

Application of Temporary Modifications to Stream Standards

Changes to the Basic Standard have initiated a discussion regarding how temporary modifications to stream standards should be used. In 2000, the Commission added “type iii” temporary modifications to section 31.7(3) to recognize that uncertainty regarding the underlying standard was an appropriate use of temporary modifications (see Statement of Basis, Regulation No 31, at section 31.37, IV C, approximately page 140). In 2005, the Commission further revised section 31.7 to remove the distinction between the types of temporary modifications, clarify the durations of temporary modifications, and institute an annual review of temporary modifications. One of the primary purposes of these revisions was to focus attention on ending the need for the temporary modification as soon as possible (see Statement of Basis, Regulation No 31, 31.44, I. D, approximately page 159). These revisions resulted in a significant change in the Division’s approach to temporary modifications.

In the last few years, the Division has implemented the revised provisions both in the regularly scheduled basin hearings and in the new annual temporary modification review hearings. Various parties have expressed concern about the new practices. The Division brought this issue to the Standards Framework Work Group to increase the dialogue and explore whether further regulatory changes should be pursued at the 2010 Basic Standards rulemaking hearing.

This issue was discussed at the August 2007 Standards Framework Work Group meeting and the Division asked for written comments. After review of these comments as well as internal discussion the Division’s current thinking is summarized below:

A. Application of Temporary Modifications

The Division continues to believe that temporary modifications are an important and useful water quality standards tool. The benefits of recognizing a short-term need for flexibility in the standards system are evident specifically where there are permitted dischargers on the segment.

~~1. Where there are point sources:~~

The only regulatory result of a temporary modification is that a permit written for discharges to a segment with a type iii temporary modification does not need to assure that limits based on underlying standards are in effect before the underlying uncertainty regarding those standards is resolved. ~~Since T~~temporary modifications have no impact on other aspects of Colorado’s water quality management program such as the 303(d) list, the Non-point Source Program or the TMDL Program. ~~Therefore,~~ the Division will only propose temporary modifications where a compliance schedule is inadequate to handle the issues and there are permitted dischargers that have or may have reasonable potential to discharge the pollutant of concern, one of the three types of uncertainty is present, as discussed below.

~~2. Provide time to resolve one of three types of uncertainty.~~ There seem to be three general sorts of uncertainty that could warrant a temporary modification: one hinges on whether there is uncertainty about the underlying standard; another hinges on uncertainty about whether the sources can be controlled; the third is uncertainty about the timing of implementing attainable source control (treatment).

1a. Provide time to determine what criteria is necessary to protect the use: There are situations where different criteria may be appropriate to protect the use, for instance a recalculation procedure might be developed to provide new site-specific criteria. A temporary modification would provide relaxed effluent limits (i.e. less stringent than the underlying standards) during the time the alternate criteria are being developed.

2b. Provide time to determine whether the sources are correctable: A second standards-based type related-of situation is where at least some of the sources are believed to be natural and/or human-induced irreversible. In this case, a temporary modification would provide relaxed effluent limits (i.e. less stringent than the underlying standards) during the time that the sources were being investigated. Ambient-based standards or site-specific standards that recognize uncorrectable sources might be warranted.

3e. Provide time to determine how additional treatment will be provided: A third type of uncertainty can still be present once the correct standard has been determined and the responsible sources have been identified. Examples of this sort of uncertainty include but are not limited to:

- A point source may need time to determine whether ~~appropriate~~ proven e treatment technology is readily available.
 - Situations where either an adaptive management strategy or experimental pollution controls are to be implemented (i.e. there are significant uncertainties regarding the effectiveness of the controls to be implemented.)
 - A point source may need time to address and/or when funding will be available to financial uncertainties such as those resulting from TABOR restrictions. ~~e the improved treatment.~~
 - Certain basin-wide water quality problems exist where there is a point source discharge compliance problem, but solving the ambient water quality problem is dependent primarily on implementation of control on nonpoint sources and the timeline for correcting the problem is greater than 10 years.
- In ~~these~~ is cases, a temporary modification would provide relaxed effluent limits (i.e. less stringent than the underlying standards) during the time that the treatment solutions were being evaluated.

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[The Division has had internal discussions about adding a fourth category that would provide time to determine what portion of the pollution is contributed by point versus non-point sources. One question that came up is whether that sort of uncertainty would result in an unreasonable outcome for the point sources unless they were protected by a temporary modification. Another question is whether the answer is different if the impairment is caused by “load” exceedances rather than concentration exceedances, (e.g. nutrient enrichment of a lake or reservoir). After thinking about it, we are inclined to say that we do not need the 4th category, because if we are certain about the standard, that implies that the non-point source contributions are correctable. That means the underlying standards are attainable and unless the point source needs time under category “c”, it should be able to provide reduction of it’s

portion with a compliance schedule. The Division welcomes further discussion as we move closer to the 2010 rulemaking hearing.]

B. Nexus with Permit Compliance Schedules

During the time that Colorado's temporary modifications regulatory provisions have been changing, EPA has also revised its policy regarding permit compliance schedules. Previously, it was thought that compliance schedules could be no longer than the term of the permit. This meant that attainment of underlying water quality standards had to occur by the end of the five-year permit term. Now, EPA has clarified the situation, and says that compliance schedules can extend past the end of the permit term.

Concerns have been raised by dischargers about reliance on new EPA policy regarding the length of compliance schedules. Some dischargers feel that temporary modifications provide a level of certainty that is absent with compliance schedules.

The above approach for application of temporary modifications would generally result in adoption of a temporary modification where there is uncertainty that could require additional time for the permittee to develop ~~and implement~~ a plan to attain compliance with an effluent limit based on the underlying standard. Where a temporary modification is not adopted, the Division believes that the permittee should provide documentation of milestones and associated time (maximum of one year apart) needed to comply with standards-based limits as soon as possible. Once the permittee's proposal is acceptable to the Division, this information would form the basis for a compliance schedule that would be included in the permit and which could extend beyond the term of the permit. Should the permittee not provide a schedule, the Division will develop a schedule based on its professional judgment.

C. Annual Review Hearing

Stakeholders and the Division have voiced concerns about the redundancy and the workload associated with the annual hearing to examine temporary modifications that expire in the next two years. For temporary modifications that are set to expire in phase with their basin hearing, the second annual hearing comes one month after the Issues Formulation Hearing for that basin.

The Division's experience with the annual hearing is that it does succeed in focusing attention on resolving the uncertainty and in some cases it does spur progress. However, it seems that this function could probably be accomplished with the hearing that is two years out from the expiration date. The second hearing could probably be dropped without reducing the effectiveness of the focused review.

D. Proposed Regulatory Changes

Since the current regulatory language is discretionary ("may" and not "shall"), the Division does not believe there is a reason to seek changes to the language at 31.7 before the 2010 Basic Standards hearing. The Division will continue to refine how it proposes temporary modifications

in the next two years' basin hearings (Regulation Nos. 33, 37, and 38) in accordance with number 1 above. The Division will consider proposing the following changes for 2010:

- Replace the three types of temporary modifications with a three-part uncertainty test (see section A above)
- Specify that the annual review will consider temporary modifications that are two years out from expiration, not both two and one year out.