

with the Act, and the initiation of court enforcement proceedings. He has no statutory authority to require prior Federal approval of discharges into a stream or of treatment facilities.

Finally, the requirement that new or increased pollution of "high quality waters" can be permitted only if the installation will have the highest and best degree of waste treatment available under existing technology is an attempt to write effluent standards into the Act, and to impose a degree of treatment that is inconsistent with the enforcement tests of "practicability" and "physical and economic feasibility." A treatment method that is technically available may well be impracticable and totally unfeasible economically. Under any circumstances, a violation of the Act must be predicated on discharge that reduces the quality of the receiving waters below the stream standard, and not on failure to install any particular type or degree of treatment facility.

For these reasons, we conclude that the Secretary has no authority to require that States adopt either effluent or nondegradation standards as a condition of receiving approval of water quality standards under the Federal Water Pollution Control Act.

Very truly yours,

COVINGTON & BURLING
By EDWARD DUNKELBERGER.

[Prepared by Ed Dunkelberger of the Covington & Burling Law Firm as a backup to their April 4 letter to the Chamber of Commerce of the United States]

APRIL 4, 1968.

MEMORANDUM RE WATER QUALITY STANDARDS UNDER THE FEDERAL WATER POLLUTION CONTROL ACT

INTRODUCTION

This memorandum focuses upon the authority of the Secretary of the Interior to require a State to include specific provisions in its water quality standards as a condition of his approval of those standards under the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1965. This and related questions are considered in the light of the legislative history of the 1965 amendments and other relevant authorities.

Section I traces in summary form the legislative developments of 1963-65 which culminated in the passage of the Water Quality Act by the 89th Congress. Section II provides a description of the water quality standards provisions of the Federal Act, as amended in 1965. State-Federal relationships (including procedures for issuing Federal water quality standards), the role of the statutory Hearing Board, and limitations on Federal enforcement authority are considered.

The Secretary's authority to insist on effluent criteria in water quality standards is considered in Section III, with emphasis on both the statutory provisions and their legislative history. It is concluded that in the light of the clear Congressional rejection of authority to set such standards, coupled with the expressed legislative intent of avoiding arbitrary National standards, insistence on any effluent standard by the Secretary has no legal basis. The Secretary's requirement of mandatory secondary treatment in particular is found to be both outside the Secretary's statutory authority and in direct conflict with the Water Quality Act's legislative history.

Section IV outlines the basis for the conclusion that the Secretary has no statutory authority to demand that a so-called nondegradation requirement be included in State water quality standards, or to require Federal approval of waste treatment methods or facilities.

Section V examines the statutory requirements for revision of standards once they are approved and adopted, and Section VI outlines State alternatives when a requirement imposed by the Secretary is deemed arbitrary or without statutory basis. The function of the Hearing Board and the extent of judicial review available during the standard-setting and enforcement processes are considered.

I. THE WATER QUALITY ACT: 1963-1965

The drive for Federal water quality standards legislation, which culminated in the Water Quality Act of 1965, 79 Stat. 903-10 (1965), began two years earlier