



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

AUG 24 1976

OFFICE OF
GENERAL COUNSEL

7-76-8

MEMORANDUM

SUBJECT: Binding Effect of 303(e) Basin Plans

FROM: General Counsel *[Signature]* (A-130)

TO: Regional Counsel, Region IV

FACTS

The Florida Department of Environmental Regulation (DER) has submitted 303(e) Phase I Basin plans to EPA for approval. The plans contain determinations that "water quality limited" segments exist in specified places and recommend application of certain limitations necessary to meet water quality standards. In its submission, the DER specifically states that "none of the provisions of this document are rules, regulations or limits. Instead this is a technical document which may be utilized as one source of information for rule development and issuance of permits..." Representatives of the Florida phosphate and citrus industries have questioned the technical basis of the plans and have asked whether the plans will form the basis for their NPDES permits.

QUESTION 1

Does the express intent of the State submitting the basin plan (e.g., that it be merely a source of technical information rather than a rule) have any effect on the

manner in which EPA utilizes the plan, if EPA is responsible for issuance and enforcement of NPDES permits throughout that State?

ANSWER

Unless a State certifies under section 401 the limitations contained in a 303(e) plan, EPA is not bound to include such limitations in the permit although EPA should give great weight to the suggested limitations.

QUESTION 2

If State recommends a "more stringent limitation" based on a "water quality segment" determination, and if this recommendation is contained in an EPA-approved Phase I "basin plan", is EPA required to impose a "more stringent limitation" in the initial issuance of NPDES permits?

ANSWER

If a State certifies that a segment is water quality limited, then a permit must contain more stringent limitations necessary to meet water quality standards. EPA is required to impose such more stringent limitations in the permit. If the State does not certify the specific limitations which are to be included in the permit, EPA must make a determination of the appropriate limitations necessary to meet water quality standards. EPA must give great weight to state recommendations contained in Phase I basin plans.

QUESTION 3

In the situation described in Question (2), above, must EPA modify existing NPDES permit conditions to be consistent with Phase I "basin plan" recommendations?

ANSWER

It is EPA policy not to modify existing permits when state requirements or recommendations change during the course of the permit. EPA is concerned with maintaining a permit program which creates a stability both for the permitting authority and for the discharger. Therefore, EPA believes that permits should be modified

only in extraordinary circumstances. Section 402(b)(1)(C) provides that permits can be terminated or modified for cause, including, but not limited to the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge..

Requiring that permits be modified each time a State amends its regulations or its plans could create administrative havoc and would result in great uncertainty for the discharger.

QUESTION 4

Will a NPDES permit applicant/holder be entitled as a matter of right to challenge the technical basis of an EPA-approved State "basin plan" at the stage of issuance/modification of a NPDES permit to that source? Should the challenge to the basin plan instead be at the stage of EPA approval/disapproval of the plan? What is the proper forum?

ANSWER

A permittee will be entitled to challenge the technical basis of a Phase I basin plan at the stage of permit issuance. To the extent that the limitations contained in a basin plan are adopted as State law, EPA must, of course, apply those limitations in permits, and challenges to the limitations may not be considered in NPDES permit issuance proceedings. Instead the discharger must challenge such limitations in state proceedings at the time the plans are being considered or adopted. Since EPA approval or disapproval of a section 303(e) basin plan has no legal implications upon the inclusion of specific limitations in a NPDES permit, it would not be appropriate for a permittee to challenge the conditions at that point.

DISCUSSION

Your letter of July 2, 1976, raises a number of questions regarding the extent to which limitations contained in a Phase I Basin Plan required by section 303(e) of the FWPCA are binding upon EPA in its issuance of a permit under section 402.

The requirements for 303(e) planning have been coordinated with the requirements of section 208 planning for the development of Water Quality Management Plans. Regulations issued on November 28, 1975, cover both "Policies and Procedures for Continuing Planning Process" (40 C.F.R. 130) and "Preparation of Water Quality Management Plans" (40 C.F.R. 131).

