

**IN THE MATTER OF STAR-KIST CARIBE, INC.**

NPDES Appeal No. 88-5

***ORDER DENYING MODIFICATION REQUEST***

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Decided May 26, 1992

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**Syllabus**

This matter concerns a petition by EPA Region II for a substantial modification to an April 16, 1990 decision of the Administrator in this case. The Administrator's decision denied a request of the petitioner to overturn portions of an earlier decision by the Agency's Chief Judicial Officer. The Administrator's decision held, inter alia, that

[T]he 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 construed as authorizing a schedule of compliance. The Agency's powers in this respect \* \* \* are no greater than the States'.

Petitioner objected to a statement in the decision, where the Administrator said, "If a State does not provide for compliance schedules in its water quality standards, it may be assumed that the omission was deliberate." Petitioner asked that the Administrator's decision be modified "so as not to require EPA to interpret a state's regulator's silence on schedules of compliance as a deliberate statement that none are allowed, unless there is some other indicator of such state intent."

Held: The petition is denied. Petitioner failed to justify the requested modification request, which would allow EPA to establish schedules of compliance as if the Administrator's decision had never existed. The remark in the Administrator's decision that the petitioner finds objectionable is a legal presumption, not a factual observation, and is drawn from a comprehensive analysis of the entire statutory scheme.

***Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).***

***Opinion of the Board by Judge McCallum:***

This matter concerns a petition by EPA Region II<sup>1</sup> for a substantial modification to the Administrator's April 16, 1990 decision in this matter.<sup>2</sup> The Administrator's decision denied a request by the petitioner to overturn portions of an earlier decision by the Agency's Chief Judicial Officer ("CJO").<sup>3</sup> By separate order dated September 4, 1990, the Administrator's decision was stayed pending a ruling on EPA Region II's petition. For the reasons stated below, the petition is denied and the stay is lifted.

In view of the nature of our ruling (a denial of a modification request) and the fact that the Administrator's decision and the CJO's decision deal comprehensively with the subject of schedules of compliance as presented in this controversy, there will be no attempt here to provide a general overview of the subject or to explain how or why today's ruling has come up for consideration. Rather, matters will be addressed as deemed necessary to dispose of the petition. Accordingly, the reader is advised to consult the petition and the previous decisions for a complete understanding of the context of the instant ruling.

The Administrator's decision holds, *inter alia*, that:

[T]he 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 construed as authorizing a schedule of compliance. The

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<sup>1</sup>See "Petition for Modification of Order on Petition for Reconsideration," dated August 13, 1990. The petition is signed by representatives of the Agency's Office of General Counsel and EPA Region II.

<sup>2</sup>See "Order on Petition for Reconsideration," dated April 16, 1990 (referred to either as "Administrator's Decision" or "Administrator's decision").

<sup>3</sup>See "Order Denying Petition for Review," dated March 8, 1989 (the "CJO's decision").

Agency's powers in this respect \* \* \* are no greater than the States'.

Order on Petition for Reconsideration at 5. The chief objection to this holding, as stated in the petition, is a single remark in the decision, where the Administrator said, "If a State does not provide for compliance schedules in its water quality standards, it may be assumed that the omission was deliberate." Administrator's Decision at 17. Petitioner argues that the assumption is unwarranted, is unnecessary to ensure that States are not forced to accept unwanted EPA-imposed schedules of compliance, and leads to irrational results when considered in conjunction with section 304(l) of the Act (which provides for individual control strategies (permits) for point sources located on certain listed toxic-contaminated stream segments). Petitioner suggests that the Administrator's decision should be modified "so as not to require EPA to interpret a state's regulations' silence on schedules of compliance as a deliberate statement that none are allowed, unless there is some other indication of such state intent." Petition at 6. The practical effect of granting the modification would be to allow EPA to establish schedules of compliance as if the Administrator's decision had never existed. In other words, the modification would nullify the decision.

Petitioner's arguments in support of modification are not compelling.<sup>4</sup> The remark in the Administrator's decision that petitioner finds objectionable is a legal presumption, not a factual observation, and is drawn from a comprehensive analysis of the entire statutory scheme. Moreover, as a factual observation, the remark—despite petitioner's original assertions—is amply justified: according to petitioner's recent status report,<sup>5</sup> there are seven States with no explicit authorization for schedules of compliance because, in petitioner's

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<sup>4</sup>Petitioner repeatedly refers to the Administrator's holding as dicta, claiming that the Administrator "acknowledg[es]" in a footnote that "the issue of post-1977 standards is dicta (opinion at 3, n.2.) \* \* \*." An examination of the footnote fails to support petitioner's contentions; there is in fact no such "acknowledgement" by the Administrator. Had petitioner instead stated that the last sentence in the footnote can be read as if the Administrator agreed with petitioner that the post-1977 status of the standards was not critical to his determination, there might be some merit to the assertions. Even so, the context of the decision as a whole makes it clear that the sentence obviously was not crafted with that intent in mind. The water quality standards at issue were promulgated by the Commonwealth of Puerto Rico in 1983. But for petitioner's erroneous interpretation of the law—which has forced petitioner to indulge in the unnecessary fiction of treating "virtually unchanged" post-1977 standards as if they were really pre-1977 standards—there would be no occasion to question the post-1977 status of the 1983 standards.

