



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20450

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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

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

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

SUBJECT: Downgrading of Water Quality Standards

ISSUE AND ANSWER

This is in response to your memorandum of April 26 concerning 40 CFR 130.17(c)(3), which specifies the conditions under which states may "downgrade" designated uses in their water quality standards. You ask whether water quality conditions as of November 28, 1975 (the promulgation date for 130.17) are to serve as the basis for judging "non-attainability" of the designated use. In our view, this question must be answered in the affirmative.

DISCUSSION

Section 303(c)(2) of the Clean Water Act provides that water quality standards must "enhance" the quality of water. Section 101(a)(2) of the Act calls for "fishable, swimmable" water quality by 1983 wherever attainable.

Based upon these broad congressional mandates, EPA issued 130.17 on November 28, 1975 (40 FR 55340). The basic themes of this regulation are protection of high-quality waters and improvement of lower-quality waters; sanctioning of less than fishable, swimmable water quality is limited to carefully defined circumstances.

In particular, 130.17(c)(1) provides that:

Existing instream water uses shall be maintained and protected. No further water quality degradation which would interfere with or become injurious to existing instream water uses is allowable. (Emphasis added.)

Because these regulations were made effective immediately upon publication (40 FR 55336), the publication date (November 28, 1975) is the point in time from which "no further" degradation is allowable. To allow downgrading demonstrations to be based solely on later, worsened, water quality could as you indicate produce a continuing "downward spiral" in contravention to the basic themes of the Act and EPA's regulations.

This is not to say, however, that every time EPA reviews a downgrading proposal it must conduct a factual inquiry into actual water quality conditions on November 28, 1975. EPA may assume, unless it is aware of changed circumstances which could have degraded water quality since 1975 (such as new point sources locating on the stream in question) that current water quality is as good as 1975 water quality.