August 8, 2003

Martin Fitzpatrick
Water Quality Division
Oregon Department of Environmental Quality
811 S.W. Sixth Ave.
Portland, OR 97204

Re: **1999-2002 Triennial Review of Water Quality Standards**
Proposed Rule for Compliance Schedules

Dear Mr. Fitzpatrick:

The Department is proposing to adopt an illegal rule and should withdraw this rulemaking.

I. THE PROPOSED RULE IS ILLEGAL

The proposed rule would "allow [the Department] to establish compliance schedules for wastewater discharge permit holders to comply with standards." Revised Public Notice, Attachment A (June 10, 2003). It would establish by rule, at OAR 340-041-0120(19):

> Compliance Schedules: In implementing the water quality criteria in permits issued under Division 45, the Department is authorized to issue permits that include a schedule requiring the permit holder to achieve compliance with these water quality criteria in the shortest period reasonably possible. However, in no case may a compliance schedule extend beyond a maximum duration of five years.

Revised Public Notice, Attachment E.

A. The Proposed Rule Language is Precluded by the Clean Water Act and EPA's Implementing Regulations.

1. The Language of the Federal Regulations is Clear and Unambiguous and Courts Have Interpreted it as Such.

EPA regulations state that any schedules of compliance incorporated in an NPDES permit "shall require compliance as soon as possible, but not later than the applicable statutory deadline under the Clean Water Act [CWA]." 40 C.F.R. § 122.47(a)(1) (2003). The applicable statutory deadline in the Act for point sources to meet water quality standards is July 1, 1977. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2001). By that date, dischargers must comply with "any more stringent [effluent] limitation, including those necessary to meet water quality standards . . . or schedules of compliance. . ." established under the CWA or State law. *Id*. After that 1977 deadline, all dischargers

must comply
with water quality-based effluent limitations in their permits necessary to meet any water quality standards applicable to their receiving waters. These water quality standards include designated uses, antidegradation requirements, and specific numeric and narrative criteria necessary to achieve the CWA's statutory objectives of "chemical, physical, biological, and radiological integrity." See PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 714-21 (1994). Today, no CWA provision allows dischargers to meet State schedules of compliance in lieu of the water quality-based effluent limitations in their State-issued NPDES permits.

Numerous courts have held that neither EPA nor a State has any authority to extend the deadlines for compliance established by Congress in § 301(b)(1). *See e.g.*, State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977) ("Section 301(b)(1)'s effluent limitations are, on their face, unconditional"). Any attempt by the State to delay compliance with such limitations beyond July 1, 1977, or the date such limitations are applied to the discharger, violates Congress' clear statutory compliance deadline.

The same logic applies to the March 31, 1989 effluent limitations and toxics criteria subject to § 301(b)(2), at 33 U.S.C. § 1311(b)(2)(A)-(F). *See* Northwest Environmental Defense Center v. Oregon Department of Environmental Quality, Case No. 9905-05144 (Or. Cir. Ct. Multnomah Cty. Oct. 19, 2000), *citing* Save Our Bays & Beaches v. City & Cty. of Honolulu, 904 F.Supp. 1098, 1122 (D.Hawai'i 1994). That case concerned a condition in the Port of Portland's new NPDES permit for de-icing operations at Portland International Airport. Plaintiffs successfully argued that the Department could not insert a condition on the proposed toxic effluent content that it termed "interim" when it actually operated as a compliance schedule delaying the achievement of existing Oregon numeric water quality criteria. The court held that neither the EPA nor a State agency is empowered to extend or modify the rigid statutory deadline in the Act. *Id*. Thus, an interpretation of § 301(b) that allows each State to extend the deadline for compliance with water quality-based effluent limitations runs afoul of the numerous cases acknowledging § 301(b)'s firm guideposts.

