February 25, 2010

House Fisheries Committee

Dear Chairman Edgmon,

After contact with the Office of the Attorney General regarding HB 46 there are several points of concern that have been brought to our attention. They relate to federal rule making requirements under the Clean Water Act to legislation that seeks to change a state's water quality standard. Enclosed is a copy of the response received.

Please note that in answer to question 5 the Senior Assistant Attorney General states that a proposed revision to a water quality standard must include among other things: "analyses conducted to support the standard" and "an explanation of the scientific basis for the standard." In response to question 6 the Senior Assistant Attorney General says that to satisfy the Clean Water Act's public hearing requirements "there must be a public hearing not simply on the language of the standard itself, but after the supporting analyses have been assembled and made available to the public."

Before we hear this bill again we would appreciate the opportunity to hear first from the Senior Assistant Attorney General. Particularly it would be helpful to review: 1) the sufficiency of the analyses conducted to support the proposed legislative revision to Alaska's current mixing zone standard; 2) the scientific basis for the proposed revision; 3) whether items 1 and 2 were sufficiently noticed at the Committee's hearings on the proposed legislative revision to the mixing zone standard to be in compliance with the Clean Water Act's public hearing requirements; and 4) such other steps as may be necessary to make sure that any legislative revisions to Alaska's current mixing zone standard meet Clean Water Act requirements for such revisions.

Thank you for your consideration.

Representative Cathy Munoz
House District 4

Representative Craig Johnson
House District 28

Sean Parnell, Governor

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February 11, 2010

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Re: Mixing Zone Bill Questions, Our File No. 665-09-0019

Dear Honorable Representatives,

Thank you for your letter of February 4, 2010, posing several related questions that arise when a state elects to legislate water quality standards, rather than develop them through regulations. As you appreciate, the answers to your various questions turn on the application and interpretation of federal law. I have consulted with counsel at EPA's Regional Office and at EPA Headquarters in framing my answers to your questions. EPA has occasionally been confronted with similar circumstances in other states, and they recognize that it can be an awkward fit to review water quality legislation under standards and procedures that were designed for review of state water quality regulations.

In addition to the provisions of the Clean Water Act (CWA) that you mention in your letter, there are also federal regulations that govern the process of securing EPA's approval of state water quality standards. The most important regulations for the purposes of your inquiry are 40 CFR § 131.6 and 40 CFR §131.20. These two regulations set out the requirements for a state's submission of proposed water quality standards to EPA for approval. Both of these regulations will be addressed further below, in responses to each of your numbered questions.

1. Would the information required by CWA § 303(c)(2)(A) and (2)(B) have to be included in legislation to change a water quality standard?

Any new or revised water quality standard, whether enacted as legislation or promulgated as regulations, is subject to EPA review and approval (or disapproval) under CWA § 303(c)(2) & (3).[1] Thus, the substantive review standards set out in CWA § 303(c)(2)(A) would apply to legislation. Also, the procedural requirements of 40 CFR § 131.6 and 40 CFR § 131.20, describing the information that must be submitted to EPA along with the proposed new or revised water quality standard, will also apply. However, such information does not have to be included in the legislation itself; rather, it has to be included in the set of materials ultimately sent to EPA for its approval.

2. If so, would DEC or the legislation's sponsor be required to provide the information?

Federal law does not prescribe which state entity is responsible for forwarding the water quality standard approval packet to EPA for its review. EPA would accept a submission from either ADEC, the agency that normally handles such matters, or from the legislature. EPA would review the submission under the same substantive and procedural standards in either case.

3. If the answer to the previous question is that DEC would have to provide the information, what would happen if, based on the science, DEC disagreed with the change? For example, what if DEC found that the proposed, legislated water quality standard reduced the value of the public water supply?

If ADEC believes that a bill changing state water quality standards includes provisions that it could not support in a subsequent submission to EPA, then ADEC should advise the legislature about its concerns in hearings on the bill, in order to avoid the situation you describe. If the legislature passed the bill despite ADEC's expressed concerns, and then asked ADEC to submit the new statute to EPA for approval, then ADEC would have to discharge that function professionally. Presumably ADEC would have to include its honest assessment of the new water quality standards in the materials that it submitted to EPA. But if the legislature does not want ADEC to include its own assessment of the new law in the packet submitted to EPA, then the legislature should undertake the submission itself.

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[1] All references to the CWA will be to the section number of the Act itself, rather than the codified version.

4. How would such legislation address the requirement in CWA § 303(c)(2)(B) that the State adopt criteria for toxic pollutants? Would such information have to be included in the legislation? Would DEC be responsible for providing it or verifying it? Again, what if DEC disagreed?

The State has already adopted water quality criteria for all the toxic pollutants referred to in CWA § 303(c)(2)(B). Those criteria may be found at 18 AAC 70.020(b)(11) [for freshwater] and 18 AAC 70.020(b)(23) [for marine water]. Those criteria have been approved by EPA. The State must also perform a "triennial review" of its standards under CWA §303(c)(1) to allow for public input on any needed revisions. As long as the State does this, it can adopt other water quality standards, such as rules for mixing zones, without needing to go back and re-visit or re-adopt its existing criteria for toxics.

While the language of CWA § 303(c)(2)(B), read literally, might seem to require that a state re-promulgate its toxics criteria every time it revises any of its water quality standards, it is not interpreted or applied that way in practice. Rather, the section simply imposes an on-going duty on the states to keep their toxics criteria complete and current (*i.e.*, consistent with the requirements of CWA § 303(c)(2)(B)). If a state does so, it may still revise other water quality standards without going back and changing or re-adopting its toxics criteria.

