



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

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OFFICE OF
WATER**MEMORANDUM**

SUBJECT: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits

FROM: James A. Hanlon, Director
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TO: Alexis Strauss, Director
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EPA Region 9

Recently, in discussions with Region 9, questions have been raised concerning the use of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits consistent with the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. § 122.47. The use of compliance schedules in NPDES permits is also the subject of ongoing litigation in California. The purpose of this memo is to provide a framework for the review of permits consistent with the CWA and its implementing regulations.

When may a permitting authority include a compliance schedule in a permit for the purpose of achieving a water quality-based effluent limitation?

In *In The Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177 (1990), the EPA Administrator interpreted section 301(b)(1)(C) of the CWA to mean that 1) after July 1, 1977, permits must require immediate compliance with (*i.e.*, may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977, and 2) compliance schedules are allowed for effluent limitations based on standards adopted after that date only if the State has clearly indicated in its water quality standards or implementing regulations that it intends to allow them.

What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

1. “When appropriate,” NPDES permits may include “a schedule of compliance leading to compliance with CWA and regulations . . . as soon as possible, but not later than the applicable statutory deadline under the CWA.” 40 C.F.R. § 122.47(a)(1). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. 40 C.F.R. § 122.47(a)(3).

2. Any compliance schedule contained in an NPDES permit must be an “enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation [“WQBEL”]” as required by the definition of “schedule of compliance” in section 502(17) of the CWA. *See also* 40 C.F.R. § 122.2 (definition of schedule of compliance).

3. Any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable state or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17); the Administrator’s decision in *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990); and EPA regulations at 40 C.F.R. §§ 122.2, 122.44(d) and 122.44(d)(1)(vii)(A).

4. Any compliance schedule that extends past the expiration date of a permit must include the final effluent limitations in the permit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 C.F.R. § 122.2 (definition of schedule of compliance).

5. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule “will lead[] to compliance with an effluent limitation . . .” “to meet water quality standards” by the end of the compliance schedule as required by sections 301(b)(1)(C) and 502(17) of the CWA. *See also* 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A).

6. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is “appropriate” and that compliance with the final WQBEL is required “as soon as possible.” *See* 40 C.F.R. §§ 122.47(a), 122.47(a)(1).

7. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. 40 C.F.R. §§ 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is “appropriate” under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL “as soon as possible,” as required by 40 C.F.R. § 122.47(a)(1) include: consideration of the steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The permitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State’s authorizing provision.

10. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate, consistent with EPA’s letter of October 23, 2006, to Celeste Cantu, Executive Director of the California State Water Resources Control Board, in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California.

11. A compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate, consistent with EPA’s letter of February 20, 2007, to Doyle Childers, Director Missouri Department of Natural Resources, nor is a compliance schedule based solely on time needed to develop a site specific criterion, for the same reasons as set forth in the October 23, 2006, (referenced in Paragraph 10) and February 20, 2007 letters.

If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.