In the Matter of Star-Kist Caribe, Inc. , 3 E.A.D. 172; 1990 EPA App. LEXIS 45

United States Environmental Protection Agency Environmental Appeals Board

April 16, 1990

NPDES Appeal No. 88-5 NPDES Permit No. PR0022012

Reporter
3 E.A.D. 172 *; 1990 EPA App. LEXIS 45 **

In the Matter of Star-Kist Caribe, Inc.

Prior History:

In the Matter of Star-Kist Caribe, Inc., 1989 EPA App. LEXIS 38 (E.P.A., 1989)

Core Terms

compliance, schedules, state water, quality standards, water quality standards, stringent, timetable, Clean Water Act, limitations, deadline, regulations, discharges, permits, pollutant, revised, certification, memorandum, authorize, permittee, post-July, petition for reconsideration, effluent limitation, water quality, state law, pre-July

Panel: [1]** William K. Reilly, Administrator

Opinion

ORDER ON PETITION FOR RECONSIDERATION

[*172] On June 1, 1989, EPA Region II filed a Petition for Reconsideration of the Chief Judicial Officer's (CJO's) March 8, 1989 Order Denying Petition for Review. [1] In that order, the CJO upheld the Regional Administrator's denial of an evidentiary hearing on the issue of whether Star-Kist Caribe was entitled to a schedule of compliance in its NPDES permit that would allow it to delay compliance with applicable water-quality-based effluent limitations, i.e., those established pursuant to § 301(b)(1)(C) of the Clean Water Act to ensure that pollutant discharges from the facility will meet state water quality standards. The Regional Administrator had refused Star-Kist's request to include such a schedule in the permit. In its petition for reconsideration, Region II does not contest the CJO's ultimate conclusion -- i.e., that the Regional Administrator's denial of the request for the schedule of compliance was proper. Instead, Region II argues that the CJO's ruling was too broad and went beyond the arguments presented in the case. Specifically, the CJO had ruled that § 301(b)(1)(C) of the Act barred EPA from **[**2]** including such a schedule in the permit, since it would extend compliance with applicable water quality standards beyond the July 1, 1977 statutory deadline. That section of the Act provides as follows:

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[1] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

The petition for reconsideration is signed by representatives of the Agency's Office of the General Counsel (Headquarters) and Region II's Office of Regional Counsel.

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[§ 301](b) Timetable for achievement of objectives

[*173] In order to carry out the objective of this chapter there shall be achieved --

* * *

[(1)](C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1311(b)(1)(C). Region II requests that the **[**3]** CJO's opinion be modified to delete the discussion concerning compliance dates for post-July 1, 1977 state water quality standards or, alternatively, that the opinion be modified to make it clear that the Clean Water Act does not categorically prohibit schedules of compliance for meeting such standards. In its response to Region II's Petition for Reconsideration, Star-Kist concurs with Region II's assertion that the March 8, 1989 ruling was too broad, and argues further that upon reconsideration its request for an evidentiary hearing should be granted. [2]

[4]**

Based on Region II's Petition for Reconsideration and attachments, it has become apparent that, for some time now, the policy and practice of the Agency's Office of Water has been to include, in some permits, so-called "schedules of compliance" [3] containing interim **[*174]** effluent limitations that do not "meet" applicable, post-July 1, 1977 state water quality standards. These schedules allow the discharger to postpone immediate compliance with more stringent effluent limitations specifically tailored to meet the applicable state water quality standards. By allowing the discharger to phase in compliance over time, the interim limitations implicitly sanction pollutant discharges that violate applicable state water quality standards.

[5]**

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[2] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

On June 27, 1989, the Region filed a reply to Star-Kist's response, opposing Star-Kist's argument that its request for an evidentiary hearing should be granted. In its reply, Region II contends that compliance schedules may be considered only where the water quality standards at issue are adopted, or in some instances, newly interpreted, after the statutory deadline. Because the standards at issue here were not newly adopted or interpreted after the July 1, 1977 deadline, Region II reasons, it may not consider a schedule of compliance. I do not concur with Region II's unqualified assertion that the Clean Water Act allows it to establish compliance schedules for post-July 1, 1977 standards. Nevertheless, as this decision intends to make clear, the Region is correct that it would not be appropriate to establish a schedule of compliance here because the water quality standards at issue are virtually identical to those that existed prior to July 1, 1977.

