EPA Wants More Control Over State-Issued Discharge Permits

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Ronda Sandquist

Christine Jochim

How will the U.S. Environmental Protection Agency's proposed changes to the discharge permit program affect discharge permits and limits? The proposed rule,[1] issued on May 18, 2016, would revise several key components of the agency's National Pollutant Discharge Permit System (NPDES) program, including provisions that states with delegated authority to administer their own NPDES permitting programs must follow. In response to requests from interested stakeholders, the EPA extended the period for submitting public comments on the proposal. Comments are now due on Aug. 2, 2016.[2]

The proposed rule addresses a wide range of topics,[3] ranging from minor revisions to NPDES program definitions and the contents of permit fact sheets, to major revisions that will expand EPA's ability to object to permits administratively continued by a state program. Any entity currently discharging pursuant to an NPDES permit, whether issued by the EPA or its state, should consider the far-reaching implications of the proposed rule and submit comments to the EPA for consideration.

Objections to Administratively Continued Permits

When permittees submit timely and complete permit renewal applications, the existing permit is generally "administratively continued" until the renewal permit goes into effect. Under administratively continued permits, the permittee is authorized to continue its operations under its existing permit. Partially due to limited state resources, the EPA estimated that there were approximately 17,000 facilities covered by administratively continued permits as of September 2015.[4]

The proposed regulations are intended to allow the EPA to take actions if it determines there are inappropriate delays in states' issuance of renewal permits.[5] As proposed, the EPA could invoke its existing permit review and objection authority for permits where a state has delayed issuing a renewal permit.[6]

Under the current regulations, states must submit proposed state permits to the EPA for review and objection prior to the permit becoming effective. The proposed revisions would expand the EPA's review and objection authority to administratively continued permits by revising 40 C.F.R. section 123.44 to allow the EPA to designate certain administratively continued permits as "proposed permits."[7]

The EPA proposes two options for when an administratively continued permit could be designated as "proposed" — after either two years or five years following the expiration of the

original permit term. Since many states do not issue the majority of permit renewals within two years, a five-year trigger would be more appropriate.

The EPA would provide the state and permittee with 180 days' notice of its intent to designate the administratively continued permit as a "proposed" permit, which would transfer permit issuing authority to the EPA. Although the EPA only expects to exercise its new objection authority in limited circumstances, the proposal outlines a wide variety of conditions that would warrant such a review:

- New or revised water quality standards;
- New or revised effluent limitations guidelines;
- Potentially significant impacts to an impaired or threatened water body;
- Potentially significant impacts to a drinking water resource;
- National program priorities (e.g., combined sewer overflow, concentrated animal feeding operations);
- Protection of threatened or endangered species;
- Significant changes to a facility's operations, treatment or effluent characteristics; or
- Public concerns or environmental justice issues.[8]

This proposal has the potential to increase administrative reviews and judicial challenges of permits because states may issue permits prematurely and without adequate support in an effort to avoid the EPA's issuance of renewal permits. The proposal also does not consider the due process implications for permittees who rely on administratively continued permits while their renewal permits are being developed. The proposed rule suggests that draft permits could become "proposed" permits before they have completed the public comment and review process, meaning that permittees would be forced to appeal the EPA's permit actions, rather than submitting comments during the draft permit review process.

401 Certifications

The EPA also proposes revising the regulations that allow federal NPDES permits to be modified after issuance to reflect state administrative or judicial decisions that occur after a state has provided 401 certification for the permit. The proposal is meant to allow anyone to request changes to federal NPDES permits to reflect decisions made by state administrative bodies and courts, even after the permit is issued.

This proposal has significant implications for permittees who rely on federal NPDES permits, such as federal facilities, general permits and all permittees in states that do not have delegated permit programs. The proposal would allow the EPA to reopen the permit and modify it, effectively eliminating any operational predictability inherent in a five-year permit.

Reasonable Potential Determinations

Under the current regulations, NPDES permit writers undertake reasonable potential analyses to determine whether water quality-based effluent limits are necessary to meet applicable water quality standards. However, the EPA found that permitting authorities "often defer the reasonable potential determination ... until a minimum data set has been collected."[9]

To address this, the proposed rule would require that such reasonable potential analyses be based not only on relevant quantitative data, but also "qualitative data, analyses or other valid and representative information" that could support the need for effluent limitations.[10] Under the proposed rule, reasonable potential analyses would now account for "existing controls on both point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the involved species to toxicity testing (when evaluating WET), the use of relevant qualitative or quantitative data, or other information on pollutants or pollutant parameters to assess the need for a water quality-based effluent limitation, and where appropriate, the effluent dilution in the receiving water."[11]

The proposed rule does not further define what might constitute "quantitative data" or "other information" and could lead to arbitrary and inconsistent reasonable potential analyses across permits.

Dilution Allowances

The EPA proposes revisions to 40 C.F.R. Section 122.44(d) to require that dilution allowances must be supported by data or analyses quantifying or accounting for the presence of each assessed pollutant or pollutant parameter in the receiving water.[12] However, the EPA's proposal does not consider the unique perspective of the arid western United States, where receiving waters are often dry, very low-flow or perennial, so the uses to be protected by effluent limits are not consistently attained throughout the year.

Although the proposed rule would allow states to provide an explanation of why ambient pollutant concentration data may not be available, the rule should more clearly provide that discharge allowances may be warranted for discharges to very low-flow or perennial waters.

Entities holding state or federal NPDES permits are encouraged to submit comments on the proposed rulemaking to ensure that the EPA considers a variety of perspectives in finalizing the rule.

—By Ronda L. Sandquist and Christine A. Jochim, Brownstein Hyatt Farber Schreck LLP

Ronda Sandquist is shareholder and Christine Jochim is an associate in Brownstein Hyatt's Denver office.

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[1] 81 Fed. Reg. 31,344 (May 18, 2016).

[2] 81 Fed. Reg. 41,507 (June 27, 2016).

[3] The proposed rule includes other changes not discussed in this article; entities should carefully review and consider the implications of the proposal to their own operations.

[4] 81 Fed. Reg. at 31,356.

[5] Id.

[6] Id.

[7] Id. at 31,368.

[8] Id. at 31,357.

[9] Id.

[10] Id. at 31,354.

[11] Id. See also 81 Fed. Reg. at 31,371.

[12] Id. at 31,353.