
THE USE OF COMPLIANCE SCHEDULES UNDER UNITED STATES ENVIRONMENTAL LAW

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SUMMARY

This paper presents an overview on the use of compliance schedules under various environmental laws administered by the U.S. Environmental Protection Agency (EPA).

Compliance schedules are tools commonly used in the United States to implement environmental laws and achieve expeditious compliance with regulatory requirements. A good working definition of a compliance schedule is found in one of the major U.S. environmental laws, the Clean Air Act. It defines a "Schedule of Compliance" as "a schedule of remedial measures, including an enforceable sequence of action or operations, leading to compliance with an applicable implementation plan, emission limitation, or emission prohibition."¹ In some cases, the authority to use compliance schedules, as well as boundaries on their use, are specifically provided for in the enabling legislation (as in the Clean Air Act noted above). In other cases, they are approved by courts using their equitable powers.

Compliance schedules may be granted generically to an entire sector or class of facilities by law or regulation, in the form of waivers, exemptions or delayed compliance dates. Schedules can also be negotiated and imposed at individual facilities via an enforceable order (judicial Consent Decree² or administrative order) or a permit. Both types of schedules, generic and site-by-site, are useful tools to achieving full compliance and can be used alone or in combination.

When established in the context of an enforcement action, compliance schedules are virtually always used in conjunction with penalties. First, penalties are imposed for the initial violation (i.e., the non-compliance for which the schedule has been established). This penalty has both a gravity based component and an economic benefit component. The penalty amount is designed to both remove any economic benefit that accrued to the violator based on its non-compliance, as well as provide a deterrent to future non-compliance. Secondly, compliance schedules contained in judicial consent decrees or administrative consent agreements routinely include stipulated penalties. These are penalties that the parties agree to for violations of the compliance schedule.

1 INTRODUCTION

Throughout the history of the United States' environmental enforcement program, the government has found negotiated compliance schedules to generally be both a practical and effective mechanism for bringing non-compliant facilities into compliance. As a result, it is now

standard operating practice in the U.S. to undertake negotiations in all civil judicial cases, even before formally filing the enforcement action. Over 95% of EPA's enforcement actions (both judicial and administrative) result in negotiated settlements, many of which contain compliance schedules. Due to the success of negotiated agreements, the U.S. often begins negotiations earlier and earlier in the enforcement/compliance process. Although negotiating compliance schedules can be a time consuming endeavor, if the end result is a solution that all parties have agreed to, the up front investment of time will usually be well worth it.³

1.1 Purpose of compliance schedules

Compliance schedules provide an adjustment period for affected polluters to comply with laws and regulations. The principle advantage of compliance schedules is that they bring those who cannot meet pollution control standards within the regulatory framework. For example, under an inflexible regulatory system with one maximum pollution level, those companies lacking the resources and the technology to comply with the law may make no effort to reduce emissions. The company has no hope of receiving a permit from the government, so it will continue to pollute at high levels without a permit. Alternatively, the company will close down - permanently, or at least until they can comply with the new standards. In contrast, through a compliance schedule, the government can grant a permit to a company that provides a step by step plan for reducing a company's emissions. The company gains from the compliance schedule because its emissions are now permitted while it is coming into compliance, and it continues to generate revenues which can be used to make necessary environmental improvements. The government gains because the company's emissions are now monitored and the company is obligated to make measurable, incremental progress towards reducing emissions in the future. And the community gains: economically from an operating company that provides jobs and other benefits, and environmentally by the company's commitment to achieve full compliance while protecting the environment to the greatest extent possible as it does so.

