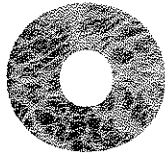


# Anti-backsliding Guidance for Water Quality-Based Permits

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Over the past few years, there have been significant advances in the development of National Pollutant Discharge Elimination System (NPDES) permit limits based on local water quality standards. Perhaps most important, the Environmental Protection Agency (EPA) has endorsed the use of dynamic, "probabilistic" modeling of point source loadings and stream flows to calculate water quality-based permit limits. These more advanced techniques eliminate much of the excess conservatism reflected in earlier approaches. As such, they offer municipalities and industries significant opportunities for justifying less stringent water quality-based limits in their NPDES permits.

While these new techniques hold promise for relaxing existing permit limits in many circumstances, the ability of regulated sources to make full use of these techniques has been in question since passage of the 1987 amendments to the Clean Water Act (CWA). In those amendments, Congress added two "anti-backsliding" provisions, Sections 402(o) and 303(d)(4), that restrict the circumstances under which NPDES permit limits may be relaxed upon permit renewal, reissuance, or modification. At the time of enactment, it was unclear whether these new statutory provisions were merely a codification of current program requirements or a major new obstacle to revising permit limits even where justified.

EPA has issued draft "interim guidance" that interprets the new anti-backsliding provisions of Sections 402(o) and 303(d)(4) as they apply to permit limits based on either a state treatment

standard or a water quality standard. The new guidance indicates that NPDES permit holders may obtain relaxed water quality-based limits under a variety of circumstances. However, EPA may seriously restrict opportunities to modify permit limits based on a state technology standard.

## REGULATORY BACKGROUND

Before the 1987 CWA amendments, EPA promulgated regulations which required that a NPDES permit must be at least as stringent as the previous permit, unless certain grounds for "backsliding" apply (40 CFR 122.44[1] and 122.62[a]). These regulations were challenged by industrial and environmental groups in consolidated litigation in federal court. Industry contended that the anti-backsliding rules were too rigid, while environmental groups argued that the regulations should be more restrictive.

In the face of this litigation, Congress enacted the 1987 CWA amendments, effectively mooted the litigation. Those amendments, which added both Sections 402(o) and 303(d)(4) to the CWA, affirm the basic approach to backsliding that was adopted in EPA's regulations. Specifically, new Section 402(o)(1) establishes a broad prohibition against relaxing effluent limits that are based on either best professional judgment (BPJ) or state water quality standards, except as expressly provided. With respect to BPJ permit limits, Section 402(o)(2) lists six narrow grounds—similar to those already in EPA's regulations—on which such effluent limits may be made less stringent. Four of the six enumerated exceptions are also applicable to permit limits based on a state treatment or water quality standard.

These exceptions allow backsliding in the following circumstances:

- Substantial expansion or alteration to the facility after permit issuance that justifies less stringent limits;
- Events occurring beyond the permittee's control for which there is no reasonably available remedy;
- Permittee has properly installed and operated required treatment equipment that cannot achieve permit limits; or
- New information (other than revised regulations, guidance, or test methods) is available that justifies less stringent limits.

Section 402(o)(1) also cross-references new Section 303(d)(4), which identifies further grounds for backsliding for water quality-based permits. Importantly, Section 402(o)(3) states that a revised BPJ or water quality-based permit may not violate either applicable national technology-based guidelines or state water quality standards.

On January 4, 1989, EPA issued a final rule codifying the provisions of the 1987 amendments. In that rule, EPA revised its regulations to incorporate the new anti-backsliding provisions that are applicable to BPJ permit limits. Notably, EPA deleted a regulatory provision allowing a BPJ permit to be modified because of excessive costs, reasoning that the 1987 amendments forbid backsliding on this ground.

Discussions with EPA staff revealed that the water quality-based, anti-backsliding provisions were still under considerable debate within EPA because of the apparent inconsistencies in the statute. In its recent interim guidance, EPA states that it will propose regulations implementing the new anti-backsliding provisions applicable to water quality-based permit limits in early 1990. Until this rulemaking is completed, however,

EPA's guidance is to govern backsliding for such permit limits.

#### EPA'S INTERIM GUIDANCE

In its interim guidance, EPA interprets the new anti-backsliding provisions that are applicable to water quality-based effluent limits. By far the most important issue addressed is whether the requirements of both Sections 303(d)(4) and 402(o)(2) must be satisfied for backsliding to occur. As EPA acknowledges, the statute is less than clear on this issue, primarily because the 1987 amendments on backsliding represent a last minute compromise between disparate House and Senate versions.