<sup>5</sup>Petitioner's Status Report (filed April 3, 1992).

words, "this appears to reflect a State decision not to allow such schedules."<sup>6</sup> In other words, consistent with the Administrator's remark, there is factual as well as legal justification for interpreting a State's silence on schedules of compliance in the manner prescribed by the Administrator's decision. Also, petitioner's status report reveals that there are 12 other States with no explicit authorization, since "there is some uncertainty as to the States' intentions."<sup>7</sup> Combining these 12 jurisdictions with the previous 7 produces a total of 19 jurisdictions in which it would be either wrong (7 jurisdictions) or imprudent (12 jurisdictions) for EPA to make a unilateral assumption that schedules of compliance are consistent with the States' wishes.<sup>8</sup>

To the extent the remark in the Administrator's decision may not accurately reflect an unwritten practice of a particular State, the State is on notice to conform its practices to the law.<sup>9</sup> Thus, it will be necessary for the State to provide for schedules of compliance in a sufficiently prominent way to erase the legal presumption that otherwise is legitimately drawn from the State's silence. The responsibility of States under the law to make specific provision for schedules of compliance, rather than leaving it to the word-of-mouth policy of whoever may be in charge of the State's permit-issuing desk at any particular moment, is unequivocal. As the decision notes, EPA's regulations provide that each State is to have a "continuing planning process" in place that "must" describe "[t]he process for developing effluent limitations and *schedules of compliance*" and "for establishing and assuring adequate implementation of new or revised water quality standards, including *schedules of compliance* \* \* \*." Administrator's Decision at 17, n.17 (quoting 40 CFR § 130.5(b)(1)&(6)). See also Clean Water Act § 303(e)(3)(A)&(F). In view of the substantial confusion and uncertainty that the lack of an easily ascertainable policy can occasion, nothing short of adopting

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<sup>6</sup>*Id.* at 5.

<sup>7</sup>*Id.* (Declaration of Gary W. Hurdiburgh, Jr. at 7).

<sup>8</sup>The Commonwealth of Puerto Rico, the jurisdiction that gave birth to the instant controversy, is in the process of amending its standards or implementing regulations to make express provision for schedules of compliance. See Petitioner's Status Report (Declaration of Gary W. Hurdiburgh, Jr. at 6).

<sup>9</sup>According to petitioner's Status Report, 29 jurisdictions have provisions in their laws (water quality standards or related regulations, including permit regulations) that explicitly authorize schedules of compliance in NPDES permits. See Status Report (Declaration of Gary W. Hurdiburgh, Jr. at 5-6 (¶'s 12 & 14)). Six (6) others have begun, but not completed, the steps necessary to provide for such schedules. *Id.* (Declaration at 6 (¶ 14)).

explicit provisions in a State's regulations or water quality standards will suffice to overcome the presumption raised by a State's silence.

Petitioner's second argument is based more on practicality than on law or policy. Petitioner argues that section 401 of the Act enables States to fend for themselves against EPA-issued permits that might contain unwanted schedules of compliance, i.e., schedules which, in the opinion of the States, might possibly undercut their water quality standards. Petitioner cites this section of the Act because it allows States to exercise an effective veto power over any EPA-issued permit if the permit contains a schedule of compliance that is inconsistent with water quality standards. This argument also is not compelling. Although petitioner is correct that section 401 is available for that purpose,<sup>10</sup> it is well to keep in mind that the concerns of States are not the sole matters at stake. First, there is a matter of adherence to the law as it is written, not as petitioner might wish it had been written. Second, the interests of the public are given important recognition in the Clean Water Act. Specifically, the Act and implementing regulations require States to provide for public participation in setting water quality standards. See Administrator's Decision at 20 (citing CWA § 303(c); 40 CFR § 131.20). It is therefore appropriate to ask whether any purpose is served by inviting the general public to participate in developing state water quality standards without concurrently giving equivalent publicity to the possibility of later allowing individual permit applicants to bypass those standards, albeit temporarily, pursuant to relaxed schedules of compliance. Petitioner does not address this question—or, more importantly, the concern underlying it—anywhere in its several submissions.<sup>11</sup> We believe the open process contemplated by the regulations, which calls for

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<sup>10</sup>In his decision, the Administrator specifically acknowledged the States' right to exercise this power, but he observed that "EPA's longstanding 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." Administrator's Decision at 16, n.15.