2. Congress Intended for Compliance to be Achieved According to the Timetable it Set Out in the Act.

Congress did not mandate that all water quality standards for the life of the Act be established by July 1, 1977. Congress mandated that there shall be achieved by July 1, 1977 and from that date forward compliance with any established standards. Even where those standards are updated and become more stringent after 1977, a process required to occur every three years (33 U.S.C. § 1313), § 301(b)(1)(C) requires dischargers to achieve immediately upon permit renewal the limitations necessary to comply with those more stringent standards. In the Matter of Star-Kist Caribe, Inc., 3 E.A.D. 172, 1990 WL 324290.

Congress provided specific processes to assist dischargers making good-faith efforts to comply with Act. EPA and the State's ability to provide extensions based on their forbearing from enforcing the effluent limit is sufficient to address most compliance concerns of the affected dischargers. However, even this extension authority is limited to the extent it does not violate the Act, as discussed *infra*, in point number four of this subsection.

EPA and the State may also grant variances. 33 U.S.C. § 1311(c),(g); § 1312(b)(2); *See also* 40 C.F.R. § 122.21(m) (2003). Site-specific variances for permitted non-publicly owned treatment works can be granted for technology-based effluent limits on various grounds, so long as the discharger is already meeting or shows they will meet "applicable regulatory and/or statutory criteria" (such as existing water quality standards and the effluent limitations necessary to satisfy them). 40 C.F.R. § 122.21(m)(1)-(2). The public must receive the opportunity to comment on such variances, which must be proposed during the permitting process. *Id.* Variances may also be granted for water quality-based effluent limits and thermal discharges, again on a site-specific basis and during the public comment period. 40 C.F.R. § 122.21(m)(5)-(6) (2003). In certain limited circumstances, for toxic pollutants, EPA or the State may allow a five year extension to comply with a *newly established* water quality-based effluent limit. 33 U.S.C. § 1312(b)(2)(B). However, such a variance may not delay compliance with existing water quality standards and the water-quality based effluent limits necessary to implement them. 33 U.S.C. § 1312(b)(2)(C) ("The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under § 1311 of this title," which includes existing State water quality standards subject to Congress' July 1, 1977 deadline at § 1311(b)(1)(C).)

Congress' express grant of variance authority in § 301(c),(g) and § 302(b)(2) of the Act, (33 U.S.C. § 1311(c), 1312(b)(2)) to address *site-specific* problems with compliance forecloses any interpretation of § 301(b) that would justify a *general* authority for States to use compliance schedules in any permit. The fact that Congress expressly placed EPA and the States' authority to grant variances within the permitting process, during the public comment period, cannot be reconciled with a general agency authority to grant compliance schedules at will.

3. Sections 510, 301, and 303 of the Act are Consistent in Their Prohibition of Non Site-Specific Use of Variances or Compliance Schedules.

The Act forbids States from creating schedules of compliance under the guise of more lenient authority to implement their water quality standards. Section 510 of the Act provides that a State "may not adopt or enforce any effluent limitation . . . which is less stringent than the effluent limitation . . . under this chapter. . . ." 33 U.S.C. § 1370(1)(B); *See also* 33 U.S.C § 1362(11) (definition of effluent limitation). Because they permit effluent discharges above the quantity or rate that would otherwise occur, schedules of compliance are themselves a type of effluent limitation less stringent than those necessary to achieve existing State water quality standards.

Any across-the-board effort by the State to delay compliance with its standards at this late date violates § 510.

Section 301(b)(1)(C) incorporates the requirements of § 510, 33 U.S.C. § 1370, requiring NPDES permits to include only more stringent limitations necessary to meet water quality standards, performance standards, or schedules of compliance "established pursuant to any State law or regulation under authority preserved by § 1370 . . . ." 33 U.S.C. § 1311(b)(1)(C) (emphasis added). Once again, on its face, § 301(b)(1)(C) precludes any hesitation in implementing the Act's clear goals, because it only allows compliance schedules that would not violate § 510.

