

EXHIBIT 5

In Re: Los Alamos National Laboratory
NPDES Permit No. NM0030759



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

**75 Hawthorne Street
San Francisco, CA 94105-3901**

Ms. Dorothy Rice, Executive Director
California State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Mr. Bruce H. Wolfe, Executive Officer
Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Ms. Tracy Egoscue, Executive Officer
Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Ms. Pamela C. Creedon, Executive Officer
Regional Water Quality Control Board
Central Valley Region, Sacramento Office
11020 Sun Center Drive #200
Rancho Cordova, CA 95670

Dear Ms. Rice, Egoscue, Creedon, and Mr. Wolfe:

To satisfy a commitment we made in a settlement agreement with Baykeeper, Humboldt Baykeeper, Ecological Rights Foundation, and Communities for a Better Environment, the Environmental Protection Agency reviewed twelve randomly chosen National Pollutant Discharge Elimination System (NPDES) permits issued by Regional Boards 2, 4 and 5, focusing solely on provisions in those permits regarding schedules of compliance to achieve water quality-based effluent limitations.

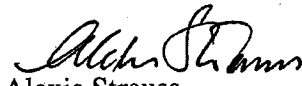
In the settlement agreement, EPA agreed to provide a written report setting forth the results of its review, and to make that report available to the plaintiffs, State Board, all Regional Boards, and any other interested persons upon request. A copy of that report is attached to this letter.

We recommend changes to strengthen compliance schedules included in California NPDES permits issued by the Regional Boards. Specifically, permits, and/or the

administrative records for the permits, need to include explanations why compliance schedules are "appropriate" and how they provide for achieving compliance with the permits' final effluent limitations "as soon as possible," as required by EPA regulations at 40 CFR § 122.47. We are encouraged that the State Board has made significant progress in standardizing the State's approach to issuing compliance schedules in NDPES permits in drafting a Statewide compliance schedule-authorizing policy that may be released for public comment in the near future. Additionally, we appreciate the State Board's oversight efforts in this area and look forward to the benefits such oversight is likely to bring. Through these and similar efforts by the State and Regional Boards, which EPA will make every effort to support, we are confident that the use of compliance schedules and the inclusion of appropriate supporting material in future California NPDES permits and fact sheets can be fully consistent with the requirements of the Clean Water Act and EPA's regulations.

We look forward to working with you on these matters. If you have any questions regarding this report, please call me at (415) 972-3572 or Doug Eberhardt at (415) 972-3420, or refer legal staff to Suzette Leith at (415) 972-3884.

Sincerely yours,


Alexis Strauss 31 Oct. 2007
Director, Water Division

cc:

M. Lauffer, SWRCB

Executive Officers, RWQCB 1, 3, 6-9

Christopher Sproul, Environmental Advocates

Enclosure: California Permit Quality Review for Compliance Schedules

California Permit Quality Review Report on Compliance Schedules

October 31, 2007



U.S. Environmental Protection Agency
Region IX

in cooperation with Office of Water

CALIFORNIA PERMIT QUALITY REVIEW REPORT ON COMPLIANCE SCHEDULES

October 31, 2007

I. Introduction

Pursuant to the terms of a settlement agreement, dated June 7, 2007, between EPA and Baykeeper, Humboldt Baykeeper, Ecological Rights Foundation, and Communities for a Better Environment (collectively referred to as "Plaintiffs"), EPA reviewed a random selection of twelve (12) permits issued by Regional Board 2, Regional Board 4 and Regional Board 5 in the State of California. These permits were all issued between 2004 and February 28, 2007, and each included at least one compliance schedule. The random selection of these permits occurred on July 16, 2007, before interested parties (including a representative of the Plaintiffs). EPA reviewed each of these permits and addressed in writing the five issues specified in the settlement agreement. The results of this review are set forth below.

