



TOXIC TALES – LEGAL OVERVIEW

OREGON ACWA SEMINAR

Laura Maffei & Brian King
Schwabe, Williamson & Wyatt
February 21, 2012

Compliance Schedules

- What is a Compliance Schedule?
 - Provides time to come into compliance with permit conditions
 - Federal Clean Water Act rule
 - Compliance should be “as soon as possible”
 - Interim dates required for Compliance Schedules longer than one year
 - No specific time limit for CS

Compliance Schedules

- Oregon Rules (circa 2006)
 - Two provisions under Oregon law:
 - NPDES permitting rules
 - Water quality standard
 - Must comply with federal rules
 - Only available when WQSs are “newly applicable” to a permit

Compliance Schedules

- Litigation
 - Blue Heron permit appeal
 - Direct challenge to Oregon's rules
 - Result:
 - Compliance schedules still allowed in OR
 - Must follow DEQ's Internal Management Directive
 - Subsequent challenge to DEQ's settlement with NEDC, including IMD

Compliance Schedules

- Internal Management Directive
 - When allowed:
 - New or revised WQS
 - New Source w/a new WQS after construction begins
 - When NOT allowed:
 - To comply with existing permit limits
 - New limit from federal tech-based standards
 - During a UAA
 - During development of a TMDL

Compliance Schedules

- IMD (con't)
 - Establishing need for compliance schedule:
 - Permittee supplies documentation of inability to comply with effluent limit, such as:
 - Substantial modifications to treatment facilities
 - Results of studies, modeling, etc.
 - Permit writer's checklist @ Appendix A of IMD
 - How long is “As soon as possible”?
 - Permit writer will consider project-specific issues
 - Appendix B = “typical” construction schedule for major plant upgrades (based on POTWs in Oregon)

Compliance Schedules

- IMD (con't)
 - Other considerations:
 - Milestones & interim permit limits are enforceable permit conditions
 - Pretreatment requirements
 - Adopt local limits on pollutants
 - Pollutant reduction program

Site-Specific Background Pollutant Criteria

- NEW - part of new Toxics Water Quality Standard
- Performance-based WQS protective of human health, provided that:
 - No increase in pollutant mass
 - Pollutant concentration does not increase more than 3%
 - Human health risk is less than 1×10^{-4}
 - Only applies to carcinogenic pollutants
 - The permittee does not have a WLA for the pollutant (e.g., can't override a TMDL)
 - Permittee uses all feasible pollutant reduction measures
 - No chemical or physical alteration of the pollutant

Site-Specific Background Pollutant Criteria

- Intake Credits:
 - Pollutant present in intake from same water body as receiving water, including groundwater
 - Hydrologic connection
 - Concentrations similar in intake and receiving water

Variance Rule & IMD

- New rule & IMD for variances as part of toxic WQS rulemaking
 - IMD = February 2012
- Conditions for granting:
 - No use impairment
 - Water quality standard not feasible because:
 - Naturally occurring pollutant prevents use attainment
 - Human-caused sources of pollutants (e.g., legacy) cannot be controlled or would cause more damage to remedy than to leave in place
 - Going beyond technology-based limits will lead to widespread economic and social impact

Variance Rule & IMD

- Variance is the “last resort” after other options are explored:
 - Site-specific background pollutant criterion
 - Physical modifications: change outfall or mixing zone, source reduction, treatment
 - Compliance schedule (if limits can be met at some point in the future)

Variance Rule & IMD

- Other Highlights
 - Permit conditions:
 - Interim concentration-based permit limit (previous permit effluent limit)
 - Implement Pollutant Reduction Plan
 - POTWs must control pollutant sources:
 - By ordinance
 - With Pollutant Reduction Plan
 - Renewals
 - Same process as initial application
 - Priority review by DEQ (to reduce admin extensions for variances)

SUMMARY: Compliance Schedules, Background Pollutants & Variances

- Significant documentation/studies required for each
- Compliance schedules & variances are not perpetual but site-specific background pollutant criteria *might* be
- Compliance schedules and background pollutant criteria are preferred over variances

Building the Administrative Record

- Any challenge to the legal adequacy of an NPDES permit will focus primarily on the administrative record.
- In general, the administrative record consists of the Permit Evaluation Report (PER) and all relevant supporting documentation.
- The administrative record should be worded so that it can be understood by a non-technical third party (e.g., circuit court judges).
- The administrative record must provide evidence that supports the necessary elements of any applicable legal requirement.

Building the Administrative Record: The Reasonable Potential Analysis (“RPA”) Process

- RPA is a statistically-based approach.
- “There are three kinds of lies: lies, damned lies and statistics.”
- The highly technical evaluation inherent in the RPA process will not be easily understood by third parties.

Building the Administrative Record: The RPA Process

Try to be especially clear when explaining the following “ladders” in the RPA process.

- Data precision and amount
 - false positives, outliers, ultra clean, background.
- Application of discretion within method
 - coefficient of variation, sample frequency, probability.
- Refined analytical methods
 - Seasonal analysis.
 - Rigorous statistical analysis, dynamic simulation.

Building the Administrative Record The RPA Process

Intake Credits

- Upon finding an intake pollutant does not have the reasonable potential to cause a violation of an applicable water quality standard:
 - The permit evaluation report must document this determination and reference appropriate “supporting documentation” in the administrative record.

Building the Administrative Record: The RPA Process

- Goal of the RPA process is to conduct a technically robust analysis that can be supported and easily explained by reviewing the Permit Evaluation Report and supporting documentation.

Building the Administrative Record Variances

The administrative record should clearly support the DEQ's determination that:

- The granting of a variance is not prohibited by the variance rule (e.g., the conditions allowed by the variance do not result in an unreasonable risk to human health).
- The conditions for granting a variance have been met (e.g., no existing use is impaired and attaining the water quality standard during the term of the variance is not feasible).
- All required information has been submitted to the DEQ.

Building the Administrative Record

The “Final Word”

- When in doubt, err on the side of supplementing the administrative record to strongly support the permitting decision made by DEQ.