

September 13, 2007

Ms. Lila Tang
Chief, NPDES Permitting Division
SF Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Sent via electronic mail to ltang@waterboards.ca.gov

RE: Proposed NPDES Permit and Waste Discharge Requirements for Municipal and Industrial Wastewater Discharges of Mercury to San Francisco Bay

Dear Ms. Tang:

On behalf of Baykeeper and our members, we submit these comments on the proposed NPDES permit and Waste Discharge Requirements for Municipal and Industrial Wastewater Discharges of Mercury to San Francisco Bay, NPDES Permit No. CA 0038849 (“draft permit”), prepared by the San Francisco Regional Water Quality Control Board (“Regional Board”).¹ We recognize and appreciate staff’s efforts to address some of the issues raised in our written comments on April 16, 2007, such as implementing the federal requirement that permits contain maximum daily or average weekly effluent limits. We remain opposed, however, to several significant aspects of the proposed permit, most importantly the permit’s group enforcement regime and relaxation of current permit limits.

The proposed permit departs dramatically from standard NPDES permitting. It proposes a novel and complex enforcement regime involving group compliance and multiple “triggers.” It also contains numeric effluent limitations that are less stringent than those with which Bay Area NPDES permit holders are already complying! The legal rationales for these provisions are questionable at best. Moreover, no clear policy rationale has been offered for these significant departures from traditional permitting. We urge the Regional Board to make the revisions we have requested to address these issues, including omitting the group compliance provisions and making all limits at least as strict as those in current permits.

¹ California Regional Water Quality Control Board, San Francisco Bay Region, Tentative Order (Revised August 14, 2007) for Waste Discharge Requirements for Municipal and Industrial Wastewater Discharges of Mercury to San Francisco Bay, NPDES No. CA 0038849 (hereinafter “Draft Permit”).

1. Compliance. The permit must assign a mass limit to each discharger that is enforceable against that discharger at all times.

Baykeeper strongly disagrees with the Regional Board's claim that the draft permit contains enforceable mass-based effluent limitations.² While the draft permit assigns average annual mass effluent limits to each and every Discharger, it also allows them to violate these limits as long as the sum of all the Dischargers' emissions does not exceed 17 kilograms per year.³ As we have argued in the TMDL context, not only is this enforcement scheme unsound from a legal perspective, the policy benefits of conditioning individual compliance on group performance are completely unapparent.

Mass limits that only take effect when a group limit is exceeded are not true limits as required by federal regulations. The United States Code of Federal Regulations unequivocally states that that permit effluent limits must be established for "*each* outfall or discharge point" of a permitted facility.⁴ The permit limit for a particular pollutant must be expressed in terms of mass.⁵ When permit limits are expressed in terms of mass and another unit of measurement—such as concentration—the permit "shall require the permittee to comply with *both* limitations."⁶ Every permit, therefore, must assign a mass limit to each and every outfall or discharge point. The draft permit is inconsistent with these legal requirements in that it nullifies the individual mass limits whenever the group mass limit is met.

In addition to our legal concerns, we fail to see the benefits to be obtained in conditioning individual compliance on group performance. The draft permit essentially establishes a cap on point source discharges of mercury and provides individual dischargers with relief from individual permit limits provided that the cap is not exceeded. Establishing and enforcing a cap is logical and has been done in the context of trading but its purpose is unclear here as trading does not appear likely. First, bioaccumulative pollutants such as mercury are unsuitable for trading.⁷ Second, the Regional Board has declared that "trading is extremely unlikely because each discharger is required to take actions to ensure it operates within its own individual wasteload allocation."⁸ If the purpose of the group compliance plan is not to facilitate trading, then what is the purpose except to insulate individual dischargers from liability for violating individual effluent limits?

² California Regional Water Quality Control Board, San Francisco Bay Region, Response to Written Comments for the NPDES Permit for Municipal and Industrial Wastewater Discharges of Mercury to San Francisco Bay, (August 14, 2007) at 4 (hereinafter "Response to Comments").

³ Draft permit at 15 and 18.

⁴ 40 C.F.R. § 122.45(a) (emphasis added); 40 C.F.R. § 123.25 (making requirements applicable to State programs).

⁵ 40 C.F.R. § 122.45(f)(1).

⁶ 40 C.F.R. § 122.45(f)(2) (emphasis added).

⁷ EPA Water Quality Trading Policy (January 13, 2003) at 4, available at <http://www.epa.gov/owow/watershed/trading/tradingpolicy.html>.

