

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION--DIVISION OF WATER QUALITY
MARCH 18, 2008**

ITEM 12

SUBJECT

CONSIDERATION OF A RESOLUTION ADOPTING A POLICY FOR COMPLIANCE SCHEDULES IN NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMITS AND AN ASSOCIATED CERTIFIED REGULATORY PROGRAM ENVIRONMENTAL ANALYSIS

DISCUSSION

The California Porter-Cologne Water Quality Control Act authorizes the State Water Resources Control Board (State Water Board) to adopt statewide water quality control plans and policies and requires each of the nine Regional Water Quality Control Boards (Regional Water Boards) to adopt water quality control plans (Basin Plans) that provide the basis for protecting water quality in each Region. Water quality standards contained in these plans are translated into enforceable limits for pollutant discharge which are written into waste discharge requirements issued to dischargers.

The federal Clean Water Act (CWA) established the National Pollutant Discharge Elimination System (NPDES) permit program to specifically regulate point source discharges of pollutants to navigable surface waters of the United States. The CWA and implementing regulations require that NPDES permits contain effluent limitations as stringent as necessary to ensure that receiving waters meet water quality standards¹. NPDES permits may also include enforceable limits that must be met in the affected receiving waters and other provisions necessary to assure attainment of water quality standards. The State Water Board and Regional Water Boards (collectively Water Boards) are authorized to issue NPDES permits in lieu of direct regulation by the U.S. Environmental Protection Agency (USEPA). The term of a NPDES permit is maximum five years.

Both federal and State law recognize compliance schedules as a discretionary regulatory tool for bringing NPDES dischargers into compliance with new, revised, or newly interpreted water quality standards, without being in violation of their permits. The purpose of a compliance schedule is to give an existing discharger time to make necessary changes in the facilities or operations in order to comply with a new, or more stringent, water quality-based permit limitation without subjecting the existing discharger to enforcement proceedings. A compliance schedule is included in the discharger's permit and lays out an enforceable sequence of actions or operations to be taken by the discharger in order to comply with permit limitations as rapidly as possible.

The essential effect of including a compliance schedule in a permit is to allow a discharger a specific period of time, that is as short as possible and that includes appropriate interim deadlines and requirements, to achieve compliance with an effluent limit that is established to

¹ See 33 U.S.C. §1311(b)(1)(C).

implement a water quality standard. By including the compliance schedule in the permit, the effective date of the effluent limit is postponed; however, in no circumstances would a compliance schedule authorize an increase in pollutant discharges above existing levels because of State and federal antidegradation and antibacksliding requirements.

Compliance schedules may be included in NPDES permits only if there is explicit authorization in the state's water quality standards or implementing regulations. In the absence of such explicit authorization, compliance schedules can be specified only in enforcement orders such as "Time Schedule Orders" and Cease and Desist Orders. The issuance of an enforcement order in such a case may be misinterpreted by a casual observer and engender a negative perception of the discharger, which may be unwarranted based on the circumstances. An enforcement order furthermore does not stay NPDES permit requirements, meaning the discharge is open to lawsuits from citizens under the self-enforcing provision of the CWA and, under certain circumstances, mandatory minimum penalties.

The State Water Board has adopted specific compliance schedule provisions for California Toxics Rule (CTR) criteria for toxic pollutants, which are contained in the statewide "*Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California*" (SIP). In addition, six of the nine Regional Water Boards have individually adopted general NPDES compliance schedule authorizations into their Basin Plans that vary in coverage, authorized length, and other provisions. Water Boards have also authorized compliance schedules in NPDES permit requirements by incorporating compliance deadlines as part of a specific water quality standards action, and by incorporating compliance dates in the implementation sections of Total Maximum Daily Load (TMDL) implementation plans.

At a meeting on October 25, 2006 to consider compliance schedule authorizations for the San Diego Region, the State Water Board identified a need for statewide uniform compliance schedule provisions and consistency in implementation of these provisions in the State's NPDES permit program. The State Water Board directed staff to develop a statewide policy that would meet this need. The purpose of the proposed Policy is to make better use of both stakeholder and Water Board resources by providing clear direction on the appropriate use of compliance schedules in NPDES permits.