Section 303(e)(3)(A) reiterates the critical requirement that State-issued effluent limitations and schedules of compliance be at least as stringent as § 301(b)(1), including the deadline to achieve existing water quality standards. 33 U.S.C. § 1313(e)(3)(A). Section 303(e)(3)(A) requires that water quality management plans prepared as part of the State's continuing planning process include "effluent limitations and schedules of compliance at least as stringent as those required by § 1311(b)(1) . . . and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section; . . ." *Id*. This section, like those noted above, does not permit a State to shield its dischargers from the effluent limits necessary to comply with existing water quality standards. EPA's own NPDES program regulations at 40 C.F.R. § 122.4(d) concur with sections 510, 301, and 303 that "No permit shall be issued. . .when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."

Finally, § 303(c) mandates that States establish water quality standards that "serve the purposes" of the Act. 33 U.S.C. § 1313(c)(3)-(4). Those purposes are "restor[ing] and maintain[ing]" the goals of "chemical, physical, biological, and radiological integrity" stated in § 101(a) of the Act. 33 U.S.C. § 1251(a). Water quality standards under the Clean Water Act are designed to provide federally approved goals that can be achieved by State controls (such as numeric effluent limits in State-issued NPDES permits or narrative criteria) and federal strategies other than point source technology-based limitations. Pronsolino v. Nastri, 291 F.3d 1123, 1132 (9th Cir. 2002). Those "federally approved goals" begin with the Act's § 101(a) mandate from Congress to "restore and maintain…chemical, physical, biological, and radiological integrity," and not with interim or subsidiary requirements.

Oregon currently does not have valid water quality standards that achieve any of these goals. By proposing general authority to grant compliance schedules, it proposes its own interim goals untethered to Congress' § 101(a) mandate and to its currently proposed and new water quality standards intended to meet the § 101(b) mandate. Such interim goals do not "serve the purposes" of the Act because they do not guarantee that the water quality standards themselves actually achieve Congress' goals in § 101(a). For example, the goals cannot be met if attainment

of standards is postponed indefinitely, particularly if the designated uses are threatened and endangered species. State water quality standards are only valid if they fulfill the Act's goals, and can only claim to do so if they will be enforced. They cannot simultaneously satisfy Congress' § 101(a) mandate and violate Congress' deadline for dischargers to achieve existing State water quality standards under § 301(b)(1)(C).

It may be EPA's position that "serve the purposes" of the Act implicates only an interim, subsidiary goal of Congress expressed at § 101(b)(2) of the Act as:

> Restoring, "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."

33 U.S.C. § 1251(b)(2).

In fact, this interim goal is the only one that appears in EPA's water quality regulations, whereas Congress' expressed purposes in § 101(a) are absent. See 40 C.F.R. § 130.3, 131.2 (2003). But even taking EPA's exclusion of the CWA's overarching § 101(a) goals in its implementing regulations as valid, *arguendo*, the components of water quality standards still must be consistent with one another. 40 C.F.R. § 131.11(a)(1). *See* further discussion, Part C of this subsection. For instance, States must adopt water quality criteria that protect designated uses. 40 C.F.R. § 131.11 (2003). If a State grants itself the authority to exempt dischargers from effluent limits in their permits intended to achieve those water quality criteria, it is hard to see how the State's standards will protect a designated wildlife or recreation use under the Act, even if EPA is only aiming to comply with the Act's subsidiary goal at 40 C.F.R. § 130.3 and 131.2, rather than "chemical, physical, and biological integrity."

Other sections of the Act, of course, strongly conflict with EPA's de facto adoption of the interim goal in place of Congress' express mandate, and are simply incompatible with any interpretation that would allow for compliance schedules. Section 502(11)'s definition of effluent limitation, for instance, expressly implicates Congress' "chemical, physical, and biological" integrity goals. 33 U.S.C. § 1362(11). Effluent limitations apply to discharges of *pollutants* from point sources, and are included in NPDES permits to ensure that the receiving water body meets State water quality standards. If it were true that only the interim goal at § 101(b)(2) applied to *pollutants* being regulated from point sources, while § 101(a) applied to *pollution* from a variety of non-point sources, then Congress' definition of effluent limitation would be difficult to explain. The interim, subsidiary provision at § 101(b)(2) is a goal of § 101(a), and not the other way around. Therefore, if water quality standards are to "serve the purposes" of the Act, they must meet all of the goals of the Act, starting with § 101(a) and extending to designated uses, antidegradation, and biological and other criteria.

