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

MAY 29 1979

MEMORANDUM

OFFICE OF
GENERAL COUNSEL

SUBJECT: Water Quality Standards and Underground Waters

FROM: Joan Z. Bernstein *Joan Z. Bernstein*
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TO: Conrad Simon
Director, Water Division
Region II

In your memorandum of April 27, 1979, you asked whether EPA has authority under §303(c) of the Clean Water Act (CWA) to approve a State's groundwater quality standards. As discussed below, except in very limited circumstances, EPA does not have such authority. We will address this issue, as well as others raised by the EDF letter of April 18, 1979 attached to your memorandum.

1. General Rule: The CWA Does not Extend to Groundwater

Generally, EPA's authority under the CWA is limited to surface waters. While §502(7) defines "navigable" waters broadly to include all waters of the United States,* the legislative history shows that Congress did not intend to stretch navigability so far as to encompass underground waters. Both the Senate and the House rejected such an approach.

The Senate Report states:

Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation. 2 Leg. Hist. 1491.

In the House, Representative Aspin noted that the Senate Bill failed to cover groundwater and introduced an amendment to provide such coverage. This was defeated by over a 2 to 1 margin on the floor of the House. 1 Leg. Hist. 589-597.

* The basic prohibition of §301 relates to the "discharge of any pollutant," which phrase is defined in §502(12) to mean the addition of pollutants into "navigable" waters.

We once took the limited position that EPA could regulate a plant's subsurface discharge if that plant were also discharging into surface waters. Even this limited position was rejected by the Fifth Circuit in Exxon v. Train, 554 F.2d 1310 (5th Cir. 1977). While the Seventh Circuit upheld this position in U.S. Steel v. Train, 556 F.2d 822 (7th Cir. 1977), we now accept the Fifth Circuit's decision as controlling in light of the Safe Drinking Water Act's coverage of underground waters. 43 Fed. Reg. 37081, August 21, 1978.

Our view that the CWA generally does not apply to groundwater extends to water quality standards under §303. This seems clear from the Senate Report language quoted above. Accordingly, our water quality standards guidelines* provide (emphasis added):

5.10 Groundwater

EPA recommends that States adopt water quality standards to protect the underground waters of the State. Such standards are not a Federal requirement: however, standards for groundwater are particularly desirable to protect waters which are a present or potential public drinking water supply source or have particular ecological or hydrographic significance.

2. Limited Exception For Water Quality Standards: Where A Surface Stream Has Underground Segments

EDF has cited Kentucky v. Train, 9 ERC 1280 (E.D. Ky. 1976), for the proposition that §303 covers groundwater. The District Judge's Order in that case does provide that §303 extends to "subsurface waters having a clear hydrological nexus" with navigable waters. 9 ERC at 1282. We feel, however, that this language must be construed very narrowly to comport with the situation in that litigation.

When EPA approved Kentucky's water quality standards in 1974, the underground segments of several surface streams were not covered by the standards. Plaintiffs sued to force EPA to promulgate §303 standards covering these underground segments.

We agreed with the plaintiffs' claims and promulgated such standards. We then drafted, with the plaintiffs' concurrence, a consent order of dismissal which

* EPA Guidelines For State and Areawide Water Quality Management Program Development: Chapter 5, Water Quality Standards, November, 1976 (notice of availability published at 41 Fed. Reg. 48777, November 5, 1976).

the District Judge signed. It is this order, which we drafted ourselves, which contains the "clear hydrological nexus" language.

Because the Court merely ratified the Consent Order language drafted by the parties, we do not regard the Order as a definitive judicial interpretation of the CWA. Because our basic position, supported by Exxon, is that the Act in general does not cover groundwater, we feel that the "clear hydrological nexus" language should be construed as narrowly as possible. We will therefore consider it applicable only where a surface stream has some underground segments. We will not apply it to an underground aquifer merely because the aquifer has a clear connection to a surface water body.

3. "Approvability" of Underground Water Quality Standards

We can "approve" standards under §303 only for those waters over which we have authority to promulgate standards.* Therefore, unless an underground standard applies to waters falling within the limited exception described above, EPA should not "approve" it under §303(c).

This is not to say EPA should "disapprove" underground standards. We should instead inform the State that we are taking no action under §303 with respect to underground standards. The State and EDF should understand that our failure to approve would not affect the standards' validity under State law.

4. Irrelevancy of Social and Economic Impact in Approving Water Quality Standards

While the foregoing may resolve your current problem, we have noted another issue raised by EDF which warrants discussion for future guidance. EDF states that your Region has "raised a concern regarding the social and economic impacts of the standards."

EPA cannot disapprove State water quality standards on the grounds that they are too stringent or would have, in EPA's view, unacceptable social and/or economic consequences. Section 510 of the Act leaves such judgments to the States when their rules are more stringent than necessary to comply with Federal requirements. We can disapprove a State standard if it is not stringent enough to satisfy Federal requirements; we cannot disapprove it because it is or may be more stringent than necessary.

We are aware of an old OGC memo (August 2, 1973) which incorrectly states that we should not approve overly restrictive standards. The 1973 memorandum is hereby superseded on that point.

* If we have the authority to approve a standard for a water body, we must necessarily have the authority to disapprove a standard for that water body. Whenever we disapprove a standard, §303(c)(4)(A) requires us to promulgate one.