

EPA Authority to Change Compliance Schedule

QUESTION

The following question was sent to members of the NACWA Legal Affairs Committee via e-mail on April 25, 2007:

“Is any NACWA member aware of any decisions dealing with EPA's authority to change an 8-year compliance schedule [under a Settlement Agreement] as part of a permit renewal? Can EPA unilaterally supersede that compliance schedule as part of renewing the permit and adding new, more stringent permit limits before the permittee has even completed its plant upgrades under the existing schedule?”

RESPONSES

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

Response 1: Most of EPA's settlement agreements address this issue since it commonly arises. I would start with the document.

Response 2: We have dealt with a similar issue. My general answer would be that EPA can do that, subject to any limitations on its authority that it agreed to in the Settlement Agreement. They probably reserved rights to take action in permits that could modify or supersede provisions of the Settlement Agreement, but you at least have to ask that question.

Response 3: I am not aware of any decisions giving the EPA specific authority to change a compliance schedule (which is part of a settlement agreement) as a condition of permit renewal. However, I have a few questions:

1. How far into the 8-year schedule is the agency? Did the agency ever fall behind, or is it behind schedule?
2. Have the circumstances giving rise to the settlement agreement (of which the compliance schedule is a part) changed since the settlement was entered into giving EPA a reason to require a change to the compliance schedule?
3. Did the terms of the original settlement address permit renewal issues?

I am no expert but it seems to me that an agency would have a tough time resisting proposed permit renewal requirements if either the compliance schedule has not been met or if conditions have changed. And I think it would be tough even if the agency is on schedule and if circumstances have not changed. But in order to say anything intelligent, I would have to see the terms of the settlement, the permit in place at the time and the proposed permit.

Response 4: That is a great question, and I would certainly like to know the answer myself. By settlement agreement, I assume that you mean a consent decree? If so, I believe that this would be controlling for effluent limits regardless of the NPDES permit. We are currently operating under a consent decree for BOD and TSS effluent limits (along with construction requirements) even though our permit limits are more stringent.

Response 5: I'm curious as to whether the settlement agreement was with EPA, or a state agency (I'm guessing that it is with EPA, since EPA is referenced as the permitting entity in your email below). If the settlement agreement was with EPA, and the federal court retained jurisdiction to enforce the terms of that agreement, seems the permittee could easily seek an injunction to halt the change as inconsistent with the agreement (even if the federal court didn't retain jurisdiction, could still seek injunction, of course). I'm not aware of any specific decisions on this issue.

Response 6: I have never encountered such a situation where EPA would agree to something in a settlement, and then try to override it in a permit re-issuance. However, I suspect it is legal if the settlement does not explicitly prohibit EPA from doing something contradictory in a permit. Some settlement agreements contain language to that effect, but most of the ones I've seen have some standard language that says that the settlement is independent of the permit. I wonder if the settlement agreement was executed with the state, and EPA is not a party to the agreement. If so, EPA might feel that the permit is its recourse to overturn a state-approved schedule that it objects to.

In any event, a permittee has the right to challenge any provision of a permit by filing a petition for a Contested Case Hearing, and it seems likely that a Hearings Officer would have to give serious consideration to an already approved schedule as a basis for overturning the disputed permit schedule.

I would guess that EPA's proposed permit schedule is probably not constrained by the settlement agreement, but the permittee can fight the new permit and hopefully win based on the prior agreement.

Response 7: We are not aware of any decisions allowing an agency to do an "end around" by incorporating schedules in permits more stringent than what was previously included in a consent agreement (assuming you are referring to a civil action).

But by the same token, it is our understanding that injunctions do not "freeze the law in place" either so that any new regulatory requirements could be included in the subsequent permit even if the court had addressed the same or similar issue by decree but under an earlier version of the law.

Of course, if one is simply talking about the matter of schedules and agency discretion, we would think that the schedule as set forth in the decree controls and that the court would not be amused that the agency was ignoring what it originally agreed to by court order.