A. Settlement Agreement

According to the terms of the settlement agreement, EPA agreed to "address in writing the following issues as to each compliance schedule in each permit" as part of a permit review:

- (a) whether the permit and/or administrative record justifies the compliance schedule "as appropriate" as required by 40 C.F.R. § 122.47(a);
- (b) whether the permit and/or administrative record justifies whether the compliance schedule requires compliance with the final water quality-based effluent limitation as soon as possible, as required by 40 C.F.R. § 122.47(a)(1);
- (c) whether, as part of the compliance schedule, the permit contains enforceable interim requirements and dates for their achievement as required by 40 C.F.R. § 122.47(a)(3) and section 502(17) of the CWA, 33 U.S.C. § 1362(17);
- (d) whether the permit contains an appropriate final effluent limitation as required by section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. §§ 122.2 (definition of "schedule of compliance"), 122.44(d)(1)(vii); and
- (e) whether the compliance schedule inappropriately includes time solely to develop a Total Maximum Daily Load, site specific objective/criterion, and/or a Use Attainability Analysis and therefore is not consistent with sections 301(b)(1)(C) and 502(17) of the CWA, 33 U.S.C. §§ 1311(b)(1)(C) and 1362(17) and 40 C.F.R. §§ 122.2 (definition of "schedule of compliance") and 122.47.

Additionally, EPA agreed to prepare a written report setting forth the results of the permit review and to make such report available by September 30, 2007 to the Plaintiffs, the State Board, all Regional Boards and any other interested persons upon request. Plaintiffs subsequently agreed to an extension of this deadline until October 31, 2007.

B. Permits Reviewed

- **EPA reviewed 6 permits and each of their compliance schedules in Regional Board 2** (San Francisco Bay Region): City of Petaluma; City of American Canyon; Rodeo Sanitary District; US Navy Naval Support Activity Treasure Island; Rhodia-Martinez Plant; Tesoro Refining & Marketing Company, Golden Eagle Refinery.
- **EPA reviewed 3 permits and each of their compliance schedules in Regional Board 4** (Los Angeles Region): Los Angeles County Sanitation Districts, Pomona WWRP; Los Angeles County Sanitation Districts, San Jose Creek WWRP; Metropolitan Water District of Southern California, Rio Hondo Power Plant.
- **EPA reviewed 3 permits and each of their compliance schedules in Regional Board 5** (Central Valley Region): City of Live Oak; Olivehurst PUD; Placer County Facility Services, Placer County SMD No 1.

II. Results of the California Permit Review

Pursuant to the settlement agreement, EPA reviewed each of the compliance schedules in each of the twelve randomly selected permits and addressed the five issues identified in subsections (a) to (e) below. The twelve permits contained a total of 59 individual parameter-specific compliance schedules, covering 23 different pollutants.¹ EPA's permit review was further informed by the relevant provisions of the Clean Water Act, EPA regulations, and the Memorandum from the Director of the Office of Wastewater Management (OWM) to the Director of EPA Region 9's Water Division, dated May 10, 2007, attached to this document.

(a) Permit and/or administrative record justifies the compliance schedule "as appropriate" as required by 40 C.F.R. § 122.47(a).

None of the twelve permits reviewed, or their supporting administrative records, adequately explained why any of the compliance schedules in those permits was "appropriate." Absent an adequate discussion of the "appropriateness" of the compliance

¹ Some of the permits issued by Regional Board 2 included in the permit findings a determination that there was reasonable potential for the discharge of dioxin TEQ to cause or contribute to an excursion above the water quality standard, but did not include either a final or interim effluent limit for this parameter. Accordingly, it appears that the discharger in each of these cases was given a de facto compliance schedule without an applicable interim or final water quality-based effluent limit. These de facto compliance schedules are reflected in the total number of parameter specific compliance schedules identified in this paragraph.

schedules in light of the factors identified in Paragraphs 6, 7 and 8 of the May 10, 2007 memorandum, or any other potentially relevant factors, EPA is unable to conclude that any of the reviewed compliance schedules was "appropriate" at the time of issuance.

As best as EPA could determine, many of the compliance schedules were granted based solely on an analysis of effluent data showing past performance above the limits calculated for the new permit. While EPA agrees that past performance can be a relevant factor in determining whether a compliance schedule is "appropriate," it is not necessarily the only relevant factor. Without an analysis of other relevant factors, e.g., whether there is a need for modifications to treatment facilities, operations, or other measures to meet the new WQBEL, EPA does not have an adequate basis in these permit records to conclude that such compliance schedules are "appropriate."

