

Henry



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

REPLY TO ATTENTION OF: 5WQP-TUB-8

MAR 11 1991

Paul D. Zugger, Chief
Surface Water Quality Division
Michigan Department of Natural Resources
P.O. Box 30028
Lansing, Michigan 48909

Re: Storm Water Permitting Authority

Dear Mr. Zugger:

We have received your letter of January 25, 1991, concerning the storm water permit application regulations promulgated on November 16, 1990. In your letter, you asked us to provide the legal basis requiring States, such as Michigan, to administer National Pollutant Discharge Elimination Program (NPDES) permit regulations applicable to storm water.

Michigan has storm water permitting authority ab initio.

Federal regulations at 40 CFR 123.25 require State permit programs to implement specifically listed NPDES program elements in conformance with Federal regulation. The list of required program elements includes storm water permitting under 40 CFR 122.26. We note that whereas States are provided the option of whether or not to administer general permit programs and any portions of the sludge requirements enacted subsequent to the 1987 CWA amendments, no such provision is made for storm water permitting, and that is and has been an integral part of the NPDES program since its inception (albeit expanded by the new regulations).

The Michigan Department of Natural Resources (MDNR) was authorized by the U.S. Environmental Protection Agency to administer a NPDES program on October 17, 1973. In taking this action, U.S. EPA transferred authority to the State for all point source permitting including storm water.

Storm water discharges, with the exception of agricultural storm water, are point sources under 40 CFR 122.2. Unlike certain other NPDES programs such as the industrial pretreatment, general permitting and sludge permitting programs, storm water permitting does not require the development of comprehensive new State authorities, and does not entail a further delegation beyond that provided in the NPDES Memorandum of Agreement. States in Region V, including Michigan, have demonstrated their authority in the past by issuing permits to storm water dischargers. In promulgating permit application requirements for storm

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water discharges, U.S. EPA did not establish a new program, but rather established specific permit application requirements for this class of point source dischargers. While we acknowledge that storm water requirements have changed subsequent to Michigan's NPDES program authorization, we note that storm water requirements were in place in 1973 (38 FR 13530, May 22, 1973), prior to the delegation of the State's program. Any additional State program modifications the State believes will assist in implementing the new requirements should be addressed under the procedures at 40 CFR 123.62, which do not affect the underlying delegation.

For the above reasons, Michigan retains authority to issue NPDES permits for storm water discharges under its 1973 program delegation. No amendment to the original Memorandum of Agreement is required for the State to implement these authorities.

No partial return of State NPDES programs.

Neither the CWA nor Federal regulations permit the piecemeal return of State programs. The CWA and Federal regulations allow for voluntary transfer of State program authorities back to U.S. EPA, as well as withdrawal of State program authority for just cause (CWA Sections 402(c)(3) and (4), 40 CFR 123.63, 40 CFR 123.64). Section 402(c)(4)(B) of the CWA allows the return of partial programs approved pursuant to Section 402(n). Michigan's program was not approved pursuant to Section 402(n); therefore, Section 402(c)(2)(B) is not applicable. Thus, Michigan cannot choose to transfer storm water permitting back to the U.S. EPA and still retain other NPDES authorities. Furthermore, such action violates the fundamental scheme of the CWA to avoid dual or parallel State and Federal permitting programs.

We note that the legislative history relative to Sections 402(c)(4)(A) and (B) states that "[n]othing in either provision confers authority to a State to return parts of a program approved prior to the date of enactment." (See Conference Report No. 99-1004, 99th Congress, 2d session, page 153.)

U.S. EPA is currently in the process of drafting regulations in response to provisions of the 1987 CWA not heretofore addressed. One section, which is to be proposed as 40 CFR Section 123.30(b), would bar States previously approved to administer an NPDES program from returning a portion of their existing program and thereby becoming partial programs. The draft preamble language states that "[t]he partial program amendment was not intended to authorize existing NPDES States to reduce the scope of their approved NPDES programs. Rather, the major category partial and phased program options are mechanisms to induce States to assume NPDES authority."

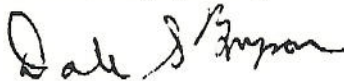
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We understand that MDNR is operating under substantial resource constraints, which will make the maintenance of existing programs difficult. The added burden of comprehensive storm water permitting will put a greater strain on these resources. Other States in Region V have expressed similar concerns. We are prepared to work with you through the program planning process to set reasonable goals and priorities for the storm water program over the next 2 to 3 years. We have received valuable input from your staff on this matter, and will be interested in any further suggestions you might have.

I hope that this discussion adequately addresses your concerns. Please do not hesitate to contact me to discuss this matter further.

Sincerely yours,



Dale S. Bryson,
Director, Water Division

cc: William McCracken, MDNR
Gary Boersen, MDNR

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