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[3] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

The Clean Water Act defines "schedule of compliance" in Section 502(17):

The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

33 U.S.C.A. § 1362(17). It is unclear whether the Office of Water is intending to use the term in any strict statutory sense.

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The only direct legal authority relied upon by the Office of Water in support of these schedules of compliance is a 1978 memorandum from an EPA Associate General Counsel (Water and Waste Division). [4] The following excerpt from the memorandum (at 4-5), as quoted by the Region, contains the entire analysis of the issue:

The Act establishes the end date [July 1, 1977] for the first stages of WQS [water quality standard] compliance, but for subsequent levels of possibly more stringent WQS, the Act defers to State planning determinations * * *. However, if the State plans do not contain specific compliance schedules, the EPA permit writer must establish the source's Phase II WQS compliance schedule.

The Act supplies no express guidance as to what the EPA-determined, post-1977 WQS compliance schedule should be. In general, Congress intended compliance with the Act's requirements to occur at the earliest practicable time. One option, therefore, might be for EPA simply to establish the policy that post-1977 compliance must be achieved by the earliest practicable time.

[6]**

The conclusion reached in the memorandum thus rests on a single proposition, namely, that the Act does not specify a fixed deadline for compliance with state water quality standards after July 1, 1977, and therefore EPA should be free to add schedules as it sees fit, subject only to a self-imposed "earliest practicable time" deadline. The Region's reconsideration request, although more detailed than **[*175]** the memorandum, basically relies on the same reasoning for its analysis and defense of post-July 1, 1977 compliance schedules.

Despite the long-standing practice of the Office of Water and the reliance it has placed on the memorandum, I cannot concur in either the practice or the memorandum. I agree with the CJO's conclusion that the Clean Water Act does not authorize EPA to establish schedules of compliance in the permit that would sanction pollutant discharges that do not meet applicable state water quality standards. In my opinion, the only instance in which the permit may lawfully authorize a permittee to delay compliance after July 1, 1977, pursuant to a schedule of compliance, is when the water quality standard itself (or the State's implementing regulations) can be fairly **[**7]** construed as authorizing a schedule of compliance. The Agency's powers in this respect, as discussed below, are no greater than the States'. Thus, the Associate General Counsel was in error in concluding that EPA could establish schedules of compliance "if the State plans do not contain specific compliance schedules * * *." If, on the other hand, a schedule of compliance is authorized by the State program, EPA's inclusion of interim limitations pursuant to the schedule would be fully consistent with, and therefore "meet," the requirements of the state water quality standard as contemplated by § 301(b)(1)(C). [5] In the present case, however, there is no indication from the record before me that Puerto Rico's water quality standards authorize any such schedules of compliance. [6]

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[4] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

Memorandum from James A. Rogers, Associate General Counsel, Water and Solid Waste Division, to the Deputy Assistant Administrator for Water Enforcement (December 28, 1978).

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[5] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

For that reason it is incorrect to read the CJO's decision as barring all schedules of compliance in permits issued after July 1, 1977. The CJO did not rule that schedules of compliance consistent with a State's water quality standards (or implementing regulations) are nevertheless barred by the July 1, 1977 deadline. What he did was hold that schedules of compliance not meeting the requirements of state water quality standards are barred after July 1, 1977. As stated in the decision:

The EQB is likewise without authority to extend the July 1, 1977 deadline, particularly by including a vague statement in a water quality certification that it has no objection to a compliance schedule. Star-Kist has not shown that Puerto Rico's water quality standards contain a provision that could be read to allow a delay in implementation.

Order Denying Petition for Review at 6 (emphasis added). Because the CJO's decision should not be read as barring all post-July 1, 1977 schedules of compliance, the Region's arguments respecting §§ 303(e) and 304(a)(1) are not pertinent.

[8]**

[*176] A.

