Toxic Pollutants: Industry Worried at Abatement Agreement

Chemical manufacturers, petroleum refiners, steel producers, rubber processors, and other industrial giants appear worried and upset about an agreement recently negotiated by the Environmental Protection Agency (EPA) and the Natural Resources Defense Council (NRDC), and other environmental groups. The agreement calls for a comprehensive regulatory program to control toxic water pollutants, about half of which are known or suspected carcinogens. Many of the industries that would be affected are urging the federal district judge who has the agreement under review not to sanction it.

Negotiated out of court to settle four lawsuits brought against EPA by NRDC, the Environmental Defense Fund (EDF), and other groups, the agreement contemplates an ambitious program of abatement intended to bring the desired results by 1983. "We are at long last very close to a major program to clean up toxic water pollutants," says J. G. Speth, an NRDC attorney who played a part in the negotiations. EPA's past program to control such pollutants has been anemic and mired in procedural difficulties.

The new program would involve four basic steps, each to be executed according to a fixed timetable.

- By this coming July, EPA would initiate a 3-year, $20-million program of contract studies to determine the ecological and health effects of the 65 toxic pollutants and classes of pollutants listed in the agreement; the present and developing state of control technology for each of 21 specified industrial categories; and the economic impact on particular industries if the "best available technology" (BAT) is used to control the discharge of toxic pollutants.

Under the Federal Water Pollution Control Act (FWPCA) Amendments of 1972, industrial polluters already face a 1983 deadline for installing BAT to improve further the quality of their effluents. But, with the information to be gathered in the proposed contract studies, the BAT requirements would in part be directed specifically at toxic pollutants, which are often the most troublesome.

- No later than mid-1977, EPA would start preparing effluent limitations and technology performance standards for control of all toxic pollutants for which contract studies have been finished. By 1978, the first proposed limitations and standards would be published.
- In mid-1978, 6 months after the publication of the proposed regulations has begun, the initial promulgation of final limitations and standards would occur. By the end of 1979, issuance of all such regulations would be complete.
- Finally, EPA would publish, by mid-1978, water quality criteria reflecting the latest scientific information about toxic pollutants and their effect on aquatic organisms and human health. And, if any of these pollutants posed a continuing hazard despite prescribed effluent limitations and technology standards, EPA would be required to reconsider those limitations and standards and make them more stringent.

In sum, the aim of the program is first to try to cope with toxic pollutants by specially tailored BAT requirements. Then, but only then, could effluent limitations be tightened further—even to the extent of closing plants in aggravated cases—if water quality studies indicate this to be necessary. The case is before Judge Thomas A. Flannery of the U.S. District Court in the District of Columbia. His consent to the agreement would make it legally enforceable.

The industries objecting to the agreement have contended in papers filed with Judge Flannery that it flouts the intent of the 1972 act. They argue that EPA can regulate toxic pollutants solely under a procedurally demanding section of the act known as 307(a).

The fact is, EPA has tried to use this section, albeit futilely and halfheartedly. To prescribe effluent limitations under 307(a), the agency must first take into account "the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms and the nature and extent of the effect of the toxic pollutants on such organisms."

These requirements derive from the same water-quality standards approach that was the basis of the overall water pollution control program prior to the 1972 act. Because of the difficulties involved in arriving at and enforcing such standards for all public waters, Congress largely abandoned this approach in favor of technology-based standards to be broadly applied regardless of such considerations as the capacity of "receiving" waters to assimilate pollutants.

Lacking the data to support a larger and more effective program under 307(a), EPA has to date—more than 3 years since passage of the act—listed only nine toxics as subject to 307(a) proceedings. Moreover, no final regulations limiting discharges of these toxics have been promulgated, notwithstanding the statutorily prescribed deadlines.

Frustrated by this poor performance, NRDC, EDF, and other environmental groups sued EPA. And, inasmuch as the duties imposed by 307(a) on the administrator are mandatory rather than discretionary, EPA was in a weak position and it had reason to seek an out of court settlement.

As the negotiations got under way early this year, EPA officials perceived the advantages in shifting largely to a technology-based approach to the control of toxic pollutants, with 307(a) to be used as a fail-safe in those situations where other sections of the act proved inadequate. But, until an agreement was reached with NRDC and consented to by the court, EPA would risk being confronted with a court order that might conflict with such a strategy.

EPA counsel views the industry argument that Congress meant for the agency to rely solely on 307(a) in the regulation of toxic pollutants as self-serving nonsense put forward for the sake of delaying abatement. Present indications are that Judge Flannery may approve the agreement within the next few weeks. If he does, the schedules which it sets forth would be binding and enforceable. Industries affected by the agreement would not lose their right to challenge in court the validity of regulations issued.

Some industry groups, such as the Iron and Steel Institute and the American Petroleum Institute, are intervenors in the pending lawsuits and they could appeal a decision consenting to the agreement. An embarrassment here, however, is that another intervenor, the National Coal Association, actually has signed the agreement, finding it reasonably responsive to the coal industry's situation and needs.

If the agreement is not approved by Judge Flannery, or if consent is lost on appeal by industry, NRDC will continue to press the pending lawsuits. According to Speth, his group has learned through hard experience that dependable abatement programs and schedules are the ones backed by court order.—LUTHER J. CARTER