Extension of Schedule of Compliance

QUESTION

The following question was sent to members of the NACWA Legal Affairs Committee via e-mail on April 10, 2007:

"An NPDES permit issued by EPA contains a schedule of compliance (SOC) to allow construction of a treatment system to meet newly established water quality based effluent limits. The permit holder has applied for a variance from the underlying water quality standard due to the circumstances of the situation. The time to process the variance will likely extend beyond the SOC deadline and EPA is refusing to extend the SOC, saying that it can only extend an SOC for construction problems/delays but not for administrative reasons like a pending variance. EPA says it is bound by a California court decision which they haven't described to the permittee. Is any NACWA member aware of any barrier to EPA granting the permit extension to allow a variance to be processed, or of the existence of the mysterious CA decision?"

RESPONSES

The following responses were received. The names of those responding have not been included for privacy reasons.

Response 1: I am not aware of any such case. In response to a lawsuit filed against USEPA by NGOs, EPA issued a statement of its position on compliance schedules (see document at http://www.nacwa.org/getfile.cfm?fn=2006-12-29RB1CS.pdf) that indicates that final effluent limits must be included at the end of a compliance schedule even where studies, such as a TMDL, are pending. That is quite different from not allowing any compliance schedules at all. In fact, EPA approved CA's Implementation plan which specifically allows schedules of compliance for pending studies such as translators, etc.

Response 2: At a recent water quality standards hearing in Colorado, EPA Region 8 got worked up about adoption of temporary modifications to underlying water quality standards, arguing that EPA Region 9 allowed compliance schedules longer than the term of an existing permit (thus making temporary modifications unnecessary). The letter they relied on is the same as in Response 1.

Response 3: I do not know of any other reason that would prevent EPA from granting the extension pending consideration of the variance. But I have a couple of thoughts.

1. If the permit has just been issued, I would recommend that the member immediately appeal the SOC and any other terms that it needs to have stayed during consideration of the variance processing and consideration. In the appeal, put in issue specific factual questions about how long it will take to construct the treatment systems required and how long it will take the agency to render a decision on the variance. In necessary (and it shouldn't be, since the appeal of an EPA permit stays contested provisions), seek a stay of any provision that is problematic.

2. There may be some useful precedent indicating that EPA DOES have the authority to extend (or to stay) the offending provisions, namely:

a) In the early days of the NPDES program, it became apparent that EPA's decision-making on the effluent guidelines and standards was not going to be completed in time for dischargers to meet the requirements in the permits by the original July 1, 1977 deadline. The predecessor of OECA came up with a mechanism called an "Enforcement Compliance Schedule Letter" or "ECSL" in Washington-speak, modeled somewhat on an SEC no-action letter. The Agency issued these ECSLs to dischargers who otherwise would have gotten caught in the switches as a result of EPA's administrative delay.

b) In addition, power plants that would have been subject to Closed-Cycle Cooling requirements in the original 40 CFR Part 423 regulations that were set aside in *Appalachian Power v. Train,* 545 F.2d 1351 (4th Cir. 1976), had the availability of a thermal discharge variance under CWA sec. 316(a). EPA said at the time that it would not require construction of the cooling towers until the operators had a chance to seek and possibly obtain a variance. I believe statements to this effect can be found in the *Federal Register* preambles. It was expected at the time that it would take a year or more for the affected dischargers to gather the data and even prepare to submit the variance request.

c) I'd also suggest looking for similar statements by EPA during that same era about the Fundamentally Different Factors ("FDF") variances. The modicum of flexibility afforded by the theoretical availability of variances for existing sources figured prominently in the courts' logic in upholding the early regulations from challenges under earlier Supreme Court cases like *Storer Broadcasting* and its progeny. I believe we will find a hint of this in the Supreme Court's opinion in the *DuPont* decision circa 1977. Does EPA now acknowledge that the supposed flexibility was only a ruse to to deceive the courts?

b) With respect to the July 1, 1977 deadline as applied to municipalities, the rub was not so much the delay in issuing regulations to define the requirements, but rather the impoundment by the White House of appropriated grant funds. Ultimately, the D.C. Circuit (I believe, it may have been the Second) held that the impoundment of funds was illegal. On behalf of Virginia municipalities, the Virginia State Water Control Board sued EPA to seek to invalidate the deadline, as applied to municipalities who had not received adequate funding due to the impoundment. The Fourth Circuit found that the statutory deadline was hard and fast, not conditioned upon the availability of funding. But it strongly implied that, if EPA were to seek to enforce that date against such a municipality unable to comply due to no fault of its own, no penalty would be appropriate. It almost dared EPA to try it. Needless to say, no such enforcement actions were brought until well after the impounded funds were released. I believe your member will find some helpful language in the court's decision in the *Virginia Water Control Board* decision.