For some of the permits, EPA's analysis of the administrative records indicated that a compliance schedule was not "appropriate," even though there may have been some past exceedences of the WQBELs calculated for the new permit. In those permits, the record contained information indicating that the facility had already implemented controls sufficient to achieve the new or revised WQBEL, as well as effluent data indicating that, at the time of permit issuance, the permittee was able to discharge at or below the final limits calculated for the new permit. Compliance schedules are intended to provide a discharger the time it needs to take the necessary steps to construct additional treatment systems or implement other changes so that it can meet a new or more stringent WQBEL. When such steps have already occurred such that the discharger at the time of permit issuance is able to meet the new or revised WQBEL, a compliance schedule is not appropriate.

(b) Permit and/or administrative record justifies whether the compliance schedule requires compliance with the final water quality-based effluent limitation "as soon as possible," as required by 40 CFR § 122.47(a)(1).

None of the twelve permits and/or administrative records reviewed contained a specific finding that their compliance schedules required compliance with the final WQBEL "as soon as possible." Nor did any of them contain an adequate justification for the specific length of the compliance schedule. As best as EPA could determine, in all but one of the twelve permits, the compliance schedules were set at the maximum length permitted under the applicable compliance schedule authorizing provision, without documentation in the permit and/or administrative record demonstrating that this length of time was "as soon as possible." Without such documentation, EPA was unable to determine for these permits whether the schedules chosen were "as soon as possible," or whether the maximum length available under the State's authorizing provision was simply applied as a default. Although one permit included a compliance schedule of two years duration that was shorter than the maximum allowed by the authorizing provision, EPA was unable to determine whether this was "as soon as possible" given the absence of a supporting justification in the permit and/or administrative record.

Additionally, as discussed above, some of the permit records contained effluent data indicating that, at the time of permit issuance, the permittee was able to discharge at or below the final limits calculated for the new permit. In each of those cases, a compliance schedule was neither "appropriate" (as discussed above) nor established to provide for compliance with the final effluent limitation "as soon as possible."

(c) As part of the compliance schedule, the permit contains enforceable interim requirements and dates for their achievement as required by 40 CFR 122.47(a)(3) and section 502(17) of the CWA, 33 USC § 1362(17).

The CWA and its implementing regulations define a compliance schedule as an "enforceable sequence of actions or operations leading to compliance with an effluent limitation..." EPA regulations at 40 CFR § 122.47(b)(3) require any compliance schedule longer than a year to "set forth interim requirements and the dates for their achievement." The regulation includes a note giving examples of interim requirements such as (a) submit a construction grant application, (b) let a construction contract, (c) commence construction, or (d) complete construction of required facilities.

Most of the compliance schedules reviewed included interim steps of some type. For example, nearly all of the compliance schedules included requirements for annual or semi-annual reports, and most of the permits included other tasks such as the performance of studies and/or the development and implementation of Pollution Minimization Plans (PMPs). In addition, most of the permits contained enforceable interim numeric effluent limitations effective during the compliance schedule's term. Interim numeric limits, while highly desirable, were often established in these permits at a level currently being achieved by the discharger at time of permit issuance. EPA was unable to conclude that the mere inclusion of such interim limits in these permits, without more explanation in the record than provided here, would lead to compliance with the final WQBEL. Similarly, while the inclusion of PMPs in a compliance schedule is appropriate and desirable, the inclusion of PMPs by itself does not necessarily lead to the achievement of final limits. For example, the PMPs in some of the permits reviewed appeared to contemplate simply the continued implementation of generic pollutant minimization or pretreatment measures that had been specified in prior permits, without any accompanying demonstration that there was a sequence of actions intended to achieve compliance with the WQBEL in the new permit. Moreover, the stated goal of the Pollutant Minimization Plans in certain permits was merely to "reduce" loadings of pollutants; it was unclear whether such plans, when implemented, would likely attain the WQBEL.

