



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

OFFICE OF
WATER

MAY 25 1989

MEMORANDUM

SUBJECT: EPA Designation of Outstanding National Resource Waters

FROM: William R. Diamond, Acting Director *W. R. Diamond*
Criteria and Standards Division (WH-550D)

TO: All Regional Water Management Division Directors

We recently requested the Office of General Counsel review a legal opinion dated August 15, 1979, which indicates that EPA may not designate a water as an Outstanding National Resource Water (ONRW) where a State does not do so. As you can see from the attached memo, OGC continues to believe that this opinion is still valid.

Since several questions have been raised regarding ONRW designation, I would like to know if you think this is an important enough issue for us to revise the regulation to give EPA authority to designate ONRWs in the absence of State action.

Please have your staff contact Bob Shippen (475-7329) or Patti Morris (475-7323), of our Standards Branch, with any comments or suggestions by June 11, 1989.

CC: Water Quality Standards Coordinators



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

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: EPA Designation of Outstanding National
Resource Water

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

TO: William Diamond, Director
Criteria and Standards Division
(WH-550D)

You have asked us to review a legal opinion dated August 15, 1979, which indicates that EPA may not designate a water as an Outstanding National Resource Water (ONRW) where a state does not do so. For the reasons below, while some of the circumstances and documents upon which the 1979 opinion relied have changed, this office continues to believe that it would be quite legally risky for EPA to designate a water an ONRW.

The 1979 memo reached its conclusion based on a number of factors, including the lack of easily demonstrated statutory basis for EPA's antidegradation policy, the lack of attention given the ONRW provision in the 1975 rulemaking compared to its potential impact, the lack of any explicit indication that EPA intended designation to be mandatory, and the lack of guidance on which waters were to be designated ONRW.

The 1987 amendments to the Clean Water Act have largely put to rest the question of the statutory basis for EPA's antidegradation policy (although we have not yet had any court rulings on the subject). The question now is what EPA's antidegradation policy means (or what a court would find we have reasonably put the public on notice that it means).

The 1983 Water Quality Standards rulemaking gave more attention to the antidegradation policy, including the ONRW provision in particular, than did the 1975 rulemaking. For example, in 1983, unlike 1975, the preamble expressly discussed the "no degradation" requirement for ONRW's and explained that EPA was modifying it slightly to allow minor, short-term impacts which did not interfere with the character of the ONRW. On the other hand, neither the revised regulation nor the preamble clearly states that states have a mandatory duty to designate eligible waters as ONRW's or that EPA will do so if they fail to do it. In fact, the explanation for why EPA modified the "no degradation" requirement strongly implies that states had some discretion in designating ONRW's (preamble indicated that states were deterred by the strictness of the "no degradation" requirement from designating waters which could be ONRW's). Moreover, although the 1983 preamble discusses briefly some criteria for what waters are appropriate for designation as ONRW's, the regulation itself is unchanged from the 1975 version in that regard.

Although "Chapter 5", the applicable guidance of the 1970's, has been superseded by the WQS Handbook and by the Q&A's on Antidegradation, the new guidance does not give any indication that the designation process is mandatory or that EPA will step in if a state fails to act. Page 2-14 of the Handbook says that the change in level of protection for ONRW's should "encourage" more states to make use of the designation; this strongly suggests that the designation process is voluntary. The Q & A's (#10) do not address the question of designation but rather only discuss the level of protection to be given ONRW's.

In summary, neither the 1983 rulemaking nor the subsequent guidance indicates to the public (or to OGC) that EPA intended the ONRW designation one to be a mandatory one. Nor does the regulation clearly indicate the criteria for designation such that we could reliably defend a disapproval of a non-designation against a charge that we were being arbitrary and capricious. Since EPA is authorized to promulgate only where we find that a state standard does not meet the requirements of the act or that a new or revised standard is necessary to meet the requirements the act, I believe that, absent regulatory change, EPA designation of an ONRW where a state failed to act would still be quite risky.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

AUG 15 1979

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Outstanding National Resource Waters

FROM: James A. Rogers *JAR*
Associate General Counsel
Water and Solid Waste Division (A-131)

TO: Kenneth M. Mackenthun
Director
Criteria and Standards Division (WH-585)

This is in response to your memorandum of August 7, 1979. You have asked: (#1) whether EPA may designate particular waters as "Outstanding National Resource Waters" ("ONRW's") where States fail to designate ONRW's; and (#2) whether EPA may promulgate water quality standards to protect State-designated ONRW's.

Our conclusions are as follows: (#1) even assuming that EPA has such authority under the Clean Water Act, EPA could not exercise such authority without substantially amending its regulations; (#2) if a State voluntarily designates an ONRW, EPA can take whatever action is necessary (against point sources) to protect the ONRW.