4. The Above-Mentioned Sections Also Bar Use of Memoranda of Agreement and Orders (MAOs) that Also May Function as Compliance Schedules.

Just as with the illegal "interim" condition struck down in Northwest Environmental Defense Center v. Oregon Department of Environmental Quality, *supra*, it is important to recognize that constructive compliance schedules, even if not referred to as such, are still illegal. We fear that the Department may have just such a means of constructive compliance in mind here. The Department regularly enters into MAOs with chronic violators, only to extend the deadlines for compliance with the MAO indefinitely. Under such a scenario, the Department need not even insert a "5-year" compliance schedule into a permit. The discharger could receive a perfect permit every five years, and violate it with impunity, if the State gave itself the authority to implement compliance schedules outside of the permit, such as in a MAO.

Implementation of constructive compliance schedules by extending MAO deadlines indefinitely debases the Act. It deprives the public of its right to comment and participate effectively in the permitting process and enforcement, as MAOs are not enforceable by third parties. As noted above, the state could issue perfect permits for the discharger and continue to extend the MAO without limitation. Any public participation in the permitting process would be worthless, and the public would be almost powerless to hold the discharger accountable to the Act. As noted above, § 510(1)(B) of the Act forbids States from creating schedules of compliance under the guise of more lenient authority to implement its water quality standards. Likewise, Congress' express inclusion of a means for States to deal with site-specific problems exists in § 301(c),(g) and § 302(b)(2). Therefore, Congress did not intend for States to undermine the Act's consistently firm timeline for compliance through a general compliance schedule authority outside of the permitting process.

The Clean Water Act categorically prohibits States from issuing NPDES permits with schedules of compliance to meet minimum federal standards in the Act. Therefore, the Department cannot establish by rule an extension of statutory deadlines and the EPA cannot approve such a rule.

B. EPA Administrative Decisions and Federal Case Law Agree that the Department Cannot Create a Rule that Extends the Compliance Deadlines Established by Statute.

1. The Star-Kist Caribe Case

In 1990, the EPA Administrator made a formal order finding that "if a state lacked authority to establish schedules of compliance. . . EPA would also lack that authority because of its derivative relationship to the State under § 402(a)(3)." In the Matter of Star-Kist Caribe, Inc., 3 E.A.D. 172, 1990 WL 324290, modification denied, 4 E.A.D. 33.

In a hearing before the Chief Judicial Officer below, 2 E.A.D. 758, 1989 WL 266781, Star-Kist, a Puerto Rico cannery seeking an NPDES permit, had sought an NPDES permit from EPA Region II. The Region issued the permit without Puerto Rico issuing a water quality certificate. After Puerto Rico certified the permit, the Region modified it slightly. Star-Kist, unsatisfied by effluent limits in its permit, applied to Puerto Rico's Environmental Quality Board for designation of a mixing zone at its outfall. It then argued that it was entitled to a compliance schedule from the Region with interim conditions, until Puerto Rico certified its mixing zone. Puerto Rico said it "did not object" to a schedule of compliance, but lacked the power to extend one. Star-Kist argued that it did not have to comply with its new permit immediately, because EPA could still grant and in fact had to grant it a compliance schedule. While noting that "Congress did not want to preempt the States' rights to impose and enforce *stringent* State water quality requirements," the Chief Judicial Officer ordered Star-Kist to comply with Puerto Rico's existing standards, contained in the permit issued by the Region, immediately. *Id*. (emphasis added).

The Administrator's 1990 order in Star-Kist Caribe came in response to a petition for reconsideration by EPA Region II. The Region argued that EPA should be free to add compliance schedules as it sees fit, subject only to a self-imposed "earliest practicable time" or "reasonable" deadline. The Administrator soundly rejected the Region's argument. Nor did the Administrator overturn the Chief Judicial Officer's interpretation below, which stated:

> Star-Kist argues that this 1977 deadline applies only to standards existing prior to that date. Star-Kist reasons that otherwise a discharger would be out of compliance whenever a state adopted new standards or revised old standards to be more stringent. I disagree. EPA is required to include in permits state water quality standards that are in effect on the date of the initial permit issuance. . . Moreover, the preamble to [40 C.F.R. § 122.47(a)(2)] expressly states that the regulation does not authorize extension of statutory deadlines. Thus, far from bolstering Star-Kist's position, § 122.47 makes in clear that EPA does not have the authority to extend statutory deadlines regardless of whether a water quality standard was adopted prior to or after July 1, 1977.

