



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 28 1975

THE ADMINISTRATOR

Dear Governor Carey:

I am delighted to inform you that the State of New York's request for approval to conduct a State permit program pursuant to the provisions of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Federal Water Pollution Control Act Amendments of 1972 (the Act) is hereby approved. Accordingly, as of this date I am suspending the issuance of permits by the Environmental Protection Agency (EPA) under section 402(a) of the Act as to all discharges in the State of New York other than those from agencies and instrumentalities of the Federal Government.

The program that you conduct pursuant to this authority must at all times be in accordance with section 402 of the Act, all guidelines promulgated pursuant to section 304(h)(2) of the Act, and the enclosed Memoranda of Agreement between the Regional Administrator of EPA's Region II, the Commissioner of the State of New York's Department of Environmental Conservation (DEC) and the Chairman of the New York State Board on Electric Generation Siting and the Environment (the Board), which I have also approved today. Because of the split in permitting authority between the DEC and the Board, I believe it is extremely important to the effective implementation of the State program that close cooperation between these State agencies be maintained, particularly regarding the issuance of certificates of environmental compatibility and public need (certificates) by the Board to major steam electric generating facilities.

It is equally important that there be effective enforcement of permits and the permit program. The Memoranda of Agreement, which indicate that the Regional Administrator generally intends to undertake direct enforcement of State issued permits or certificates only when the State does not take appropriate enforcement action, are not intended to and will not foreclose federal enforcement action in any case where EPA determines that a violation has occurred and federal enforcement proceedings are warranted.

I understand that several adjustments and clarifications are being made to the New York permit program in order to avoid any uncertainty as the program is being implemented. For example, there was some ambiguity concerning the burden of proof in connection with New York's thermal water quality standards. That ambiguity has been substantially resolved as a result of a September 5, 1975, DEC legal opinion. My approval of the New York program today is based in part upon assurances that the Attorney General of New York agrees with the DEC on the thermal water quality standard burden of proof question and has rendered a supplemental opinion on this issue.

I also understand the Attorney General's Statement has been supplemented to reflect legislative amendments enacted subsequent to the date of the original Statement and to reflect the State Pollutant Discharge Elimination System (SPDES) regulations which became effective on August 29, 1975. This supplement will be most helpful in completing the record and informing the public of the positive actions taken by the New York Legislature and the DEC to prepare for administration of the State's permit program.

Finally, the Public Service Commission's regulations regarding the issuance of certificates by the Board must be revised in conformance with applicable NPDES provisions set forth in 40 CFR Part 124. It is my understanding that the necessary revisions will be finally adopted by the Board prior to its issuance of any certificates to new electric power generating facilities. I am delighted to know that the effort to revise the regulations is underway and have no doubt that the revised regulations will be promulgated in the near future.

As currently in effect, the DEC's SPDES regulations, in section 751.3, exclude certain categories of point sources from New York's SPDES permit program. These exclusions were authorized by section 124.11 of EPA's regulations setting forth guidelines for State NPDES programs, 40 CFR Part 124 (37 FR 28390; December 22, 1972). However, the District Court for the District of Columbia in the recent case of Natural Resources Defense Council, Inc. v. Train (Civil No. 1629-73), held that the Act does not authorize such exclusions and, in an order issued June 10, 1975, directed EPA to amend its regulations accordingly. EPA has filed a Notice of Intent to Appeal the Court's decision. Should the Court order be upheld, however, EPA will be required to publish final amendments to its regulations by February 1976 to remove the exclusions from the NPDES program. Following such amendments New York would similarly be required to amend its regulations in order to continue to comply with the NPDES requirements. We are

holding hearings and soliciting suggestions to minimize the potential impact of the program changes required by the Court order. We welcome any suggestions that you or your staff may make to assist us in this effort.

The State of New York has demonstrated great capability, patience, and cooperation in the development of its permit program. You, your staff, the New York Legislature, and personnel of the DEC should feel justifiable pride and satisfaction upon assuming administration of this important environmental program.

We look forward to working with you and the DEC in continuing the progress you have made towards cleaner water in New York.

Sincerely yours,

RET
Russell E. Train

Honorable Hugh L. Carey
Governor of New York
Albany, New York 12224

Enclosures

cc: Mr. Ogden Reid, Commissioner, State of New York
Department of Environmental Conservation

Mr. Alfred E. Kahn, Chairman, State of New York
Board on Electric Generation Siting and the Environment

Mr. Louis J. Lefkowitz, State of New York
Attorney General