<sup>11</sup>Although the public may participate in proceedings for the issuance of individual permits, and object to overly generous schedules of compliance, the absence of a written policy on schedules of compliance may lull the public into believing that there are no exceptions to immediate compliance, and therefore little reason to monitor individual permits. The same effect on the public is produced if the policy is written but can only be found in unpublished internal memoranda. Cf. Anthony, Robert A. "Well, You Want The Permit Don't You?" Agency Efforts to Make Nonlegislative Documents Bind the Public, 44 Ad. Law Rev. 31, 33 (Winter 1992)("If the [nonlegislative] document is an internal memo to staff that is not published, there is the additional problem of secret law, whereunder affected parties do not know the principles by which their affairs are governed unless they have back-channel sources within the agency.").

States to make specific provisions for their policies on schedules of compliance, makes for a more vigilant and informed public and thereby serves the greater interests of the policies underlying the Clean Water Act.

Petitioner's last argument, that irrational results will ensue from the Administrator's decision in the context of section 304(l) of the Act, is actually an effort to reargue and refine points previously presented in earlier phases of this proceeding. Those arguments were rejected then<sup>12</sup> and are rejected again now. Section 304(l) was enacted on February 4, 1987,<sup>13</sup> nearly 15 years after enactment of the principal statutory provisions construed in the Administrator's decision.<sup>14</sup> To argue in the space of one short paragraph, as petitioner does,<sup>15</sup> that this subsequently enacted statutory provision should somehow prevail over the entirety of the comprehensive statutory scheme interpreted by the Administrator falls short of the task. In any event, the simple truth is that no "irrational results" ensue from the Administrator's decision, as an examination of petitioner's concerns quickly discloses.

According to petitioner, the Administrator's decision would give rise to a situation where persons who discharge toxic waste into designated toxic hot spots would be allowed up to three years under section 304(l) to come into compliance with water quality standards, but dischargers who are discharging into streams not so designated—presumably less heavily polluted waters—would be denied similar extensions. The short answer to this charge is that it is possible, in some instances, for the States to modify their water quality standards (including associated provisions, if any, for schedules of compliance) for the less heavily polluted streams in order to reduce some or all of the disparity envisioned by petitioner.<sup>16</sup> Even if modification is not feasible or desirable, it must be kept in mind that eliminating

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<sup>12</sup> See Administrator's Decision at 6, n.5.

<sup>13</sup> Water Quality Act of 1987, PL 100-4, § 308, 101 Stat. 7, 38 (February 4, 1987).

<sup>14</sup> The principal statutory provisions considered by the Administrator in his decision are §§ 101(a) and (b), 301(b)(1)(C), 303(e)(3)(A) and (F), 304(l), 401(a)(1), 402(a)(3), 402(b)(1)(B), 402(k), 502(17), and 510. Except for § 304(l), all of these provisions were first enacted as part of the Federal Water Pollution Control Amendments of 1972, Pub. Law No. 92-500, 86 Stat. 816, et seq. (October 18, 1972), and none has undergone any material change since that time.

<sup>15</sup> Petition at 5.

<sup>16</sup> Any modification of water quality standards must be carried out in accordance with EPA regulations, including applicable antidegradation policies. See generally CFR Part 131 (Water Quality Standards). In addition, effluent limitations in any permits issued pursuant to a modification would have to be consistent with anti-backsliding requirements or an exception thereto. See generally CWA §§ 402(o) & 303(d)(4).

disparities that result from geography should not be a paramount concern, particularly if the disparity flows from the structure of the statutory scheme, as is often the case. Examples of such disparities in the law of pollution control are not unknown despite the fact that relative economic advantages or disadvantages may accrue to individual polluters depending on their location. The Clean Air Act, for example, draws distinctions between areas close to certain national parks and wilderness areas and those that are not, with the result that those close enough to have an effect on those areas are subject to more rigorous requirements. *See, e.g.*, CAA § 165(d)(2)(C)(ii) (protecting “air quality-related values” of such areas in addition to conventional “increment” protection); 42 USCA § 7475(d)(2)(C)(ii). Finally, petitioner overlooks the fact that notwithstanding these disparities some States might not want to relax compliance dates for their less heavily polluted streams. They might wish instead to see higher standards of compliance observed for those streams, thereby preserving their relative purity *vis-a-vis* toxic hot spots. In our opinion, therefore, there is nothing irrational about the results of the Administrator’s decision as construed and applied in the context of section 304(l).

Accordingly, the petition of EPA Region II is denied and the stay of the Administrator’s decision, entered on September 4, 1990, is hereby lifted.

So ordered.