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Regional Administrator
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FROM: G. William Frick
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SUBJECT: Revision of Water Quality Standards and Implementation Plans Under § 303 of the Federal Water Pollution Control Act

MEMORANDUM OF LAW

FACTS

Related questions have arisen in the States of Utah and Delaware wherein the States have modified State water quality standards so that they are now less stringent than the standards which were Federally approved. In Delaware, the revisions are to the water quality criteria and uses; in Utah, the dates for compliance with the existing criteria and uses have been deferred from 1978 to 1979. The compliance dates were part of the approved implementation plan required by the provisions of the 1970 Federal Water Pollution Control Act. In neither case has EPA taken any action to approve the revisions. Inquiry has been made regarding the impact of these revisions on the approved standards.

QUESTIONS PRESENTED

1. Does the approval by EPA of a State water quality standard create a Federal standard which remains in effect regardless of any revision of the standard pursuant to State law?

2. After approval of a State's water quality standards under §303(a) of the Act, may a State revise the implementation schedule contained in such approved standards by postponing the date of implementation?

CONCLUSIONS

1. Since the Act contains no specific provision for the creation of Federal standards, EPA's approval only acknowledges the adequacy of the State standards and indicates that promulgation of Federal standards is not required. It does not create a Federal standard which has an existence independent of the State standard. Accordingly, where a State revises its standards, it will be necessary for the State to submit its new standards to EPA for approval or EPA may have to adopt substitute Federal standards.

2. EPA's approval of an implementation plan submitted and approved under the provisions of the Act prior to the 1972 amendments, neither precludes the State from revising it nor establishes the provision as a Federal requirement. Revisions of State implementation plans are not provided for under §303(c)(2), which limits revisions of water quality standards to criteria and uses; this eliminates any requirement that States revise implementation plans or that EPA promulgate implementation plans. Generally, because of other provisions of the 1972 Act such as §301(b)(1)(C) establishing a Federal compliance date, it will not be necessary to prescribe any modifications to the water quality standards where the implementation plan is changed by the State. However, if the change in the implementation plan does affect the approved criteria and uses so that they are no longer consistent with the requirements of §§301 and 303, some additional revision may be required by the State or, should it fail to do so, by EPA.

DISCUSSION

Section 303 of the Act provides for the adoption by States of water quality standards. The standards are to be adopted pursuant to two distinct approaches. Under §303(a), the Administrator was required to insure within a specified period of time after the passage of the 1972 Amendments that States have water quality standards which meet the requirements of the Act as it existed prior

to the 1972 Amendments. Standards under the prior Act included criteria, uses, and implementation plans for achievement of the criteria and uses. If the State standards were inadequate and the State failed to submit revised regulations, the Administrator was directed to propose and promulgate adequate regulations. Pursuant to §303(c), the States are to review water quality standards every three years and upgrade them wherever necessary to meet the Act's requirements. Again, the Administrator is to propose and promulgate regulations whenever he determines that the State standards are inadequate or the State fails to submit adequate revisions of its regulations. The requirement that State standards include implementation plans was eliminated in §303(c)(2) so that the revised standards have to consist only of criteria and uses.

The issue presented by the particular State revisions involved here is the exact nature and effect of the Administrator's approval. It can be argued that the approval of a water quality standard by the Administrator is similar to the approval of an implementation plan under §110 of the Clean Air Act, creating a Federal standard which can be revised only by Federal action and which would not be affected by any change in a water quality standard as a matter of State law. Thus, a State would be effectively precluded from modifying standards without Federal approval. The contrary interpretation, which we believe is more supportable, is that the approval by EPA is merely an affirmation of the adequacy of the State standards and a declaration that no Federal promulgation is necessary. Under this interpretation, the standards remain exclusively State standards.

