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

OCT 2 1973

MEMORANDUM

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

TO : Director, Water Planning Division
FROM : Acting Deputy General Counsel
SUBJECT : Mixing Zones

You have requested my opinion regarding the legality, under the Federal Water Pollution Control Act Amendments of 1972 ("the Act"), of provisions for "mixing zones" 1/ in water quality standards approved or promulgated under section 303 of the Act or established in connection with proceedings under section 316(a) of the Act.

It is my opinion that mixing zones are consistent with the Act in both contexts.

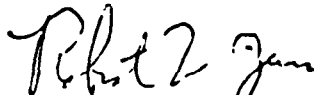
The Act itself contains no reference to mixing zones. No court has considered the issue either under the present Act or its predecessor statute, the Federal Water Pollution Control Act of 1965. Nevertheless, there is sufficient evidence to demonstrate that Congress, in enacting the 1972 Amendments, did not intend to preclude the use of mixing zones.

By 1971 most states had adopted water quality standards for at least portions of their waters, as required by section 10(c) of the old FWPCA (33 USC §1160(c)). In reviewing and approving these state standards both EPA and its predecessor in the Department of Interior, the Federal Water Pollution Control Agency, employed criteria published in the National Technical Advisory Committee's Report of 1968, popularly known as the "Green Book." The Green Book criteria specifically authorized the inclusion of mixing zones in standards designed to protect both freshwater and marine fish populations (see, e.g., Report, p. 31).

1/ Mixing zones are provisions in water quality standards which recognize that the standards will frequently not be met in an area of water in the immediate vicinity of a discharge point and which, in effect, legitimize this deviation by specifying that the standards must be met at the edge of the zone, which is typically limited in volume or surface area.

Congress must be presumed to have been aware of the widespread and consistent administrative reliance on and approval of mixing zones. 2/ The question of mixing zones was, in fact, briefly discussed during the House Public Works Committee hearings on H.R. 11896. 3/ Certainly, had Congress desired to eliminate mixing zones it could easily have done so. Instead, it specifically directed that existing state water quality standards remain in effect and confined EPA's review of others to the question of whether they are consistent with the requirements of the FWPCA in effect prior to the 1972 Amendments. (Section 303(a)(b) of the Act). The 1972 Amendments represent a fundamental revision of federal water pollution control legislation. It is inconceivable that, if Congress had desired to eliminate the use of mixing zones in water quality standards, it would have specifically carried forward state water quality standards which included mixing zones and have provided for continued federal review of new and revised state standards in language virtually identical to that of the old FWPCA. (See section 303(c)(2) of the Act.) The fact that it did so permits the inference that Congress saw no incompatibility between its criteria for water quality standards and the provision for mixing zones.

Similarly, there is nothing in the Act or the legislative history to indicate that mixing zones are impermissible in the context of section 316(a) of the Act. That section authorizes the Administrator to impose alternative effluent limitations on the thermal component of a discharge if he is satisfied that those proposed are more stringent than necessary to ensure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife in the receiving water and that the effluent limits which he substitutes will do so. In effect, the effluent limitations authorized by section 316(a) are to be based on a specified water quality related consideration: the protection of aquatic life. So long as any mixing zone provided is of a size and configuration which is compatible with this protection, it will satisfy the requirements of section 316(a).


Robert V. Zener

2/ A summary of standards adopted and federally approved appears at 40 CFR Part 120.

3/ The subject arose during the testimony of former Administrator Ruckelshaus. Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 1218-1219 (1973).