

WET Enforcement Response Strategy

Chronic Toxicity Limits:

1. Modify the current permitting strategy to eliminate Pass/Fail Chronic and “Phase II” permit limits in favor of new chronic permit language (attached). It is recommended those facility permits currently assigned Phase II language (there are 9) be immediately modified to the new language. Otherwise, conversion would occur upon permit renewal unless a permit modification was requested by the permittee.
2. Critical elements of the new language are:
 - First test of the quarter can be a Pass/Fail or ChV test.
 - If failed or ChV lower than limit, a Notice of Violation (NOV) is issued and at least two ChV tests (one per month) are required over the following two months. As many analyses as can be completed will be accepted.
 - Civil penalty assessment for the three-month period will be determined based on the average of the follow-up ChV tests.
3. Each test result will be evaluated for compliance.

Conversion to the new language of all permits currently with chronic Pass/Fail limits will take approximately five years. In the meantime, it is recommended enforcement response evaluation of facilities with chronic Pass/Fail limits occur as follows:

1. Upon failure of a pass/fail test, the facility will be issued a NOV and informed of the opportunity to perform as many ChV chronic tests as reasonable over the following two months. This will give the facility the opportunity to average chronic values (ChVs) for the period and influence the Division’s enforcement response. It is recommended that the chronic values of the follow-up tests be averaged. A civil penalty would be issued if the average ChV is below the permit limit. The initial test will not be considered in the civil penalty determination. Facilities issued a civil penalty would also be advised of the availability of regulatory relief via Special Orders by Consent (SOCs).
2. Facilities choosing to perform a Pass/Fail test in follow-up to an initial failure will be assessed for the noncompliance. If the follow-up test results in a Pass, the facility will be back in compliance and will not be required to monitor again until the next permit-specified month. A facility which chooses to respond repeatedly to failed quarterly or monthly tests with pass/fail testing (as allowed in their NPDES permit), risks the issuance of a NOV and a civil penalty for every failed test.

Comments:

- There will be a significant number of permits with chronic pass/fail limits for some time. The above strategy gives those facilities the opportunity to influence the Division's enforcement response over a three-month period. Additional testing will serve to restrict the time period any potential environmental harm that may have occurred due to the initial test failure as well as characterize the severity of any recurring toxicity. If the facility chooses not to conduct the additional ChV tests, it will be assessed a civil penalty.
- The strategy achieves the Division's initial WET enforcement strategy goal of being more aggressive with civil penalties than the current policy.
- The strategy will be more in line with EPA's recommendations in that it encourages a monitoring regime under which there would be no assessment of single failures to meet limits for chronic toxicity in the absence of environmental harm.
- The strategy addresses the regulated community's concerns with transient chronic toxicity events.
- The complexity of the program will decrease as permits are renewed with the new permit language.
- The strategy retains the option for facilities routinely in compliance to perform pass/fail testing and retain the economic benefit of that strategy.

Acute Toxicity Limits:

1. Evaluate compliance for each test.
2. Send an NOV for each limit violation.
3. Assess a civil penalty for any two consecutive violations.

Comments:

- The area of the receiving stream affected by an acute noncompliance is restricted to the immediate area of the discharge; therefore, a smaller assessment amount is warranted.
- Observed instream effects may warrant higher penalties.

General Comments:

- Assessment amounts will be determined by the Division.

- There will be a need for a major education effort for DWQ personnel, the regulated community, and laboratory personnel.
- There will be a need for an implementation period for the education to occur and DWQ to make the appropriate modifications to its tracking mechanisms.