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

MAY 27 1992

OFFICE OF WATER

MEMORANDUM

SUBJECT: Order Denying Modification Request With Respect to the Administrator's 1990 Decision in Star-Kist Caribe, Inc. (NPDES Appeal No. 88-5)

FROM: Ephraim S. King, Chief
NPDES Program Branch

TO: Water Permits Branch Chiefs,
Regions I - X

Attached, for your information, is a copy of the May 26, 1992 decision of the Environmental Appeals Board (Board) which denies EPA's request for modification of the Administrator's April 16, 1990 decision in this matter. I ask that you provide this information to your States. (The Administrator's April 1990 decision had been stayed on September 4, 1990 by the Chief Judicial Officer pending resolution of the modification request. Your staff provided us information earlier this Spring to respond to a request by the Board for a status report on any pertinent development subsequent to entry of the stay order. For your information, I am also attaching the status report and déclaration that was filed on April 3, 1992.)

As indicated on page 2 of the order denying the request for modification, the Administrator's April 1990 decision holds 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 construed as authorizing a schedule of compliance.

We have been working on more specific guidance in this area in terms of the Great Lakes Water Quality Initiative. We hope to be able to provide you more specific guidance on implementation of the Administrator's April 1990 decision within the next few weeks.

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If you have any questions on this matter, please call me at (202) 260-9541 or have your staff contact Laura Phillips of my staff at (202) 260-9532.

Attachments

cc: Cynthia C. Dougherty, PD
William R. Diamond, OST
Susan G. Lepow, OGC

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

| | | |
|---|---|---|
| In the Matter of<br><br>Star-Kist Caribe, Inc.<br><br>Petitioner<br><br>NPDES Permit No. PR0022012 | ) | NPDES Appeal No. 88-5 |

STATUS REPORT

On March 12, 1992, Environmental Appeals Judge Ronald J. McCallum ordered Petitioner (EPA Region II) to submit a status report on whether the circumstances giving rise to the September 4, 1990 Stay Order still exist and on the steps Petitioner and the Office of Water have taken to address the issue. Specifically, Petitioner was directed to submit by April 3, 1992 a:

> detailed status report on the Agency's efforts to develop guidance for the States respecting implementation of the Administrator's Order, and on any subsequent changes in the laws, policies, and permit programs of the States that would affect their respective abilities to implement the Order.

A. Status of Agency Guidance

The Supplemental Information submitted on August 24, 1990, described the progress in developing agency guidance through that date. Following that date, agency staff continued to work on the draft guidance. However, the guidance has not yet been issued in final form, for several reasons.

The plan of the Criteria and Standards Division ("CSD," now part of the Standards and Applied Science Division, Office of Science and Technology) in the summer of 1990 was to issue the guidance (once its terms were final) as part of the preamble to proposed amendments to the water quality standards regulations. Those amendments were then going through the clearance process to go into Red Border review. This procedure offered the advantages of wide public dissemination of the guidance, an opportunity for public comment, and an emphasis on the relationship between schedules of compliance for water quality-based effluent limitations and State standards programs. Concurrently, CSD staff were working with staff from the Office of Water Enforcement and Permits (now Office of Wastewater Enforcement and Compliance), to produce a stand-alone version of the guidance for easy distribution.

However, before that proposed rulemaking or the stand-alone version could be finalized, work on them was temporarily suspended to make staff available to work on other more pressing matters pursuant to the 1987 Amendments to the Clean Water Act. These included the Office of Water's need to identify States which had failed to promulgate numerical criteria for toxics as required under section 303(c)(2)(B) and to propose and promulgate Federal criteria in their stead. This major undertaking resulted in a proposal to promulgate water quality criteria for 22 States on November 19, 1991. 56 Fed. Reg. 58420. That rule is expected to be promulgated in final form in approximately a month. In

