

proposed standards. These modifications are reported back with a recommendation to the Secretary of HEW. He shall conform and comply with these recommendations of the hearing board and promulgate these standards. We have a process for establishing standards which will be a joint operation at which not only the Federal Government and its agencies, other than the Secretary of HEW shall be represented, but the States affected shall be represented, private industries shall be represented, and the general public shall be represented. In fact, all members affected by the standards are represented on the board, *and the recommendations of the board shall govern the final decision of HEW.*" 111 Cong. Rec. 24588 (1965). (Emphasis supplied.)

Judicial review of Federal water quality standards is provided in an enforcement action under section 10(c)(5) (*see* section II of this Memorandum). The Act is silent about the availability of judicial review of the Hearing Board's decision prior to a charge of violation,² and it is doubtful that such review may be obtained by States under the general statutory authority for review of administrative action, which does not apply to action by "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them . . ." 5 U.S.C. §§ 701, 702, 704 (Supp. II 1965-67). *See Pennsylvania-Reading Seashore Lines*, 245 F.2d 579 (3d Cir. 1957) and *Brotherhood of Locomotive Firemen v. Chicago Burlington & O.R.R.*, 225 F. Supp. 11 (D.D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964). This accords with Senator Muskie's understanding of the statutory review machinery.³

Thus, a State would apparently have no right to obtain judicial review of a Hearing Board's decision either approving or recommending modification of standards promulgated by the Secretary. Review under section 10(c)(5) is available only in the course of an enforcement action for abatement of pollution, and the State would presumably not be a party to the litigation. But if the State objected to standards as approved or modified following a Hearing Board decision, and if such standards were sought to be enforced by the Secretary under section 10(c)(5), the court might be expected to permit the State to intervene as a defendant in the enforcement action and thereby to challenge the legal or factual basis for the standard in question.

Mr. McEWEN. The answer from the Federal Water Pollution Administration still stands, that it could mean any or all of these things?

Mr. COFFEY. Depending upon the case that they decided on each situation what they meant.

Mr. McEWEN. That is all.

Mr. SULLIVAN. Are you saying that the Secretary was requiring the States to go above and beyond what the standards were, to make the water as clean as possible, Mr. Coffey?

Mr. COFFEY. Yes, I do not think there are any objections to meeting the State's water quality standards as they were adopted.

What the secondary treatment and the non-degradation policy both do is override any numbers of implementation plans which the States have submitted for approval and which the States have adopted after public hearings; and the point that was made this morning by Secretary Udall, he would have to be consulted on any lowering of water qualities.

This does not apply to lower the water quality below what the State standards are. It applies to lowering the quality below what is now existing, which may be above the State standard.

² Prior to Senate passage of S. 4, Senator Cooper offered an amendment which would have added additional procedural safeguards, including judicial review, at the standard-setting stage. The amendment was rejected by the Senate Committee and a more limited version was thereafter rejected by the Senate. See 111 Cong. Rec. 1524-31 (1965).

³ "As I understand, the Administrative Procedure Act provides only for administrative review of the regulations. Judicial review is provided when enforcement action is undertaken but in the establishment of rules and regulations only administrative review is provided." 111 Cong. Rec. 1530 (1965) (remarks of Senator Muskie).