



# Inside Pretreatment Underneath EPA Newsletter

March 21, 2008

## Springtime

Happy Spring! I am really excited that the sun is staying with us longer and climbing higher in the sky. Winter seemed pretty long this year. Because it is Spring, I wanted to give you something to think about, and hopefully provide some insight to how EPA works internally. I was sworn to secrecy....so I never wrote this. There is no need to change the names because I did not use any.

## Underneath EPA – This Newsletter has a new, temporary name.

I knew the day would come when I would have to write a newsletter because of an issue of justice. An issue of hypocrisy. An issue of fairness. An issue of judgment.

**Full Disclosure:** *This issue deals with a POTW Pretreatment Program that I have recently assisted in revising their legal authority, local limits, inspections, and permits. The issue I am addressing in this newsletter does not involve that work. It involves POTW previous SIU permitting actions that were addressed in an EPA audit that was just issued. I am not disclosing the name of the POTW in question. I have not been asked by the POTW to assist in a response to EPA on this issue. This newsletter reflects the opinions of CWACS.*

## When has a POTW Failed to Implement or Enforce It's Program?

When an Approval Authority does an audit (and a PCI to some degree), the intent is to assess compliance with the minimum Federal/state requirements and the approved pretreatment program. Another significant part of any audit is the technical assistance component. While I was at EPA, we never used audits to generate enforcement cases for the "bean count" and we were very careful in documenting and finding a program in non-compliance. The two levels of non-compliance that EPA applies are: Significant Non-Compliance (SNC) and Reportable Non-Compliance. Both put the POTW in violation and open the door for EPA enforcement and potentially, citizen lawsuits, under the Clean Water Act. This is a serious finding by EPA and is published in National publicly accessible database. Do not underestimate the negative aspects to being placed in SNC or RNC.

In 1987, EPA issued guidance addressing when a POTW may be found to be in Reportable Non-Compliance. In 1989, this Guidance was refined to establish criteria to prioritize the seriousness of POTW pretreatment program violations for

enforcement and reporting purposes. All of us at the Regional level (pretreatment staff) had the opportunity to work on this guidance document.

As a general concept, SNC violations are more serious than RNC level violations. However, they are both statements of the POTW's failure to comply with its NPDES permit and applicable regulations.

### **Topic for Today – Failure to Issue Permits to SIUs**

The importance of controlling industrial users through a permit or order has been the foundation of local programs since the earliest days. EPA recognized that two general situations existed: The first situation is where the newly approved pretreatment program would not get permits issued in a timely manner (within six months). The second situation was where a pretreatment program would have a Significant Industrial User (SIU) permit expire and the POTW would not get it reissued within six months. This failure to have a SIU covered by an effective permit made enforcement of standards and requirements a potential problem.

EPA adopted the following RNC criterion: ***POTWs must have issued at least 90% of the permits required to be issued within six months of program approval or expiration of the existing SIU permit.*** (You can read the actual text in the referenced guidance document).

We should all agree this is a good thing. Especially important is the requirement for a POTW to obtain an application from the permittee.

### **We Were Pretty Smart!**

Again, this was 1989 (really 1988-1989). During this time, we were requiring many new programs to be developed and writing as much guidance as possible to help in the implementation of this young program. That was 20 years ago. I had a \$2000 IBM computer that had a 5 MB hard drive. CDs? Internet access? Cell phone? Big Screen TV? PowerPoint? If I had only invested in one of these companies I would not be writing this newsletter today! Remember doing local limits? (hmm... I wonder what the other cities are adopting..... that is what I will adopt so I am the same as the guy down the highway!).

### **What Did We Not Foresee?**

The brain drain at EPA during the 21<sup>st</sup> Century and the lack of resources to revise out-of-date guidance documents. We did not foresee that there would be such onerous restrictions put on EPA Pretreatment staff regarding developing and revising guidance and policy and the inability to maintain resources. Did you know that EPA has to pass draft guidance documents through OMB in Washington, D.C. to make sure they like it before it can be provided to POTWs?

**Back on Track:** We did not foresee how sophisticated pretreatment programs would become and how similar POTWs and Approval Authority's philosophies would become.

We also did not foresee the increasing complexity of site-specific local limits, changes to the 403 Pretreatment Regulations (disappointing Streamlining changes), or the ability of POTWs to administratively extend permits.