The proposed Policy authorizes compliance schedules for existing dischargers in all NPDES permits adopted by the Water Boards that must comply with CWA §1301(b)(1)(C). The proposed Policy supersedes all existing provisions authorizing compliance schedules with the exception of: (1) existing compliance schedule provisions in TMDL implementation plans in Basin Plans that are in effect as of the effective date of the proposed Policy; and (2) the provisions authorizing compliance schedules for CTR criteria in the SIP. The proposed Policy applies to all NPDES permits that are modified or reissued after the effective date of the proposed Policy that implements new, revised, or newly interpreted water quality standards that are more stringent than water quality standards previously in effect.

A discharger who seeks a compliance schedule must demonstrate to the satisfaction of a Water Board that additional time is needed to design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with a permit limitation specified to implement a new, revised, or newly interpreted water quality standard. If the Water Board determines that an existing discharger has met the application requirements for a compliance schedule specified in the proposed Policy, then the Water Board has the discretion to include an appropriate schedule in the permit.

The proposed Policy requires that a compliance schedule must include interim requirements and dates for their achievement and, if the compliance schedule exceeds one year, must also include interim numeric limitations for the pollutant. Numeric interim limitations for the pollutant must be based on current treatment facility performance or on existing permit limitations, whichever is more stringent. The entire compliance schedule, including interim requirements and final permit limitations, must be included as enforceable terms of the permit.

Any compliance schedule must require compliance as soon as possible. The proposed Policy specifies that, in general, the duration of the compliance schedule may not exceed five years **or** the life of the permit, whichever is less, and can in no event exceed ten years from the date of adoption, revision, or new interpretation of the applicable water quality standard. However, an extended compliance schedule may be established in a permit for a permit limitation that implements waste load allocations specified in a TMDL. A compliance schedule may also be extended one permit term where unforeseen circumstances, beyond the control of the discharger, have arisen that preclude or significantly delay construction of the facilities or implementation of the programs expected to result in compliance with the final permit limitation, even though the interim milestones have been met.

The proposed Policy requires the Water Boards to document in the permit findings that the compliance schedule is necessary and that the schedule requires compliance as soon as possible. The permit fact sheet must adequately describe the basis for these findings.

Nothing in this proposed Policy prevents a Water Board from requiring immediate compliance with permit limitations if a Water Board finds that immediate protection of beneficial uses of waters of the United States or California is in the best interest of the people of the State. However, in such an event, the Water Board must make a finding stating the beneficial uses and specific interests of the people of the State that are being protected or promoted. Water Boards also retain the discretion to issue an enforcement order (with a time schedule) to compel compliance when the discharger has not acted responsibly to achieve compliance.

Issuance of compliance schedules in NPDES requirements would not limit public participation and comment. Consideration of the terms and conditions of NPDES requirements, including any proposed compliance time schedules, must occur at a public hearing. The public would be able to comment not only on the propriety of granting a compliance schedule, but also on the interim limits, the duration of the compliance period, and whether the discharger made the appropriate showing that the compliance schedule was as short as practicable taking into account the relevant factors.

Further, the administrative and judicial remedies afforded under the California Water Code remain fully available to those who object to a Water Board's issuance of a time schedule in NPDES permit requirements.

POLICY ISSUE

Should the State Water Board adopt the proposed statewide Policy for compliance schedules in NPDES permits?

FISCAL IMPACT

Water Board staff work associated with or resulting from this action will be addressed with existing and future budgeted resources.

REGIONAL WATER BOARD IMPACT

Yes, all Regional Water Boards.

STAFF RECOMMENDATION

That the State Water Board adopts the proposed Policy for compliance schedules in NPDES permits.

