



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

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JUL 24 2012

Ref: 8EPR-EP

Honorable Mike Coffman
U.S. House of Representatives
Washington, DC 20515-0606

Re: Letter of Proposal of the adoption of nutrient regulations by the Colorado Department of Public Health and Environment.

Dear Congressman Coffman:

Thank you for your letter of May 25, 2012, regarding the proposed adoption of nutrient regulations by the Colorado Department of Public Health and Environment. I understand the importance of this issue to Colorado, and I appreciate the opportunity to provide the following information in response to the questions you included in your letter pertaining to whether provisions of proposed Regulation 85 - which would set effluent limits for nitrogen and phosphorus - are required under federal law and suffice to meet Clean Water Act requirements.

Question 1: Does the Clean Water Act require states to adopt technology-based effluent limitation requirements to control nutrients discharged by municipal facilities? If so, what section of the Act contains this mandate and by what date must it be achieved.

Sections 301 and 402 of the Clean Water Act requires National Pollutant Discharge Elimination Systems permits to include effluent limits to meet water quality standards (i.e., Water Quality-Based Effluent Limits) where technology-based limits are insufficient to do so. The State of Colorado has proposed the use of technology-based effluent limits as a first step in reducing nutrient pollution until the means to establish Water Quality-Based Effluent Limits are developed. 40 CFR 122.44(d), which applies to states via 40 CFR 123.25(a), requires a permit-issuing agency to: (1) determine whether point-source discharges will cause, have a reasonable potential to cause, or contribute to an excursion beyond applicable water quality criteria; and (2) set water quality-based effluent limits in permits when the agency makes an affirmative determination. The regulation applies whether the relevant criteria are expressed numerically or in a narrative form. As Colorado is approved by the Environmental Protection Agency to run their National Pollutant Discharge Elimination Systems Program, the State must maintain programs that are consistent with Section 402 of the Clean Water Act.

Question 2: Has the EPA informed the State of Colorado that it must adopt a technology-based nutrient reduction requirement to address existing nitrogen and phosphorous discharges such as that proposed by Regulation 85? If so, please provide copies of that correspondence that informed the state of this mandate.

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No, the EPA has not informed Colorado that it must adopt a regulation establishing technology-based limits for nutrients. While it is true the Clean Water Act does not explicitly require states to adopt regulations establishing technology-based limits for nutrients, Regulation 85 is an integral part of the State's approach to protecting water quality and addressing Clean Water Act requirements. States have options and flexibilities for establishing a water quality-based control program that complies with the Clean Water Act. Any such program must include several key elements:

- water quality criteria that protect designated uses (Clean Water Act § 303(c)),
- an antidegradation program (40 CFR 131.12),
- identification of waters for which technology-based effluent limits are not stringent enough to implement any water quality standard applicable to such waters (Clean Water Act § 303(d)(1)(A)).
- total maximum daily loads Total Maximum Daily Load at a level necessary to implement the applicable water quality standards (Clean Water Act § 303(d)(1)(C)).
- Water Quality-Based Effluent Limits in permits issued to point source discharges (Clean Water Act § 301 and § 402).

Colorado's Regulation 31 includes narrative standards, applicable to all waters of the State, for the purpose of controlling substances from anthropogenic sources in amounts, concentrations, or combinations that:

- produce color, odor, or other conditions in such a degree as to create a nuisance or harm existing beneficial uses,
- are toxic to humans, animals, plants, or aquatic life, or
- produce a predominance of undesirable aquatic life.

The plan developed by Colorado Department of Public Health and Environment, with input from a stakeholder workgroup, is to initiate case-by-case implementation of the narrative standards (e.g., during the 2014 303(d) listing cycle), while moving forward with phased adoption of numeric standards for nutrients over the next 14 years. It is expected that for most segments receiving point-source discharges such numeric standards will not be adopted until the 2022-2025 time period. The Department's plan for the next 10+ years, in many cases, is to rely on Regulation 85 limits to reduce nutrient discharges.

It is worth noting here that exemptions and exclusions in Regulation 85 limit its impact on municipal facilities. For example, all municipal facilities with design flows equal to or less than 1 million gallons per day are exempted from meeting Regulation 85 limits. In addition, compliance with the Regulation 85 limits for all municipal facilities in low priority watersheds with design flows greater than 1 million gallons per day, and less than 2 million gallons per day, would be delayed by 10 years. As a result, the Regulation 85 limits would apply to about 15 percent of municipal facilities in designated priority watersheds. Additionally, where compliance is not affordable for a covered facility, Regulation 85 would authorize variances so that affordable control technologies could be implemented to achieve permit limits.

The EPA has participated actively in the Colorado Department of Public Health and Environment work group process. One of our objectives has been to explain Clean Water Act requirements to the Department and to Colorado stakeholders, including the options and flexibilities available for achieving compliance. To that end, the EPA has informed Colorado Department of Public Health and Environment that we are willing to be flexible on the schedule for complying with Clean Water Act requirements, consistent with the EPA's March 16, 2011 Memorandum to the EPA Regional Administrators "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions" signed by Nancy K. Stoner, Acting Assistant Administrator, Office of Water, which clearly articulates this policy position.

Question 3: Does the Clean Water Act or its implementing regulations allow a state to assume that a technology-based requirement, such as Regulation 85, is sufficient to meet narrative criteria requirements at the time of permitting.

The Clean Water Act generally envisions a combination of technology-based and water quality-based limits. Permitting authorities are required to develop water quality-based effluent limits when technology-based effluent limits are not sufficient to ensure compliance with water quality standards. Questions about whether Regulation 85 limits are sufficient to protect water quality standards are best addressed on a permit-by-permit basis, because it is important to consider site-specific circumstances.

Question 4: Does the following statement, contained in the Statement of Basis and Purpose for Regulation 85, constitute an explicit State policy or regulation interpreting the State's narrative water quality criteria, so that effluent limitations established pursuant to Regulation 85 will satisfy the requirements of the Clean Water Act and its implementing regulations? "Compliance with Regulation #85 will be deemed to be compliance with the narrative standards unless and until the Commission adopts subsequent revisions to Regulation #85 and/or Regulation #31."

As mentioned above, questions about whether Regulation 85 effluent limits are sufficient to protect water quality standards are best addressed on a permit-by-permit basis. However, the requirements of the Clean Water Act and the EPA's implementing Part 122 regulation apply to discharge permits issued

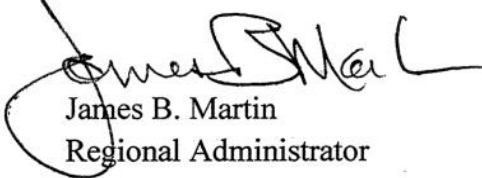
by Colorado Department of Public Health and Environment, regardless of Statement of Basis and Purpose language adopted by the Commission. As noted above, states have options and flexibilities for establishing a water quality-based control program that complies with the Clean Water Act.

Question 5: Does the Clean Water Act require that both nitrogen and phosphorous be limited in permits to prevent adverse ecological impacts from nutrient discharges?

As a general matter, if a reasonable potential analysis demonstrates that discharges of nitrogen and/or phosphorous will cause or contribute to an exceedance of any applicable water quality standard, then Water Quality-Based Effluent Limits are to be included in the discharge permit.

Again, we appreciate your writing; and I hope the above information will help clarify the EPA's position. If you have additional questions, please contact me or Sandy Fells, Regional Congressional Liaison, at 303-312-6604 or fells.sandy@epa.gov.

Sincerely,


James B. Martin
Regional Administrator

cc: Chris Urbina, Director, CDPHE

