

approval and therefore the states should not relax or cut back their abatement programs while awaiting federal approval.

Two legal questions immediately arise concerning these two items independent of the Secretary's lack of authority to propose them. One is whether or not such proposals can be legally adopted by the states and, secondly, can they be adopted by the states without additional hearings.

As to the first proposition, it must be divided into two sub-topics: (1) are the standards consistent with state water pollution control acts and (2) can any state water pollution control administration legally delegate a portion of its authority and discretion to an agency of the federal government in the absence of specific state legislative authority.

With respect to sub-topic (1), the so-called "nondegradation" policy reads that: "Waters whose existing quality is better than the established standards as of the date on which such standards become effective will be maintained at their existing high quality. These and other waters of your State will not be lowered in quality unless and until it has been affirmatively demonstrated to the State water pollution control agency and the department of the Interior that such change is justifiable as a result of necessary economic or social development and will not interfere with or become injurious to any assigned uses made of, or presently possible in, such waters. This will require that any industrial, public or private project or development which would constitute a new source of pollution or an increased source of pollution to high quality waters will be required, as part of the initial project design, to provide the highest and best degree of waste treatment available under existing technology, and, since these are also Federal standards, these waste treatment requirements will be developed cooperatively."

This statement contains two important factors namely the requirement that the Department of Interior give prior approval to any installation and that any new sources of pollution be given "the highest and best degree of waste treatment available under existing technology."

The appropriate statutes of each state would have to be examined to determine whether or not such a proposed standard or regulation would be contrary thereto. Most states operate on either a permit system or a stream quality system basis. Examples of the effect of such proposed standard on each of these types of systems are set out hereinbelow.

The State of West Virginia operates on a permit system; that is, no one may discharge pollutants into the waters of the State until a permit therefor has been issued. Chapter 20, Article 5A, Section 7, Subsection (c), of West Virginia Code provides that:

"The department's permit shall be issued upon such reasonable terms and conditions as the chief may direct if (1) the certificate or permit of the department of health was issued (in those cases where the director of the division of sanitary engineering was required to act as aforesaid) and/or (2) the application, together with all supporting information and data and other evidence, establishes that any and all discharges or deposits of sewage, industrial wastes, or other wastes or the effluent therefrom resulting from such proposed activity will be treated and/or the quality and rate of flow thereof regulated or controlled to the fullest extent reasonably, economically and practically feasible in view of modern technology and scientific methods for the treatment, regulation or control of sewage, industrial wastes, or other wastes or the effluent therefrom."

Thus a permit shall be issued when the above-stated requirements are fulfilled. An attempt by West Virginia to adopt the regulation as suggested by the federal agency would add additional requirements to the organic laws of West Virginia and thus be invalid. The regulation would require prior federal approval of any new source and also highest and best treatment without regard to economic and practical feasibility. It is well settled in West Virginia and elsewhere that an administrative agency may not by regulation subvert or enlarge upon the statutory policy established by the Legislature.

The State of Colorado operates on a stream quality standard basis; that is, that no discharge is permitted which causes the quality of the water in the stream to fall below a certain standard established with respect to present and future uses. Consequently an attempt by the control authorities to establish such standards and requirements which are not related to the maintenance and attainment of stream quality standards would be contrary to the statute.