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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2008-

POLICY FOR COMPLIANCE SCHEDULES IN NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS AND AN ASSOCIATED CERTIFIED REGULATORY PROGRAM ENVIRONMENTAL ANALYSIS

WHEREAS:

1. The State Water Resources Control Board (State Water Board) is designated as the state water pollution control agency for all purposes under the federal Clean Water Act.
2. Under section 303(c) of the Clean Water Act, the states are primarily responsible for establishing water quality standards.
3. Under section 301(b)(1)(C) of the Clean Water Act, not later than July 1, 1977, National Pollutant Discharge Elimination System (NPDES) permits must include effluent limits as stringent as necessary to achieve water quality standards.
4. For new or revised water quality standards adopted after July 1, 1977, the states can include compliance schedules in NPDES permits to achieve effluent limitations implementing the new or revised standards when the applicable water quality standards or the states' implementing regulations authorize compliance schedules.
5. For water quality standards adopted on or before July 1, 1977, the states can include compliance schedules in NPDES permits if the states are authorized to include compliance schedules in permits and if the states have adopted a new interpretation of the pre-July 1, 1977 standard.
6. The State Water Board recognizes that a compliance schedule may be appropriate, in some cases, when a discharger must design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with permit limitations implementing new, revised, or newly interpreted water quality standards.
7. The State Water Board has adopted compliance schedule provisions for California Toxics Rule (CTR) criteria, and six Regional Water Quality Control Boards (Regional Water Boards) have adopted NPDES compliance schedule authorizations in their water quality control plans (Basin Plans). The compliance schedule authorizations vary in their coverage, authorized length, and other provisions.
8. The State Water Board has identified a need for uniform provisions authorizing compliance schedules and for statewide consistency in the implementation of these provisions in the state's NPDES permit program. Failure to address this need will perpetuate the inefficient use of discharger, interested party, and Water Board resources, which has resulted from the lack of clear policy guidance on the appropriate use of compliance schedules.

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9. It is the intent of the State Water Board that compliance schedules for NDPES permits only be granted when the discharger must design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with permit limitations implementing new, revised, or newly interpreted water quality standards, and that any schedules be granted for the minimum amount of time necessary to achieve compliance.
10. Water Code section 13140 provides that the State Water Board shall formulate and adopt state policy for water quality control.
11. The State Water Board issued the draft Policy and Staff Report, including an environmental checklist, for public comment on [insert date].
12. The State Water Board, in compliance with California Water Code section 13147, held a public hearing in Sacramento, California, on March 18, 2008 on the draft Policy and Staff Report and carefully considered all testimony and comments received.
13. The State Water Board finds that adoption of the Policy will not have any significant or potentially significant effects on the environment and, therefore, no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment.

THEREFORE BE IT RESOLVED THAT:

1. **Definitions.** The following definitions apply to this Policy:
 - a. **“Compliance schedule”** means a schedule of remedial measures, including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitations, prohibition, or standard.
 - b. **“Existing discharger”** means any discharger who is not a new discharger. An existing discharger includes an increasing discharger (i.e., an owner or operator of an existing facility with treatment systems in place for its current discharge that is or will be expanding, upgrading, or modifying its existing permitted discharge after a new, revised, or newly interpreted water quality standard becomes applicable).
 - c. **“New discharger”** means the owner or operator of any building, structure, facility, or installation from which there is or may be a “discharge of pollutants” (as defined in 40 C.F.R. § 122.2) to surface waters of the United States, the construction of which commences after a new, revised, or newly interpreted water quality standard becomes applicable.
 - d. **“New, revised, or newly interpreted water quality standard”** means a water quality standard that is adopted, revised, or newly interpreted after the effective date of this Policy, except that the following dates shall apply instead of the effective date of this Policy in the Regions specified below:
 - i. North Coast: February 27, 2006
 - ii. San Francisco Bay: November 13, 1995
 - iii. Los Angeles: February 18, 2004