The Region's belief that § 301(b)(1)(C) does not bar EPA from establishing schedules of compliance for meeting state water quality standards after July 1, 1977, is based on an incomplete and, ultimately, erroneous reading of the Act. The Region takes the position that a literal reading of the section produces an illogical result: it argues that "since standards adopted after [July 1, 1977] obviously cannot be complied with 'no later than July 1, 1977,' that deadline cannot be applied literally." Pet. for Recon. at 3 (emphasis added). Because a literal reading is illogical in its view, the Region argues we should look elsewhere in the statute for indications of Congressional intent. It then proceeds to argue that the results of such a search lead to the conclusion that EPA is not barred from establishing schedules of compliance as it deems necessary and appropriate in the exercise of its own discretion.

The flaw in this reasoning is that it omits a step. Rather than immediately looking elsewhere in the statute for indications of Congressional intent, more time should be spent concentrating on the language of the section in question. The caption, "Timetable for achievement **[**9]** of objectives," provides two keys to construing § 301(b)(1)(C). First, the section is part of a timetable and should be understood as such, and second, the timetable is designed to achieve the objectives of the Act. As for the timetable, it serves to ensure that state water quality standards are attained by a specified date. It is like any other timetable in the sense that it specifies a date by which something is to be achieved. The date itself is unambiguous: it is July 1, 1977. The "something" to be achieved is also unambiguous in most respects. For example, when discussing the pre-July 1, 1977 period, it is clear that § 301(b)(1)(C) required all permittees to meet, by no later than July 1, 1977, any more stringent limitation necessary to meet state water quality standards in existence at the time of permit issuance. Thus, schedules of compliance were allowed during that period, and they could be established by either EPA or the State where the discharge was occurring (depending on which entity was the permit issuing authority at the time of permit issuance). By including the July 1, 1977 deadline in the statute, Congress was, in effect, establishing a "grace period" **[**10]** as part of its timetable for implementation of the Act.

[*177] As for the post-July 1, 1977 period, there is no dispute that § 301(b)(1)(C) continues to have regulatory force and applicability. [7] It is clear, therefore, that permits must prescribe limitations derived from state water quality standards in effect at the time of permit issuance, even if the standards did not come into existence until the post-July 1, 1977 period. Less clear, however, is whether there are any limitations on schedules of compliance after July 1, 1977. The answer lies in what Congress intended when it established the timetable, which in turn requires us to focus on the objectives Congress had in mind in creating the timetable.

First, however, one point alluded to earlier merits emphasis since it narrows the focus of the issue under consideration. Specifically, since the Clean Water Act provides **[**11]** ample, direct authority for the States to adopt schedules of compliance under appropriate circumstances, [8] EPA may add a schedule of compliance to a

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[6] The Puerto Rico Environmental Quality Board stated that it would have "no objections" if EPA included a schedule of compliance in the permit containing interim effluent limitations for pollutant parameters not in compliance with state water quality standards. Water Quality Certificate, page 16, Special Condition #17 (Puerto Rico Environmental Quality Board, June 29, 1987). The Board, however, did not specify what interim limitations the schedule must contain, or what the duration of the interim limitations must be to comply with state water quality standards. More importantly, neither the Board nor Star-Kist has shown that the Puerto Rico water quality standards allow compliance schedules under the circumstances of this case.

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[7] - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

See Opinion of the General Counsel, Memorandum from Robert M. Perry, General Counsel, to John E. Daniel, Chief of Staff (February 23, 1982).

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permit when EPA is the permit issuer if a State has laid the necessary groundwork in its standards or regulations. In such circumstances, the schedule would be meeting the requirements of the state water quality standards, and therefore no basis would exist for challenging its validity. Thus, the real question raised by the Region's petition for reconsideration is whether EPA can add these schedules after July 1, 1977, if the necessary enabling language is missing from the applicable state water quality standards or regulations. This is where an analysis of the Act's objectives enters the discussion.

