

EPA Reinstates Great Lakes Mixing Zone Ban

The U.S. Environmental Protection Agency (EPA) has issued a rule that bans mixing zones for discharges of 22 listed “bioaccumulative chemicals of concern” (BCCs) in the Great Lakes system. For existing discharges, the rule phases out mixing zones for BCCs by November 15, 2010. New discharges of the listed BCCs are subject to the ban immediately upon commencing discharge.

A “mixing zone” is the area beyond a point source discharge outfall in which a particular pollutant in the wastewater mixes with the receiving water. The pollutant is allowed to be discharged at a concentration in excess of the applicable water quality standard on the theory that the pollutant will be diluted in the mixing zone without causing harm and will meet the water quality standard outside the zone. The mixing zone ban applies to BCCs, which are absorbed by aquatic life and increase in concentration up the food chain. EPA estimates that the ban will prevent the discharge of up to 700,000 pounds of BCCs to the Great Lakes system every year. The BCCs subject to the ban include mercury and PCBs.

EPA had previously promulgated a mixing zone ban provision similar to the new rule on March 23, 1995, as part of the Great Lakes Water Quality Guidance (also known as the Great Lakes Initiative, or GLI). The U.S. Court of Appeals for the District of Columbia Circuit vacated that provision in the case of *American Iron & Steel Institute v. EPA*, 115 F.3d 979 (D.C. Cir. 1997) on the basis that EPA had inadequately considered the costs of the mixing zone ban. In the new rule, EPA claims to have corrected this deficiency.

The new rule provides limited exceptions from the ban for existing dischargers who establish that they have already reduced their discharge of BCCs as much as possible and that further requirements are not technically feasible or cost-effective. Dischargers must continue to meet water quality standards while covered by an exception and must demonstrate their continued eligibility for the exception every new permit term.

Another exception applies to dischargers who demonstrate that failure to grant a mixing zone would preclude water conservation measures that would lead to overall reductions in BCCs, even though higher concentrations of BCCs may occur in the effluent – for example, as a result of water conservation measures, concentrations of a BCC may increase while the mass of the BCC being discharged does not.

Michigan, Illinois, Indiana, Minnesota and Wisconsin had previously promulgated rules banning mixing zones to be consistent with the provision that the D.C. Circuit court vacated in 1997. Those states kept the ban in their rules because, after the court decision, EPA had quickly announced its intention to reinstate the ban.

However, these states may now wish to modify their rules to provide an effective date for the ban consistent with the effective date of the new rule. Michigan's rule, for example, provides that the ban becomes effective in 2007 – 3 years sooner than required under the new rule. New York, Ohio, and Pennsylvania, which did not adopt a mixing zone ban, have 18 months to promulgate rules consistent with the new rule.

EPA has now reportedly begun work on a BCC mixing zone ban applicable to the rest of the country and expects to issue a proposal for such a ban in 2001.

65 Fed. Reg. 67638 (Nov. 13, 2000).

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