ENVIRONMENTAL ADVOCATES
BUILDING 1004B O'REILLY AVENUE
SAN FRANCISCO, CALIFORNIA 94129
(415) 561-2222, EXT. 108
FAX: (320) 205-3163

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Frank Roddy, Division of Water Quality
California State Water Resources Control Board
P.O. Box 100, Sacramento
CA 95812-0100
Fax: (916) 341-5584
Email: roddf@dwq.swrcb.ca.gov

Re: Comments on Proposed 2004 Amendment to the California State Ocean Plan Regarding the Adoption of Fecal Coliform Standard for Shellfish Harvesting Areas

Dear State Board:

On May 24 2004, the California State Water Resources Control Board ("the State Board") will be holding a public hearing to solicit comments from the public regarding issues relevant to the proposed amendments to the California Ocean Plan. The State Board has indicated that it will receive public comments regarding the amendments until May 17, 2004. On behalf of the Ecological Rights Foundation ("ERF"), the following comments are submitted regarding proposed amendments.

ERF wishes to comment on second of the four proposed amendments under consideration, the Adoption of Fecal Coliform Standard for Shellfish Harvesting Areas. The State Board has identified three proposed approaches to addressing the water quality objectives for shellfish harvesting standards from total coliform to fecal coliform. ERF is concerned with the adoption of the third alternative that would allow coastal Regional Water Quality Control Boards ("Regional Boards") to use compliance schedules in evaluating water bodies for which shellfish harvesting is listed as a beneficial use and to revise their designations if needed ("the Proposed Third Alternative").

ERF finds the language of the Proposed Third Alternative to be unintelligible. It is not clear what the State Board is proposing, as there is no implementing language included in the public scoping document released December 2003. ERF objects to the third amendment for this reason. Furthermore, if the Proposed Third Alternative means to give Regional Boards the authority to grant compliance schedules with respect to subsequently adopted Water Quality Based Effluent Limitations ("WQBELs") such that discharges will not have to comply with the

WQBELs over the course of their National Pollutant Discharge Elimination System permits, ERF also objects to the Alternative. The reasons that ERF finds granting the Regional Board's authority compliance schedules objectionable are explained in the attachment to this letter.

ERF hereby requests to be placed on any list of interested persons to be notified of any further proceedings before the State Board concerning approval of the Resolution and/or the Compliance Schedule Amendment. Please send any notices to the address below.

Sincerely,

Christopher Sproul
Attorney for Ecological Rights Foundation
1004 O'Reilly Avenue
San Francisco, California 94129
Tel: (415) 561-2222, Fax: (415) 561-2223
email: sproul@sbcglobal.net

Comments on the 2004 Amendment to the California Ocean Plan Regarding the Implementation of Fecal Coliform Standard for Shellfish Harvesting Areas

Introduction

Ecological Rights Foundation ("ERF") is a prominent environmental public interest organization that particularly focuses on protecting California's ocean waters from pollution and degradation. ERF represents citizens who are striving to protect these waterways from pollution and secure the multitude of public and private benefits that follow from clean, vibrant waters: safe drinking water, abundant and diverse wildlife populations, healthy recreational opportunities, and economic prosperity from commercial fishing and other commercial activities that depend on clean water.

This comment letter is concerned with the California State Water Resources Control Board's ("the State Board") adoption of the Proposed Third Alternative if it would allow coastal Regional Water Quality Control Boards ("Regional Boards") to use compliance schedules in revising their Water Quality Based Effluent Limitations and issuing subsequent National Pollutant Discharge Elimination System ("NPDES") permits. ERF strongly opposes the Proposed Third Alternative, which would represent a huge step backward in the effort to develop and enforce the regulatory requirements needed to ensure clean water in the California's offshore ocean environment.

Several Regional Water Quality Control Boards ("Regional Boards") have implemented compliance schedules in order to delay the effective date of "water quality standard-based effluent limitations" ("WQBELS") issued pursuant to the federal Clean Water Act ("CWA"). Compliance Schedules are established in NPDES permits or as part of NPDES permit decisions made by the State Board or the Regional Boards. The State Board and the Regional Boards have already amended California Water Quality Standards ("WQS") or official state policies to grant themselves the authority to establish Compliance Schedules. The use of compliance schedules provides dischargers additional time to come into compliance with WQBELs without facing liability for not meeting WQBELs. The central purpose for the use of compliance schedules has been to shield dischargers from liability under the CWA's citizen suit provisions and for mandatory minimum penalties ("MMPs") under "the Migden law" for violating WQBELs during the pendency of the Compliance Schedule.

The use of compliance schedules contradicts core CWA policies and requirements, would delay further progress toward mitigating serious water pollution problems in California Coastal waters, is motivated by improper considerations that are not legitimate exercises of State and Regional Board authority, and is flatly unlawful.