In the Matter of Star-Kist Caribe, Inc., 2 E.A.D. 758, 1989 WL 266781.

Nothing in the Administrator's order gave States authority to contravene either § 510(1)(B) or § 303(e) of the Act. As noted above, States must set effluent limits, water quality standards, and criteria "at least as stringent" as those necessary to meet existing standards in effect under the Act. 33 U.S.C. § 1370(1)(B). The Administrator held that EPA could only extend schedules of compliance when first, "the schedule is added pursuant to authorization contained in the State water quality standards or the State's regulations implementing the standards," and second, EPA was "deferring to the reserved rights of the States to impose more stringent requirements than the

technology-based standards of the Act would otherwise mandate." In the Matter of Star-Kist Caribe, Inc., 3 E.A.D. 172, 1990 WL 324290 (explaining in footnote that "technology-based standards" under § 301(b) includes effluent limits to meet water quality standards under § 302(a) of the Act, and not just the best available technology classifications in § 301(b)(1)(A)).

Therefore, the Department and EPA can only use compliance schedules to the extent they comply with the Act's mandate to from Congress, within the Act's timelines. The *only* non-enforcement exception the Administrator found for a State to use explicit statutory or regulatory authority to insert schedules of compliance for effluent limits was when the State promulgated water quality standards more stringent than those required by the Act. Absent those circumstances, "state water quality standards, like the great majority of laws and regulations, take effect immediately in accordance with their terms." *Id.*

Two recent EPA Environmental Appeals Board decisions addressing Star-Kist Caribe's implications do not disturb the Administrator's 1990 conclusions in that case.

2. The City of Moscow, Idaho Case

In a case involving a publicly-owned water treatment plant in Moscow, Idaho, the EPA Appeals Board did not find a general State authority to grant compliance schedules "less stringent than" the requirements of the Act. Instead, it noted, as Star-Kist Caribe held:

> [T]he Region's authority to provide compliance schedules is dependent on the relevant State's first having recognized a role for compliance schedules in its articulation of its own water quality standards. Thus, the key question is what is authorized under state law.

In re City of Moscow, 2001 WL 988721.

Nowhere in the decision, however, did the Appeals Board hold that whatever was authorized under State law could trump the Act itself. The EPA, as administrator of Idaho's NPDES program, had granted the City of Moscow, the operator of the treatment facility, a compliance schedule to delay the deadline for compliance with State temperature and total phosphorus water quality standards in the City's NPDES permit. This compliance schedule ran nearly the entire 5-year term of the permit. Idaho had a regulation authorizing compliance schedules of indefinite length based on EPA's authority to administratively extend expired NPDES permits at 40 C.F.R. § 122.6. The City argued unsuccessfully that Idaho's regulation authorizing compliance schedules could rely on EPA's extension authority alone. This would force EPA to uphold compliance schedules longer than the life of the permit (5 years). Idaho had proposed compliance schedules of 6 and 10 years for temperature and total phosphorus when it certified the City's permit. *Id.* at FN 43. EPA would otherwise be required to incorporate the State's

certification into the NPDES permit under 40 C.F.R. § 124.55. Instead, the Board found that Idaho lacked its own authority to administratively extend expired NPDES permits. In re City of Moscow, 2001 WL 988721. Following the holding in Star-Kist Caribe that EPA's authority to grant schedules of compliance could not exceed that of the states, the Board held that schedules of compliance added by EPA could not exceed the five-year term of the NPDES permit. *Id.*

Though the Appeals Board did not address the issue, Idaho's compliance schedule provision was not legal in the first place. Though more cabined than Oregon's proposed rule, by restricting compliance schedules to new water quality-based effluent limits included in a permit for the first time, the regulation is still inconsistent with Star-Kist Caribe and other case law stating that new State water quality standards and the effluent limits necessary to achieve them take effect immediately once the permit is renewed.

