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

JAN 18 1980

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OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Regional Enforcement Directors

FROM: Acting Deputy Assistant Administrator for Water Enforcement (EN-336)

SUBJECT: Regional Review of State-Issued NPDES Permits

It has been the practice in certain Regions to issue letters which "approve" State-prepared draft or proposed NPDES permits submitted for the Agency's review pursuant to section 402(d) of the Clean Water Act. However, that section, while authorizing review of proposed permits, only provides a mechanism for disapproval ("veto") of permits and does not authorize Agency "approval" of State-issued permits. We believe that the practice of formally approving State permits is open to serious misconstruction.

It has been the Agency's position that review of permits prepared by States is discretionary and does not constitute Agency action. Thus, the Agency has successfully argued that its review of State permits is not subject to judicial review and does not require preparation of environmental impact statements. See Save the Bay, Inc v. EPA, 556 F.2d 1282 (5th Cir. 1977); Mianus River Preservation Committee v. EPA, 541 F.2d 891 (2d Cir. 1976); Chesapeake Bay Foundation v. Virginia State Water Control Bd., 445 F. Supp. 122 (E.D. Va. 1978). Letters which purport to "approve" draft or proposed permits may undercut this position and raise the possibility that the approval will be subject to judicial review.

To avoid this result, the provisions of section 402(d) and 40 CFR §123.23 should be closely followed. If the Region concludes that the draft or proposed permit is outside the guidelines or requirements of the Act, the Region should object in writing to its issuance. The State should be advised of the problem with the permit and alternative provisions should be suggested.

However, if the Region does not intend to object to the permit, approval is neither necessary nor desirable. If the Region wishes merely to offer comments on the permit without objecting to it under section 402(d), it should clearly so state.

The legal concerns expressed in this memorandum were first brought to my attention by the Office of General Counsel. If you have any questions about the legal implications of EPA review of State-issued permits, please contact Alan Eckert, Deputy Associate General Counsel, at 755-0753 (FTS).

I have attached draft language which you might consider in formulating responses to State draft permits. These forms do not, of course, cover all situations. In many instances, for example, it may be necessary to raise an interim objection and seek further information from the State. In other instances, we have to file a general objection to the proposed or draft permit within the time period allotted in the EPA-State MOA and follow-up with the specifics later.

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