⁸ Response to Comments at 4.

Having a permit with consistently enforceable mass-based limits is important for several reasons. Despite substantial research, the distribution of mercury and its transformation to methylmercury in natural aquatic systems is still poorly understood. Due to varying physical, chemical, and biological factors, the discharge of mercury at one location may have greater environmental health impacts than discharges at a different location. One way to minimize the risk presented by this lack of knowledge is to ensure that each NPDES permit holder discharges as little mercury as it can. Individual limits also provide an incentive for a Discharger to ensure that its processes are working as efficiently and effectively as possible. Individual mass-based limits create individual accountability that is undermined by the group regime.

For the legal and practical reasons outlined above, we ask that the draft permit be revised to assign an individual mass limit for each Discharger that is enforceable regardless of group performance.

2. Backsliding. Backsliding from previous permit limits is illegal and establishes harmful precedent.

If adopted as written, this permit violates anti-backsliding requirements because it contains effluent limits less stringent than those in the Dischargers' current permits. Specifically, the draft permit contains 20 concentration-based effluent limits—both average monthly and maximum daily—that are higher than current permit limits. Despite claims to the contrary in the draft permit, the permit's backsliding is not consistent with either the Clean Water Act or the State Water Resources Control Board's ("State Board") Tosco Order.⁹ Furthermore, backsliding is not justified by economic or technical considerations as the Dischargers have already demonstrated their ability to comply with the more stringent limits in current permits.

The Clean Water Act's anti-backsliding provision provides that in the vast majority of instances "a permit may not be renewed...to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."¹⁰ The purpose of this backsliding prohibition is to ensure consistent progress towards the Clean Water Act's ultimate goal of *eliminating* pollutant discharges.¹¹ To this end, exceptions to the prohibition on backsliding are very narrow and not applicable here.

The draft permit erroneously cites Clean Water Act section 303(d)(4)(1) as the authority for the permit's backsliding.¹² Section 303(d)(4)(1) states that effluent limits that are based on a TMDL or Waste Load Allocation ("WLA") may be relaxed "*only* if the cumulative effect of all such revised effluent limitations based on [a] total maximum daily load or waste load allocation will assure the attainment of [the applicable] water

⁹ California Water Quality Control Board, *In re Avon Refinery*, Order No. 2001-06 (March 7, 2001) (hereinafter "Tosco").

¹⁰ 33 U.S.C. § 1342(o)(1).

¹¹ See 49 Fed. Reg. 37898, 38019 (September 26, 1984).

¹² Draft Permit at F-27.

quality standard.”¹³ This section clearly does not apply to the effluent limits in the draft permit for two reasons.

First, the exception applies only to limits based on a TMDL; meaning that it authorizes backsliding *from* a TMDL-based permit.¹⁴ The limits in the Dischargers’ current permits, however, are based on current performance and not a TMDL. Therefore section 303(d)(4)(1) does not apply. Second, the exception only applies if the cumulative effect of all the limits will result in attainment of water quality standards. The mercury TMDL recently adopted by this Regional Board provides for an extended timeframe for water quality standards to be attained. Thus, even if the Dischargers complied with the limits in the draft permit, the Regional Board has acknowledged that the applicable water quality standard established in the TMDL will not be met and, so, section 303(d)(4)(1) does not apply.

The draft permit’s fact sheet erroneously interprets section 303(d)(4)(1) to allow backsliding “as long as the cumulative effect of all WQBELs for NPDES-permitted discharges to a water is consistent with the assumptions and requirements of an applicable TMDL.”¹⁵ This interpretation is at odds with the plain language of the Clean Water Act and conflates section 303(d)(4)(1) with section 122.41(d)(1)(vii)(B) of the Code of Federal Regulations. Section 303(d)(4)(1) allows backsliding when the cumulative effect of the new limits will ensure water quality standards are met. Section 122.44(d)(1)(vii)(B) of the Code of Federal Regulations requires that effluent limits be “consistent with the assumptions and requirements of any available wasteload allocation.” Taken together or separately, these provisions do not authorize backsliding whenever effluent limits are consistent with a TMDL. Rather, they require that permit limits be consistent with a TMDL and allow backsliding from TMDL-based limits as long as the net effect of the new limits is attainment of water quality standards.

Additionally, we find unpersuasive the Regional Board’s application of Clean Water Act section 402(o)(2)(B)(i), which allows for backsliding when “information is available which was not available at the time of permit issuance and which would have justified the application of a less stringent effluent limit.”¹⁶ The draft permit notes that many of the previous permit limits were based on a now-outdated mercury objective and argues that this “bad science” should not be canonized by perpetuating existing permit limits.