Reviewing the legislative history and applying established canons of statutory construction, EPA concludes that the Section 303(d)(4) and 402(o)(2) requirements are not cumulative. Rather, backsliding of water quality-based permit limits is allowable if the requirements of either section are met. Because 402(o)(2) is more restrictive than 303(d)(4), EPA's interpretation, by allowing a permittee to satisfy either provision, increases the opportunities for backsliding under the statute.

EPA's guidance also interprets Section 303(d)(4). As explained by EPA, for non-attainment waters, 303(d)(4) allows backsliding only where the existing permit limit sought to be revised is based on a total maximum daily load (TMDL) or other wasteload allocation, and the revised permit limit assures attainment of the water quality standard at issue. Attainment may be assured by either modifying the TMDL or revising the stream-use designation. For attainment waters, 303(d)(4) allows backsliding when the revised permit limit is consistent with the state's approved anti-degradation policy.

Appended to EPA's guidance are six hypothetical scenarios that illustrate EPA's interpretation of the new provisions. These scenarios are instructive. For example, Scenario 2 assumes that an industrial permittee seeks to revise its water quality-based permit limit for total suspended solids (TSS), set at 1000 mg/L based on a TMDL, to reflect actual discharge levels of 6000 mg/L. A permit limit of 6000 mg/L TSS is consistent with national effluent guidelines. However, the revised limit will not assure attainment of water quality standards. For this reason, backsliding is not allowable, even though the circumstances described fit one of the six exceptions where backsliding may be allowed. EPA notes, however, that if the state were to downgrade the use classi-

fication for a water body in accordance with the provisions of 40 CFR Part 131, revision of the TSS permit limit might be allowable.

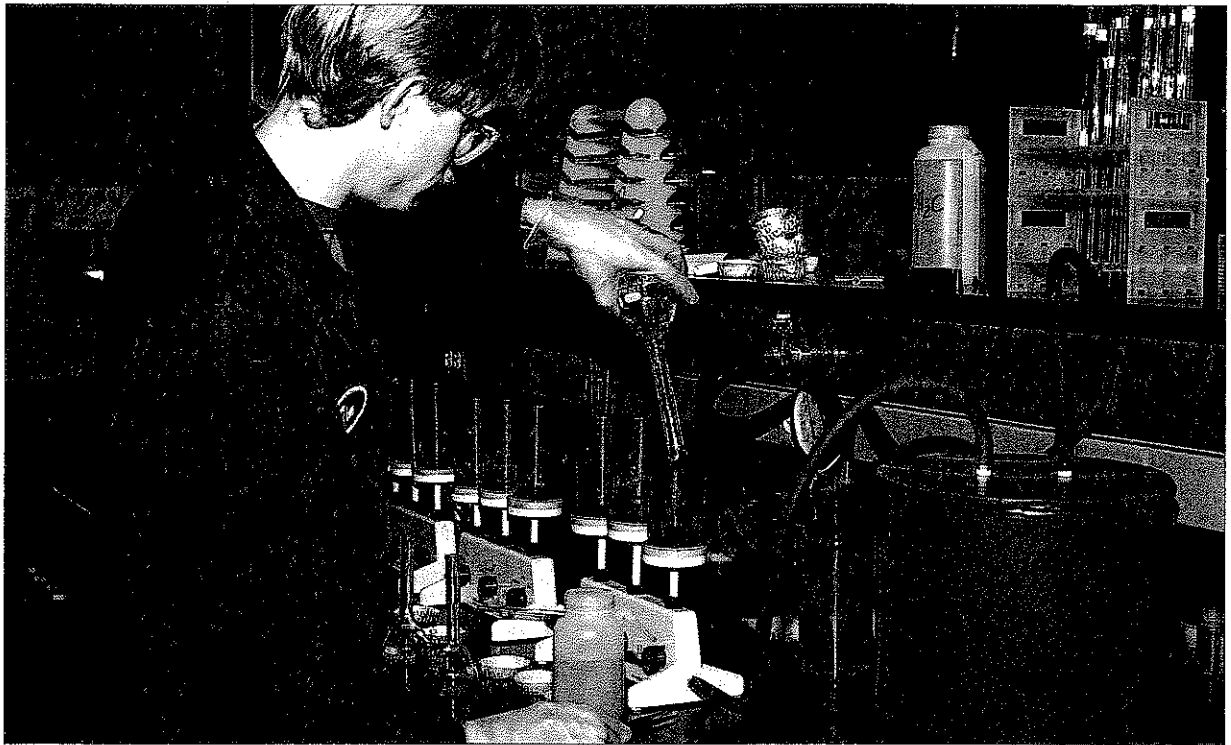
In Scenario 3, the same facts as in Scenario 2 are assumed, except that a new model shows that the water quality standard for TSS will be attained with a permit limit of 4000 mg/L. Because of the new modeling information, backsliding is allowable under Section 303(d)(4), but only to 4000 mg/L.

