UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

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MEMORANDUM

TO: David K. Sabock
Chief
Criteria Branch (WH-585)

FROM: Catherine A. Winer
Attorney
Water Division (LE-132W

SUBJECT: Seaward Extent of State Water Quality Standards

You have asked me for an opinion on how far offshore state water quality standards adopted under section 303 of the Clean Water Act should extend. As explained more fully below, such state water quality standards should generally extend to the outer limit of the territorial seas (that is, three miles out); in limited circumstances they should be given greater applicability.

The intended seaward extent of state section 303 water quality standards must be discerned from the overall statutory scheme. 1/ Section 303 establishes a means for adopting and updating a comprehensive set of water quality standards for the navigable waters. Since section 502 defines the navigable waters to include the territorial seas, and since section 303 does not distinguish between the territorial seas and other navigable waters, it follows that section 303 water quality

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1/ The Federal government has paramount authority over ocean waters, including the territorial seas, and their underlying lands, United States v. Maine, 420 U.S. 515 (1974). However, the United States may by Act of Congress waive elements of that authority in favor of the states, for example, under the Clean Water Act by authorizing state permit programs and water quality standards applicable to the territorial seas.

Such programs operate under state law; the Clean Water Act allows such state-authorized programs to have legal effect in waters in which the Federal government otherwise would have an overriding, paramount interest.

standards are to cover the territorial seas. In addition, section 303 assigns to the states the primary role in adopting and updating such standards. EPA's responsibility is to review state standards, approve or disapprove as appropriate, and to promulgate federal water quality standards where states fail to adopt standards that meet the requirements of the Act. Again, the Act makes no distinction between the Federal/state relationship in territorial seas and in the other navigable waters. Accordingly, one may reasonably conclude that Congress intended states to adopt water quality standards for waters within the territorial seas. Moreover, the provisions for enforcing such state water quality standards against dischargers, primarily sections 401 and 301(b)(1)(C), make no distinction between enforcement in the territorial seas and in other navigable waters, thereby reinforcing this conclusion.

The statutory scheme just outlined also suggests that Congress generally did not expect states to adopt section 303 water quality standards for waters (such as the contiguous zone) beyond the territorial seas. However, there is one situation where Congress apparently did intend to recognize such extended application, that is, in marine waters for which a section 301(h) waiver is sought. Section 301(h) provides for waivers from secondary treatment for POTW's discharging to marine waters (including the contiguous zone), but conditions each waiver on there being an applicable water quality standard specific to the pollutant under consideration. As explained in the preamble to the original and revised section 301(h) regulations (44 FR 34798-99, June 15, 1979, and 47 FR 53671, November 26, 1982), if state water quality standards could not apply to the contiguous zone, this waiver provision would be internally inconsistent. Accordingly, in order to give effect to the obvious Congressional intent, EPA has interpreted 301(h) to allow application of state marine water quality standards to the contiguous zone.2/

One final issue is whether the Marine Research, Protection, and Sanctuaries Act (MRPSA) limits application of water quality standards in the territorial seas or beyond. (The territorial

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2/ An alternative solution would be to limit section 301(h) waivers for the contiguous zone to waters for which EPA had issued federal water quality standards. However, this would be inconsistent with the general approach of giving states primary responsibility for setting water quality standards, subject to Federal oversight.

seas and beyond are among the waters regulated under that Act.) Section 106(d) of MRPSA provides that after its effective date, no state shall adopt or enforce any rule or regulation relating to any activity regulated by MRPSA. In practical terms this section simply bars the application of state water quality standards by states 3/ to ocean dumping and transportation for dumping, but does not otherwise affect their implementation under the Clean Water Act, and hence does not excuse states from adopting water quality standards for the territorial seas.

3/ Section 102(a) of MRPSA provides that no dumping permit may be issued which violates "applicable water quality standards." This presumably requires EPA to apply any state water quality standards which predate the MRPSA, plus any water quality standards promulgated by EPA pursuant to section 303(c)(4) of the Clean Water Act, or 106(d) of the MRPSA.