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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SEP 4 1980

SUBJECT: Applicability of the Part 25 "Public Participation" Regulations to the approval of Variances from Water Quality Standards

FROM: Michele Beigel Corash
General Counsel (A-130)

James N. Smith
Associate Assistant Administrator (WH-556)

TO: Donald P. Dubois
Region X
Regional Administrator (M/S 401)

You have requested a joint opinion on the applicability of the Agency's "public participation" regulations (40 C.F.R. Part 25) to the issuance by the State of Washington of "a one time permit for application of an herbicide to the waters of Lake Washington." In issuing this permit, you not that the State "issued a waiver from its water quality standards to allow the degradation accompanying the application." You have specifically requested an opinion as to whether the grant by EPA of planning funds brings this activity within the scope of 40 C.F.R. 25.2(a)(5). This section extends the coverage of Part 25 to the activities supported with EPA financial assistance.

Our resolution of this matter is based on the provisions of the Clean Water Act and 40 C.F.R. 25.2(a)(1), and we need not

CONCURRENCES

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whether the application of the herbicide would constitute a violation of water quality standards in the absence of a variance.

ISSUER

I. Are variances from water quality standards subject to the requirement of public participation under the Clean Water Act?
II. If public participation is required in the approval by a State of variances from water quality standards, do the provisions of Part 25 apply?

CONCLUSION

Variances from water quality standards constitute revisions to those standards, and as such, are subject to the requirement of public participation. 40 C.F.R provides minimum guidelines for public participation in this process.

DISCUSSION

I

The Clean Water Act establishes a requirement that public participation be allowed in any revision by the State of a water quality standard. Section 101(e) broadly requires public participation in all programs established under the Act. This section states that

> [p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.

The implementation and revision of water quality standards is subject to this general requirement.

Section 303(c) establishes a specific requirement for public participation in the process of revision of water quality standards by States. This section provides that States shall "from time to time . . . hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." This section not only specifies that States must periodically review and revise water quality standards, but also, together with section 101(e), imposes an obligation to provide public participation whenever such revisions are undertaken. This requirement is codified in water quality standards regulations, 40 C.F.R 35.1550(a).

Variances or short term modifications of water quality standards are subject to this requirement of public participation. In our Opinion of the General Counsel No. 58, the General Counsel concluded that variances from water quality standards constituted revisions to those standards and were subject to the substantive requirements applicable to the downgrading of the designated use. This opinion went on to state that

> **(s)ince State variance proceedings involve revisions of water quality standards, they must be subjected to public notice, opportunity for comment, and public hearing. (See section 3C3(c)(1) and 40 C.F.R. 130.17(a) [now 35.1550(all)]. The public notice should contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.**

Thus, the Clean Water Act and the water quality standards regulations mandate public participation in state approval of variances to water quality standards.

II

40 C.F.R. Part 25 defines minimum elements for public participation under the Clean Water Act. The applicability of this regulation to the broad scope of actions involved in the State water quality standards program is not clear, and future revisions of the water quality standards regulations should clarify this relationship.

However, we conclude that Part 25 does apply to the issuance of variances from water quality standards. 40 C.F.R. 25.2(a)(1) provides that Part 25 applies to "State rules and regulations under the Clean Water Act. . . ." Although most activities specifically affecting one discharger, such as NPDES permit issuance, are not within the scope of this subsection, the approval of variances involves revision of the underlying water quality standard (see OCC Opinion No. 58, above). As such, these variances constitute rulemaking under the provisions of section 303 of the Clean Water Act and are subject to the requirements of Part 25.