

<p style="text-align: center;">Water Quality Control Division Water Pollution Control Program Implementation Policy</p> <p style="text-align: center;">Colorado Department Of Public Health And Environment</p>	<p>Water Pollution Control Program Policy Number: WPC-Permitting-2</p>
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Background

Schedules of compliance are a regulatory tool specifically authorized under the Federal Clean Water Act and the Colorado Water Quality Control Act. As defined in the Clean Water Act:

"Schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard."

As defined under the Colorado Water Quality Control Act:

"Schedule of compliance" means a schedule of remedial measures and times including an enforceable sequence of actions or operations leading to compliance with any control regulation or effluent limitation."

While the regulatory tool is used both in permitting and in enforcement, the scope of this policy is limited to the use of schedules of compliance in permits, or "permit compliance schedules."

In May 2007, EPA published a memorandum to provide a framework for review of permit compliance schedules consistent with the Clean Water Act and its implementing regulations (EPA, 2007). The Division is issuing this policy to adopt the principals outlined by EPA, and to expand on how permit compliance schedules are used in Colorado.

Policy

The Division adopts the principles governing permit compliance schedules included in EPA's memorandum, and provides additional policy regarding the use of permit compliance schedules in Colorado. Policy statements are discussed by subtopic below, including statements from EPA's memorandum, and additional information pertinent to Colorado.

Compliance Schedules for Effluent Limits Based on Water Quality Standards.

EPA Principal

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

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 Clean Water Act 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.

Colorado Policy

Since all of Colorado's water quality standards were established or revised after 1977, Colorado's policy is that compliance schedules can be allowed for effluent limits based on any of Colorado's water quality standards, including the antidegradation standard, consistent with remaining provisions of this policy.

Provisions authorizing the use of compliance schedules are included both in Colorado's water quality standards (Regulation 31) and the implementing regulations (Regulation 61).

31.14(4). For new standards, revised standards that have become more stringent, and new interpretations of existing standards, the Division shall include schedules of compliance in permits when it determines such schedules to be necessary and appropriate.

61.8(3)(b). The conditions set forth in permits will implement, among other matters, procedures, requirements, and restrictions with respect to the following:

(v) Schedule of compliance where the Commission has adopted new standards, adopted temporary modifications, adopted revised standards that have become more stringent, or where the Division has developed new interpretations of existing standards including, but not limited to, implementation requirements through approved total maximum daily loads (TMDLs) and wasteload allocations and antidegradation reviews.

Compliance Schedules for Effluent Limits Based on Technology Based Standards.

EPA Principal

The subject of compliance schedules for effluent limits based on technology based standards was beyond the scope of the memorandum published by EPA in May 2007 and was not addressed.

Colorado Policy

Consistent with the requirements of the Clean Water Act and 40 CFR 125.3, compliance schedules are not allowed for effluent limits based on technology based standards established in accordance with federal requirements. In the 1970s and 1980s, EPA provided some opportunity for additional time to come into compliance with these types of effluent limitations, but now the compliance deadlines have passed. This includes secondary treatment requirements for publicly owned treatment works (POTWs), effluent limitations established consistent with Effluent Limitation Guidelines (ELGs), and effluent limitations established on a case-by-case basis based on Best Professional Judgment (BPJ). In cases where an applicable federal compliance deadline has passed, the permit may not provide relief by inclusion of a compliance schedule. In these cases the only way to provide an enforceable sequence of events leading to compliance with the effluent limitation is through a schedule of compliance included in a formal enforcement action.

On the state level, there is no prohibition in state regulations against allowing compliance schedules for technology based standards.

61.8(1)(d). No permit shall be issued which allows a violation of a control regulation unless the waste discharge permit contains effluent limitations and a schedule of compliance or a variance specifying treatment requirements as determined by the Division.

Regulation 62 is a control regulation and contains technology based effluent limits applicable in the state, including application of the secondary treatment based standards to non-POTWs. Therefore, unless otherwise specified in an effluent limitation guideline (ELG) or other federal regulation, compliance schedules can be allowed for effluent limits based on technology based standards established at a state level, as long as they are not established in accordance with Section 402(a)(1)(B) of the Clean Water Act. In these circumstances, if the Division determines that a compliance schedule is appropriate in a specific situation, treatment requirements must be specified and other applicable provisions of this policy must be met.

