UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MEMORANDUM

TO : Regional Administrators

FROM : Thomas C. Jorling, Assistant Administrator
for Water and Waste Management (WH-556)

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SUBJECT: State Authority to Allocate Water Quantities --
Section 101(g) of the Clean Water Act

Confusion has apparently arisen over the intent and effect of new §101(g) of the Clean Water Act. Known as the "Wallop Amendment," §101(g) declares as a "policy of Congress" that the Act shall not impair a State's authority to allocate water quantities.

Many persons have interpreted §101(g) as prohibiting EPA from taking any action which might affect water usage. You should be aware that such an interpretation is incorrect.

Background

Section 101(g) was added to the Clean Water Act by §5(a) of the 1977 Amendments (P.L. 95-217, December 27, 1977). It provides as follows:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

As explained in the Conference Report to the 1977 Amendments, §101(g) is intended to "clarify existing law to assure its effective implementation. It is not intended to change existing law." H. Rept. 95-830, December 6, 1977, p. 52. The "existing law" on this point is §510(2), which was enacted as part of P.L. 92-500 in 1972 and was unchanged in the 1977 Amendments. Section 510(2) provides:

> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

The only discussion of §101(g) in the legislative history, other than the Conference Report cited above, is by Senator Wallop. It is useful to examine closely several portions of his floor statement:

> This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This "State's jurisdiction" amendment reaffirms that it is the policy of Congress that this act is to be used for water quality purposes only.
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> It is not intended to change present law, for a similar prohibition is contained in section 510 of the act. . . . Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of section 402 and 404 permits may incidentally affect individual water rights. Management practices developed through State or local §208 planning units may also incidentally effect [sic] the use of water under an individual water right. It is not the purpose of this

> amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.
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> 123 Cong. Rec. S19677-78, (daily ed., Dec. 15, 1977, emphasis added).

Discussion

In light of the foregoing, it is obvious that Congress did not intend to prohibit EPA from taking such measures as may be necessary to protect water quality. It is noteworthy that the 1977 Amendments left untouched both §301(b)(1)(C), which requires without exception that point source discharges be controlled to meet water quality standards, and §101(a)(2), which declares the national "fishable, swimmable" water quality goal.

It is also noteworthy that §510(2), which Congress expressly declined to change, provides that States' water rights are not to be impaired "except as expressly provided in this Act." Thus, as Senator Wallop noted, the requirements of water quality standards, §402 and §404 permits, and §208 plans may incidentally affect water rights and usages without running afoul of §101(g) and §510(2).

It is important to recognize, however, that §101(g) reinforces §510(2)'s general proscription against unnecessary Federal interference with State water rights. EPA should therefore impose requirements which affect water usage only where they are clearly necessary to meet the Act's requirements.

Finally, new §102(d) requires EPA to analyze water quality-quantity problems and submit its analysis to Congress. We anticipate that this analysis will be complete early next year and that we will be able to provide you more specific guidance on §101(g) and §510(2) at that time.