1.2 Concerns with using Compliance Schedules

There are, however, some concerns with using compliance schedules. Compliance schedules must strictly be used to bring companies into compliance by improving environmental performance. They should not provide a means for firms with existing permits to increase their emissions or stay in out of compliance without making improvements. Compliance schedules should require that compliance be achieved as expeditiously as possible and that public health and the environment be protected to the maximum extent possible in the interim. Governments must have the authority to require companies seeking compliance schedules to produce evidence of their inability to comply immediately. Such evidence may include financial records (including tax returns), documentation of efforts to obtain necessary services or equipment to meet the requirements, and feasibility studies or other indicia of attempts to come into compliance. Also, similar companies must be treated the same - the level playing field. The government could award an economic advantage to a company by granting a compliance schedule, while holding its competitors to more stringent environmental controls. Penalties should be used in conjunction with compliance schedules to offset any economic advantage gained.

1.3 Legal limits on use of Compliance Schedules

Another possible concern with compliance schedules is the potential for abuse. To prevent abuse, laws may place limits on the use of compliance schedules, controlling their conditions and duration. In the Clean Air Act (CAA), the U.S. Congress specifically provides for the use of generic compliance schedules.⁵ Existing sources may receive a one year extension for complying with technology-based Maximum Achievable Control Technology (MACT) standards if this time is necessary for the installation of emission controls. Any stationary source may obtain an exemption from either the MACT or health-based standard if the government finds that the technology necessary to meet the standard is not available and it is in the national security interest of the country to grant the exemption. This exemption is renewable but the maximum period of non-compliance is four years.

The CAA also uses compliance extensions as an incentive for industry to achieve early, voluntary reductions in emissions.⁶ The Act allows sources a six year compliance extension if the owner/operator voluntarily achieves a reduction in emissions of 90% or more (calculated from a base year no earlier than 1987), prior to the issuance of an applicable draft standard.

In addition to these statutorily provided generic compliance extensions, the enforcement provisions of the CAA also authorize the use of individual, case-by-case compliance schedules. The provision in that Act that grants administrative order authority requires that EPA, in its administrative orders, specify a time for compliance that is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply.⁷ Administrative orders must require compliance "as expeditiously as practicable". Furthermore, administrative orders can only include compliance schedules of up to one year in duration (and are not renewable). If compliance will take longer than one year to achieve, EPA, working with the Department of Justice, must invoke the court's jurisdiction and use a judicial action to take its enforcement action.

2 COMPLIANCE BY MUNICIPALITIES WITH WATER LAWS

Seeking compliance by municipalities with drinking water and wastewater requirements has always posed difficult and unique problems in the United States. Municipalities often lack the financial capability to comply, but since the provision of drinking water and wastewater treatment is critical, a forced shut down of operations is not a realistic option. As a result, this is an area where both types of compliance schedules (generic and site-by-site) have frequently been used.

2.1 Compliance with the Clean Water Act

EPA has enforced the Clean Water Act's (CWA) requirements for municipal wastewater treatment plants primarily through the use of judicial actions, even though the law provides EPA with the authority to issue administrative orders with compliance schedules.⁸ Specifically, EPA enters into negotiated, court sanctioned consent decrees with noncompliant communities setting forth mandatory schedules of compliance. These schedules may extend for many, many years depending on the extent of the problem and the financial wherewithal of the non-compliant community.⁹ Unfortunately, slippage from compliance schedules is relatively common and courts are sometimes asked to unilaterally modify existing consent decrees by the non-compliant party. Generally, courts are reluctant to grant such requests¹⁰ since the consent decrees were freely entered into by the involved parties. In the case of U.S. v. City of Providence, the municipality sought to unilaterally modify a compliance schedule concerning

their wastewater treatment plant in a consent decree it had negotiated with EPA and the state environmental agency. The court denied the municipality's request, basing its decision on an analysis set forth in a U.S. Supreme Court decision.¹¹ Its conclusion was that any unilateral modification must meet a stringent two-pronged test: 1) the modification must relate prospectively and not relate to "rights fully accrued upon facts so nearly permanent as to be substantially impervious to change" and 2) that because of changing circumstances, the original consent decree has become "an instrument of wrong." This decision demonstrates courts' reluctance to later unilaterally modify signed and in-place agreements willingly entered into between parties.