Appropriateness, Duration, and Milestones of Permit Compliance Schedules

EPA Principals

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 time frame 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.

Additional relevant regulation:

40 CFR 122.47(ii). If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for submission of reports of progress toward completion of the interim requirements and indicate a projected completion date. NOTE: Examples of interim requirements include: (a) Submit a complete Step 1 construction grant (for POTWs); (b) let a construction contract for construction of required facilities; (c) complete construction of required facilities.

Colorado Policy

Consistent with the EPA principals, permit compliance schedules are only allowed where appropriate, must ensure compliance with the associated effluent limit as soon as possible, must include 1 year

milestones as a minimum, must contain enforceable milestones, and may extend beyond the permit expiration date as long as the effluent limit is implemented in the permit.

Appropriateness

In determining the appropriateness of a compliance schedule, the Division first evaluates whether the facility is a new or existing source.

The use of compliance schedules for new and recommencing discharges is extremely limited. In accordance with state and federal regulation:

61.8(3)(n)(iii). The first permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge.

61.8(3)(n)(iv) For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of the discharge.

61.8(1)(b) The Division shall not issue a permit under the following circumstances: ..(iii) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States. (iv) to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.

For existing sources, the Division first evaluates appropriateness on the basis of necessity. The necessity determination is made on the basis of whether associated effluent limits can be met. In conducting this analysis, the Division relies upon information that is available for development of a draft permit. This normally includes information contained in the application, information included in the development of federal effluent limitation guidelines (ELGs) (for industrial discharges), information contained in the site application and design review record (for domestic discharges), DMR data and other information contained in the permit record.

On the basis that there is necessity, the appropriateness determination includes factors such as whether the effluent limit is the same, more stringent, or less stringent than the previous effluent limit. The Division's policy is that compliance schedules may be allowed for pollutants that were previously limited, but for which revised more stringent effluent limits are included in a renewal permit. This includes allowing compliance schedules for new effluent limits based on water quality standards that were in place at the time of the previous permit renewal, but are only now being implemented based on new information that the pollutant is one of concern for the discharge. There is no specific regulatory prohibition against providing a compliance schedule for an effluent limit that is the same as the effluent limit in the previous permit, or for a less stringent effluent limit, as long as the anti-backsliding provisions have been met. However, often in these cases the appropriateness determination is based on a consideration of how much time has already been given to meet effluent limits under previous

permits and enforcement actions. Compliance schedules are considered inappropriate for facilities that have not made a good faith effort to comply with effluent limits and associated compliance schedules in the previous permit cycle. In those cases, Division permits staff coordinate with enforcement staff to ensure that an enforcement action is in place prior to issuance of a renewal permit.

There can be situations where the facility failed to meet the previous effluent limit and new information is available that was not available at the time of issuance of the previous permit action, such as monitoring data needed to determine whether the facility could comply with the limit that demonstrates that a compliance schedule would have been appropriate to include in the former permit action. In these situations, the Division can include a less stringent effluent limit and schedule of compliance, again to the extent this conforms with applicable antibacksliding provisions.

As stated in EPA's memorandum, compliance schedules based solely on time needed to develop a TMDL, use attainability analysis, or site-specific criterion are inappropriate. As stated in the prohibitions, permits may not be issued when conditions cannot ensure compliance with applicable water quality requirements of all affected States. On this basis, the Division's policy is to fully implement applicable water quality requirements in discharge permits, including effluent limits based on water quality standards and applicable TMDL wasteload allocations. The compliance schedule must include an enforceable sequence of actions leading to compliance with the established water quality standard and/or TMDL wasteload allocation.

