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

OFFICE OF
GENERAL COUNSEL

JAN 24 1992

MEMORANDUM

SUBJECT: Request for Views on Allowable Duration of Water Quality Standards Variances

FROM: Catherine A. Winer, Attorney CAW
Water Division (LE-132W)

THRU: Susan G. Lepow
Associate General Counsel
Water Division (LE-132W)

TO: Dale Vodehnal, Chief
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Christine Phillips, Chief
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You have requested our views on an issue which has arisen during your review of recently revised Colorado water quality standards. Specifically, you ask whether you can disapprove Colorado's variances procedures on the grounds that, under the Clean water Act and existing regulations, variances must have an initial term of three years or less. For the reasons below, I believe that, at least on its face, the Colorado provision meets the requirements for duration of water quality standards variances under the Clean Water Act.

Neither the Clean Water Act nor 40 C.F.R. Part 131 of EPA's regulations directly addresses the question presented. The Clean Water Act does not speak directly to water quality standards variances, and EPA's regulations merely state that states may adopt policies on variances, which are subject to EPA approval. 40 C.F.R. 131.13. Since EPA's approval or disapproval must be based on the "requirements of the Act," the permissible scope of variances must be discerned from the general structure of the Act and by analogy.

Section 303(c) of the Clean Water Act requires states to conduct a triennial review of their water quality standards. If, as a result of such review, that state decides to adopt new or revised water quality standards, they must be submitted to EPA for approval. One of the goals of the Act is to achieve, where

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attainable, that level of water quality which provides for the protection of fishable/swimmable uses. Under our regulations, where a standard is revised to provide for less than fishable/swimmable water, the state must conduct a use attainability analysis (UAA) as justification for such revision and must reexamine the validity of the UAA every three years as part of the triennial review. 40 C.F.R. 131.10(g) and (j); see also preamble discussion at 48 FR 51401 (November 8, 1983). Such standard is not required to expire and be readopted every three years; rather, as with other standards, it is assumed to be effective until modified through rulemaking. If the state fails to reassess the standard triennially (or if we believe the UAA to be inadequate), EPA can disapprove the standard. Section 303(c).

Variances have been accepted by EPA under circumstances in which downgrading of standards would be permitted, on the grounds that a variance granted to particular dischargers for a limited duration is environmentally preferable to permanent downgrading of the whole segment. This position was initially explained in General Counsel Opinion No. 58, and was also discussed in the 1983 preamble to EPA's regulation. 48 FR 51400 at 51403 (November 8, 1983). (While both the opinion and the preamble emphasized the "temporary" or "limited" duration of variances, neither articulated a three-year maximum.)

Since EPA has effectively taken the position that variances are approvable as temporary downgrades, the requirements for approvable variances are logically derived from those for downgrades. Neither the regulations nor the preamble define "temporary" as limited to three years. Like other standards, variances are subject to the triennial review requirement. As noted above, that requirement does not require expiration and readoption of standards at least every three years, but rather only a review of their adequacy (which includes, in the case of less than fishable/swimmable uses, review of the use attainability analyses upon which they were originally based).

Section 3.1.7 of Colorado's regulations allows the granting of water quality standards variances (called temporary modifications by the state) for periods longer than three years, where the circumstances are expected to prevent attainment for such longer period. Such variances must have an expiration date specified at the time they are adopted through rulemaking, they must be reassessed at least every three years, and they may be extended or eliminated through rulemaking. Nothing that has been provided to me suggests that the three-year assessment called for in section 3.1.7(3) is a sham. Indeed, the February 26, 1991 memorandum from Assistant Attorney General Martha Rudolph to the Colorado Water Quality Commission stated that the informational hearings used to receive information on the continuing validity of variances are the same hearings used to assess other standards. The memorandum notes that "For temporary modifications [variances] with a longer than

three year life, the Commission will consider whether the facts that formed the basis for the original expiration date have changed enough to warrant reconsidering the temporary modification in a rulemaking hearing." Mem. at 3.

Accordingly, it appears that Colorado's procedures relating to the duration of variances meet the requirements of the Clean Water Act.

Your January 6, 1992 memorandum sets out various arguments in support of the position that issuing temporary modifications that extend beyond three years is "clearly inconsistent with federal variance requirements." I do not believe those arguments provide a basis for disapproval of Colorado's provision under section 303(c) of the Clean Water Act.

While I agree that the triennial review requirement is a fundamental element of the standards program, it can be satisfied by the periodic review of a state's standards and any use attainability analyses upon which those standards were based. Standards need not expire at the end of a three-year period in order to satisfy the triennial review requirement; neither General Counsel Opinion No. 58 nor your memorandum sets out a basis for interpreting the triennial review requirement differently for variances.

Second, the General Counsel opinion cited does not identify a three-year limitation on variances; rather it simply stresses that they are to be of limited duration and cannot be extended without a new showing of unattainability. While it appears that there has been some tendency to assume that a reasonable limited duration would be three years (see, e.g., introduction to the November 1990 National Assessment of State Variance Procedures), such a requirement is not spelled out in any regulation currently in effect. The draft proposed revisions to the water quality standard regulation do include such a requirement, but that provision of course has not yet been proposed, much less been promulgated as a final regulation, and therefore cannot be said to describe the requirements of the Act in a definitive way. If such a provision is proposed, the Agency will need to set forth its basis.

cc: Tudor Davies
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