



# TOXIC TALES – LEGAL OVERVIEW

## OREGON ACWA SEMINAR

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# 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  $1 \times 10^{-4}$
  - 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.