Among the permits reviewed, a frequent practice was to require the permittee to conduct studies designed to evaluate the sources of the pollutants, develop a source control plan or treatment measures necessary to achieve the WQBELs, and (in some permits) implement the measures developed in the plan. At one end of the spectrum, some compliance schedules reviewed by EPA had a clear sequence of steps with the final step being compliance with a final WQBEL, had specific enforceable dates for each step, and included implementation of the measures identified in the studies as one or more of the interim steps. At the other end of the spectrum, some of the permits appeared to

contain only the continued implementation of generic pollutant minimization measures carried over from the prior permit, in addition to numeric interim limits, with no explanation of how these measures would lead to compliance with the final WQBEL. Some permits included a clear sequence of steps, but did not include dates for the steps. Others required development of a plan to achieve the WQBELs, but did not include a step requiring implementation of the plan. Whether the interim requirements include construction, treatment process, operating process, or pollution prevention milestones, or simply relate to the development and implementation of a plan, the permit findings or fact sheet should demonstrate that such steps constitute an enforceable "sequence" of actions "leading to compliance" with the final WQBEL. The permits and administrative records reviewed generally did not contain such a demonstration; hence, EPA was unable to determine whether the interim steps would lead to compliance with the final WQBEL, as required by EPA's regulations and section 501(17) of the CWA.

(d) Permit contains an appropriate final effluent limitation as required by section 301(b)(1)(C) of the CWA.

EPA reviewed all twelve permits to determine whether the compliance schedule contained final water quality based effluent limits for the parameters covered in the compliance schedule.²

Of the 59 compliance schedules reviewed, 40 included numeric final water quality based effluent limitations in the enforceable permit provisions and thus satisfied this element. One compliance schedule included a non-numeric final effluent limitation in the enforceable permit provisions; this compliance schedule is discussed below in the last paragraph of this section.

In 18 of the 59 compliance schedules, there was no final effluent limitation included in the associated enforceable permit provisions.

In five of the Regional Board 2 permits, there was at least one compliance schedule that did not include a specific final effluent limitation. Instead, for these compliance schedules, there was a statement in the permit findings that the final effluent limitation would be the wasteload allocation to be derived in an upcoming TMDL or in a site-specific objective (SSO). For the reasons set forth in EPA's October 23, 2006, letter to the California State Water Resources Control Board referenced in the attached May 10, 2007 Memorandum, EPA does not consider this to be an appropriate expression of a final effluent limitation. This issue did not arise in any of the Regional Board 4 or 5 permits.

One Regional Board 2 permit included a final limit dependent on the adoption of a TMDL. It also anticipated the possibility that the TMDL would not be completed prior to the end of the compliance schedule and identified an alternative final WQBEL. It defined the final WQBEL as either "the wasteload allocation to be derived in an

² EPA did not analyze whether any specific numeric limit "derives from and complies with all applicable water quality standards" per 40 CFR § 122.44(d)(1)(vii)(A) because this is beyond the scope of this compliance schedule review.

upcoming TMDL, or no net loading.” The permit said that “no net loading” required that the discharge of pollutants must be offset. Although “no net loading” may in certain circumstances be an appropriate final WQBEL, this compliance schedule inappropriately appeared to include time solely for development of the TMDL before requiring the permittee to comply with interim steps leading to compliance with the “no net loading” alternative limit, as discussed in (e) below. Moreover, neither the permit nor the administrative record explained how the compliance schedule would achieve compliance with the alternative limit “as soon as possible.”

(e) The compliance schedule inappropriately includes time solely to develop a TMDL, site specific objective (criterion), or use attainability analysis.

A compliance schedule based solely on time needed to develop a TMDL, site specific criterion, or a use attainability analysis is not appropriate. None of the three permits reviewed from Regional Board 5 referenced any TMDL, SSO, or UAA in connection with the length of their compliance schedules. Among the Regional Board 4 permits, two, similarly, did not reference any TMDL, SSO or UAA in connection with the compliance schedule provisions. However, the third Regional Board 4 permit gave the permittee the option of conducting studies leading to development of an SSO. Because this permit did not contain specific actions or tasks leading to compliance with the WQBEL, it was difficult to tell whether this permit included time solely to allow for SSO development.

Each of the six permits from Regional Board 2 contained at least one compliance schedule that relied on the time needed for development of TMDLs or SSOs in allowing permittees time to comply with the final WQBELs. These fell into three categories:

For some of the compliance schedules, the final effluent limitation was expressed as the wasteload allocation to be derived from an upcoming TMDL or SSO, and no rationale was given for the length of the compliance schedule. Given the absence of other explanations for the schedules' length in the permit or administrative record, it appeared that these compliance schedules were included to allow time solely to develop the TMDL or SSO.