Background

Only one paragraph of EPA's water quality standards regulation deals with "antidegradation." 40 CFR 35.1550(e). This paragraph requires States to adopt a "statewide antidegradation policy," which is to provide that "high quality waters" cannot be degraded unless the State finds degradation "necessary and justifiable" on economic or social grounds. 40 CFR 35.1550(e)(2).

One sentence in 40 CFR 35.1550(e)(2) provides that no degradation (regardless of economic and social considerations) may be allowed in ONRW's. The sum total of EPA's regulatory guidance on this idea is as follows:

Additionally, no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional, recreational or ecological significance. 40 CFR 35.1550(e)(2), third sentence.

The preamble discussion accompanying EPA's "antidegradation" regulation contains only four sentences. 40 FR 55336, November 28, 1975. There is absolutely no mention of ONRW's or the "no degradation" idea. In fact, the preamble reader is led to believe the States may allow limited degradation of high quality waters for social and economic reasons:

The policy provides for protection of existing instream water uses and, for water whose quality exceeds the national water quality goals, prohibits degradation except to allow necessary and justifiable economic and social development. 40 FR 55336, emphasis added.

The preamble suggests that States have a great deal of discretion in formulating the specifics of their antidegradation policies:

The effect of including antidegradation requirements in these regulations is to require the States to review their current antidegradation policies and to establish a mechanism, including a public process, for implementing the State anti-degradation policies. 40 FR 55336.

The only other formal guidance on ONRW's of which we are aware appears in the November 1976 Water Quality Standards ("Chapter 5") Guidelines. The ONRW discussion appears at §5.4(C) (pages 5-14, 5-15) and is quite brief. The Guidelines say that certain types of waters should be "considered" as ONRW's, and that States should provide adequate notice on the "possible" designation of ONRW's. The Guidelines "recommend" that each State include a listing of ONRW's in its water quality standards.

Discussion

Question #1

Especially because the Clean Water Act never mentions ONRW's,*/ we do not feel that EPA could under its current regulations demand any particular State ONRW designations or designate ONRW's through the Federal promulgation process. We believe that the foregoing background shows that the only reasonable interpretation of our current regulations is that States should consider designating ONRW's, but that they are free, after such a consideration, not to designate any.

First, if we had been asserting the highly significant Federal power to designate zones of no degradation in 1975, it seems incredible that our preamble would contain absolutely nothing on this point. As discussed above, the preamble not only failed to mention ONRW's, but also stressed that degradation could be allowed for social and economic reasons (not the case for ONRW's) and that "the effect" of our regulations would be to establish a mechanism for "implementing the State antidegradation policies."

Second, our current regulations offer totally insufficient guidance as to which, if any, areas the States are to designate as ONRW's. It seems obvious that EPA did not intend for all park waters to be designated, for the Guidelines say that park and other waters should be "considered" for "possible" designation. Moreover, phrases such as "exceptional recreational or ecological significance" and "high quality waters" are highly subjective and virtually impossible to enforce without further regulatory guidance.

Third, in its Chapter 5 Guidelines, EPA merely "recommended" that States include ONRW designations in their water quality standards. This is in vivid contrast to other provisions in the Chapter 5 Guidelines, which stress the mandatory nature of certain requirements. E.g., §55.2(A), 5.2(B).

In short, we think the only fair interpretation of current 40 CFR 35.1550(e) is that EPA has left the States complete discretion with respect to ONRW's, including the

*/ Because our regulations have made reference to ONRW's since 1975, we are willing to assume for now that the Clean Water Act authorizes our regulations.

discretion not to designate any at all. If EPA now demanded State ONRW designations under the threat of Federal ONRW promulgations, the legal screams from potentially affected parties could be deafening (and devastating in many courts). If EPA is to embark upon this highly significant new course, it must first amend its regulations to make its intentions known clearly and explicitly.

Question #2

Assuming a State has adopted an ONRW, you ask if EPA has authority to promulgate a water quality standard to protect the ONRW's status. We are not sure why any water quality standard would be necessary for an ONRW, since the standard is no degradation;*/ it would seem that arguments over x or y micrograms per cubic meter would be irrelevant. Whenever a new point source applied for a permit to discharge into an ONRW, we could simply deny the permit (or force the State to deny the permit through our veto power) under §301(b)(1)(C), which requires compliance with all State laws.**/

Assuming that it would be necessary to issue a water quality standard to protect an ONRW, however, we feel that EPA has such authority. Section 303(c)(4)(B) authorizes EPA to promulgate such water quality standards as may be necessary to meet the requirements of the Act. If a State has designated a water body as an ONRW, §§301(b)(1)(C) and 510 require that EPA honor such a designation and give it effect. If a new water quality standard is necessary to effectuate the designation, §303(c)(4)(B) would accordingly authorize EPA to promulgate the standard.

*/ Unlike the Air Act concept, which is no "significant" deterioration.

**/ We are assuming that the State would designate the ONRW through the regular processes of State law.