Our primary reason for adopting the latter view is that the Act in §303 contains no language suggesting that an approval creates a Federal standard. Moreover, in view of the unusual nature of such an action, we do not believe that a statute should be read to provide for establishing Federal regulations by EPA's embracing a State regulation through a simple approval, i.e., without following the normal approach of proposing and promulgating regulations independently, unless there is a clear statutory directive or necessity for such an interpretation. Under §110 of the Clean Air Act, the approval of a State implementation plan, and emission limitations included in such plans, allows EPA to enforce the requirements of the plan independently of the State pursuant to §113 of the Clean Air Act. Because that approval created a directly enforceable Federal requirement, the courts have held that EPA had to follow the APA requirements of notice and opportunity for comment. See Buckeye Power Company v. EPA, 481 F.2d. 162 (6th Cir. 1973). In the absence of any statutory suggestion in the FWPCA that a similar result was intended for water quality standards, we do not believe that such a conclusion should be reached.

The principal distinction between water quality standards under the FWPCA and the implementation plan requirements of the Clean Air Act is that the water quality standards are not directly enforceable. The water quality standards are to be implemented primarily through the issuance of permits pursuant to §402 and it is the provisions of the NPDES permit which are the actual enforceable requirements to which §309 will apply. Under the Clean Air Act, it is the approved implementation plan provision which is the enforceable requirement. A finding that the Administrator's approval creates a Federal water quality standard is therefore not as essential.

It has been argued that if Federal standards are not created, there will be a hiatus if a State modifies an approved standard. During that period, there might not be an "approved" standard meeting the Act's requirements which could be applied in a permit issuance proceeding. Although it possibly presents some administrative burdens, we do not believe that this hiatus causes any insurmountable problems. First, EPA has authority to propose and promulgate corrective regulations. It should not be difficult to determine what the proposals should be; the Administrator could simply propose the State's prior water quality standards that had been approved. If there were a need for prompt action, the Administrative Procedure Act, in 5 USC §553(d)(3), provides for dispensing with opportunity to comment. It would thus appear that a proposal, while requiring some administrative action in preparing Federal Register publications, does not have to create delays which would impede effective implementation of the Act. We expect that permit issuance could be deferred until the new standards were promulgated without any significant difficulty.

Moreover, even if action were required on a permit in such a short period of time that it would be impossible to prepare a Federal standard even under an expedited promulgation, we believe that the provisions of §402(a) of the Act, which provide for the issuance of a permit with such conditions as the Administrator deems appropriate, would allow the Administrator to prescribe limitations that would achieve a water quality standard meeting the Act's requirements. Since a standard had been previously approved, it would provide a level against which the limitation could be calculated. While this approach should not be used extensively, it is a means of avoiding the problems presented by a State withdrawing a standard. 1/

1/ We recognize that allowing States to pull the rug out from under the water quality standards program by revising their regulations without the approval of EPA does tend to subvert the Congressional effort to compel States to improve their water quality standards. A "Federally approved standard" may be a somewhat hollow designation. However, the Act does seem to contemplate that there will be periods during which there will not be adequate standards. The original development of standards provides a period of 130 days during which the Administrator would be proposing and promulgating regulations and during which, presumably, there would not be adequate State standards.

Another possible objection to this interpretation is that it requires additional promulgation of Federal standards which States might fail to enforce on grounds that they lack legal authority to do so. As we discussed above, the standards are not directly enforceable and are pertinent only in calculating limitations to be included in permits. Section 301(b)(1)(C) provides that permits must require compliance with water quality standards whether the permit is being issued by the State or by EPA. Moreover, the obligation of States to enforce Federal laws has been consistently sustained in the courts. See Testa v. Katt, 330 U.S. 386 (1947).