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- iv. Central Valley: September 25, 1995
 - v. Santa Ana: July 15, 2002
 - vi. San Diego: [November 9, 2005, if USEPA approves the San Diego Water Board's compliance schedule provisions, or the effective date of this Policy]
- e. **“Newly interpreted water quality standard”** means a narrative water quality objective that, when interpreted during NPDES permit development (using appropriate scientific information and consistent with state and federal law) to determine the permit limitations necessary to implement the objective, results in a numeric permit limitation more stringent than the limit in the prior NPDES permit issued to the discharger.
 - f. **“Permit limitation”** means a water quality-based effluent limitation (WQBEL). A permit limitation also includes a receiving water limitation.
 - g. **“Single permitting action”** is an action in which a Regional Water Board incorporates all the requirements to implement a total maximum daily load (TMDL), developed pursuant to Clean Water Act section 303(d), in one NPDES permit.
 - h. **“Water Board(s)”** means either the State Water Board or a Regional Water Board, or both.
2. **Scope and Applicability.** This Policy shall apply to all NPDES permits adopted by the Water Boards that must comply with Clean Water Act section 301(b)(1)(C) and that are modified or reissued after the effective date of the Policy. This Policy authorizes a Water Board to include a compliance schedule in a permit for an existing discharger to implement a new, revised, or newly interpreted water quality standard where the Water Board determines that the discharger must design and construct² facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with a permit limitation specified to implement the standard. Compliance schedules, however, are not authorized under the following circumstances:
- a. Compliance schedules are not authorized in permits for new dischargers.
 - b. Compliance schedules are not authorized for permit limitations implementing criteria promulgated for California in the National Toxics Rule, as amended (40 C.F.R. §131. 36, revised as of July 1, 2005).
 - c. Compliance schedules are not authorized under this Policy for permit limitations implementing criteria promulgated in the CTR, as amended (40 C.F.R. section 131.38, revised as of July 1, 2005). Compliance schedules for existing CTR criteria are authorized only under the SIP. However, this Compliance Schedule Policy authorizes compliance schedules for permit limitations implementing CTR criteria that are revised by the United States Environmental Protection Agency after the effective date of this Policy.

² Construction includes related activities such as the purchase of property needed for the construction, performance of the environmental studies and reviews, identification of social and environmental mitigation, and purchase and installation of necessary equipment.

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- d. Compliance schedules for permit limitations implementing a water quality objective that is identical to a CTR criterion and that was adopted after promulgation of the CTR may not extend beyond May 18, 2010.
 - e. Compliance schedules are not authorized for permit limitations implementing new, revised, or newly interpreted water quality standards that are less stringent than water quality standards previously in effect.
3. **Application Requirements.** A discharger who seeks a compliance schedule must demonstrate to the satisfaction of the Water Board that the discharger needs time to design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with a permit limitation specified to implement a new, revised, or newly interpreted water quality standard. In addition, the discharger must provide the following documentation:
- a. Diligent efforts have been made to quantify pollutant levels in the discharge and the sources of the pollutant in the waste stream, and the results of those efforts;
 - b. Source control efforts are currently underway or completed, including compliance with any pollution prevention programs that have been established;
 - c. A proposed schedule for additional source control measures or waste treatment;
 - d. Data demonstrating current treatment facility performance to compare against existing permit effluent limits, as necessary to determine which is the more stringent interim permit effluent limit to apply if a schedule of compliance is granted.
 - e. The highest discharge quality that can reasonably be achieved until final compliance is attained;
 - f. The proposed compliance schedule is as short as possible, given the type of facilities being constructed or programs being implemented, and industry experience with the time typically required to construct similar facilities or implement similar programs; and
 - g. Additional information and analyses to be determined by the Regional Water Board on a case-by-case basis.
4. **Review of Application.** The Water Board is responsible for thoroughly evaluating the information submitted by the discharger in its application and, in particular, for ensuring that the discharger has adequately demonstrated the need for time to design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with a permit limitation specified to implement a new, revised, or newly interpreted water quality standard.
5. **Maximum Compliance Schedule Length and Conditions for Renewal of Compliance Schedules.** If the Water Board determines that an existing discharger has met the application requirements for a compliance schedule, then the Water Board has the discretion to include an appropriate schedule in the permit.