The Appeals Board in City of Moscow did say that:

> If the applicable state's water quality standards were promulgated after July 1, 1977, and if the state regulations allow for compliance schedules, EPA, when acting as the permitting authority, may grant compliance schedules in accordance with the requirements of 40 C.F.R. § 122.47.

Id. at FN 46.

That regulation states, in relevant part:

> (1) Time for compliance. Any schedules of compliance under this section shall require compliance as soon as possible, *but not later than the applicable statutory deadline under the CWA.*

40 C.F.R. § 122.47(a)(1) (2003) (emphasis added).

The continuing validity of EPA's own regulation and any compliance schedule, State or EPA, in light of the CWA's mandatory deadlines, which have long passed, is certainly at issue. This is particularly true since most of the variance provisions discussed supra, Part I.A.2., were added in the 1987 CWA Amendments. If Congress sought to allow schedules of compliance to extend beyond the statutory deadlines, it would have reauthorized them and not created site-specific variances. EPA's compliance schedule regulation, promulgated on April 1, 1983 and amended several times since, is neither valid nor necessary if new State water quality standards take effect immediately once a permit is renewed.

Thus, it seems, the urgency for States to authorize themselves to grant compliance schedules. However, if EPA lacks the authority, there is nothing in footnote 46 of City of Moscow, or

anywhere else in that decision, that suggests the States can contravene the Act in the manner proposed. City of Moscow recognizes that the States and their dischargers are bound by Congress' mandate and deadline in the Act. Congress has likewise foreclosed the use of discretionary administrative authority for extensions or enforcement (including MAOs) to create constructive compliance schedules by including other means to address site-specific problems in the Act. Administrative extensions or enforcement methods constructively or explicitly encompassing a compliance schedule impermissibly shield the discharger from compliance with State water quality standards already in effect. To argue otherwise is to allow States to create their own authority to grant administrative extensions and compliance schedules for NPDES permits, and then use that authority to nullify the CWA. The Department's Proposed Rule could theoretically allow it to set 5-year compliance schedules for each new NPDES permit under its new water quality standards, and then extend those compliance schedules so long as the dischargers applied for a new permit. This would clearly violate the CWA.

The Administrator noted in his 1990 order in Star-Kist Caribe that:

> [I]t 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" containing interim 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.

In the Matter of Star-Kist Caribe, Inc., 3 E.A.D. 172, 1990 WL 324290. It was this practice that the Administrator soundly rejected in Star-Kist Caribe, and the use of the administrative extension or enforcement process to achieve the same ends is similarly illegal. The Act simply does not permit these delays.

3. The New England Plating Company Case

The Appeals Board has also rejected the argument that dischargers are entitled to compliance schedules from EPA simply because the State may have the power to provide one when appropriate. In a twist on Star-Kist Caribe, in a case involving a plating facility in Massachusetts, the Board found that the State's authorization to grant compliance schedules when "appropriate" applied. In re New England Plating Co., 9 E.A.D. 726 at fn16, 2001 WL 328213. However, it held that:

> [S]imply because New England Plating raised the issue of its alleged inability to

> meet the [effluent toxicity] test limit does not mean the Region should reasonably have inferred that a compliance schedule was being requested and should have addressed this issue sua sponte in its response to comments.

This decision certainly did not provide a basis to assume that "appropriate" meant anything different from the Administrator's 1990 order:

> In the instant case the Region, pursuant to 40 C.F.R. § 122.44(d)(1)(v), [FN30] determined that the complexity of New England Plating's metal finishing effluent was such that a [effluent toxicity test] limitation was necessary to avoid violation of water quality standards for receiving waters.
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> FN30. Section 122.44(d)(1)(v) establishes that "when the permitting authority determines * * * that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity." 40 C.F.R. § 122.44(d)(1)(v).

