k), that may take the form of numeric performance or design standards, such as a certain number of overflow events or a certain percent volume capture. Generally, only after the long-term control plan is in place and after collection of sufficient water quality data (including applicable wasteload allocations developed during a TMDL process) would numeric water quality-based effluent limitations be included in the permit. This would likely occur only after several permitting cycles.

QUESTION 7: If BMPs alone are demonstrated to provide adequate water quality protection, are additional controls necessary?

ANSWER 7: No. If the permitting authority determines that, through implementation of appropriate BMPs required by the NPDES storm water permit, the discharges have the necessary controls to provide for attainment of WQS and any technology-based requirements, additional controls need not be included in the permit. Conversely, if a discharger (municipal or industrial) fails or refuses to adopt and implement adequate BMPs, the permitting authority may have to consider other approaches to ensure water quality protection.

If, however, the permitting authority has adequate information on which to base more specific conditions or limitations, such limitations are to be incorporated into storm water permits, as necessary and appropriate. Such conditions or limitations may include an integrated suite of BMPs, performance objectives, narrative standards, monitoring triggers, numeric water quality-based effluent limitations, action levels, etc. Storm water permits may also need to include additional requirements to receive State or Tribal 401 certifications.

QUESTION 8: What is EPA doing to develop information about the linkage between BMPs and water quality and to facilitate a watershed-based approach to storm water permitting?

ANSWER 8: The Agency has cooperative agreements with WERF (Water Environment Research Foundation) and ASCE (American Society of Civil Engineers) to research which BMPs are most effective under which circumstances. The results of this research should provide permitting authorities and permittees with information about how to evaluate the effectiveness of different kinds of BMPs in different circumstances and to select the most appropriate controls to achieve water quality objectives. EPA also has cooperative agreements with the Watershed Management Institute and other organizations to conduct research over the next two to four years that will examine the capability of storm water BMPs to improve receiving water quality and restore/protect the biological integrity of those waters. EPA expects the Urban Wet Weather Flows Federal Advisory Committee to provide recommendations on how to permit storm water discharges on a watershed basis.

QUESTION 9: The interim permitting approach states that permits should include monitoring programs to generate necessary information to determine the extent to which permits are providing for the attainment of water quality standards. What types of monitoring should be included and how much monitoring is necessary?

ANSWER 9: The amount and types of monitoring necessary will vary depending on the individual circumstances of each storm water discharge. EPA encourages dischargers and permitting authorities to carefully evaluate monitoring needs and storm water program objectives so as to select useful and cost-effective monitoring approaches. For most dischargers, storm water monitoring can be conducted for two basic reasons: 1) to identify if problems are present, either in the receiving water or in the discharge, and to characterize the cause(s) of such problems; and 2) to assess the effectiveness of storm water controls in reducing contaminants and making improvements in water quality.

Under the NPDES storm water program, large and medium municipal separate storm sewer system permittees are required to conduct monitoring. EPA recommends that each such municipal permittee design the monitoring effort to be supportive of the goals and objectives of its storm water management program when developing such a program for the term of its NPDES permit. To accomplish this, a municipal permittee may use a variety of storm water monitoring tools including receiving water chemistry; receiving water biological assessments (benthic invertebrate surveys, fish surveys, habitat assessments, etc.); effluent monitoring; including chemical, whole effluent and visual examinations; illicit connections screening; and combinations thereof, or other methods. Techniques that assess receiving waters will help to identify the degree to which storm water discharges are contributing to any water quality

problems. Techniques that assess storm water discharge characteristics will help to identify potential causes of any identified water quality problems. The municipal permittee, in conjunction with the applicable NPDES permitting authority, should determine which monitoring approaches would be most appropriate given the objectives of the storm water management program. If municipal permittees conduct ambient monitoring, it may be most cost-effective to pool resources with other organizations (including, for example, other municipalities, States, and Tribes) conducting monitoring within the same watershed. This could be best accomplished through a coordinated watershed monitoring strategy.

For industrial storm water dischargers, monitoring may be required under the terms of an NPDES permit for storm water discharges. For those industrial storm water permits that do require monitoring, this is typically done to characterize contaminants that might be found in the industrial runoff and/or to assess the effectiveness of the industrial storm water pollution prevention plan in reducing these contaminants. This typically involves end-of-pipe chemical-specific monitoring. End-of-pipe monitoring may be more appropriate for an industrial facility than for a municipal permittee, given the industrial facility's more discrete site characteristics, which make management strategies such as collection and treatment more feasible. Industries, for the most part, have readily defined storm water conveyances into which runoff flows from discrete drainage areas. Industries may more readily identify and control existing on-site sources of storm water contamination or provide collection and treatment within these discrete drainage areas to control pollutant concentrations in their storm water discharges.

EPA and other organizations are currently working to improve approaches for monitoring storm water and the potential effects upon water quality. These new approaches are called storm water program "environmental indicators." Environmental indicators are designed to be more meaningful monitoring tools that storm water dischargers can use to conduct storm water monitoring for the purposes described above. A manual describing each of the recommended storm water program environmental indicators is being prepared by the Center for Watershed Protection in Silver Spring, Maryland. That manual is expected to be ready by the end of August 1996 and should provide useful information for storm water dischargers contemplating the need to develop a cost-effective, meaningful storm water monitoring program. In addition, EPA expects the Urban Wet Weather Flows Federal Advisory Committee to provide recommendations on how to better monitor storm water and other wet weather discharges using a watershed approach.

QUESTION 10: Does this interim permitting approach apply to both storm water discharges associated with industrial activity and storm water discharges from municipal separate storm sewer systems?

ANSWER 10: Yes. The interim permitting approach is applicable to both discharges from municipal separate storm sewer systems and storm water discharges associated with industrial activity (as defined by 40 CFR 122.26(b)(14)). The interim permitting approach would not affect, however, permits that already incorporate appropriately derived numeric water quality-based effluent limitations. Since the interim permitting approach only addresses water quality-based effluent limitations, it also does not affect technology-based effluent limitations, such as those based on effluent limitations guidelines or developed using best professional judgement, that are incorporated into storm water permits. In addition, particularly for some industries, adequate information may already have been collected with which to assess the reasonable potential for a storm water discharge to cause or contribute to an excursion of a WQS, and from which a numeric water quality-based effluent limitation can be (or has been) appropriately derived. An adequate amount of storm water pollutant source information may also exist with which to assess the effectiveness of the industrial storm water control measures in complying with the limitations and in reducing storm water contaminants for protecting water quality.