addition, the Office of Water has developed application regulations to implement the storm water program on November 16, 1990 (55 Fed. Reg. 47990), as revised March 21, 1991 (56 Fed. Reg. 12098), November 5, 1991 (56 Fed. Reg. 56548) and April 2, 1992 (57 Fed. Reg. 11394). The Office of Water has undertaken numerous activities to assist the States in implementation of the storm water program, including assumption of general permits authority. In addition, the Office was responsible for developing a complex regulation implementing the 1987 statutory amendments to the NPDES program, which is likely to be proposed in the next one to two months, as well as regulations governing the treatment of Indian tribes as States (final water quality standards regulation on December 12, 1991 (56 Fed. Reg. 64876) and proposed NPDES regulation on March 10, 1992 (57 Fed. Reg. 8522). As a result of these competing demands on staff, the draft guidance remains unpublished.

However, the Office of Water, as well as the Office of General Counsel and the Regions, in their oversight capacity, have worked with the States to make clear their intentions with regard to schedules of compliance, and to modify their standards or implementing regulations to make those intentions explicit, where necessary. In addition, as part of the Great Lakes Water Quality Initiative, EPA has helped draft language which will ensure that a proper regulatory basis exists for schedules of compliances for water quality based effluent limitations in the

Great Lakes States. The results of those efforts are described below, State by State.

B. Changes in State laws, policies and permit programs

As explained in the affidavit submitted to the Administrator on August 24, 1990, following issuance of the March 8, 1989, and April 16, 1990, Orders in this case, the Office of Water, in concert with the Regions, took steps to bring those orders to the attention of their State counterparts. Through their normal NPDES and water quality standard oversight efforts, the Regions have continued to work with the States to ensure that the States' laws, regulations and standards reflect their intentions with respect to schedules of compliance in NPDES permits for effluent limitations based on post-July 1, 1977 water quality standards (hereinafter referred to as "schedules of compliance for post-1977 standards"). The following sets out our current understanding of the status of each State in this regard.

Several States have incorporated provisions into their water quality standards or related regulations which explicitly authorize schedules of compliance for effluent limitations based on post-July 1, 1977 standards. These States are Arkansas, Texas, New Mexico, Wisconsin, Mississippi[2], Alabama2/,

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[1]We were not able to reliably determine in all cases whether these provisions were adopted in response to the Star-Kist Orders or were pre-existing. Therefore, this Status Report lists States according to their present status.

[2]. For certain states which have explicitly authorized schedules of compliance for post-1977 standards, we have not been able to verify by the deadline for this Status Report which regulation(s), NPDES or standards, sets forth the authorization.

Florida2/, Georgia2/, South Carolina2/, North Carolina2/, Kentucky2/, Tennessee2/, Maryland[3], West Virginia3/, Colorado, Wyoming2/, Montana2/, North Dakota2/, South Dakota2/, Guam2/, Missouri, Arizona, and California.

Several other States have begun, but not yet completed, the process for changing their standards or implementing regulations to provide for schedules of compliance. These States include New Jersey, Puerto Rico, Delaware, Virginia, Oklahoma, and Oregon (Oregon is only in the preliminary stages of considering such a change; it has not yet proposed any regulatory change).

A number of States have provisions which, while set out in their permit regulations programs, nonetheless express a State's intention to allow schedules of compliance for post-1977 standards as well as for technology-based requirements. Such provisions would appear to meet the April 16th Order, if permit regulations are deemed to be implementing regulations. These States include New York, Pennsylvania, Hawaii, Iowa, Kansas, and Nebraska. (The States listed in the text at footnote 2 may actually belong here.)

Some States have no explicit authorization for schedules of compliance for post-1977 standards, and no plans to add such authorization. In some cases, this appears to reflect a State decision not to allow such schedules. States in this category include Maine, Massachusetts, New Hampshire, Connecticut, Rhode

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[3] While Maryland and West Virginia believe that they have such provision, the Region has raised questions about their adequacy.