2.2 Compliance with the Safe Drinking Water Act

The Safe Drinking Water Act provides for statutory variances and exemptions, with schedules of compliance, for communities that cannot meet drinking water regulations.¹² For example, a community may be granted a variance from a maximum contaminant level (MCL) if, after trying "best technology..." (taking cost into consideration) it is unable to come into compliance. In order to grant the variance, EPA or the State must find that the variance will not result in "an unreasonable risk to health". The variance must include a schedule for compliance, setting forth increments of progress. Noncompliance with a variance will result in enforcement of the schedule under the general enforcement authorities of the Act.

Similarly, public water supply systems may be granted an exemption from an MCL if the State finds that: 1) due to compelling factors (including economic factors), the system is unable to comply, 2) the system was in operation when the MCL requirement became effective, or if the system was not in operation by that date, no reasonable alternative source of drinking water is available, and 3) the granting of the exemption will not result in an unreasonable risk to health. Again, with the granting of the exemption the State must prescribe a schedule for compliance and any necessary interim control measures. The statute requires compliance with the requirement for which an exemption is granted "as expeditiously as practicable"¹³ and provides some limits on the length of the schedule. Generally, noncompliance with the exemption will result in its revocation. However, EPA or the State can extend the final date for compliance beyond even the statutory limit if: 1) the system must make capital improvements which can not be completed within the exception period, or 2) the system needs financial assistance in order to comply and has entered into an agreement to obtain such assistance, or 3) the system has entered into an agreement to become part of a regionalized water system and is taking all practicable steps to meet the standards. Very small systems (i.e., those with less than 500 service connections) may obtain additional extensions.

3 COMPLIANCE SCHEDULES TO PROTECT UNDERGROUND SOURCES OF DRINKING WATER

The Safe Drinking Water Act is also designed to protect present and future underground sources of drinking water (USDW)¹⁴. The underground injection control program (UIC) controls the subsurface placement of fluids through wells. There are various classes of wells, the most numerous being Class V. Class V wells (commonly known as "5x28 injection wells") are shallow wells, including drainage wells, septic tank drain fields and/or cesspools.

In 1991, EPA settled a national action against ten major oil companies who discharged or spilled contaminated automobile servicing fluids (e.g., waste oil, antifreeze) into sinks and floor drains that were connected to Class V wells. These wells allowed the discharge of contaminated fluids directly into or above a USDW, in violation of UIC regulations. Using an Administrative

Order on Consent¹⁵ (see Appendix 1), EPA required the ten companies to cease injection of contaminated fluids by a specified date. While there was no estimate of the reduction in contaminants discharged, assuming each well discharged only 2 gallons/day, this would amount to a reduction of over 940,000 gallons per year of contaminated fluids from reaching any USDWs.

The ten companies agreed to the settlement which required them to cease discharge, properly plug and abandon their injection wells, remove any contaminated soil, implement waste minimization at all facilities covered by the order where routine vehicle maintenance was being performed, provide EPA with detailed inventory information, provide EPA with quarterly progress reports, distribute an EPA pamphlet to their customers, and pay a penalty. These activities were to be accomplished largely under a detailed compliance schedule set out in the order. All wells were to have been closed by December 31, 1993. Certification of full compliance with all order requirements was required by March 31, 1994. The companies met this requirement for all but 6 wells out of 1288 wells closed.

This action resulted in the closure of Class V injection wells in 49 States, including States where EPA directly implements the UIC program and States which had been delegated primary enforcement authority for the UIC program. It required considerable cooperation among the States and EPA to reach agreement on the requirement for a generic 5X28 well closure plan. This plan now serves as a model for the industry and has been incorporated as an industry standard by the American Petroleum Institute (API).