**Quick Regulatory Review:** 40 CFR Section 403.8(f)(1)(iii)(A) requires that permits cannot have a duration longer than five years. That seems straight-forward. This is consistent with the Federal and state regulations for NPDES permits.

*I am always amazed that no one ever wanted to adopt regulations to allow a permit to never expire. Why not build in a simplified system to keep the permits updated on a continuing basis. You could easily develop a procedure to streamline this modification process. I swear... not like the other Streamlining. I am getting off subject again and I apologize.*

#### **A Real Example (but I will tell everyone it is hypothetical)**

Let's take this real example (and call it a hypothetical example). You are the POTW. Your legal authority allows you to issue permits for three years. You have always made sure permits never expired before they were reissued. Now, you decide to revise your legal authority and local limits because EPA requested you do so (I like updated legal authorities and local limits, too). Your permits are going to change dramatically. Over the period of a year, you make various submittals to EPA for review. EPA determines the submittals need revision and returns them each time to you.

Unfortunately, you notice that the permits are going to expire if you cannot get everything done and the Approval Authority approves the modifications in time. The last thing your program wants is to have a SIU out there without an effective permit. You decide to administratively extend the existing permits to allow you to focus resources on the modifications. Yes, the SIUs all reapplied for new permits so they were in compliance. You are a great pretreatment coordinator and do not want to extend the permits beyond the five year Federal maximum duration. That may be viewed by EPA as incompetent (a fallacy that we will address in a minute). There is no legal question as to whether or not you have guaranteed that the SIUs were fully controlled. They were fully covered under the administratively extended permit.

You do get the permits reissued prior to the five year Federal maximum duration (but beyond your own three year duration). The new permits contain new legal

authority language (mandatory streamlining) and new local limits. Then you get your audit report: You are in RNC for administratively extending the permits over six months (but less than 5 years). The permits had expired and had not been reissued within 6 months (but were administratively extended and completely effective).

### **What was the RNC Guidance Based Upon?**

As stated above, it was EPA's concern that SIUs would be without some or all enforceable controls if POTWs did not have permits in place. This is called the **applicability** of the guidance. It is easy to read the literal wording of the RNC criterion, but it is always the applicability of the guidance, or regulations, or policy that is critical to understanding what the wording means.

### **Hypocrisy?**

This is my favorite part. I even raised this to EPA in hopes that they would look at whether or not a 1989 guidance document should be used literally to create significant liability for a POTW in 2008. *Like Jurassic Park: Not whether or not you could, but whether or not you should.*

***EPA has permits that it writes that have been administratively extended for years, well beyond the five year maximum.***

***In Region 8, at least two states have administratively extended permits that have been in place for years, well beyond the five year limit.***

Are there other examples throughout the country? Of course.

What is done? Nothing. The states are not placed in non-compliance and their NPDES programs withdrawn. EPA has no real internal repercussions to its lack of complying with its own regulations. Why? Because there are a lot of issues that drive these problems, whether it is a management, resource or political problem.

I think the best and most reasonable explanation may be is that we did not anticipate the problem of administratively extending permits when we wrote the NPDES regulations. Therefore, we had no real way of dealing with it across POTWs, states, Regions, etc).

Is there Federal or state policy or regulations in place to address this reality? No. I even saw an example recently where a state modified an expired (administratively extended) permit! Since EPA provides state oversight, it appears that a new option for modifying expired permits is being allowed.

### **What Should be Done?**

1. EPA Region 8 should withdraw this audit report and have it reviewed by enforcement, legal and management prior to any conclusion on RNC (or SNC) being finalized.
2. EPA should have a process in-place that uses a team approach to make these decisions. EPA should not make this determination unless it is willing to provide proof and potentially defend its actions in court.
3. EPA should public notice for comment any policy or guidance document it intends to use to establish liability before informal interpretations are made that change the historical direction of the program. The pretreatment community should be involved and not frozen out of decisions that affect the operation of local government programs.

### **On a Lighter Note**

I appreciate everyone who has (or is now going to) return their training needs survey. We are developing in-depth (advanced) training around your input. An especially exciting opportunity for the development of training materials from an industry has been offered to us. More on that soon.

***Newsletters reflect the opinions of CWACS.*** They are not intended to change what a specific Approval Authority may require.

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