Island, Vermont, and Illinois (latter has statutory impediment). In other cases, there is some uncertainty as to the State's intentions. Such States include the Virgin Islands, Washington, Alaska, Idaho, Indiana, Michigan, Minnesota, Ohio, Louisiana, Nevada, Commonwealth of the Northern Mariana Islands, and the Pacific Trust Territories.

In sum, the States have made progress in making their regulations and standards more explicit as to whether, and if so under which circumstances, schedules of compliance are consistent with their water quality standards. In the majority of cases, it appears that States do intend to allow them under at least some circumstances. However, a number of states still have pending rulemakings or have not made their intentions clear.

Respectfully submitted,

Catherine A. Winer

Catherine A. Winer
Attorney
Office of General Counsel
Water Division

Dated: April 3, 1992

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

| | | |
|---|---|---|
| In the Matter of | ) | |
| Star-Kist Caribe, Inc. | ) | NPDES Appeal No. 88-5 |
| Petitioner | ) | |
| NPDES Permit No. PR0022012 | ) | |

DECLARATION OF GARY W. HUDIBURGH, JR.

1. I, Gary W. Hudiburgh, Jr., declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, or on information contained in the records of the United States Environmental Protection Agency ("EPA" or "the Agency") or supplied to me by current EPA employees within my area of oversight.

2. I am the Chief of the Regulatory Implementation Section, NPDES Program Branch, in the Permits Division, Office of Wastewater Enforcement and Compliance ("OWEC"), a position I have held since 1989. OWEC is one of four offices that report to the Assistant Administrator for Water.

3. As part of my responsibilities, I oversee the issue regarding the question of compliance schedules for water quality-based effluent limitations in permits issued under section 402 of the Clean Water Act.

4. The purpose of this declaration is describe the information obtained for the Status Report requested by Judge McCallum, and the process used to obtain such information.

## I. Process Used to Collect Information for Status Report

5. On March 19, 1992, a memorandum signed by Cynthia Dougherty, Director of the Permits Division, and William R. Diamond, Director of the Standards and Applied Science Division, was sent to each of EPA's ten Regional Water Management Division Directors, with copies to each of the Regional Water Quality Branch Chiefs and Regional Water Permit Branch Chiefs, requesting information for the Status Report. Specifically, the memorandum requested information on changes to laws, policies and permit programs of each State which would affect their ability to comply with the April 16, 1990 Star-Kist Order, to be submitted to my staff by March 27, 1992.

6. Regional staff responded to this request by sending written or oral information on a State by State basis. My staff made numerous phone calls to clarify the information provided and to fill in gaps. In a number of instances, the information appears to have been provided by the States without an opportunity for independent review by EPA of the laws, regulations, or policies involved. Therefore, the following State by State information, while representing the best information available by April 3, 1992, has not been independently verified.

## II. Information Gathered

### A. Status of Agency Guidance

7. The Supplemental Information submitted on August 24, 1990, described the progress in developing agency guidance

through that date. Following that date, agency staff continued to work on the draft guidance. However, the guidance has not yet been issued in final form, for several reasons.

8. The plan of the Criteria and Standards Division ("CSD," now part of the Standards and Applied Science Division, Office of Science and Technology) in the summer of 1990 was to issue the guidance (once its terms were final) as part of the preamble to proposed amendments to the water quality standards regulations. Those amendments were then going through the clearance process to go into Red Border review. This procedure offered the advantages of wide public dissemination of the guidance, an opportunity for public comment, and an emphasis on the relationship between schedules of compliance for water quality-based effluent limitations and State standards programs. Concurrently, CSD staff were working with staff from the Office of Water Enforcement and Permits (now Office of Wastewater Enforcement and Compliance), to produce a stand-alone version of the guidance for easy distribution.

