6 APR 1978

M-78-2

MEMORANDUM

TO: Regional Administrators
State NPDES Directors

FROM: Deputy Assistant Administrator for Water Enforcement (EN-335)

SUBJECT: Confidentiality of NPDES Permit Applications

Attached is a copy of a recent decision issued by the Office of General Counsel which requires that all information in NPDES permit applications and permits be made public. Please advise your staff of this change so that implementation can be uniform.

Jeffrey G. Miller

Attachment

cc: Regional Enforcement Division Directors
Regional Permits Branch Chiefs

JShaffer:mHite:PD:EN-336:3109 WSM:S-0750

EPA0010xx.xxx

CLASS DETERMINATION 1-78

CONFIDENTIALITY OF INFORMATION IN NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMITS AND PERMIT APPLICATIONS UNDER SECTION 402(j) OF THE FEDERAL WATER POLLUTION CONTROL ACT

Under the Federal Water Pollution Control Act (FWPCA), as amende (33 U.S.C. 466 et sec.), the Environmental Protection Agency (EPA) or counterpart State agencies issue National Pollution Discharge Elimination System (NPDES) permits to individual sources of water pollution. This program is administered primarily in EPA's Regional offices. Those offices have asked for a Class Determination concerning the confidentiality of information contained in NPDES permits and permit applications in light of section 402(j) of the FWPCA. Under 40 CFR 2.207, I have authority to issue Class Determinations concerni the confidentiality of classes of information obtained by EPA.

In the case of information contained in NPDES permit application and NPDES permits, I have found:

1. EPA possesses and will continue to acquire information in NPDES permits and permit applications.

2. The information contained in NPDES permits and permit applic tions is of the same character. It is proper to treat all of the information as in the same class.

3. A Class Determination would serve a useful purpose in clarif the status of potentially confidential information contained in NPDE permits and permit applications as restricted by section 402(j) of F

MAR 22 1978

OFFICE OF GENERAL COUNSEL

MEMORANDUM

SUBJECT: Confidentiality of NPDES Permit Applications

FROM: Joan Z. Bernstein
General Counsel (A-130)

TO: Thomas C. Jorling
Assistant Administrator for
Water and Hazardous Materials (WH-556)

Marvin Durning
Assistant Administrator
for Enforcement (EN-329)

Attached is a Class Determination I have issued concerning the status of potentially confidential business information contained in NPDES permits and NPDES permit applications. I have concluded that section 402(j) of the FWPCA requires that NPDES permits and permit applications be made public notwithstanding the fact that some of the information contained in them would otherwise be treated as confidential.

The Class Determination will be used by this office and the Regional Counsels in making final confidentiality determinations under the regulations in 40 CFR Part 2, Subpart B. Any request for confidentiality of information in a permit application or permit would be denied citing the Class Determination. The applicant would be given 10 days notice prior to disclosure in which to seek a judicial remedy. At the end of the 10-day notice period the information would be made available to the public.

An important part of implementing this Class Determination is to inform the various EPA regions and State agencies of the decision. I have informed the Regional Counsels of the Class Determination and of the way in which it is to be implemented. You will need to inform your counterpart offices in the Regions and the States.

It is clear from the language of section 402(j) and the legislative history of that provision that Congress intended section 402(j) to be a disclosure mandate in contrast to the basic approach of section 308 which provides protection for trade secret information. Accordingly, EPA is required to make public NPDES permits and NPDES permit applications.

The NPDES permit application is a standard form specified by EPA. It asks the applicant to supply certain specific information. In some cases, there is insufficient space for the applicant to supply all of the requested information. In those cases the applicant attaches additional sheets with the further information. For purposes of section 402(j), the NPDES permit application required to be made public is the application form itself and any attachments that are used to supply information requested by the application form. Any information obtained by EPA that goes beyond that asked for in the application, whether submitted by the applicant or obtained by EPA under authority such as 40 CFR 125.13, is not considered part of the permit application as contemplated by section 402(j). This additional information will be treated in accordance with the procedures of 40 CFR 2.302.

If an applicant has claimed as confidential any information contained in the NPDES permit application or the NPDES permit, confidential treatment will be denied in accordance with this Determination and notice given to the applicant in accordance with 40 CFR 2.205(f).

Joan Z. Bernstein
Joan Z. Bernstein
General Counsel (A-130)

3/22/78
Date