5. How would a record satisfactory to EPA's administrative rules be made as part of such legislation?

Federal regulations require that a state seeking EPA approval of a proposed revision to a water quality standard submit the following information: analyses conducted to support the standard; an explanation of the scientific basis for the standard; and certification by the Attorney General or other legal authority that it was duly adopted.[2] Ideally, the sponsor of a bill proposing to change an existing standard should make the first two items available to the committees considering the bill, and to the public, before the bill is enacted. While such supporting materials could be provided to accompany the new law after it was enacted, that sequence would defeat the open public process required for the state's development of its standards. The federal requirements for public hearings are discussed in the response to the next question.

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[2] These requirements are gleaned from 40 CFR § 131.6 and 40 CFR § 131.20. Note that not all the requirements of the former regulation apply to a revision to an existing water quality standard.

6. How would the CWA's public hearing requirement be integrated with the legislative hearings? Would separate public hearings have to be held?

Federal regulations require that a state hold a public hearing before it revises its water quality standards. *See* 40 CFR § 131.20(b). The governing regulation specifies that "[t]he proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing." *Id.* (emphasis added). Thus, to satisfy this regulation, there must be a public hearing not simply on the language of the standard revision itself, but after the supporting analyses have been assembled and made available to the public. The public hearing must also comply with 40 CFR Part 25. *See* 40 CFR § 131.20(b). Note in particular 40 CFR § 25.5, which describes specific rules governing the public hearing required for a water quality standard revision.

The federal requirements could theoretically be satisfied in either of two ways. If the supporting analyses were made available to the public prior to the legislative hearings on the bill that was revising the standards, and the specific rules applicable to the public hearing were also met, then the legislative enactment process itself could satisfy this regulation. If that does not occur, then there would have to be a subsequent opportunity for public hearing, after the bill was enacted and after the supporting information required by federal regulation is assembled. Presumably this public process could be managed either by ADEC or by some appropriate legislative committee or office.

7. If the Administrator of EPA disapproves the proposed, legislated, water quality standard under CWA § 303 (c)(3) may he/she substitute his/her judgment as to what would be the appropriate standard? (Please consider the last two sentences of CWA § 303 (c)(3) in giving your answer.) If so, could the Administrator also substitute his/her judgment as to what should be the appropriate numbers for the toxic substance criteria that CWA § 303 (c)(3) requires a State to submit when adopting or revising its water quality standards?

Whenever EPA disapproves a state's water quality standard, it has the duty to inform the state of the changes needed to secure approval. It also has the option of promulgating substitute standards for the state. *See* CWA § 303(c)(3). In practice, when EPA has disapproved standard revisions offered by ADEC, it has chosen not to promulgate its own. Rather, EPA has simply allowed the prior version of the State's standards to remain in effect. EPA has followed this course in two recent disapprovals of state water quality standards submitted by ADEC. In taking this position, EPA cites to 40 CFR § 131.21(e), which provides that an EPA-approved standard remains in effect, for purposes of the CWA, "until EPA approves a change, deletion, or addition to that water quality standard."

Because all of your questions pertain to a bill that would make changes to the rules governing mixing zones, we would expect EPA to follow the same course here. ADEC already has mixing zone regulations that EPA has approved,[3] so if EPA disapproves revisions to those rules (whether those revisions be in the form of a bill or a new regulation), EPA would likely simply allow the currently-approved version to remain in effect. But there is no guaranty of that outcome. and EPA would certainly have the option of promulgating its own mixing zone regulations for Alaska if it chose to do so.

In the latter event, I do not think that EPA could also change the State's water quality criteria for toxic pollutants, as those criteria have already been approved by EPA, and are outside the scope of the mixing zone standards that, under our hypothetical scenario, EPA would have disapproved.

8. What would be the status of the proposed, legislated, water quality standard if the Administrator of EPA publishes it and a court determines that it is arbitrary and capricious under the Federal Administrative Procedures Act? Could a third party litigate whether the toxic substance criteria, that CWA § 303 (c)(2)(B) requires a State to submit when adopting or revising its water quality standards, are arbitrary and capricious under the Federal administrative Procedures Act?

As I understand this question, the scenario is that EPA approves the State's revised mixing zone standard, and a third party then brings a legal challenge under the federal APA, and prevails. In that event, the status of the State's revised standard would depend wholly upon the court's ruling. If the court vacates EPA's approval of the new or revised standard in its entirety, then the most likely consequence would be for the State's former mixing zone regulation to remain in effect. But the appropriate remedy would likely be contested by the parties to such a case, and it is impossible to predict with any certainty how the court would rule.

As noted in response to your question 4, the State can adopt a new mixing zone rule without having to re-adopt criteria for toxic pollutants. Therefore, it is highly unlikely that the current, EPA-approved criteria for toxic pollutants would be at issue, since they would be unrelated to a bill that focused solely on mixing zones.

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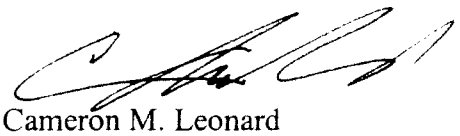
[3] You may note that the EPA-approved version of the state's mixing zone regulations is <u>not</u> the version currently included in our state regulations, 18 AAC 70.240, as that regulation is awaiting EPA approval. Rather, for purposes of the CWA, the current mixing zone regulations are the 2003 version, which may be found at http://dec.alaska.gov/water/wqsar/wqs/pdfs/70mas.pdf.

I hope that these answers are helpful to you in your further deliberations. Please let our office know if we can be of any further assistance.

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: 
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