9. However, before that proposed rulemaking or the stand-alone version could be finalized, work on them was temporarily suspended to make staff available to work on other more pressing matters pursuant to the 1987 Amendments to the Clean Water Act. These included the Office of Water's need to identify States which had failed to promulgate numerical criteria for toxics as required under section 303(c)(2)(B) and to propose and promulgate Federal criteria in their stead. This major undertaking resulted

in a proposal to promulgate water quality criteria for 22 States on November 19, 1991. 56 Fed. Reg. 58420. That rule is expected to be promulgated in final form in approximately a month. In addition, the Office of Water has developed application regulations to implement the storm water program on November 16, 1990 (55 Fed. Reg. 47990), as revised March 21, 1991 (56 Fed. Reg. 12098), November 5, 1991 (56 Fed. Reg. 56548) and April 2, 1992 (57 Fed. Reg. 11394). The Office of Water has undertaken numerous activities to assist the States in implementation of the storm water program, including assumption of general permits authority. In addition, the Office was responsible for developing a complex regulation implementing the 1987 statutory amendments to the NPDES program, which is likely to be proposed in the next one to two months, as well as regulations governing the treatment of Indian tribes as States (final water quality standards regulations on December 12, 1991 (56 Fed. Reg. 64876) and proposed NPDES regulations on March 10, 1992 (57 Fed. Reg. 8522)). As a result of these competing demands on staff, the draft guidance remains unpublished.

10. However, the Office of Water, as well as the Office of General Counsel and the Regions, in their oversight capacity, have worked with the States to make clear their intentions with regard to schedules of compliance, and to modify their standards or implementing regulations to make those intentions explicit, where necessary. In addition, as part of the Great Lakes Water Quality Initiative, EPA has helped draft language which will

ensure that a proper regulatory basis exists for schedules of compliances for water quality based effluent limitations in the Great Lakes States. The results of those efforts are described below, State by State.

B. Changes in State laws, policies and permit programs

11. As explained in the affidavit submitted to the Administrator on August 24, 1990, following issuance of the March 8, 1989, and April 16, 1990, Orders in this case, the Office of Water, in concert with the Regions, took steps to bring those orders to the attention of their State counterparts. Through their normal NPDES and water quality standard oversight efforts, the Regions have continued to work with the States to ensure that the States' laws, regulations and standards reflect their intentions with respect to schedules of compliance in NPDES permits for effluent limitations based on post-July 1, 1977 water quality standards (hereinafter referred to as "schedules of compliance for post-1977 standards"). The following sets out our current understanding of the status of each State in this regard.

12. Several States have incorporated provisions into their water quality standards or related regulations which explicitly authorize schedules of compliance for effluent limitations based on post-July 1, 1977 standards. These States are Arkansas,

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[1]We were not able to reliably determine in all cases whether these provisions were adopted in response to the Star-Kist Orders or were pre-existing. Therefore, this Status Report lists States according to their present status.

Texas, New Mexico, Wisconsin, Mississippi[2], Alabama2/, Florida2/, Georgia2/, South Carolina2/, North Carolina2/, Kentucky2/, Tennessee2/, Maryland[3], West Virginia3/, Colorado, Wyoming2/, Montana2/, North Dakota2/, South Dakota2/, Guam2/, Missouri, Arizona, and California.

13. Several other States have begun, but not yet completed, the process for changing their standards or implementing regulations to provide for schedules of compliance. These States include New Jersey, Puerto Rico, Delaware, Virginia, Oklahoma, and Oregon (Oregon is only in the preliminary stages of considering such a change; it has not yet proposed any regulatory change).

14. A number of States have provisions which, while set out in their permit regulations programs, nonetheless express a State's intention to allow schedules of compliance for post-1977 standards as well as for technology-based requirements. Such provisions would appear to meet the April 16th Order, if permit regulations are deemed to be implementing regulations. These States include New York, Pennsylvania, Hawaii, Iowa, Kansas, and Nebraska. (The States listed in the text at footnote 2 may actually belong here.)

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[2]. For certain states which have explicitly authorized schedules of compliance for post-1977 standards, we have not been able to verify by the deadline for this Status Report which regulation(s), NPDES or standards, sets forth the authorization.