The overarching objective of the Clean Water Act is to "restore and maintain the chemical, physical, **[**12]** and biological integrity of the Nation's waters," as Congress provided in its declaration of goals and policy contained in § 101(a) of the Act, *33 U.S.C. § 1251(a)*. When read in context with § 301(b)(1)(C), this objective, with its implicit censure of "backsliding," [9] would appear to rule out schedules of compliance after July 1, 1977, if they would delay attainment of pre-July 1, 1977 state water quality standards. In other words, if a pre-July 1, 1977 water quality standard remains on the books after that date, full and immediate compliance with the standard is mandatory. [10] **[*178]** Neither the States nor EPA would be permitted to use schedules of compliance under those circumstances, since to do so would completely undo what § 301(b)(1)(C), inter alia, unambiguously set out to accomplish, i.e., to ensure full compliance with pre-July 1, 1977 state water quality standards no later than July 1, 1977.

[13]**

The above recited objective does not, however, provide any definitive direction in deciding whether EPA, as permit issuer, can establish schedules of compliance for new or revised post-July 1, 1977 state water quality standards (in the absence of enabling language in the state standards). The answer to this question is found in § 402(a)(3) of the Act, which embodies another major objective of the Act and says that the Agency's powers as permit issuer are no greater than the States':

[§ 402] National pollutant discharge elimination system

(a) Permits for discharge of pollutants

* * *

(3) The permit program of the Administrator * * * and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder * * *.

33 U.S.C. § 1342(a)(3). Thus, if a State lacks authority to establish schedules of compliance (for instance, if it elected not to include the necessary enabling language in its water quality standards), EPA would also lack that authority because of its derivative relationship to the State under § 402(a)(3).

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[8] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

See, e.g., § 303(e)(3)(A) and (F) of the Clean Water Act, *33 U.S.C. § 1313(e)(3)(A)* and (F) (discussed in text, infra).

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[9] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

The term "backsliding" refers to the renewal or reissuance of a permit containing less stringent limitations than the comparable limitations in the previous permit. EPA's regulatory backsliding prohibition, *40 CFR § 122.44(a)(1)*, was given explicit statutory recognition (in a specific context) in 1987 by the enactment of § 402(o), *33 U.S.C. § 1342(o)*.

[10] Of course, post-July 1, 1977 readoption of a pre-July 1, 1977 standard without any substantive changes would not open the door to schedules of compliance because the standard would still be one that was in effect prior to July 1, 1977.

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The latter section furthers the Act's **[**14]** objective of assigning a major role to the States in managing water quality within their own borders. The Congressional declaration of goals and policy contained in § 101 of the Clean Water Act, *33 U.S.C. § 1251*, demonstrates that Congress intended the individual States to play a leading part in formulating their own water quality policies and that Congress **[*179]** did not want EPA to preempt the States' rights to impose and enforce stringent state water quality requirements:

[§ 101](b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution * * *.

33 U.S.C. § 1251(b). The policy announced in § 101(b) is given prescriptive force in § 510 of the Act, as follows:

[§ 510] State Authority

[N]othing in this chapter shall (1) preclude or deny the right of any State * * * to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement **[**15]** of pollution; except * * * [one] which is less stringent than the effluent limitation * * * in this chapter * * *.

33 U.S.C. § 1370. With respect to schedules of compliance specifically, the Act keeps them in the hands of the States, not EPA, as part of a continuing planning process for water quality under § 303(e) of the Act (subject only to EPA review and approval):

[§ 303](e) Continuing planning process

* * *

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1) * * * and at least as stringent as any **[*180]** requirements contained in any applicable water quality standards in effect under authority of this section;

* * *

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section * * *.

33 U.S.C. § 1313(e) (emphasis added). [11] **[**16]**

Section 301(b)(1)(C) draws on all three of the preceding provisions of the Act by requiring EPA, when it is the permit issuer, to include any limitations that will be necessary to meet state water quality standards, thus deferring to the reserved rights of the States to impose more stringent requirements than the technology-based standards of the Act would otherwise mandate. [12] This requirement extends to schedules of compliance. Specifically, in

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[11] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

See also *40 CFR § 130.5* (continuing planning process).