4 COMPLIANCE SCHEDULES FOR HAZARDOUS WASTE UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT

In implementing the Resource Conservation and Recovery Act (RCRA), the law that governs "cradle to grave" management of hazardous waste, EPA has used individual compliance schedules in both permits and orders. The statute specifically states that EPA has the authority to issue orders requiring compliance immediately or within a specified time period, without placing any additional limitations or conditions on the use of compliance schedules.¹⁶ Compliance schedules in orders are often used when a requirement cannot be implemented quickly. Examples include hydrogeologic study and the installation of ground water monitoring wells, as well as remediation of soil or ground water contamination. However, they have also been used to provide more time for a facility to come into compliance when their good faith efforts to comply have not been fruitful. For example, compliance schedules have been used to provide more time to facilities that were unable to obtain required liability insurance by the deadline for so doing, despite good faith efforts. This particular situation posed a real dilemma for EPA because even after time extensions, some facilities never were able to obtain the mandated liability insurance, i.e., no insurance company was willing to insure them. EPA was faced with changing its regulations to delete the requirement or closing down hazardous waste management facilities. Ultimately, despite a great deal of negative political reaction, EPA did shut down some facilities that never were able to obtain liability insurance. However, in most cases, their inability to obtain insurance was related to their prior poor waste management practices, weak financial condition or poor physical location. Thus, ultimately, this effort was viewed as a success in that it shut down many marginal operations.

Compliance schedules under RCRA provide needed flexibility to resolve outstanding non-compliance while maintaining governmental control to ensure that compliance is achieved in an expeditious manner with little, if any, economic benefit derived from the non-compliance. One such instance involves a complex judicial RCRA case the government initiated against the

Eastman Kodak Company. This case concerned Kodak Park, in Rochester, New York, the principal manufacturing facility of the Eastman Kodak Company. Kodak Park is a large integrated manufacturing plant producing films, papers, light filters and processing chemicals, synthetic organic chemicals, laboratory and research chemicals, food supplements, photographic equipment and related materials. There were a total of thirty-four RCRA claims alleged by the government that occurred at Kodak Park and its associated waste water treatment plant at King's Landing. The violations included, in part, failure to obtain a permit for hazardous waste incinerators, illegal disposal of hazardous waste (e.g., release of hazardous waste from the Kodak Park industrial sewer), illegal exportation of hazardous waste, illegal storage of hazardous waste and failure to properly identify hazardous waste. After intense negotiations with Kodak prior to filing an enforcement action, the parties entered into a Consent Decree which included extensive injunctive relief.

The injunctive relief required under the Kodak Consent Decree focused on: (1) Kodak's RCRA hazardous waste determinations, (2) the inspection and repair of the industrial sewer system, (3) the upgrade, permitting and/or closure of several hazardous waste incinerators, and (4) ash management at the facility. The comprehensive attachments to the Consent Decree set forth the type of injunctive relief required as well as the compliance schedules (see Appendix 2). The compliance schedules not only cover when work will need to be completed but also covers reporting requirements and procedural deadlines for such requests as modifications to the work schedule. Additionally, the Consent Decree in Section XV specifies that stipulated penalties are owed to the United States for failure to comply with the requirements of the Consent Decree including the compliance schedules. This balance of compliance schedules, reporting requirements and stipulated penalties ensures the government of timely compliance while providing Kodak with an incentive for achieving that goal.