Section 402(o)(2)(B)(i), however, explicitly states that the exception is unavailable when the sole reason for a less stringent limitation is a revision in regulations. Regardless of the bases for the previous mercury objective, promulgation of a new objective constitutes revision of a regulation and therefore cannot be the basis for backsliding. Moreover, the limits in the permits to which the Regional Board refers are not based on any mercury

¹³ 33 U.S.C. § 303(d)(4)(1).

¹⁴ See Tosco at 50.

¹⁵ Draft Permit at F-27 (citing Memorandum from Michael Lauffer, Chief Counsel of the State Water Resources Control Board, regarding legal authority for offsets and trading programs, dated November 22, 2006).

¹⁶ 33 U.S.C. § 1342(o)(2)(B)(i).

water quality objective or criterion. Most, if not all, are interim limits based on the Dischargers' current performance. Thus, requiring continued compliance with current permit limits does not canonize bad science.

Even if one of the exceptions to the backsliding rule applied, section 402(o)(3) bars less stringent limits in this situation.¹⁷ Section 403(o)(3) acts as a floor and prohibits relaxation of limits if it would cause the receiving waters to violate applicable state water quality standards. Because the Bay is already impaired by mercury, any increase in the amount discharged by a particular discharger constitutes an exceedance of applicable water quality standards and, thus, backsliding is prohibited.

The draft permit also mistakenly interprets the State Board's Tosco order and subsequent court decisions upholding it as allowing backsliding in this situation. The rationale offered is that the proposed permit limits do not backslide from current limits because the limits are not "comparable."¹⁸ We note that the Tosco decision has been largely undermined by subsequent EPA action on compliance schedules as well as the State Board's recent EBMU decision.¹⁹ We further note that the Tosco decision is inapplicable here. The issue in Tosco was whether the Clean Water Act prohibits backsliding from final water quality based effluent limit to an interim performance-based limit.²⁰ The State Board determined that backsliding did not occur because the limits were not comparable, as one was an interim limit and the other a final limit.²¹ In the instant case, both the current and proposed permit limits are interim limits based on performance. As such, they are comparable; therefore, the Tosco decision does not allow backsliding.

Finally, relaxation of permit limits is illogical from a policy perspective. The San Francisco Bay is impaired by mercury to the extent that it will take many decades before regular consumption of Bay fish is safe. Most of the current permits that legalize discharges of mercury into the Bay have interim, performance-based limits with which the Dischargers can comply. This permit would allow Dischargers to increase the amount of mercury they discharge for no apparent reason related to cost or compliance. Relaxing permit limits for mercury violates the letter and intent of the Clean Water Act and mitigates no apparent economic or other harm. We again request that the Regional Board no adopt the proposed permit until it contains effluent limits at least as stringent as those in current permits.

3. Compliance Schedules. The compliance schedule provisions are illegal.

As Baykeeper has repeatedly stated in comments previously submitted to the Regional Board, the Clean Water Act forbids issuance of compliance schedules that delay the

¹⁷ 33 U.S.C. § 1342(o)(3).

¹⁸ Drat permit at F-27.

¹⁹ California Water Quality Control Board, *In re* East Bay Municipal Utility District, Order No. 2007-04 (May 1, 2007).

²⁰ Tosco at 50.

²¹ Tosco at 50.

effective date of Water Quality Based Effluent Limitations (“WQBELs”) past July 1, 1977. To date, the Regional Board has rejected these comments. Baykeeper and other public interest environmental groups currently have appeals pending before the State Board which raise this issue. We have included an attachment to these comments which repeats our contentions with respect to the legality of delaying the effective date of WQBELs past July 1, 1977, and hereby incorporate them by reference.

Assuming, *arguendo*, that the Clean Water Act authorizes compliance schedules in limited situations, the provisions in the draft permit are still inadequate. The Clean Water Act defines compliance schedules as “an enforceable series of actions or operations leading to compliance with an effluent limitation...”²² It requires that compliance schedules include interim requirements at specified time intervals. The performance-based interim effluent limits in the permit are not interim requirements as contemplated by the Clean Water Act because they do not and cannot lead to compliance. The draft permit, therefore, does not require Dischargers to take *any* action to reduce discharges or mercury or otherwise make progress towards complying with the final limitations. Because the compliance schedules in draft permit lack any interim requirements, they do not satisfy the legal definition of a compliance schedule.