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[12] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

directing EPA to prescribe more stringent limitations necessary to meet applicable state water quality standards, § 301(b)(1)(C) also directs EPA to "includ[e] those necessary to meet * * * schedules of compliance [] established pursuant to any State law or regulations * * *." *33 U.S.C. § 1311(b)(1)(C)* (emphasis added). Except for this language (and the pre-July 1, 1977 authority also in the same section), nowhere else in the Act is EPA authorized to establish schedules of **[**17]** compliance where state standards or regulations do not provide for them. [13]

[18]**

[*181] To further promote the form of federalism envisioned by the Act, and to ensure that all permits contain limitations necessary to meet all state water quality standards, the Act establishes a certification system for EPA-issued permits. Under § 401(a)(1), EPA cannot issue an NPDES permit without first receiving a certification (or a waiver of certification) from the State in which the discharge is to occur, certifying, inter alia, that the permit complies with § 301(b)(1)(C). [14] Once the state certifies that a permit limitation is necessary to meet state water quality standards, EPA is without authority to modify the limitation. The legislative history of the Act leaves no doubt as to this interpretation:

[T]he provision makes clear that any water quality requirements established under State law, more stringent that those requirements established under this Act, also shall through certification become conditions on any Federal license permit. The purpose of that certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.

[19]**

S. Rep. No. 92-414, 92nd Cong., 2nd Sess., reprinted in, 1972 U.S. Code Cong. & Adm. News 3735 (emphasis added). This Congressional injunction against "overriding" state water quality standards logically extends to a State's timetable for implementing its water quality standards. Not surprisingly, the legislative history also supports this modest extension:

By enacting § 301(b) of the Clean Water Act, Congress sought to put into place certain technology-based controls on water pollution while simultaneously requiring attainment of state water quality standards.

The basic scheme of the [Clean Water Act] * * * is to require all dischargers to meet uniform technology-based effluent standards as a minimum. However, each body of water also has water quality standards, and a discharger may be required to achieve a greater reduction in his effluent than the applicable effluent standard would require if such a reduction is necessary to meet the water quality standards applicable to the body of water that receives his effluent.

R. Zener, The Federal Law of Water Pollution Control, in Federal Environmental Law 694 (1974).

[13] EPA's rights are coextensive with the States' insofar as writing a water quality standard is concerned. Thus, if EPA is prescribing a federal water quality standard to take effect in lieu of a state water quality standard, it would have authority, like the States, to establish schedules of compliance in the water quality standard. See *40 CFR § 131.22*.

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[14] - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

Section 401(a)(1) of the Clean Water Act provides in relevant part as follows:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with the applicable provisions of section[] 1311 [CWA § 301] * * * of this title.

33 U.S.C. § 1341(a)(1).

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If a State establishes more stringent limitations and/or time schedules pursuant to Section 303, they should be set forth in a certification under Section 401. Of course, any more stringent requirements imposed by a State pursuant to this section shall be enforced by the Administrator.

[*182] Report of the Conference Committee on S. 2770, October 4, 1972, reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972 at 171 (1973) (emphasis added).

In sum, the language, structure, and objectives of the Act, as set forth in §§ 101(a) and (b), 402(a)(3), and 510, all support an interpretation of § 301(b)(1)(C) that Congress intended the States, not EPA, to become the proper authorities to define appropriate deadlines for complying with their own state law requirements. Just how stringent **[**20]** such limitations are, or whether limited forms of relief such as variances, mixing zones, and compliance schedules should be granted are purely matters of state law, which EPA has no authority to override. Consequently, if a State elects not to include a provision for a schedule of compliance in a water quality standard, EPA has no authority to override the State's authority by adding a schedule of compliance of its own invention. [15] It is well established in federal case law that the Clean Water Act preserves a State's right to enact its own anti-pollution measures even if they are more stringent than necessary to comply with the Clean Water Act. *Roosevelt-Campobello International Park Commission, 684 F.2d 1041, 1056 (1st Cir. 1982)*. The Region's interpretation makes no mention of the States' role in carrying out the timetable and objectives of the Act and is fatally flawed for that reason.

