General Counsel Opinions
From the

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sary with state water management." Slip op. at 43. (Emphasis added.)

Question

Must the guidelines consider secondary impacts?

Answer

By "secondary impacts," I am assuming you mean reasonably foreseeable impacts of the discharge itself that occur away from the immediate site of the discharge, *e.g.*, downstream impacts or impacts from the altered circulation as opposed to impacts on whatever is buried by the discharged material. Such secondary impacts must be included in the guidelines. Some impacts that may be caused by the subsequent operation of a project or by associated development may be considered, depending on the directness of the causal connection, the predictibility of such impacts, and a general rule of reason.

Discussion

The statute itself indicates that secondary impacts (as defined above) should be addressed under the guidelines. For example, § 403(c) requires consideration of impacts on shores and beaches, which are secondary impacts from ocean dumping, in recognition of the effects of currents. Also, § 404(f)(2) indicates that Congress was concerned with the effects of discharges of dredged and fill material on flow and circulation.[6] It follows from § 404(f)(2) that the guidelines should consider impacts on flow and circulation; unless such considerations were part of the permit process there would be no point in "recapturing" discharges because of such impacts.

Finally, there is nothing in the Act that indicates Congress intended to exclude from consideration adverse impacts on the aquatic environment caused by a discharge merely because they were "secondary." To the contrary, part of the very rationale for extending the Act's jurisdiction beyond traditionally navigable waters was the fact that the effects of pollution move through the aquatic system. *See, e.g., United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974), *Commonwealth*

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[6] Section 404(f)(2) reinstates § 404 permit requirements for discharge of dredged or fill material otherwise exempt under § 404(f)(1) if, *inter alia*, "the flow or circulation of navigable waters may be impaired."

of Puerto Rico v. *Alexander*, 438 F. Supp. 90, 95 (D. D.C. 1977). Pollution is controlled at the source in order to prevent such secondary effects. There can be no serious doubt that such off-site effects are to be considered in deciding whether to allow the discharge.

When one moves beyond secondary impacts, as defined above, to impacts caused by the subsequent operation of a project or by associated development, the question becomes more difficult. While it is hard to answer in the abstract, in general whether such impacts must be considered would appear to depend on the directness of the causal connection and the predictability of the impacts, interpreted in light of a rule of reason. For example, where fill is discharged to build a dam whose *purpose* is to manipulate the flow of water, the permitting authority, in evaluating the impacts of the fill, may reasonably take into account the fact that water levels will be manipulated. On the other hand, when a barge-loading facility for an upland factory involves some fill, the water quality impacts of the factory are outside the scope of the guidelines, even if they are, in a sense, a "result" of the fill.

Question

What are the legal requirements for an alternatives analysis in the guidelines?

Answer

Some consideration of possible other locations and methods of disposal or recycling of pollutants, including land-based alternatives, is required. The Agency has substantial flexibility in deciding what kind of alternatives analysis to include.

Discussion

Section 403(c), upon which the guidelines are to be based, expressly includes "other possible locations and methods of disposal or recycling of pollutants including land-based alternatives." Moreover, the 1972 legislative history refers to the need to consider alternatives, including upland sites, under the § 404 program.[7] Therefore, it is clear that the guidelines must contain

[7] 1 Leg. Hist. 177–78, 325.