
December 2013

Writing terms and condition in permits pursuant to the Environmental Code – a problem within the case law

In 2009¹ the Land and Environment Court of Appeal revised its previously established case law concerning the wording of conditions in permits pursuant to the Environmental Code. The revision consisted of the discarding of the terms "guideline value" (sw. riktvärde) and "limitation value" (sw. gränsvärde) and replacing them with the term "restriction value" (sw. begränsningsvärde). The purpose was to illustrate the fact that violation of conditions in environmental permits are illegal. According to the Land and Environment Court of Appeal violations of guideline values had always been illegal, but since case law had evolved in another direction, where the application of the term no longer served this purpose, the court wanted to make a statement by introducing a new term.

Case law prior to 2009 thus implied that occasional infringements of guideline values would not automatically result in prosecution. This pragmatic view left much of the considerations regarding legal proceedings in connection with a violation to the discretion of the operator and the supervisory authority. Opponents of this view argued that it did not provide the operator with an incentive to comply with the conditions. This article, however, does not aspire to take position in this particular debate. It will instead focus on an occasion where the new term restriction value will be too blunt. As a consequence this may result in that conditions with higher content levels of contaminating substances are being set than what would be the case with the use of the now discarded terms guideline value and limitation value.

Content conditions are often set as daily, weekly, monthly or yearly average values. More often they refer to weight per cubic measures, e.g. kilogram per liter (kg/l). The content conditions which I have encountered, and where these particular problems have arisen, are conditions which regulate emissions to water or allowed contamination contents in condensation water. An example of such a condition would be *the content of cadmium in the water emitted, after the internal cleaning process, must not have a higher concentration than 0.05 mg/l measured as a restriction value and monthly average value.*

¹MÖD 2009:2 and MÖD 2009:9. Subsequent rulings have confirmed this case law, inter alia MÖD 2009:49

December 2013
Writing terms and condition in permits pursuant to the Environmental Code – a problem within the case law

In my opinion the restriction value in its classic sense should not be used in circumstances of really low concentrations of contamination. The situation I refer to is when there are such low concentrations that accredited laboratories, which analyze the water samples, no longer can measure the results with a certain accuracy, i.e. such low concentrations that the reporting limit (or the “detection limit”, if that term is preferred) has been reached. The problem arises since violation of a restriction value condition leads to direct legal action from the supervisory authority. But how will you know if the condition has been violated if the measuring uncertainty is as high as maybe fifty per cent?

An operator could previously accept a condition with a lower content as guideline value and a higher content as limitation value, and this was usually the way the conditions were constructed. Upon violation of the guideline value, which is often an indication of something being wrong in the production or in the cleaning equipment or process, the supervisory authority were to be contacted and measures would be taken to prevent a reoccurrence. At present a violation of a restriction value must be reported and the supervisory authority is obligated to pass on the matter to an environmental prosecutor.

A condition must be clearly and distinctly defined. The expectations on the operator must be clear and it must be obvious when the condition has been violated. This is stated, among other rulings, by the Supreme Court’s ruling no NJA 2006 page 310. Thus, when we propose conditions on our clients’ behalf we set them as low as possible in consideration of what is environmentally motivated and financially reasonable. We must however also take into account above mentioned rulings. If the report limit is too high and the measurement uncertainty too high, we cannot set such low concentration conditions as previously, when we were applying the guideline and limitation value construction. This results in us proposing conditions which are higher than the client actually is capable of keeping. Unfortunately it sometimes also results in - which naturally can be an affront to people - that upon reapplication for environmental permits higher content conditions are set than those previously applicable for the operations.

Attempts have been made on either side, by both operators and authorities, to write conditions which mitigate the effects of the restriction value model. So far the Land and Environment Court of Appeal have been hesitant to accept these attempts. Gradually, however, case law seems to allow certain reliefs. The Land and Environment Court of Appeal’s current ruling of November 15, 2013, case No M 3695-13, laid down a condition to the effect that merely a certain part of

December 2013**Writing terms and condition in permits pursuant to the Environmental Code – a problem within the case law**

the monthly average values during a calendar year must be under the restriction value and also a condition purporting that measures should be taken upon violation of the condition. In the current conflict between report limit and content level, these rulings present no significant relief, since the problem is to know when you exceed the concentration.

In conclusion; the rulings of 2009 served as guidance and were partly required since the conditions are sanctioned. However, it must be observed that conditions must be easy to understand and to control and also that methods of control involve a certain measurement uncertainty. This uncertainty must be balanced by a reasonable wording of the conditions. Often it is possible to reach creative and sustainable solutions when discussing conditions. But in order to succeed all parts must be aware of the problems at hand. If an operator only emits low concentrations and if the operator can prove a certain measurement uncertainty, then it should be allowed to deviate from the rulings of 2009 and use more guideline-based conditions.



Daniel Drott,
Senior Associate / Advokat