[21]**

B.

To buttress its position, the Region makes a plea on grounds of practical necessity. The Region asserts that because water quality standards, unlike technology-based standards, depend on the quality of the receiving waters and other factors that make it difficult for a permittee to plan ahead and predict what its limitations will be, EPA should have the authority to "define appropriate deadlines for complying with post-1977 standards." Pet. for Recon. at 7-8. This argument fails for the reasons previously stated, and more particularly because the States have full authority to make appropriate accommodations for dischargers needing additional time for compliance, and it is up to the States, not EPA, to decide whether their water quality standards should be applied in a flexible manner. [16] **[*183]** If a State does not provide for compliance schedules in its water quality standards, it may be assumed that the omission was deliberate. [17] Cases interpreting the Clean Water Act make it clear that States have a right to

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[15] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

Although § 401 of the Clean Water Act gives the States an effective veto power over any EPA-issued permit not meeting the requirements of state water quality standards, EPA's long-standing practice of adding schedules of compliance under the aegis of the 1978 legal opinion may have misled the States into believing they lack this authority insofar as the schedules are concerned.

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[16] - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

Section 131.13 of the regulations, *40 CFR § 131.13*, authorizes the States, at their discretion (but subject to EPA approval), to include in their water quality standards "policies generally affecting their application and implementation, such as mixing zones, low flows and variances." Logically, schedules of compliance fall within the category of "policies" listed in this regulation. Moreover, as noted in the text, the Act itself contemplates schedules of compliance being established by the States. See §§ 301(b)(1)(C) and 303(e)(3)(A) and (F).

[17] In preparing a "continuing planning process" under § 303(e) of the Act, EPA regulations direct the States to include schedules of compliance in the process:

§ 130.5 Continuing planning process.

make this type of decision even at the cost of forcing companies out of business. See, e.g., *United States Steel Corp. v. Train, 556 F.2d 822, 838(7th Cir. 1977)* **[**22]** ("[T]he states are free to force technology" and "[i]f the states wish to achieve better water quality, they may [do so], even at the cost of economic and social dislocations * * *."). The "practical necessity" argument also misses the mark on other grounds. For example, where the Agency determines that, despite good faith efforts, a permittee cannot come into immediate compliance with a newly adopted, revised, or interpreted state water quality standard, EPA may bring an enforcement action against the discharger pursuant to § 309 of the Act [18] **[*184]** and issue an administrative compliance order giving the permittee a reasonable amount of time to comply. [19]

[23]**

Also lacking merit is the Region's argument that EPA needs to establish compliance schedules because water quality standards are revised periodically. When a water quality standard is revised to be more stringent, the holder of an existing permit is not required to meet the new standard until the term of the existing permit expires and the permittee applies for a renewed permit. [20] In addition, the Clean Water Act requires States to allow for public

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(a) General. Each State shall establish and maintain a continuing planning process (CPP) as described under section 303(e)(3)(A)-(H) of the Act.

* * *

(b) Content. * * * The following processes must be described in each State CPP, and the State may include other processes at its discretion.

(1) The process for developing effluent limitations and schedules of compliance at least as stringent as those required by sections 301(b)(1) and (2), 306 and 307, and at least as stringent as any requirements contained in applicable water quality standards in effect under authority of section 303 of the Act.

* * *

(6) The process for establishing and assuring adequate implementation of new or revised water quality standards, including schedules of compliance, under section 303(c) of the Act.

40 CFR § 130.5 (emphasis added).

[18] EPA has the authority under § 309 of the Act to deal in a flexible manner, through use of compliance orders, with deserving permittees who are unable come into immediate compliance with the Act:

(3) Whenever * * * the Administrator finds that any person is in violation of section 1311 * * * or is in violation of any permit condition or limitation implementing * * * such section[] * * * he shall issue an order requiring such person to comply with such section or requirement * * *.