Where a temporary modification has been adopted, the appropriateness of a compliance schedule is determined consistent with the provisions of Regulation 31.14(15) and (16):

31.14(15) Except as provided below, where a temporary modification is adopted pursuant to sections 31.7(3)(a)(ii)(A) and (B) permits for existing and new discharges to the segment in question:

(a) Will not include a compliance schedule to meet limits based on the underlying standard during the period that the temporary modification is in effect. The Division, where necessary and within a reasonable period of the expiration of a temporary modification, shall reopen any permit for a discharge to that segment and include a compliance schedule to attain limits based on the underlying standard in accordance with section 31.14(4), above.

(b) May include a compliance schedule requiring actions intended to eliminate the uncertainty regarding the appropriate underlying standard.

31.14(16) Subsection (15)(a) and (b) notwithstanding, the Division, based on its best professional judgment, may:

(a) Where an existing permit is reissued while a temporary modification is in effect, determine limitations or other conditions for the parameter(s) in question based on an assessment of the level of effluent quality reasonably achievable without requiring significant investment in facility infrastructure (e.g. - based on past facility performance). Such limit (numerical or otherwise) may be at or below the level of the

temporary modification where such a requirement would not cause an undue economic burden, but not more restrictive than necessary to achieve the underlying standard.

(b) set effluent limits in permits for new or expanding facilities at a level that does not pose an unreasonable risk to downstream uses.

Because an alternatives analysis is an explicit component of Colorado's antidegradation policy that is codified as a water quality standard, permit compliance schedules are considered appropriate for development of an antidegradation alternatives analysis. This is considered to meet the requirement to fully implement the associated antidegradation requirement. In these cases, water quality based effluent limitations (WQBELs) based on other applicable water quality standards are fully implemented in the permit during the period that the compliance schedule for the antidegradation based effluent limit is in effect.

Duration and Milestones

Once the Division has determined that a compliance schedule is necessary and appropriate, the Division uses information to the best of its ability to determine the actions needed to meet the effluent limits (e.g., operational adjustments, source control, new treatment, alternate disposal). The Division will develop a permit compliance schedule with enforceable milestones appropriate for the type of actions anticipated to be conducted. In determining the specific milestones and duration of the compliance schedule, the Division intends to provide adequate time to conduct the sequence of actions needed thereby leading to the desired result of compliance with the effluent limit, while not providing more time than reasonably needed thus ensuring that the requirements of the CWA and applicable regulations are met "as soon as possible." Consistent with the applicable regulation, the Division attempts to balance the need to establish interim milestones that are enforceable, while providing the flexibility for real world variability in the sequence of actions that are ultimately taken to result in compliance with the effluent limits. It is important for the permittee to review and comment on the necessity, appropriateness, milestones, and duration of a permit compliance schedule during the public notice process. This provides important facility specific information that supplements the information contained in record as part of the permit application.

Interim Limits

Colorado's policy is to establish interim effluent limits during the period that the permit compliance schedule is in effect. For pollutants where data is available to establish a level of water quality that can be achieved, numeric interim limits will be established. Where such data is not available, "report only" interim limits may be established. Interim limits are established in accordance with applicable antibacksliding provisions.

Modification of Compliance Schedules

In accordance with state and federal regulations, permit compliance schedules may be modified upon request given that good cause is shown:

61.8(3)(n)(ii) The Division, may, upon request of the permittee, revise or modify a schedule of compliance if the Division determines that the permittee has shown good and valid cause exists

for such revision, and if within thirty (30) days following receipt of notice from the Division, the Regional Administrator does not object in writing.

Interim compliance schedule milestones can be modified without public notice to the extent allowed in accordance with the regulation:

61.8(8)(f) Upon consent by the permittee, the Division may make minor permit modifications without following the requirements of sections 61.5(2), 61.5(3), 61.7 and 61.15 of these regulations. Minor modifications to permits are limited to:....(iii) Changing an interim date in a schedule of compliance, provided the new date of compliance is not more than 120 days after the date specific in the existing permit and does not interfere with attainment of the final compliance date requirement

References

EPA, 2007. Memorandum from Jim Hanlon, Director, Office of Wastewater Management to Alexis Strauss, Director, Water Division EPA Region IX regarding Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits, May 10, 2007.

http://www.epa.gov/npdes/pubs/memo_complianceschedules_may07.pdf