The decision for the permit cites a lengthy record of contacts between New England Plating, the Region, and the Massachusetts Department of Environmental Protection. If "appropriate" meant anything other than compliance with the Act, the State could easily have granted the compliance schedule to circumvent the required toxicity standard, either by telling the Region to grant it or doing so when it certified the permit. Neither of these actions occurred. Instead, Massachusetts and the Region, with the full knowledge that New England Plating was attempting good-faith compliance with the Act, held that the company was obligated to comply with Massachusetts' existing water quality standards and not entitled to a schedule of compliance.

4. The D.C. Circuit's Repudiation of State Attempts to Nullify § 301(b)

A similar nullification argument, that § 301(b) would not apply, and that EPA could not veto State-issued NPDES permits until it promulgated national effluent standards, was long ago rejected by the D.C. Circuit. Natural Resources Defense Council v. U.S.E.P.A., 859 F.2d. 156, 182-87 (D.C. Cir. 1988). In that case, the D.C. Circuit decided numerous issues raised by environmentalists and industry concerning major EPA rulemakings on the NPDES program, including EPA's veto power over the States. The plaintiff environmental group made a successful argument concerning the construction of the Act in that case. It argued that States cannot use their own authority to pass statutes and regulations to enable themselves to issue permits freely violating § 301(b) with EPA powerless to intervene. *Id*. The court upheld EPA's power to overrule States that issued permits that violated § 301(b), even if the State was using its own "best professional judgment". *Id*. The plaintiff's prevailing argument similarly prevents the Department from authorizing itself to grant compliance schedules that would violate § 301(b)

here, particularly § 301(b)(1)(C). The same argument also prevents EPA from approving the Department's Proposed Rule. Neither EPA's compliance schedule regulation at 40 C.F.R. § 122.47, nor the CWA itself, give EPA or the Department the ability to grant compliance schedules that would violate § 301(b)(1)(C) today.

Because the Proposed Rule may allow the Department to simply issue successive new permits with new compliance schedules, the "maximum of five years" proposed by the Department provides little comfort. The purposes of the CWA and the interests of justice cannot be achieved by an open-ended remand that could drag the process out indefinitely. Northwest Environmental Advocates v. U.S.E.P.A., CV-01-510-HA, (D. Or. June 11, 2003) (Supplemental order directing EPA to promulgate revised water quality standards within timeline and denying Defendants' motion to remand).

C. Adoption of the Proposed Rule Calls Into Question the Department's Entire Existing Water Quality Standards Regime.

Water quality standards, and the effluent limitations necessary to implement them, are intended to support various beneficial uses of the water body negatively affected by discharges. 40 C.F.R. § 131.10 (2003). Under the Proposed Rule, many dischargers will receive up to an additional five years to come into compliance with such standards. Existing Department and EPA Region X assumptions about the how much risk the beneficial uses can handle, assumptions that underlie existing and newly proposed water quality standards and criteria, may not be valid if the Department or Region allow an additional five or more years to transpire before compliance with those standards is achieved. This is particularly, although not uniquely true, for federally-listed threatened and endangered species. If extensions of time in which criteria are achieved are allowed to occur through this rulemaking, the criteria themselves may be in question and more stringent enforcement of other sources may be necessary to restore and protect the beneficial uses.

One good example of where damage will be wrought by adopting the proposed rule is for salmonids negatively affected by toxics. The Department has no idea if extending noncompliance through compliance schedules for up to an additional five years will bring threatened and endangered populations closer to or over the "jeopardy" threshold. What is certain is that additional pressure will be placed on threatened and endangered populations if the Department adopts the Proposed Rule.

II. THE LANGUAGE OF THE PROPOSED RULE IS NOT SUFFICIENTLY STRINGENT.

Our remaining comments, concerning the actual proposed language, are not intended to alter the

legal analysis above but merely to ensure that we have made a complete record of our objections to this rule. In short, the proposed language for compliance schedules is inadequate.

