

## **FEDERAL REGISTER 122.44(d) RESPONSE TO COMMENTS (06/02/89)**

### **Defer to State:**

Today's regulations amend paragraph (d)(1) to clarify that effluent limits established under paragraph (d) must achieve any state narrative water quality criteria as well as numeric water quality criteria. (at 23871).

The amendments to § 122.44(d)(1) are intended to describe procedures for implementing existing state water quality standards and are not intended to suggest that states change existing standards. Section 303(c)(2)(B) of the CWA, as amended, addresses state review and adoption of water quality standards for toxic pollutants listed pursuant to section 307(a)(1) of the CWA. (at 23872).

State narrative water quality criteria and interpretations of their narrative water quality criteria may be more protective than levels necessary to prevent acutely toxic conditions. (at 23875).

State narrative water quality criteria provide the legal basis for establishing effluent limits under paragraphs (d)(1)(v) and (d)(1)(vi) of today's regulations. There is flexibility in the state's interpretation of its narrative water quality criteria. When a state adopts a narrative water quality criteria, EPA's regulations at 40 CFR 131.11(a)(2) require the state to "provide information identifying the method by which the state intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria." When interpreting a state's narrative water quality criteria, the permitting authority may use a proposed numeric criterion for the pollutant of concern, an explicit state policy, or a proposed or final state regulation interpreting its narrative criteria provided the interpretation will fully protect the designated use. In the absence of an explicit state policy or regulation that fully protects the designated use, the permitting authority will use the procedures summarized in paragraphs (d)(1)(ii) and (d)(1)(vii) of today's regulations for applying a state's narrative water quality criteria. (Note that states may evaluate the designated use of a waterbody by performing a use attainability analysis pursuant to 40 CFR Part 131, and depending on the results of the use attainability analysis may, after providing for public notice and an opportunity to comment, upgrade or downgrade the designated use of the waterbody.).

Subparagraph (vi), (originally proposed as subparagraph (iv)), addresses the situation in which a state has not adopted a numeric water quality criterion for a toxic, conventional, or nonconventional pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above an applicable narrative water quality criterion. In this situation the permitting authority does not have a

numeric criterion to use for deriving a water quality-based effluent limit, EPA emphasizes that paragraph (d)(1)(vi) is not used to establish effluent limits on a pollutant if the state has adopted a numeric water quality criterion for that pollutant. (at 23875).

State policies or procedures, even procedures which calculate derived criteria but are not approved by EPA, may be used to develop effluent limits under option A of paragraph (d)(1)(vi). However, if the state has adopted a policy or procedure in its standards that is approved by EPA and results in a derived or calculated numeric criteria, the permitting authority must develop effluent limits according to paragraph (d)(1)(iii) and may not use paragraph (d)(1)(vi). (at 23876).

EPA reiterates that that section 301(b)(1)(C) requires that NPDES permits contain effluent limits that achieve narrative water quality criteria. This obligation applies regardless of whether or not a state has adopted a numeric water quality criterion for a pollutant of concern. EPA's water quality criteria should not be used as a substitute for state water quality standards, but rather, Option B may be used as one of three options to interpret state narrative water quality criteria until the state adopts a numeric water quality criterion for the pollutant. Further, EPA is not requiring states to use EPA's water quality criteria. EPA is offering the water quality criteria as one of three options available to the state for interpreting and applying narrative water quality criteria. (at 23876).