However, as the preamble to those regulations states:

Phase I plans consist of those plans submitted prior to July 1, 1975, or those plans submitted prior to July 1, 1976, where an extension of up to one year has been granted by the Regional Administrator for specific basins or other approved planning areas. For Phase I, the requirements for planning are those requirements set forth in 40 C.F.R. Parts 130 and 131 "Water Quality Management Basin Plans," promulgated on June 3, 1974.

Those regulations, the "old" Part 131, clearly state that limitations contained in Phase I basin plans are to be given great weight in establishing appropriate permit conditions for dischargers when limitations relating to such dischargers are contained in the basin plan. Former section 131.310(a)(1) provided that:

"The States and EPA will use their best efforts to establish permit terms and conditions consistent with the applicable individual target effluent limitations and target abatement dates established in any approved basin plan; subject, however, to all the rights that the permit applicant and other interested persons may have under State and Federal law to contest such target effluent limitations and target abatement dates in permit issuance proceedings."

Section 131.508 further provided that:

"Each permit issued under the National Pollutant Discharge Elimination System to any source covered by the basin plan

shall be prepared in accordance with the basin plan, as provided by in §131.310. Failure of any permit to conform with the requirements of this section may constitute grounds for the Regional Administrator or the Administrator to object to the issuance of such permit."

Thus, it is expected that in developing a permit for a discharger, the permitting authority, whether state or Federal, will rely heavily upon the basin plan in its determination of conditions necessary to meet water quality standards under section 301(b)(1)(C). In most circumstances, it would be reasonable to expect that the permitting authority would initially propose limitations consistent with those contained in a 303(e) basin plan. However, the permitting authority is not bound to issue an initial permit containing such limitations. If comments made in the public hearing (as required by section 402 of the FWPCA and 40 CFR 136) establish the need for other, alternative limitations, the permitting authority is required to substitute such alternative limitations if supported by the weight of the evidence. Similarly, the question of the appropriate limitations is a factual one which can be challenged under 40 CFR 136 by a request for an adjudicatory hearing. ^{1/}

A State, however, can make limitations contained in a 303(e) basin plan binding upon a discharger by certifying such limitations to the permitting authority under section 401 of the Act. If limitations are certified, they must be included in a permit without further Federal action or review. A permittee who wished to challenge such certified limitations would be required to make such challenge in state proceedings and would not be entitled to a NPDES adjudicatory hearing.

Having stated our position in regard to the "Phase I" 303(e) plans, I should note that the situation in regard to "Phase II" 208 plans is quite different. Section 208(e) states that:

No permit under section 402 of this Act shall be issued for any point source which is in conflict with a plan approved pursuant to subsection (b) of this section.

^{1/} I note that both the Assistant Administrator for Enforcement and the Assistant Administrator for Water and Hazardous Materials have reached the same conclusion: "there is no legal requirement of permit conformity with Phase I plans". I attach a copy of their July 7, 1976 memorandum to Regional Administrators on this subject.

The new Part 130 regulations further define this prohibition:

(c) No permit under section 402 of the Act shall be issued for any point source which is in conflict with a plan approved by the Regional Administrator in accordance with this part and Part 131 of this Chapter, provided however, that no such permit shall be deemed to be in conflict with any provision of such plan or portion thereof, hereafter approved, which relates specifically to the discharge for which the permit is proposed, unless the State has provided the owner or operator of the discharge and the interested public with notice and the opportunity to appeal such provision. (40 C.F.R. 130.32)

Thus we contemplate that specific provisions of 208 plans which directly affect a discharger can be both administratively and judicially reviewed apart from the permit issuance process. Conditions which could have been subject to such review will be automatically included in proposed permits. Such requirements will then be considered similar to conditions required by state certification under section 401 and will not be reviewed or evaluated by EPA during the permit proceeding.

cc: Mark Pisano
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