A final factor which leads us to this conclusion is that the Agency has not proceeded as if it were adopting Federal regulations and has probably not satisfied the requirements of the Administrative Procedure Act. Notice and opportunity for public comment has not been provided in connection with approval of State water quality standards. The standards and criteria are not on file with the Federal Register, which is a requirement for incorporation by reference and an essential element in making them enforceable regulations. This would make all the standards subject to challenge and is a result which we believe should be avoided if at all possible. Whether the approval of water quality standards would be considered rulemaking under the APA requiring notice and opportunity for comment is difficult to predict. 2/ But, assuming it is rulemaking, we believe the rule involved is a determination that the State standards are adequate and that establishment of Federal standards is not required, rather than establishing a rule of general applicability. Accordingly, EPA should provide notice of receipt of a State's regulations and provide an opportunity for people to comment on whether the Administrator should approve the standards submitted by the State. While prior approvals still might be subject to challenge for the Administrator's failing to provide an opportunity for public participation, the decision being challenged would be much different in that it has not established a Federal regulation, and the probability of a court entering an adverse ruling should be less.

The same conclusion must apply with respect to State implementation plan requirements included in the original water quality standards

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2/ The Buckeye Power decision, supra., and the broad definition of "rule" in the APA strongly suggest that it would be rulemaking, but a recent decision by the Seventh Circuit (Indiana & Michigan Electric Co., et al. v. EPA, Nos. 72-1491 and 1492, January 23, 1975) provides support for a contrary interpretation, or, at a minimum, justifies not soliciting publi participation. We believe, however, that the Agency should take the more conservative view and provide notice and opportunity for comment in connection with all future approvals.

submitted under §303(a). Those requirements also have no independent Federal existence. The problem with implementation plan requirements, however, is more complex. Section 303(c)(2) precludes EPA from adopting implementation plan requirements pursuant to its authority to establish regulations. Revised water quality standards are to consist only of use designations and water quality criteria. The omission of implementation plans from standards subject to EPA review under §303(c) was clearly not an oversight. See H. Rept. No. 92-911, 92nd. Cong. 2nd Sess., p. 105 (1972). If a State were to revise its implementation plan requirements and make them unapprovable, unlike the situation with use designations and criteria, EPA does not have authority to promulgate the appropriate implementation plan requirements. This argues for the conclusion that the State is precluded from changing its implementation plan requirements.

We think, however, that the discussion above regarding EPA's approval not creating Federally enforceable requirements precludes an interpretation that the approval of an implementation plan creates Federal requirements which cannot be affected by State revisions. As with the water quality use designations and criteria, this conclusion should not have any significant impact. While EPA cannot promulgate the correct implementation plan requirements to substitute for those withdrawn by the State, this is not necessary under the present scheme of the Act. The reason §303(c) did away with the requirements for implementation plans is that they are not needed under the 1972 Amendments. Section 301 establishes the compliance dates for water quality standards. The provisions of the prior Act did not contain such a mechanism for achieving the water quality standards and the implementation plan requirements were of much greater significance. The revision by a State of an implementation plan requirement therefore should have no significant impact on compliance with water quality standards unless, of course, the State dates are more restrictive than the Federal dates.

The only possible situation where EPA might be required to take action is if the criteria and uses were somehow tied to the implementation

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3/ We recognize that earlier opinions from this office may have suggested that State implementation plan requirements would remain in effect even if the States were to revise them as a matter of State law. However, we believe that the above discussion represents a more defensible view of the statute and to the extent that the earlier opinions are inconsistent with this memorandum, they are superseded.

plan so that the revision of the date by the State would also impact on the criteria and uses. For example, it is our understanding that the Utah water quality standard which will be met in 1977 is less stringent than what will be eventually achieved pursuant to the implementation plan. The criteria and uses were approved, even though compliance with them was not scheduled until after 1977, on the grounds that an approvable level of water quality would be reached in 1977 as a result of efforts being taken to meet the more stringent requirements in 1978. A delay in implementation of the criteria and uses in that situation might mean that the level of water quality in 1977 would not be as stringent as was originally anticipated. In such a case, it might be necessary for EPA to promulgate criteria and uses consistent with the Act's requirements for 1977, which could be applied in permits and which would not be dependent on the implementation plan date. Whether that is necessary will, of course, depend on a factual determination; but with respect to the date revised in the State's implementation plan, we do not believe that any action is required.

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