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- a. Any compliance schedule must require compliance as soon as possible, taking into account the amount of time reasonably required for the discharger to design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with a permit limitation specified to implement a new, revised, or newly interpreted water quality standard.
- b. The duration of the compliance schedule may not exceed five years or the life of the permit, whichever is less, except as provided in paragraphs (c.) and (d.) below; provided, however, that in no event can a compliance schedule exceed ten years from the date of adoption, revision, or new interpretation of the applicable water quality standard, except as provided in paragraph (d.) below.
- c. The Water Board may allow a compliance schedule to be extended beyond the first permit term in which the schedule was authorized, for no more than one additional permit term, only if the discharger demonstrates to the satisfaction of the Water Board the conditions described below. In no event may a compliance schedule exceed ten years from the date of adoption, revision, or new interpretation of the applicable water quality standard.
 - i. The discharger has met all the conditions of the existing compliance schedules, including all interim milestones.
 - ii. Unforeseen circumstances, beyond the control of the discharger, have arisen that preclude or significantly delay construction of the facilities or implementation of the programs expected to result in compliance with the final permit limitation, even though the interim milestones have been met. Unforeseen circumstances include, but are not limited to, a natural disaster for which contingency planning was not required in the permit, failure of a new treatment system to function as anticipated, or a court ruling arising from a third-party lawsuit.
- d. A Water Board may establish a compliance schedule that exceeds ten years in a permit that either: (1) is a single permitting action, as defined in this Policy, or (2) has a permit limitation that implements or is consistent with the waste load allocations specified in a TMDL that is established through a Basin Plan amendment, provided that the TMDL implementation plan contains a compliance schedule or implementation schedule. Notwithstanding 1.e. above, a Water Board may include a compliance schedule in an implementation plan for a TMDL that is established to achieve either a numeric or narrative objective in a water quality standard.
 - i. The TMDL implementation plan shall include a maximum length for compliance schedules for attaining water quality based effluent limitations based on the assumptions of waste load allocations in the TMDLs.
 - ii. The compliance schedule in the permit must be as short as possible. The compliance schedule in the permit cannot, under any circumstances, exceed the maximum length for compliance schedules or implementation schedules contained in the TMDL implementation plan.

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6. Interim Permit Requirements and Dates.

- a. If the Water Board authorizes a compliance schedule in the permit, the Water Board shall include interim requirements and dates for their achievement.
- b. If the compliance schedule exceeds one year, the Water Board shall establish interim numeric limitations for the pollutant in the permit; and may also impose interim requirements to control the pollutant, such as pollutant minimization and source control measures. Numeric interim limitations for the pollutant must be based on current treatment facility performance or on existing permit limitations, whichever is more stringent. If the existing permit limitations are more stringent, and the discharger is not in compliance with those limitations, the noncompliance under the existing permit must be addressed through appropriate enforcement action before the permit can be reissued, unless the anti-backsliding provisions in Clean Water Act section 402(o) are met.
- c. There shall be no more than one year between interim dates. The interim requirements shall state that the discharger must notify the Water Board, in writing, no later than 14 days following each interim date, of its compliance or noncompliance with the interim requirements.

7. **Final Permit Limitation Requirements.** The entire compliance schedule, including interim requirements and final permit limitations, shall be included as enforceable terms of the permit, whether or not the final compliance date is within the permit term.

8. **Permit Findings:** The permit shall include appropriate findings that the compliance schedule is necessary, as provided in paragraphs 3 and 4, and that the schedule requires compliance as soon as possible, as provided in paragraph 5. The permit fact sheet shall adequately describe the basis for these findings.

9. **Over-Riding Considerations.** Nothing in this Policy shall prevent a Water Board from requiring immediate compliance with permit limitations if a Board finds that immediate protection of beneficial uses of waters of the United States or California is in the best interest of the people of the state. However, in such an event, the Water Board shall make a finding stating the beneficial uses and specific interests of the people of the state that are being protected or promoted.

10. **Supersession.** This Policy supersedes all existing provisions authorizing compliance schedules in Basin Plans, except for existing compliance schedule provisions in TMDL implementation plans that are in effect as of the effective date of this Policy.

CERTIFICATION

The undersigned Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Board held on March 18, 2008.

Jeanine Townsend
Clerk to the Board