

THE LACK OF A STATUTORY BASIS FOR A NONDEGRADATION STANDARD

A somewhat different question is raised by the attempt of the Secretary to insist that every State water quality standard include a provision to require that waters whose existing quality is better than established standards as of the date on which such standards become effective will be maintained at their existing high quality. The Secretary has stated that the lowering of the quality of such waters would be permitted only upon a determination by the State water pollution control agency and the Department of 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. Any new or increased source of pollution to high quality waters would be required to provide "the highest and best degree of waste treatment available under existing technology."

Such a "nondegradation" standard cannot be justified under the provisions of the Act. First, in adopting water quality standards, State authorities must consider, on the evidence presented at public hearings, whether the quality of a particular stream should be improved in order to permit uses not now possible, whether the standards should reflect the existing level of water quality because it satisfactorily accounts for desired uses and values of the stream, or whether standards should be set at levels below the existing quality level in order to accommodate uses and values of importance to the citizens of the State and consistent with purposes of the Act. A nondegradation standard would in effect override any stream standard in this last category, for it would purport to require a water quality level above that specified in the standard. There is no basis in the Act for the Secretary summarily to disregard the decision of the State authorities, and to impose a general requirement unrelated to the hearing evidence.

State standards must of course meet the general requirements of section 10(c) (3) "to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act." Presumably the nondegradation standard is thought to be justified as a means to "enhance the quality of water," but such a narrow reading of this one provision ignores the statutory purpose "to enhance the quality *and value* of our water resources," and in effect nullifies the requirement that the Secretary and the State take into consideration the "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses." If the hearing record establishes that maximum value and use of a stream can be achieved by water quality standards somewhat below existing levels, then the Secretary cannot arbitrarily refuse to give effect to such standards.

A second difficulty with a general nondegradation standard is that it purports to impose an unenforceable requirement. A Federal action for failure to observe water quality standards can be maintained only upon a showing that discharged matter reduced the quality of the receiving stream below the standards adopted for that stream. No action would lie under the Act for the discharge of matter that merely reduced the stream quality below earlier quality levels, if the stream continued to meet the requirements of the standards themselves.

A third objection to the Secretary's nondegradation standard is that it seeks to displace the initial responsibility of the State to establish water quality standards and to prevent and control water pollution. Under the nondegradation standard, permission to lower the quality of "high quality" waters would be granted only upon a showing of justification made to the State *and* the Secretary. But the Act carefully prescribes the role of the Secretary in the establishment and enforcement of water quality standards, limiting his authority to the approval of State standards, the promulgation of standards if State standards are not consistent 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