Although not specifically addressed in the Statute, regulations promulgated under RCRA¹⁷ have sanctioned the use of compliance schedules in hazardous waste management facility permits. Compliance schedules in permits have been used to upgrade facilities meeting less stringent pre-permitting standards to more stringent permit standards. (For facilities not meeting even the less stringent pre-permit standards, enforceable orders, possibly with compliance schedules, are used and permit issuance is delayed). The regulations specify that schedules of compliance shall require compliance as soon as possible. If the schedule exceeds one year, interim deadlines must be specified and reports on progress must be submitted by the permittee. Guidance on the use of compliance schedules in hazardous waste facility permits states that they can only be used where: 1) the permittee has satisfied all the informational requirements to obtain a permit, 2) the government permit writer has sufficient information to assess the adequacy of the design, construction and operating details of the work to be completed under the compliance schedule, 3) the compliance schedule is specific as to what is to be done, who is responsible for seeing that activities are completed, and when those activities are to be completed and 4) the public has a full opportunity for notice and comment.¹⁸ In addition to this limited use of compliance schedules in permits to upgrade facilities to more stringent operating standards, compliance schedules are widely used in permits to impose long term remediation requirements (i.e., removal of contaminated soil, pump and treat groundwater, construction of landfill caps, etc). Such schedules may extend five to ten years or longer and have been an effective mechanism for obtaining long term, broad scope clean-ups.

5 CONCLUSION

EPA has found compliance schedules to be very useful tools in bringing about compliance with environmental standards. In many cases, it has been necessary and desirable to have both generic and site-by-site compliance schedules. When used in conjunction with an enforcement action, compliance schedules can and should be used with penalties to avoid giving a company an economic benefit over its competitors. Governments may find it useful and appropriate to set some limits on the use of compliance schedules in order to limit the length and scope of negotiation, avoid giving some companies disproportionate advantages, prevent abuses of discretion, and assure equal environmental protection throughout a country. However, even where they've been used with few limitations in the U.S., negotiated compliance schedules have proven to be an effective and efficient mechanism to balance the need to provide industry reasonable flexibility to meet standards with the Government's interest in achieving speedy compliance with environmental standards.

ENDNOTES

Even where statutes don't specify negotiation timeframes, EPA and the U.S. Department of Justice (DOJ) often find it helpful to set guidelines describing appropriate negotiation timelines. While these are not generally mandatory, they do provide a helpful check to assure that negotiations do not become a tool for delay by the defendant.

1. 42 United States Code (U.S.C.) § 7412(i)
2. Consent decrees are agreements negotiated by the parties in dispute, that the court sanctions and enforces.
3. Negotiation timeframes are sometimes specified in the implementing legislation. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the U.S. law that addresses cleanup of toxic waste sites, specifies that if U.S. government enters into settlement negotiations with potentially liable parties, it must provide them a period of 120 days to negotiate before the government can issue a unilateral enforcement order. 42 U.S.C. § 9622 (e)(2)⁴ The alternative in the U.S. -- litigation -- is almost always more time consuming and more resource intensive.
4. 42 U.S.C § 9622(e)(2)
5. 42 U.S.C. § 7661(3)
6. 42 U.S.C. § 7412(i)
7. 42 U.S.C. § 7413(a)(4)
8. 33 U.S.C. § 319(a)(2)(A)
9. See e.g., 930 F.2nd 132 (1st Cir. 1991) (ordering a 15-year compliance schedule over the discharge of raw sewage into Boston Harbor).
10. See e.g., U.S. v. City of Providence, 492 F. Supp. 602 (D.R.I. 1980), where the court held that any departure from the terms of the consent decree "must be based on solid reason".
11. U.S. v. Swift & Co. 286 U.S.106(1932)

12. 42 U.S.C. § 300(g)
13. 42 U.S.C. § 300(g)
14. 42 U.S.C. § 300(h) and implementing regs: 40 Code of Federal Regulations (C.F.R.) Parts 124, 144, 146, & 147
15. While only one order is attached in the appendix, all the orders were substantially identical, the differences reflecting the different geographical locations of the company's business activities.
16. 42 U.S.C. § 6928 (a). Section 6928 (c) provides for penalties of up to \$25,000 per day and permit revocation or suspension for failure to comply with a compliance schedule.
17. 40 C.F.R. 270.33
18. Memo from Bruce R. Weddle, Use of Compliance Schedules in RCRA Permits, Oct. 5, 1984.