



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

APR 03 2009

Ms. Teresa Marks, Director
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, Arkansas 72118-5317

Re: NPDES Permit No. AR0050024-NACA

Dear Ms. Marks:

Thank you for your letter dated February 13, 2009, regarding the Environmental Protection Agency Region 6's (EPA) specific objection to the draft National Pollutant Discharge Elimination System (NPDES) permit for the Northwest Arkansas Conservation Authority (NACA) submitted to EPA for review by the Arkansas Department of Environmental Quality (ADEQ). We appreciate the State of Arkansas' strong commitment to water quality and commend you on the numerous actions taken over the last several years to address phosphorus and sediment issues in the Illinois River watershed.

As you are aware, under the Clean Water Act (CWA), EPA is tasked with ensuring that state-issued NPDES permits meet all the requirements of the CWA and its implementing regulations, including the requirement that all permits contain effluent limits sufficient to meet the water quality standards of all affected states. In January 2009, based on preliminary data, EPA determined that the 1 mg/l phosphorus effluent limit included in the draft NACA permit was not stringent enough to be protective of Arkansas water quality standards or those of the downstream State. Accordingly, we objected to issuance of the permit as drafted. Your February 13th letter included a revised draft permit submitted in response to EPA's specific objection letter of January 16, 2009.

Although we believe the revised draft permit complies with EPA's objection with regard to the required additional monitoring for total phosphorus (TP) and dissolved oxygen (DO), we believe the revised draft permit still falls short of the requirements of the CWA and 40 C.F.R. Part 122 with regard to the water-quality based effluent limitation for phosphorus. EPA does not object to ADEQ's issuance of a 3-year permit to NACA. However, as we have previously discussed, EPA will not object to a total phosphorus limit of 1 mg/l for the NACA facility until June 30, 2012, based on the Statement of Joint Principles and Actions agreed to by Arkansas and Oklahoma environmental agencies in 2003. That agreement was intended to act as a complement to the provision allowing compliance schedules included in Oklahoma's 0.037 mg/l criterion for phosphorus in its six (6) scenic rivers. Oklahoma's 0.037 mg/l criterion included a compliance schedule provision allowing point source dischargers up to 10 years from July 1, 2002, or until June 30, 2012, to come into compliance with permit limits based on the criterion.

The inclusion of compliance schedules in NPDES permits for the purpose of achieving water quality standards was addressed by the EPA Administrator in *In the Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (1990). In *Star-Kist*, the Administrator interpreted § 301(b)(1)(C) of the CWA to mean that compliance schedules are allowed for effluent limitations based on standards adopted after July 1, 1977, only if the State has clearly indicated in its water quality standards or implementing regulations that it intends to allow them. In this instance, Oklahoma's water quality standards indicate the intent to include with the State's phosphorus criterion a provision allowing compliance schedules. However, the standards also provide that compliance schedules are to end as of June 30, 2012, and as of that date, all dischargers must comply with effluent limits designed to meet the 0.037 mg/l criterion.

EPA further addressed the inclusion of compliance schedules in NPDES permits for the purpose of achieving water quality standards in a 2007 memorandum from the Office of Wastewater Management (enclosed). That memorandum enumerates certain principles applicable to assessing whether a compliance schedule for achieving water quality-based effluent limits is consistent with the CWA and its implementing regulations. Two of the enumerated principles are as follows:

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 timeframe 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 40 C.F.R. § 122.2, 122.44(d) and 122.44(d)(1)(vii)(A); and

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

"Memorandum from Jim Hanlon, Director of the EPA Office of Wastewater Management, to Alexis Strauss, Water Division Director, EPA Region 9, dated May 10, 2007."

In this instance, a permit limit of 0.1 mg/l is necessary in order for the permit to comply with the requirement of the CWA that the permit include an effluent limit as stringent as necessary to meet water quality standards. The 1 mg/l phosphorus limit proposed for the NACA facility is an interim limit included as part of a compliance schedule ending June 30, 2012. Therefore, based on the above, NACA's permit, regardless of its term, must include an enforceable final effluent limitation for phosphorus stringent enough to meet water quality standards and a date for its achievement that is on or before June 30, 2012.¹ The permit should also include an enforceable sequence of actions or operations leading to compliance with the water quality-based effluent limit (40 C.F.R. § 122.2).

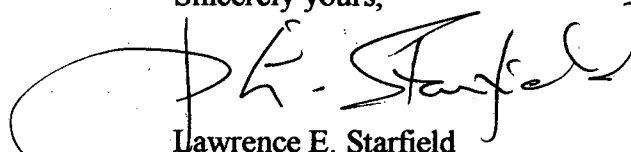
¹ The June 15, 2012 date referenced in EPA's January 16, 2009, Specific Objection letter was in error. The correct date is June 30, 2012.

We understand that ADEQ disagrees with EPA's determination that Osage Creek is impaired for phosphorus and we are aware of the State's ongoing study of that water body. We are also aware of Oklahoma's commitment under the Joint Statement of Principles and Actions to reevaluate its 0.037 mg/l criterion for phosphorus by 2012. As EPA has stated previously, should new data indicate that a phosphorus limit of other than 0.1 mg/l is appropriate for this facility, the permit limit may be revised. However, EPA believes a total phosphorus limit of 0.1 mg/l is necessary to protect the water quality of the receiving stream from any discharges associated with the NACA facility.

Therefore, by this letter, EPA is notifying you that the revised draft permit for NACA submitted to EPA by ADEQ on February 13, 2009, is not sufficient to comply with EPA's specific objection. Instead, we ask that ADEQ resubmit a draft permit that includes language specifying that a final water-quality based effluent limit of 0.1 mg/l phosphorus applies to the NACA facility as of June 30, 2012.

Thank you for your efforts to improve the environment. If you have any questions, please feel free to contact me at (214) 665-7311 or Miguel Flores at (214) 665-7101.

Sincerely yours,



Lawrence E. Starfield
Acting Regional Administrator

Enclosure

cc: Steve Drown, Chief, Water Division, ADEQ
Mo Shafii, Asst. Chief, Water Division, ADEQ
John Sempier, Northwest Arkansas Conservation Authority



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

May 10, 2007

MEMORANDUM

SUBJECT: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits.

FROM: James A. Hanlon, Director
Office of Wastewater Management
/s/

TO: Alexis Strauss, Director
Water Division
EPA Region 9

Recently, in discussions with Region 9, questions have been raised concerning the use of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits consistent with the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. § 122.47. The use of compliance schedules in NPDES permits is also the subject of ongoing litigation in California. The purpose of this memo is to provide a framework for the review of permits consistent with the CWA and its implementing regulations.

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

In *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 CWA 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.

What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

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.

If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.



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What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

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 timeframe 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.

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