



COALEX STATE INQUIRY REPORT - 197

October 1991

Nancy Kerastas, Esq.
Office of the General Counsel
Department of Environment & Conservation
150 9th Avenue North
Terra Building
Nashville, Tennessee 37243-1548

TOPIC: NPDES PERMITS: STATE SET WATER QUALITY STANDARDS

INQUIRY: According to EPA regulation 40 CFR 122.44(d) a state can set NPDES water quality standards which are more stringent than the federal standards. (Tennessee administers its own NPDES permitting program; OSM administers the surface coal mining program.) A coal company is contesting the state's right to set certain effluent limits on an NPDES permit. Please locate any information which discusses the state's right to set more stringent levels and the processes the state must follow to establish those levels for the permit.

SEARCH RESULTS: Using LEXIS, several cases and a Federal Register preamble were identified that confirm the state's right to set effluent limitations that are more stringent than the federal requirements. An additional preamble to EPA regulations noticed in the Federal Register was identified that discusses the process a state must follow in order to establish the more stringent effluent requirements. Copies of the items listed below are attached.

CASE LAW

MENZEL v COUNTY UTILS. CORP., 501 F Supp 354 (E.D. Va 1979). MENZEL v COUNTY UTILS. CORP., 19 ERC (BNA) 2197 (E.D. Va 1982). MENZEL v COUNTY UTILS. CORP., 712 F 2d 91 (4th Cir 1983).

The State of Virginia set nitrogen discharge requirements more stringent than the federal requirements. A state court judge voided the more stringent requirements as "neither technologically achievable nor economically feasible". The NPDES permit was modified to eliminate the more stringent nitrogen requirement. The federal courts stated they were "bound by the announcement of state law in the state court opinion and decree" as the permit's conditions remained in conformity with federal law.

The 4th Circuit Court stated that the "NPDES permit program serves at least two purposes: it ensures that discharges are subjected to the scrutiny of the application process...; and it enables



specification of discharge limitations, including more stringent state guidelines, for all effluent point sources."

ENVIRONMENTAL PROTECTION AGENCY v CALIFORNIA EX. REL. STATE WATER RESOURCES CONTROL BOARD, 426 US 200 (1976).

The 1972 Amendments to the Federal Water Pollution Control Act provide that "the States may set more restrictive standards, limitations, and requirements than those imposed under the Amendments. Section 510 quite plainly was intended to strengthen state authority." However, while federal installations discharging water pollutants are obliged "to comply to the same extent as nonfederal facilities with state requirements respecting control and abatement of pollution,' obtaining a permit from a State with a federally approved permit program is not among such requirements."

INTERNATIONAL PAPER CO. v OUELLETTE et al., 479 US 481 (1987).

In addressing the issue of interstate water pollution, the Court stated that the Clean Water Act "allows the State in which the point source is located (the 'source State') to impose more stringent discharge limitations than the federal ones, and even to administer its own permit program if certain requirements are met."

**UNITED STATES v CITY OF NIAGARA FALLS, 706 F Supp 1053 (W.D. NY 1989).
[Excerpt]**

In a footnote, the court explained that New York State's "somewhat more stringent effluent limitations and monitoring requirements" issued in October, 1982 were invalidated by the New York Supreme Court "on the grounds that the State had failed to hold a public hearing as required under state law."

PREAMBLES TO EPA NPDES REGULATIONS

53 FR 20764 (JUNE 6, 1988). Final rule. Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations. [Excerpt]

"In response to comments, we have clarified that States may have a program that is more stringent or extensive than what is required for an approvable program. Under State law, and not as part of its approved program, States may also regulate discharges into those waters over which the Corps retains jurisdiction. Those parts of the State's program that go beyond the scope of Federal requirements for an approvable program are not subject to Federal oversight or federally enforceable."

54 FR 23868 (JUNE 2, 1989). Final rule. National Pollutant Discharge Elimination System; Surface Water Toxics Control Program.



The preamble discusses the amendments to 40 CFR 122.44 and provides a comprehensive explanation of the procedures for developing water quality-based effluent limits from state narrative or numeric water quality criteria.

ATTACHMENTS

- A. 40 CFR 122.44 (1990)
- B. *MENZEL v COUNTY UTILS. CORP.*, 501 F Supp 354 (E.D. Va 1979).
- C. *MENZEL v COUNTY UTILS. CORP.*, 19 ERC (BNA) 2197 (E.D. Va 1982).
- D. *MENZEL v COUNTY UTILS. CORP.*, 712 F 2d 91 (4th Cir 1983).
- E. *ENVIRONMENTAL PROTECTION AGENCY v CALIFORNIA EX. REL. STATE WATER RESOURCES CONTROL BOARD*, 426 US 200 (1976).
- F. *INTERNATIONAL PAPER CO. v OUELLETTE et al.*, 479 US 481 (1987).
- G. *UNITED STATES v CITY OF NIAGARA FALLS*, 706 F Supp 1053 (W.D. NY 1989).
[Excerpt]
- H. 53 FR 20764 (JUNE 6, 1988). Final rule. Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations. [Excerpt]
- I. 54 FR 23868 (JUNE 2, 1989). Final rule. National Pollutant Discharge Elimination System; Surface Water Toxics Control Program.