A. The CWA Mandates Prompt, Bold Action, Including Achievement of WQBELS By a 1977 Deadline.

When Congress surveyed the severely degraded condition of the Nation's waters in 1972, it found that "the Federal water pollution control program... has been inadequate in every vital aspect" and that a "complete rewriting" of federal water pollution law was imperative. *EPA v. California ex rel. State Water Res. Control Bd*., 426 U.S. 200, 203 (1976); *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The federal Clean Water Act was the result, "'a bold and sweeping legislative initiative'" with broad and ambitious goals. *Dubois v. U.S.D.A*., 102 F.3d 1273, 1294 (1st Cir. 1996).

In enacting the CWA, Congress declared the Act's objective was to restore and maintain the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 US 91, 100 (1992). To achieve this objective, Congress declared a national goal of totally eliminating discharge of pollutants into our waters by 1985, and an interim goal of making water fit for fish, wildlife, and recreation wherever possible by July 1, 1983. 33 U.S.C. § 1251(a); *EPA v. California*, 426 U.S. at 203; *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 574 (D.C. Cir. 1980). While, as one federal court observed, "the CWA's ambitious goal has not been achieved . . .," this "does not vitiate Congress's intent that it be achieved as soon as possible." *Texas Municipal Power Agency v. Administrator*, 836 F.2d 1482, 1488-89 (5th Cir. 1988).

As the U.S. Supreme Court has observed, Congress foresaw and accepted that implementing the sweeping policies of the CWA would impose economic hardship, including the closing of some plants:

> Prior to the passage of the [Clean Water] Act, Congress had before it a report jointly prepared by EPA, the Commerce Department, and the Council on Environmental Quality on the impact of the pollution control measures on industry. That report estimated that there would be 200 to 300 plant closings caused by the first set of pollution limitations. Comments in the Senate debate were explicit: 'There is no doubt that we will suffer some disruptions in our economy because of these efforts; many marginal plants may be forced to close."

EPA v. National Crushed Stone, 449 U.S. 64, 80 (1980). As another federal court has observed, "The CWA is strong medicine . . . ." *Texas Municipal Power Agency,* 836 F.2d at 1488. Congress further intended that any lack of currently available pollution control technology was not to slow attainment of CWA goals of clean water. As the D.C. Circuit explained, Congress intended the Act to be "technology-forcing," i.e., to force the development of new treatment methods:

> [T]he most salient characteristic of [the CWA] statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology-forcing.… The essential purpose of this series of progressively more demanding . . . standards was not only to stimulate but to press development of new, more efficient and effective technologies.

NRDC v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987); *see also NRDC v. Train*, 510 F.2d 692, 695-97 (D.C. Cir. 1974).

Congress mandated two central regulatory strategies for achieving the CWA's goals: (1) requiring dischargers of water pollutants to install a common floor of treatment technology nationwide and (2) requiring these dischargers to take additional measures whenever this common floor of treatment technology alone is insufficient to attain clean waterways. The CWA requires EPA and/or the states to set two types of "effluent limitations" which give effect to these two strategies: (1) technology-based effluent limitations, which require dischargers to restrict their pollutant discharges to the level attainable by employing specified treatment technologies, and (2), additional limits known as WQBELs, which must be imposed whenever technology-based limits alone are insufficiently stringent to ensure attainment of clean water. The measure of whether waters are sufficiently clean under the CWA is provided by a state's water quality standards ("WQSs"). WQBELs must be set at the level needed to ensure attainment of WQS. 33 U.S.C. § 1311(b); *e.g., Sierra Club*, 813 F.2d at 1483; *Trustees for Alaska v. EPA*, 749 F.2d 549, 557 (9th Cir. 1984).

Congress has mandated that WQBELs must be set at a level necessary to ensure WQS attainment regardless of economic and technological restraints. *Ackels v. EPA* 7 F.3d 862, 865-66 (9th Cir. 1993); *Defenders of Wildlife v. Browner* 191 F.3d 1159, 1163 (9th Cir. 1999); *Oklahoma v. EPA*, 908 F.2d 595, 597-98 (10th Cir. 1990); *rev'd on other grounds Arkansas v. Oklahoma*, 503 US 91 (1992); *accord In the Matter of: NPDES for City of Fayetteville*, 1988 EPA App. LEXIS 35, *13; 2 E.A.D. 594 (June 28, 1988) ("The meaning of [the CWA] is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility. . . . "). Congress further mandated a strict deadline, long since passed, for achieving WQBELs designed to assure attainment with WQS: July 1, 1977. 33 U.S.C. § 1311(b)(1)(C).

B. The Use of Compliance Schedules Would Establish a Permit Methodology At Odds with CWA Policies and Mandates.

The Proposed Third Amendment would lead to the Regional Board to effectively write out of the law half of Congress' CWA strategy for addressing water pollution for many waters in northern California for up to a full decade: the establishment of effective, enforceable WQBELs needed to mandate attainment of WQS.

Delaying the effective date of WQBELs through the use of compliance schedules contradicts Congress' express mandate to achieve WQBELs by 1977. This approach is further at odds with advancing the broader policies of the CWA: attainment of fishable and swimable waters by 1983 and the complete elimination of water pollution by 1985. The Proposed Third Alternative's compliance schedule approach would casts aside Congress's intent that the CWA be "strong medicine" for cleaning up our waters. *See Texas Municipal Power Agency,* 836 F.2d at 1488. The proposed approach ignores that Congress meant the CWA to impose requirements to reduce pollution and attain WQS regardless of the cost. *NRDC v. EPA*, 822 F.2d at 123; *Ackels v. EPA,* 7 F.3d at 865-66.

