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

JAN 26 1990

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Federal Rulemaking to Promulgate State Water Quality Standards

FROM: LaJuana S. Wilcher, Assistant Administrator
Office of Water WH-556

LaJuana S. Wilcher

TO: Regional Administrators
Regions I-X

PURPOSE

This memorandum is to alert you that we are developing a national rule to establish numeric, surface water quality criteria for toxic pollutants. This rulemaking will federally promulgate these criteria as water quality standards for any States that have failed to meet the Clean Water Act deadline of February 1990 for adopting their own criteria.

BACKGROUND

An important amendment to the Clean Water Act in February 1987 was the addition of Section 303(c)(2)(B). This new provision requires that each:

...State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act for which criteria have been published under section 304(a), the discharge or presence of which in the affected water could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants.

Never before had Congress given specific direction to States as to what must be considered in a State's periodic water quality standards review and revision. In taking this unusual step, Congress signaled its impatience with the rate of adoption of criteria for priority toxic pollutants. Most States had failed to adopt standards for toxic pollutants, despite the fact that State adoption has been a national priority since 1983.

Failure to adopt necessary water quality standards for toxic pollutants is a major deficiency in State water pollution control programs. Standards are essential to evaluate the quality of receiving waters and determine the adequacy of control measures to protect those resources. Formally adopted water quality standards form the legal basis for including water quality-based effluent limitations in NPDES permits to control toxic pollutant discharges.

Since the 1987 amendments, there has been dramatic progress by some States in adoption of criteria for toxic pollutants. You, your water quality staff, and many of the States are to be commended for the effort of the last three years. However, even with the progress that has been made, we will still fall short of full compliance with the statute by the February 1990 deadline.

Over the past few months, the Office of Water and the Regional Water Management Divisions have had many discussions concerning the statutory deadline, the likelihood the States will meet it, and the actions we need to take if they fail to do so. The central issue is how EPA should establish default federal criteria where a State fails to: (1) adopt sufficient criteria for toxic pollutants, or (2) demonstrate that such criteria are not "reasonably" needed. We have concluded that our best course is to develop a national rule to promulgate Federal water quality criteria for each State not in full compliance with the Act by the deadline.

This approach is preferred over simply extending our efforts to assist States and also over a piecemeal State-by-State promulgation. EPA promulgation is the quickest and most cost effective way to ensure compliance with the statute and demonstrate the seriousness of the EPA commitment to addressing environmental impacts from the discharge of toxic pollutants. Federal promulgation treats all non-complying States equally and provides a very strong incentive to the States to complete ongoing standards adoption actions expeditiously.

CONTENTS OF RULE

The Office of Water currently envisions that the rule would include criteria for all Section 307(a) pollutants for which we have developed Section 304(a) criteria recommendations. Criteria would cover the protection of aquatic life, both freshwater and marine, and the protection of human health. The Office of Water currently expects to set the human health criteria at a 10^{-6} incremental cancer risk level. We would update, as appropriate, the criteria recommendations for human health to reflect the most recent reference dose levels formally established by the Agency.

The national promulgation package will not propose Federal standards for any pollutants for which the State adopted a criterion which you approved. Any State that comes into compliance during the regulation development process will be removed from the package. Even after the proposal becomes final, we will withdraw the Federal rule as being applicable to any State that adopts criteria that satisfy the requirements of the statute. I expect a number of States may satisfy this requirement between the time we initiate rule development and actual proposal. I encourage you and the States to continue working towards that end and thus obviate the need for Federal promulgation.

LEGAL AUTHORITY

This action is taken pursuant to the legal authority in Section 303(c)(4)(B) of the Clean Water Act. That provision directs the Administrator to promulgate standards "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act."

SCHEDULE

Staff work is underway on drafting the proposal. Since the proposal will directly affect every Region, we are inviting each of you to name a member to the work group.

By March 1990, we will determine the compliance status of each State. To be in compliance, a State's standards must be approved by the Region and must include, at a minimum, criteria for all pollutants identified on the State approved 304(l) short list. When we have identified the non-complying States, I will notify each of our intention to include them in the proposed rule.

CONCLUSION

Please notify the States in your Region of our plans. I ask that you point out that our policy with respect to Federal promulgation remains unchanged. We prefer that the States adopt their own standards. However, EPA will exercise our promulgation authority to achieve our water quality objectives.

I am sure I can count on your strong support and the continued efforts of you and your staff. This action will complete the final phase of our multi-year effort to meet an

important statutory goal and shape a strong water quality standards program for the 1990's.

The proposal is being developed by staff of the Office of Water Regulations and Standards. If you have any questions, please call me at 382-5700 or have your staff call Martha Prothro (382-5400), or Bill Diamond (475-7301).

cc: Administrator
Deputy Administrator
Susan Lepow, OGC
Robbie Savage, ASIWPCA
Water Management Division Directors, Regions I-X