The second category involved compliance schedules accompanied by the specific statement, “For pollutants where there are planned TMDLs or SSOs, and final WQBELs may be affected by those TMDLs and SSOs, maximum timeframes may be appropriate due to the uncertain length of time it takes to develop the TMDL/SSO.” This language suggests that the compliance schedule inappropriately included time solely to develop a TMDL or SSO.

Finally, some of the Regional Board 2 permits reviewed contained final WQBELs (either numeric limitations, or, in the permit described at the end of (d), above, “no net loading”), but contained compliance schedules that provided an initial period of time solely to allow for development of a TMDL or SSO. These permits did not require the permittee to develop and implement a plan to comply with the final WQBEL unless the

TMDL or SSO was not developed by a date certain. As stated above, it is not appropriate for a compliance schedule to include time solely for the development of a TMDL or SSO.

Attachment: Memorandum from the Director of the Office of Wastewater Management (OWM) to the Director of EPA Region 9's Water Division, May 10, 2007



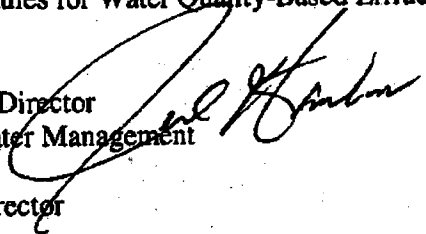
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 10 2007

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits

FROM: James A. Hanlon, Director
Office of Wastewater Management 

TO: Alexis Strauss, Director
Water Division
EPA Region 9

Recently, in discussions with Region 9, questions have been raised concerning the use of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits consistent with the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. § 122.47. The use of compliance schedules in NPDES permits is also the subject of ongoing litigation in California. The purpose of this memo is to provide a framework for the review of permits consistent with the CWA and its implementing regulations.

When may a permitting authority include a compliance schedule in a permit for the purpose of achieving a water quality-based effluent limitation?

In *In The Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177 (1990), the EPA Administrator interpreted section 301(b)(1)(C) of the CWA to mean that 1) after July 1, 1977, permits must require immediate compliance with (*i.e.*, may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977, and 2) compliance schedules are allowed for effluent limitations based on standards adopted after that date only if the State has clearly indicated in its water quality standards or implementing regulations that it intends to allow them.

What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

1. "When appropriate," NPDES permits may include "a schedule of compliance leading to compliance with CWA and regulations . . . as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. 40 C.F.R. § 122.47(a)(3).

2. Any compliance schedule contained in an NPDES permit must be an "enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation ["WQBEL"]" as required by the definition of "schedule of compliance" in section 502(17) of the CWA. *See also* 40 C.F.R. § 122.2 (definition of schedule of compliance).

3. Any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable state or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17); the Administrator's decision in *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990); and EPA regulations at 40 C.F.R. §§ 122.2, 122.44(d) and 122.44(d)(1)(vii)(A).

4. Any compliance schedule that extends past the expiration date of a permit must include the final effluent limitations in the permit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 C.F.R. § 122.2 (definition of schedule of compliance).

5. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule "will lead[] to compliance with an effluent limitation . . ." "to meet water quality standards" by the end of the compliance schedule as required by sections 301(b)(1)(C) and 502(17) of the CWA. *See also* 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A).

6. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is "appropriate" and that compliance with the final WQBEL is required "as soon as possible." *See* 40 C.F.R. §§ 122.47(a), 122.47(a)(1).

7. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. 40 C.F.R. §§ 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL "as soon as possible," as required by 40 C.F.R. § 122.47(a)(1) include: consideration of the steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The permitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State's authorizing provision.

10. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate, consistent with EPA's letter of October 23, 2006, to Celeste Cantu, Executive Director of the California State Water Resources Control Board, in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California.

11. A compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate, consistent with EPA's letter of February 20, 2007, to Doyle Childers, Director Missouri Department of Natural Resources, nor is a compliance schedule based solely on time needed to develop a site specific criterion, for the same reasons as set forth in the October 23, 2006, (referenced in Paragraph 10) and February 20, 2007 letters.

If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.