A. The Use of Compliance Schedule Are Flatly Unlawful.

The Proposed Third Alternative is flatly unlawful if it will result in allowing compliance schedules of up to five years, with the possibility of renewing the schedules for another five years as has been the case with Regional Boards who have implemented compliance schedules for other effluent limitations. This overlooks that NPDES permits must be limited to fixed terms of no more than five years. CWA § 402(b)(1)(B); 33 U.S.C. § 1342(b)(1)(B). To grant a "compliance schedule" extending the effective date of any given WQBEL for five full years and perhaps longer if the compliance schedule is renewed necessarily means that the WQBEL in issue *will never become effective during the life of the permit*. It can hardly be said that an NPDES permit includes a WQBEL if the permit expressly provides that the limit never takes effect during the life of the permit. Inescapably, the permit in such circumstance fails to include a WQBEL. This is unlawful under CWA sections 301(b)(1)(C) and 402(b)(1)(A),[13] which requires that NPDES permits include effluent limitations necessary to meet WQS. *See also* 40 C.F.R. 122.44(d)(1); *EPA v. California ex rel. State Water Res. Control Bd*., 426 U.S. 200, 205 (1976).

CWA section 301(b)(1)(c) unambiguously and without qualification provides that "there shall be achieved . . . not later than July 1, 1977, any more stringent limitation . . . necessary to meet water quality standards." There is no text in the CWA suggesting that this deadline can be extended to reflect "compliance schedules."

The CWA requires that states establish "schedules of compliance" as part of their "continuing planning process" required by CWA section 303(e), 33 U.S.C. § 1313(e). Under this continuing planning process, states are supposed to adopt and, as needed, update their plans for attaining WQS. 33 U.S.C. § 1313(e). "Schedules of compliance" adopted pursuant to this "continuing planning process" are supposed to do no more than mandate specific measures that will lead to eventual attainment of WQS. Notably, CWA section 303(e)(3)(F) mandates "schedules of compliance, *for* revised or new water quality standards." CWA section 502(17) further defines a "schedule of compliance" as:

[13] 33 U.S.C. § 1311(b)(1)(C), 1342(b)(1)(A).

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

33 U.S.C. § 1362(17).[14] Together, these clauses are unambiguous that "a schedule of compliance" consists only of *enforceable requirements* for specific remedial measures that lead to compliance with effluent limitations such as WQBELs and ultimately, WQS. Finally, CWA section 303(c)(2)(A) makes it clear that WQS include *only*: (1) designated uses of water, and (2) the water quality criteria needed to attain such uses. The *Star-Kist* decision ignores that the CWA simply provides no basis for including compliance schedule provisions *in* WQS.

There is additional logical inconsistency in concluding that a compliance schedule provision which would ultimately allow Regional Boards to delay the effective date of fecal coliform WQBELs for the entire length of a five-year NPDES permit cycle is itself a water quality standard.. As noted, all NPDES permits must have WQBELS if needed to ensure attainment of WQS pursuant to CWA section 301(b)(1)(C). If Regional Boards were to issue an NPDES permit that included an "interim" effluent limitation that lasted for the entire five year term of the permit, this would be lawful under CWA section 301(b)(1)(C) *only* if the "interim" limit ensures attainment of the applicable WQS for that five years. If the interim limit does not accomplish this, then the permit omits effluent limitations necessary to attain WQS, whereas CWA section 301(b)(1)(C) requires such limits.

The CWA defines WQS as including *only* (1) designated (beneficial) uses and (2) water quality criteria (objectives). CWA section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). Thus, for a compliance schedule to allow interim, more lenient permit limits, the "compliance schedule" should either explicitly or at least implicitly change designated uses or water quality criteria, at least for the length of the compliance schedule. The State Board's Proposed Third Alternative, however, clearly does not purport to change designated uses or water quality criteria. A change in designated uses or water quality criteria in the Basin Plan would result in an across the board change for every discharger, not case by case variance for specific dischargers in the context of individual permit decisions.

Finally, if the use of compliance schedules will relax the beneficial uses or water quality objectives set forth in WQS such that it is lawful to issue effluent limitations to particular dischargers that are more lenient, this can only be done following a Use Attainability Analysis (UAA) pursuant to 40 C.F.R. §§ 131.3 and 131.10. If the Regional Board do not perform a UAA, the use of compliance schedules is unlawful under EPA regulations.

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[14] *See also* 40 C.F.R. § 122.2 (defining a schedule of compliance as "a schedule of remedial measures included in a 'permit,' including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the [CWA] and [EPA] regulations"); 40 C.F.R. § 122.43(a) (requiring NPDES permits to "establish conditions" to enforce applicable schedules of compliance).

Conclusion

For the reasons expressed above, ERF respectfully urges the State Board to adopt the Proposed First Alternative for implementing the Fecal Coliform Standard for Shellfish Harvesting Areas.