UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTER OF LAW PURSUANT TO 40 CFR §125.35(m)

No. 44

In the matter of NPDES permit for Texaco, Inc., Lockport Plant (Permit No. IL 0002305), a legal issue has been referred to the General Counsel for decision pursuant to 40 CFR §125.36(m). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

QUESTION PRESENTED

"Can the U.S. Environmental Protection Agency, pursuant to Sections 401 or 301(b)(1)(C) of the Federal Water Pollution Control Act Amendments of 1972, or otherwise, incorporate in an NPDES permit issued by it, State effluent limitations, subject, by State statute, to a discretionary enforcement standard, and, thereby, make them Federal limitations subject to a nondiscretionary Federal enforcement standard?"

ANSWER

Yes. This result is not changed by the fact that there may be significant differences between Federal and State schemes for the enforcement of established requirements.

DISCUSSION

In this referral, Texaco, Inc. (Texaco) challenges the authority of the Regional Administrator, Region V (the Region) to impose in an NPDES permit effluent limitations based upon Part IV, Ch. 3 of the Rules and Regulations promulgated by the Illinois Pollution Control Board (the Board). Part IV "prescribes the maximum concentrations of various contaminants that may be discharged" into Illinois waters. This regulation is based upon §13(a)(2) of the Illinois Environmental Protection Act (IEPA), which authorizes the Board to prescribe

> Effluent standards specifying the maximum amounts or concentrations, and the physical, chemical, thermal, biological and radioactive nature of contaminants that may be discharged into the waters of the State . . ..

Variances from such limitations (or any requirements under the IEPA) may be granted by the Board under §§35 and

36, IEPA, upon a showing that compliance "would impose an arbitrary or unreasonable hardship." Variances are limited to one year, except that they may extend to five years in cases where the variance is granted in connection with permit issuance. §36(b), IEPA.

Enforcement is not, as the question referred assumes, entirely discretionary. The Board must issue notice and schedule a hearing when its "investigation discloses that a a violation may exist." §31(a), IEPA. At that hearing, however, the Board has the burden of showing that a violation exists. §31(c), IEPA. In making any orders pursuant to the hearing, moreover, the Board must take into account:

> (1) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (2) the social and economic value of the pollution source;
>
> (3) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
>
> (4) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source. IEPA, §33(c)1/

1/ Even in cases of clear violations of Board regulations, the Board must adduce and consider evidence on each of these factors. CPC International v. Pollution Control Bd., 32 Ill. App. 3d 747, 336 N.E. 2d 601 (1975); Metropolitan Sanitary District v. Pollution Control Bd., 338 N.E. 2d 392 (Sup. Ct. Ill. 1975).

Finally, in enforcement proceedings, the alleged violator may "show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship." §31(c), IEPA. See Chicago Magnesium Casting Co. v. Pollution Control Bd., 22 Ill. App. 3d 489, 317 N.E. 2d 689 (1974).

With this statutory scheme in mind, the question referred appears somewhat recondite. The question assumes State enforcement to be discretionary, which it evidently is not.[2/] However, an important issue does emerge from the parties' briefs. To avoid confusion, a somewhat more complete explanation of the law is required than would be necessary merely to answer the referred question.

The referred question itself is simply answered. The existence of enforcement discretion does not somehow render nugatory an otherwise effective provision of law. To so argue is to contend that, because the government has prosecutorial discretion, an unprosecuted bank robber has not violated the law.

2/ There are, however, significant differences between the state enforcement scheme and that contemplated by the FWPCA. By and large, issues as to the "reasonableness" of particular requirement are to be resolved prior to federal enforcement of NPDES permits and indeed, issues which may be litigated at an earlier stage are excluded as defenses in enforcement actions under Section 309. See Section 509(b)(1).

A second, equally significant, issue relates to whether EPA is obligated to review limitations appearing in State certifications, or, in the absence of such a certification, whether EPA must evaluate State limitations in the context of relevant State law before including them in NPDES permits.

If an identifable requirement of State law exists, and limitations based upon such requirements are incorporated into a State certification under §401 of the FWPCA, such limitations must become conditions on the NPDES permit. FWPCA, §401(d). Beyond determining that a certification meets the requirements of 40 C.F.R. §123.2(a) and (as required by §401(d) of the FWPCA) sets forth the "appropriate requirement of State law" upon which it is based, EPA is without authority to review the substance of a facially valid State certification.

Where EPA issues the permit in the absence of a certification, however, it does not have a State determination of what are the "requirements" of State law. Instead, under §301(b)(1)(C), it must apply "any more stringent limitation . . . established pursuant to any State law or regulations . . .."

Texaco cites statutory, regulatory, and judicial authority which tends to show that the State law, although authorizing the Board to establish regulations, requires the Board to surmount a number of further obstacles before the regulations may actually be enforced against any person. Thus, argues Texaco, the Illinois effluent limits are "fundamentally different" from their counterparts under Federal law, and the State limits may not be applied in NPDES permits.

To be sure, the enforcement scheme under State law, as noted previously, differs from the Federal scheme in that some administrative review of the standards takes place at the enforcement stage. But this does not mean that the State effluent limitations in question may not be included in NPDES permits. As was stated in Opinion of the General Counsel No. 13, May 19, 1975 at 4:

> In applying water quality standards in the absence of a State certification, the Administrator is entitled to presume the validity of State established

> regulations and to assume that such regulations have the substantive content that appears from the plain language of the provisions.

The availability of a State variance procedure reinforces, rather than alters, this conclusion. For if the applicant sought review of the State requirement, it could have obtained it by seeking a variance. Its failure to do so leaves the State requirement in effect, and it must be given effect under §301(b)(1)(C).

Every State requirement that has not been appealed to the State's highest court may be subject to further State review. If EPA could not incorporate in an NPDES permit any requirement for which review remains available, the Agency would be incapable, for example, of applying most State water quality standards in permits. Yet §301(b)(1)(C) clearly requires State standards to be applied in federally issued NPDES permits. Cf. EPA v. State Water Resources Control Board, U.S. , No. 74-1435, slip op. at 18-20 (June 7, 1976).

EPA is thus required to incorporate in permits limits based on State law. However, the Agency is neither authorized nor required to assume the mantle of a State judge

or administrative agency. An effluent limitation or other requirement under State law must therefore be applied to a permit applicant, regardless of differences between FWPCA enforcement and that under State law, and regardless of unutilized State procedures for variances, waivers, and exemptions.

G. William Frick

Dated: JUN 2 1976