Federal regulations also require that all compliance schedules be as short as possible.²³ Yet the draft permit’s explanation of why the compliance schedules are as short as possible is unconvincing. It is wholly inappropriate to rely on some future and uncertain regulatory action—such as development of a trading system—as evidence that the timeframes are as soon as possible.²⁴ Furthermore, each Discharger’s facility and operations are different so it is illogical to assume that they all need twenty years to come into compliance.

Please also note that the draft permit’s assertion that the Regional Board will submit a compliance schedule provision to EPA is misleading and confusing.²⁵ This permit and the effluent limits cannot be adopted until the State proposes and EPA approves a compliance schedule authorizing provision under Clean Water Act section 303(c) and consistent with EPA regulations at 40 CFR 122.47, which require that the compliance schedule be appropriate, require compliance as soon as possible, and include interim requirements at specified time intervals.

²² 33 U.S.C. §1362(a). *See also* California State Water Resources Control Board, Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2005) at 22 (hereinafter “SIP”).

²³ 40 C.F.R. § 122.47(a)(1); SIP at p. 21.

²⁴ Draft permit at F-15, F-16.

²⁵ Draft permit at 17.

4. Monitoring. More frequent monitoring is necessary to determine compliance with effluent limitations.

We remained concerned that the monitoring frequency required in the draft permit is insufficient. Federal regulations require that all permits contain monitoring sufficient to assure compliance with permit limitations and to generate data that is representative of the monitored activity.²⁶ EPA guidance specifies several factors to be considered in determining the appropriate monitoring frequency. These factors include the variability of the pollutant in the discharge, the discharger's history of compliance, and the number of monthly samples used in developing the permit limits or effluent guidelines.²⁷ EPA guidance also notes that the collecting ten or more samples each month generally provides the greatest statistical likelihood that monthly values will be reflective of the mean concentration of the pollutant discharged.²⁸

As we stated in our previous comments, nothing in the draft permit demonstrates that any of these factors were considered in determining the monitoring frequency established by the permit. We find confusing and unsatisfactory the explanation offered by the Regional Board in replying to our previous comments that the monitoring frequency is acceptable because it is "generally comparable to the frequencies used to generate the data upon which the TMDL wasteload allocation was calculated."²⁹ The fact that the frequency is similar to that used to generate the data upon which the TMDL is based seems irrelevant to determining whether the frequency is sufficient to be representative of each Discharger's effluent and to determine compliance. Therefore, we reiterate our request that the monitoring frequency required by the permit be increased so that it is sufficient to produce data that (1) is representative of the discharge and that (2) enables a determination of compliance with effluent limitations. The fact sheet should also be amended to demonstrate how federal regulations and guidance were applied to arrive at the appropriate monitoring frequency.

5. Source Control, Special Studies, and Risk Management. The permit should specify the level of effort required by each discharger and emphasize risk reduction.

We strongly support the source control, special studies, and risk management requirements contained in the permit but believe that timeframes and benchmarks as well as an increased focus on risk reduction are necessary to ensure an effective program. We reiterate, therefore, our request that a timeframe for identification and implementation of risk management actions be added and that the permit be revised to emphasize health-risk assessments and mechanisms to reduce actual and potential exposure.

²⁶ 40 C.F.R. §§ 122.44(i), 122.48(a).

²⁷ *U.S. EPA NPDES Permit Writers' Manual*, EPA 833-B-96-003, pp. 119-122 (December 1996).

²⁸ U.S. Environmental Protection Agency, Technical Support Document for Water Quality-based Toxics Control (March 1991) at 113 (EPA/505/2-90-001) (hereinafter TSD).

²⁹ Response to Comments at 17.

6. Effluent Limits. The effluent limits for POTWs should be expressed as MDELs.

While applicable regulations only require effluent limits for publicly owned treatment works (“POTWs”) to be expressed as Average Weekly Effluent Limitations (“AWELs”), EPA recommends the use of Maximum Daily Effluent Limitations (“MDEL”) for toxic pollutants such as mercury.³⁰ Establishing MDELs for all POTWs will ensure that the draft permit is consistent with EPA technical guidance and will facilitate comparison with the concentration-based triggers for municipal dischargers, which are expressed as MDELs.