[3] While Maryland and West Virginia believe that they have such provision, the Region has raised questions about their adequacy.

15. Some States have no explicit authorization for schedules of compliance for post-1977 standards, and no plans to add such authorization. In some cases, this appears to reflect a State decision not to allow such schedules. States in this category include Maine, Massachusetts, New Hampshire, Connecticut, Rhode Island, Vermont, and Illinois (latter has statutory impediment). In other cases, there is some uncertainty as to the State's intentions. Such States include the Virgin Islands, Washington, Alaska, Idaho, Indiana, Michigan, Minnesota, Ohio, Louisiana, Nevada, Commonwealth of the Northern Mariana Islands, and the Pacific Trust Territories.

Signed: Gary W. Hudiburgh, Jr.

April 3, 1992

Gary W. Hudiburgh, Jr.,
Chief, Regulatory
Implementation Section

CERTIFICATE OF SERVICE

On the 3rd of April, 1992, a true and correct copy of the foregoing Status Report was mailed postage prepaid to:

John Ciko, Jr.
Dan L. Vogus
H.J. Heinz Company
P.O. Box 57
Pittsburgh, PA 15230-0057

and delivered by hand to:

Judge Ronald L. McCallum
Environmental Appeals Board
401 M Street, S.W.
Room 1145 West Tower
Washington, D.C. 20460

Catherine A. Wiener

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C

| | | |
|---|---|---|
| In the Matter of | ) | |
| Star-Kist Caribe, Inc. | ) | NPDES Appeal No. 88-5 |
| Permit Applicant | ) | |
| NPDES Permit No. PR0022012 | ) | |

[Decided May 26, 1992]

ORDER DENYING MODIFICATION REQUEST

*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 [1/] for a substantial modification to the Administrator's April 16, 1990 decision in this matter. [2/] 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"). [3/] 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

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1/ 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.

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

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

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 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. [4] The remark in the Administrator's decision that

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[4] 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

(continued...

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, [5] there are seven States with no explicit authorization for schedules of compliance because, in petitioner's words, "this appears to reflect a State decision not to allow such schedules." [6] 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." [7] 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. [8]

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

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[4] (...continued)
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.

[5] Petitioner's Status Report (filed April 3, 1992).

[6] Id. at 5.

[7] Id. (Declaration of Gary W. Hurdiburgh, Jr. at 7).

[8] 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).

law. [9] 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 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, [10] 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

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[9] 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)).

[10] 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.

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. [11] We believe the open process contemplated by the regulations, which calls for 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 [12] and are rejected again now. Section 304(l) was enacted on February 4, 1987, [13] nearly 15 years after enactment of the principal statutory provisions

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[11] 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.").

[12] See Administrator's Decision at 6, n.5.

[13] Water Quality Act of 1987, PL 100-4, §308, 101 Stat. 7, 38 (February 4, 1987).

construed in the Administrator's decision. [14] To argue in the space of one short paragraph, as petitioner does, [15] 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. [16] Even if modification is not feasible or desirable, it must be kept in mind that eliminating 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

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[14] 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.

[15] Petition at 5.

[16] Any modification of water quality standards must be carried out in accordance with EPA regulations, including applicable antidegradation policies. See generally 40 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).

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 the 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.*

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the forgoing Order Denying Modification Request in the matter of Star-Kist Caribe, Inc., NPDES Appeal No. 88-5, were sent to the following persons in the manner indicated:

First Class Mail,
Postage Prepaid:

Warren H. Llewellyn
Regional Counsel's Office
U.S. EPA, Region II
20 Federal Plaza
New York, NY 10278

Dan L. Vogus
John Ciko, Jr.
H. J. Heinz Company
P. O. Box 57
Pittsburgh, PA 5230-0057

By Hand-delivery:

Susan G. Lepow
Office of General Counsel
Room 509W LE-132W

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Johnese R. Wilson for
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