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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO
40 C.F.R. Section 125.36(m)

No. 31

In the matter of National Pollutant Discharge Elimination System Permits Numbered NV0020095, Sierra Pacific Power Company, Frank A. Tracy Generating Station, and NV0020109, Sierra Pacific Power Company, Fort Churchill Generating Station, the Regional Administrator has certified one issue of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1975). The parties having had an opportunity to provide written briefs in support of their respective positions, present the following issues:

Question Presented

"Whether EPA has legal authority to modify a permit that it has issued so as to include in the permit a provision for a 'zone mixing', when the state in which the permittee is located has adopted a regulation that permits a state to grant 'zones of mixing' but said regulation has not been submitted to nor approved by EPA pursuant to 33 U.S.C. §1313 as part of the approved water quality standards for such state."

Conclusion

No.

Discussion

A mixing zone is a provision in water quality standards that recognizes that the standards may not be met in an area of water in the

immediate vicinity of a discharge point and which, in effect, sanctions this deviation by specifying alternative standards for the area of the zone or specifying that standards must be met at the edge of the zone. In its 1968 Report on "Water Quality Criteria," the National Technical Advisory Committee recognized and specifically authorized the inclusion of mixing zones in standards designed to protect both freshwater and marine fish populations. At 30. The EPA adopted and followed the recommendations of the NTAC in implementing the water quality standards program under the Water Quality Act of 1965. In extending and expanding the water quality standards procedure initiated in the 1965 Act, and continuing in effect the standards established pursuant to that Act, the Congress gave no indication of its intent to preclude use of this mechanism in appropriate situations under the Federal Water Pollution Control Act Amendments of 1972 (the Act). The EPA, in fact, in developing its "Guidelines for Developing or Revising Water Quality Standards" under the 1972 Act recognized the continued viability of the use of mixing zones. At 25.

Moreover, the Congress specifically recognized the availability of the mixing zone concept as a mechanism for dealing with thermal discharges pursuant to section 316(a) of the Act. During the House debate on the Conference Report, Representative Wright, a member of the Conference Committee, stated:

Section 316(a) in effect recognizes the temporary localized effects a thermal component may have as well as the potential beneficial effects. It encourages the

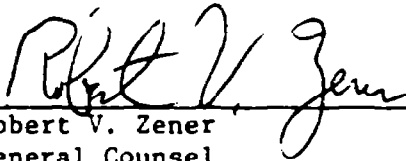
consideration of alternative methods of control, including mixing zones, so long as the controls assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife." (A Legislative History of the Water Pollution Control Act Amendments of 1972, at 264 (1973)).

Representative Johnson, another conferee, remarked:

"The Administrator, or if appropriate the State, shall consider all alternatives for dissipating heat, including once-through cooling and mixing zones, so long as the protection of fish can be assured." (Id., at 267).

It is thus my opinion that mixing zones are consistent with the requirements of the Act both in the context of water quality standards approved or promulgated pursuant to section 303 of the Act, and as established in connection with proceedings under section 316(a) of the Act. In both of these contexts, however, the mixing zone is recognized as an exception to an otherwise applicable effluent limitation, which exception is to be established through defined procedures. Although the mixing zone requested by Permittee has been adopted by the State of Nevada, it has not been submitted to the EPA for review and approval as to its consistency with the requirements of the Act. Nor would the Nevada mixing zone provision, since it establishes an exception to the stream standards for the affected streams, be a more restrictive state standard required to be applied pursuant to sections 510 and 301(b)(1)(C) of the Act. Nor, apparently, has a section 316(a) proceeding been completed for the Tracy Generating Station or requested for the Fort Churchill Generating Station. It is therefore my opinion that the Regional Administrator is required,

pursuant to section 301(b)(1)(C) of the Act, to establish effluent limitations to meet the more stringent state water quality standards; permit modification to take account of unapproved mixing zone provisions is not authorized.



Robert V. Zener
General Counsel

Dated: OCT 14 1975