Scenario 4 illustrates a different principle. Here, a state that had adopted its own technology-based treatment standard for fecal coliform may relax the standard later. A POTW, which has been violating this limit seeks revision of its permit to reflect the new standard,

noting that recent modeling demonstrates that water quality standards will be attained under the relaxed permit limit. However, the water quality standard for fecal coliform is currently not being attained. In this case, backsliding would not be allowable. First, backsliding would not be available under Section 303(d)(4) because the original limit was not based on a TMDL or other wasteload allocation, and this is prerequisite to backsliding for non-attainment waters. Similarly, backsliding would also not be permitted under any of the exceptions listed in Section 402(o)(2). Although one such exception allows backsliding based on new information, the statute expressly excludes "revised regulations" (for example, relaxation of a state technology-

**EPA's new anti-backsliding provisions** prohibit relaxing effluent limits that are based on state water quality standards or best professional judgement.





**Permittees may have to do some scientific homework** including development of site-specific water quality standards if they want to avoid regulatory agency opposition to permit relaxation.

based standard) from coverage under this exception.

#### **ANALYSES OF THE INTERIM GUIDANCE**

The interim guidance provides a reasonable reading of the statute and its legislative history with respect to water quality-based permits. The legislative history and language of Section 402(o) clearly support the concept that a permit may be made less stringent, based on either 402(o) or 303(d)(4).

In general, the provisions of Section 303(d)(4) and the exceptions in Section 402(o)(2) are designed to ensure that the anti-degradation rule requirements are met before allowing actual load increases. In circumstances where the revised permit is merely reflecting the existing condition, and existing uses are not adversely affected, anti-degradation is generally not an issue.

While EPA's treatment of water quality-based permits is reasonable, the interim guidance completely misconstrues the application of Section 402(o) to state technology-based standards. The section simply does not apply to requirements established under Section 510 which are then incorporated under Section 301(b)(1)(C).

Neither the legislative history nor the rule itself evidences any intent to control state law or restrict the modification of state technology-based limits. Under EPA's interpretation, states may adopt more stringent laws, but once incorpo-

rated into permits, the permits may not be made less stringent. In effect, EPA is stating that once a state exercises its right under Section 510 to set a more restrictive limit, it can not reverse that decision. Constitutional issues aside, if Congress intended to limit the state legislative powers, they would have to do so expressly. Congress did not amend Section 510, and Section 402(o) does not do so by implication.

EPA's confusion on this matter appears to stem from the anti-backsliding provisions' general reference to Section 301(b)(1)(C), the provision by which water quality-based limits and more stringent state requirements under Section 510 are incorporated into permits. The legislative history of the House and Senate bills makes it clear that only water quality-based limits under Sections 301(b)(1)(C) and 303(d) and (e) are addressed. Section 510 limits are not water quality-based; they are simply more stringent state requirements, however determined. Thus, EPA should republish the draft guidance to specify that a state's ability to modify Section 510 limits is not affected by the anti-backsliding provision.

In the future, most requests for relaxation of water quality-based permits will likely be based on Section 303(d)(4). The success of these requests will depend largely on the stringency of the state water quality standards at issue, the assumptions that are used to con-

duct wasteload allocation modeling, the state's interpretation of its anti-degradation rule, and the willingness of the state to consider downgrading the use classification or modify the water quality standard for a water body. EPA's initial interpretation regarding application of Section 402(o) to state technology-based limits is flawed and should be revised.

Although EPA's guidance indicates that there are many circumstances where water quality-based permits may be changed, one should expect the regulatory agencies to oppose any relaxation in permit conditions. Permittees should carefully evaluate the technical and legal basis for any proposed permit limit. Where necessary, the permittee should develop the scientific information needed to apply EPA's latest techniques for developing water quality-based limits and use all available means to ensure that the best available scientific information is used, including development of site-specific water quality standards, permit modification requests, Section 208 and 303 plan revisions, petitions for rulemaking, and requests for adjudicatory hearings. In the realm of NPDES permits, there is no substitute for getting it right the first time. ■

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