A. The Department May Not Use Any Language Besides "As Soon as Possible."

First, the rule calls for permit holders to achieve compliance with "criteria" "in the shortest period reasonably possible." Revised Public Notice, Attachment E. EPA regulations do not require compliance schedules to be "reasonably possible" but that they be "as soon as possible." 40 C.F.R. § 122.47(a)(1) (2003). The two phrases do not have the same meaning and the Department is not free to use one that is more lax than the federal regulations require. In addition, the rule does not define what is meant by this phrase nor does it direct the staff in implementing the rule in either substance or process. It does not require staff to make any formal findings of what constitutes the shortest period reasonably possible. (It is also unclear why the rule calls for compliance schedules for criteria but not for water quality standards.)

Particularly given Oregon's inability to start and complete triennial reviews in a timely fashion, implementing the results of those reviews through NPDES permits as expeditiously as possible should be a priority. *See* Northwest Environmental Advocates v. U.S.E.P.A., 2003 WL 21487274 (D. Or. March 31, 2003) and Supplemental Order dated June 11, 2003. The permit writer and the permit applicant will interpret "reasonably possible," with the result in most cases being a five-year compliance schedule, the maximum allowed by the rule.

To the extent that the compliance schedule regulation at 40 C.F.R. § 122.47 is vague at all, the EPA Appeals Board has stated that:

> Any schedule of compliance included in the permit must comply with the requirements of the Clean Water Act. . . To the extent that [a] moratorium statute mandates a schedule of compliance that conflicts with these requirements, [EPA] would not be required to give effect to the moratorium statute.

In re City of Ames, Iowa, 6 E.A.D. 488, 1996 WL 307243.
In a subsequent case, the Board concluded that compliance schedules cannot extend beyond the life of the NPDES permit, or five years. In re City of Moscow, 2001 WL 988721. Idaho's compliance schedule authority in its regulations could not rely on EPA's authority to administratively extend NPDES permits, thus foreclosing EPA's authority to grant compliance schedules longer than the five-year term of the permit.

But to the extent Idaho or EPA Region X thought they could grant compliance schedules through administrative extensions to avoid the deadlines for meeting minimum federal standards in § 301(b), they were incorrect. The EPA Appeals Board would not have reversed itself and the EPA Administrator's 1990 rejection of self-imposed, indefinite, "reasonable" compliance

schedules so casually. *See* In the Matter of Star-Kist Caribe, Inc., 3 E.A.D. 172, 1990 WL 324290, modification denied, 4 E.A.D. 33. In Star-Kist Caribe, the Administrator identified the constructive non-compliance that the Region was arguing to preserve, and soundly rejected it. "As soon as possible" for the purposes of meeting minimum federal standards in § 301(b) does not mean five years from the issuance of the next NPDES permit. It means today, or more specifically, over 14 or 26 years ago, depending on the applicable subsection of § 301(b).

B. The New Rule Has No Compliance Schedule Provision for General Permits.

Second, since Oregon has chosen to issue some NPDES permits as general permits, the rule needs to either apply only to individual permits or be tailored to meet the procedural requirements that adhere to sources covered by general NPDES permits. Specifically, under this rule it appears that DEQ could include a compliance schedule in a general permit, on the basis of a conclusion that some chosen time period was the "shortest period reasonably possible." If allowed to proceed, it will result in a staffer deciding what is "as soon as possible" without making any findings. This kind of boilerplate conclusion would obviously not be based on what was possible, but what some staff person concluded and no substantiation would be required because no findings are required by the rule. The Department cannot adopt the Proposed Rule with this deficiency.

III. CONCLUSION

Perhaps the most revealing statement on compliance schedules, however, comes from the Department itself. Current Department NPDES policy states that "Compliance schedules to correct effluent violations *cannot* by federal law be included in a permit." <http://www.deq.state.or.us/wq/wqpermit/Complinc.pdf> (July 23, 2003). By definition, a violation occurs whenever the discharger does not comply with the effluent limitations necessary to meet *existing* State water quality standards, which by law are supposed to be in its NPDES permit.

We strongly urge the Department to withdraw the proposed rule, as it does not comply with the CWA statute, EPA's implementing regulations, or case law.

Sincerely,

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