7. Recycled Wastewater. Studies on potential local impacts should be conducted prior to recycling.

The draft permit’s requirement that Dischargers evaluate the presence of or potential for local effects is inadequate in the context of wastewater recycling. A variety of factors—such as a discharge’s proximity to wetlands and the depth and characteristics of an outfall—can affect the impacts of a particular discharge. Before a Discharger is allowed to increase the volume of effluent, and therefore, the mass of mercury, it discharges, it should first conduct an analysis of the potential impacts of that increase. The permit should be revised to require participants in any recycling program to study and mitigate the potential impacts of increasing the volume of wastewater discharged before recycling begins.

* * *

In short, we ask that before adoption of this permit, the Regional Board: (1) abolish the group compliance scheme, (2) revise effluent limits to ensure compliance with anti-backsliding principles, (3) make the compliance schedule provisions consistent with applicable law by specifying interim actions, (4) require more frequent monitoring, (5) emphasize risk reduction, (6) assign MDELs to POTWs, and (7) require analyses of potential local impacts prior to allowing wastewater recycling.

Thank you for consideration of these comments.

Sincerely,



Amy Chastain, Staff Attorney
Sejal Choksi, Baykeeper and Program Director

³⁰ TSD at 96.

ATTACHMENT

Delaying the Effective Date of WQBELs Contradicts the Clean Water Act

I. *CWA Section 301(b)(1)(C) establishes a firm deadline for complying with WQBELs.*

Numerous courts have held that neither the EPA nor the states have the authority to extend the deadlines for compliance established by Congress in CWA section 301(b)(1). 33 U.S.C. §1311(b)(1); See *State Water Control Board v. Train*, 559 F.2d 921, 924-25 (4th Cir. 1977) ("Section 301(b)(1)'s effluent limitations are, on their face, unconditional."); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976), *cert. denied sub nom. Bethlehem Steel Corp. v. Quarles*, 430 U.S. 975 (1977) ("Although we are sympathetic to the plight of Bethlehem and similarly situated dischargers, examination of the terms of the statute, the legislative history of [the Clean Water Act] and the case law has convinced us that July 1, 1977 was intended by Congress to be a rigid guidepost").

This deadline applies equally to technology-based effluent limitations and WQBELs. See *Dioxin/Organochlorine Ctr. v. Rasmussen*, 1993 WL 484888 at *3 (W.D. Wash. 1993), *aff'd sub nom. Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517 (9th Cir. 1995) ("The Act required the adoption by the EPA of 'any more stringent limitation, including those necessary to meet water quality standards,' by July 1, 1977.") (citation omitted); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312 (9th Cir. 1992) ("[Section 301(b)(1)(C)] requires achievement of the described limitations 'not later than July 1, 1977.' ") (citation omitted). Any discharger not in compliance with a WQBEL after July 1, 1977, violates this clear congressional mandate. See *Save Our Bays and Beaches v. City & County of Honolulu*, 904 F. Supp. 1098, 1122-23 (D. Haw. 1994).

Congress provided no blanket authority in the Clean Water Act for extensions of the July 1, 1977, deadline, but it did provide authority for the states to foreshorten the deadline. CWA section 303(f) (33 U.S.C. § 1313(f)) provides that:

[n]othing in this section [1313] shall be construed to affect any effluent limitations or schedule of compliance required by any State to be implemented prior to the dates set forth in section 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

Because the statute contains explicit authority to expedite the compliance deadline but not to extend it, the Regional Board may not authorize extensions beyond this deadline in discharge permits.

II. *The July 1, 1977 deadline for WQBELs applies even where WQS are established after that date.*

The July 1, 1977, deadline for achieving WQBELs applies equally even if the applicable water quality standards are established after the compliance deadline. 33 U.S.C. section 1311(b)(1)(C) requires the achievement of “more stringent limitations necessary to meet water quality standards . . . established pursuant to any State law . . . or required to implement any applicable water quality standard established pursuant to this chapter.” Congress understood that new water quality standards would be established after the July 1, 1977, statutory deadline; indeed, Congress mandated this by requiring states to review and revise their water quality standards every three years. *See* 33 U.S.C. § 1313(c). Yet, Congress did not draw a distinction between achievement of water quality standards established before the deadline and those established after the deadline.

Prior to July 1, 1977, therefore, a discharger could be allowed some time to comply with an otherwise applicable water quality-based effluent limitation. Beginning on July 1, 1977, however, dischargers were required to comply as of the date of permit issuance with WQBELs, including those necessary to meet standards established subsequent to the compliance deadline.