3. Finally, I don't know the cost of the required upgrades, but if it's large enough (>$100 million) the Unfunded Mandates Reform Act may have some applicability here.

Response 4: We're definitely aware of the CA decision - it's not a court case, but rather EPA's action in disapproving of a compliance schedule provision in the state rules. A copy may be found at http://www.nacwa.org/getfile.cfm?fn=2006-10-23epacal.pdf. As for extending the SOC, that really depends on the SOC language in the state water quality standards.

Response 5: I am not aware of granting an extension outside of a consent order except in unusual cases EPA would not follow (such as a state agency reissuing a compliance schedule upon permit renewal when the original schedule was not met in the previous 5-year permit term). A couple options include (1) appeal and negotiate (if appeal period has not run) or (2) major permit modification (easier to accomplish before the schedule runs out and the limits take effect). In either case, I would look at Tesoro Refining, 1 Cal. Rptr. 3d 76, 109 Cal.App.4th 1089 (May 30, 2003). This case allowed a phased approach of (1) interim limits at current levels, (2) TMDL development, and (3) new limits. I don't know if this is the case EPA has in mind. Skimming it quickly, it looks like it might even run counter to EPA's view that a necessary procedure (there, a TMDL; here, a variance decision) cannot be accommodated.

Response 6: Only the states have the authority to establish and implement compliance schedules to implement water quality standards under various parts of the federal Clean Water Act. *See,* also, EPA Administrator's decision in *Star-Kist Caribe* NPDES Permit Appeal. Also, only the states have the authority to consider and grant WQS variances because it is part and parcel of establishing WQSs in the first instance.

Implementation or compliance schedules to implement or assure compliance with WQSs may be included in, and are enforceable through NPDES permits, and may exceed a single 5-year permit term if authorized by State water quality standards, implementing regulations such as NPDES permit rules, or other state "organic authority" such as statutes. WQS implementation schedule issues, generally, represent a classic misunderstanding, misconception or otherwise misstatement of the law by regulators at the EPA regional office levels. This is the case in part because of the confusion between a compliance schedule which is to implement a WQS and the five-year NPDES permit term. They are not the same. The only way to deal with this issue is to educate and work closely with the applicable state and EPA regional office. There is a significant amount of documentation on which to rely. For instance, EPA with heavy Headquarters involvement recently approved a California WQS allowing for up to 10 years to implement WQSs.

Additionally, WQS variances are also a state decision though they may be reviewable by EPA as to substance under the Alaska Rule. The WQS variance authority is separate from the compliance schedules authority.

The underlying reasons for extending the compliance schedules are up to the state as part of their WQSs or other organic authority. As with any administrative law action, there should be a reasonable basis for extending schedules which a variance request under state WQSs should provide. But it's a state determination. Any distinction between administrative and other reasons would be questionable and subject to a reading of the state WQS provision itself and the referenced court decision.

Once the variance is considered, there could still be a need for some implementation schedule to implement the variance or the previous WQS depending on the treatment solution if any. It makes no sense to continue costly construction to meet a particular standard if the state has an application pending to revise that standard which would call for difference construction or no construction. Further, a WQS variance is often thought of as temporary in nature, depending on what the context of the WQS provision, and could contain a schedule of its own. The law does not require an outcome which would frustrate the use of one authority by use of another.

Response 7: EPA has recently filed a case on the Northern District of California dealing with this issue. Filings from the case can be found at http://www.nacwa.org/getfile.cfm?fn=2006-11-30ERFvEPA.pdf and http://www.nacwa.org/getfile.cfm?fn=2006-11-30ERFvEPAmem.pdf.

Response 8: If the state determines that a longer schedule is acceptable, given the variance request, then it should be allowed since there is no specific schedule of compliance applicable to new WQ-based objectives. I believe that EPA approved that the state may take up to 15 years to implement adopted TMDLs. I don't see why that same time frame could not be applied to individual WQBEL calculations.

The community should ask for a permit modification and see if the state will grant it. If EPA objects, that will give them a nexus into federal court so some level of protection may be obtained from the more restrictive requirement. There was a Ninth Circuit decision a while back on TMDL related issues. Maybe EPA has concocted some applicability of that decision to this matter. More to the point, it just sounds like an excuse.

Response 9: I'm not aware of the case or EPA's position – but I might suggest applying simultaneously for an appeal and stay from the specific provisions of the newly issued permit which set forth the SOC in whatever administrative forum is available – any reasonable hearing officer would agree that a stay of the permit would be appropriate until the variance can be determined/decided