(5) [A]ny order issued under this subsection * * * shall specify a timefor compliance not to exceed 30 days in the case of a violation of an interim compliance schedule * * * and not to exceed a time the Administrator determines to be reasonable in the case of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

33 U.S.C. § 1319(a)(3) & (5)(A).

[19] The Region acknowledges the existence of this method of establishing schedules of compliance but argues that it should not be restricted to this single option. Pet. for Recon. at 7 ("in some circumstances a schedule of compliance in the permit itself may be a reasonable alternative to a schedule in an administrative order").

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[20] - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

Permit applicants need only comply with water quality standards that are in the permit, not with standards adopted or revised subsequent to permit issuance. Once issued, the permits are valid for a fixed term not to exceed five years. *33 U.S.C. §*

participation in setting water quality standards. See *33 U.S.C. § 1313(c)*; *40 CFR § 131.20*. Thus, dischargers may convince States that newly adopted and revised water quality standards should provide for grace periods for compliance. Therefore, contrary to the Region's contentions, strict compliance with the July 1, 1977 deadline need not lead to harsh or inequitable results.

[24]**

C.

In conclusion, EPA does not have the authority to establish schedules of compliance in NPDES permits that will postpone compliance with state water quality standards beyond the July 1, 1977 statutory deadline, unless the schedule is added pursuant to authorization contained in the state water quality standards or the State's regulations implementing the standards. In the absence of such authorization, state water quality standards, like the great majority of laws and regulations, take effect immediately in accordance with **[*185]** their terms, and EPA is not empowered to postpone their effectiveness even temporarily through use of compliance schedules, no matter the justification. For the reasons stated above, the Region's assertion that the deadline in § 301(b)(1)(C) applies only to state water quality standards adopted prior to July 1, 1977, is rejected. By including the July 1, 1977 deadline in the statute, Congress was, in effect, providing a "grace period" as part of a timetable for implementation of the requirements of the Act. Once the grace period has lapsed, EPA must ensure that all permits contain limitations necessary to meet whatever state water quality standards are **[**25]** in effect at the time of permit issuance, regardless of when the standards were adopted or revised. [21] Reconsideration of the Chief Judicial Officer's March 8, 1989 Order Denying Petition for Review is therefore denied. The Office of Water is directed to take immediate action to ensure that the States are aware of their responsibilities under the Clean Water Act vis a vis schedules of compliance and of the consequences of omitting enabling language for such schedules from their regulations and water quality standards. [22]

[26]**

So ordered. [23]

1342(b)(1)(B); *40 CFR § 122.46(a)*. During the term of the permit, compliance with the permit and effluent limitations in it constitute compliance with section 301. *33 U.S.C. § 1342(k)*. In fact, EPA cannot modify existing permits to require compliance with newly adopted or revised water quality standards unless the permit applicant requests such a modification. *40 CFR § 122.62(3)(i)(C)*.

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[21] - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

In other words, after the grace period has run, the statute would be read and applied in the same manner as if the deadline had never appeared in the statute. (Had the Clean Water Act contained a provision identical to § 301(b)(1)(C) but omitted the July 1, 1977 deadline, the clear meaning of the statute would be that, as of the effective date of the statute, EPA must ensure that all permits contain limitations necessary to meet whatever state water quality standards are in effect at the time of permit issuance. Also, if the State subsequently revised or adopted new water quality standards, a renewed permit would have to meet the new or revised standards, unless the State granted some form of relief, such as a variance or compliance schedule.) Thus, contrary to Region II's contentions (see, e.g., page 7, supra), the July 1, 1977 "deadline" can be literally applied to future water quality standards in the same manner that a statute with no grace period can require EPA to ensure compliance with future standards.

[22] The Region suggested rulemaking as a potential alternative to deciding the merits of its petition for reconsideration. It did not explain, however, why rulemaking is either necessary or desireable. The need for it is not readily apparent in view of the clear statutory and regulatory basis for schedules of compliance, and in view of EPA's considerable authority respecting approval of state water quality standards and regulations. Public comment on any proposed policies the Office of Water might adopt can be solicited independently of rulemaking.

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[23] - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

End of Document

This decision shall have no retroactive effect on existing permits. Schedules of compliance in those permits shall be enforceable in accordance with the terms of the permits for the remainder of the permit term. See note 20 supra.

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