III. *Congress has authorized limited extensions of CWA deadlines for specific purposes, precluding exceptions for other purposes.*

In the Clean Water Act Amendments of 1977, Congress provided limited extensions of the July 1, 1977, deadline for achieving WQBELs. In CWA section 301(i), Congress provided that “publicly-owned treatment works” (“POTWs”) that must undertake new construction in order to achieve the effluent limitations, and need federal funding to complete the construction, may be eligible for a compliance schedule that may be “in no event later than July 1, 1988.” 33 U.S.C. § 1311(i)(1) (emphasis added). Congress provided for the same limited extension for industrial dischargers that discharge into a POTW that received an extension under section 1311(i)(1). *See* 33 U.S.C. § 1311(i)(2). Also, Congress indicated that the effective date of effluent limitations on toxic pollutant discharge required by CWA section 307(a)(2) could be delayed for up to three years after their promulgation, but no further. 33 U.S.C. § 1317(a)(6). Finally, Congress provided that the effective date of pretreatment standards imposed pursuant to CWA § 307(b) on indirect dischargers (“industrial users”) that discharge into a POTW may be delayed for no more than two years after their adoption. *See* 33 U.S.C. § 1317(e).

The fact that Congress explicitly authorized certain extensions indicates that it did not intend to allow others which it did not explicitly authorize. In *United States v. Homestake Mining Co.*, the Eighth Circuit held that an enforcement extension authorized by section 301(a)(2)(B) for technology-based effluent limitations did not also extend the deadline for achievement of WQBELs. 595 F.2d 421, 427-28 (8th Cir. 1979). The court pointed to Congress' decision to extend only specified deadlines:

Having specifically referred to water quality-based limitations in the contemporaneously enacted and similar subsection [CWA section 309](a)(6), the inference is inescapable that Congress intended to exclude extensions for water quality-based permits under subsection 309(a)(5) by referring therein only to Section 301(b)(1)(A). See generally H.R.Conf.Rep. No. 95-830, 95th Cong., 1st Sess. 88-89, Reprinted in (1977) U.S.Code Cong. & Admin.News, pp. 4463-64.

Id. at 428 . By the same reasoning, where Congress extended the deadline for achieving effluent limitations for specific categories of discharges and otherwise left the July 1, 1977 deadline intact, there is no statutory basis for otherwise extending the deadline.

IV. *Schedules of compliance may be issued only to facilitate, not to avoid, achievement of effluent limitations by the statutory deadline.*

The Clean Water Act defines the term effluent limitation as:

any restriction established . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11). The term schedule of compliance is defined, in turn, as “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). The purpose of a compliance schedule is to facilitate compliance with an effluent limitation by the applicable deadline by inserting interim goals along the way:

[a] definition of effluent limitations has been included so that control requirements are not met by narrative statements of obligation, but rather are specific requirements of specificity as to the quantities, rates, and concentration of physical, chemical, biological and other constituents discharged from point sources. It is also made clear that the term effluent limitation includes schedules and time tables of compliance. The Committee has added a definition of schedules and time-tables of compliance so that it is clear that enforcement of effluent limitations is not withheld until the final date required for achievement.

S. Rep. No. 92-414, at 77, *reprinted in* 1972 U.S.C.C.A.N. 3668 (Oct. 28, 1971) (emphasis added). Thus, Congress authorized compliance schedules, not to extend its deadlines for achievement of effluent limitations, but to facilitate achievement by the prescribed deadlines.

In *United States Steel Corp.*, the industry plaintiff argued that 33 U.S.C. § 1311(b)(1)(C) allows the July 1, 1977, deadline to be met simply by beginning action on

a schedule of compliance that eventually would result in achieving the technology- and water quality-based limitations. 556 F.2d at 855. The Court of Appeals disagreed:

[w]e reject this contorted reading of the statute. We recognize that the definition of 'effluent limitation' includes 'schedules of compliance,' section [1362(11)], which are themselves defined as 'schedules . . . of actions or operations leading to compliance' with limitations imposed under the Act. Section [1362(17)]. It is clear to us, however, that section [1311(b)(1)] requires point sources to achieve the effluent limitations based on BPT or state law, not merely to be in the process of achieving them, by July 1, 1977.

Id. Thus, compliance schedules may not be used as a means of evading, rather than meeting, the deadline for achieving WQBELs.

V. States may not issue permits containing effluent limitations that are less stringent than those required by the Clean Water Act.

Finally, a compliance schedule that delays the effective date of WQBELs beyond CWA section 301(b)(1)(C)'s statutory deadline would amount to a less stringent effluent limit than required by the CWA. States, however, are explicitly prohibited from establishing or enforcing effluent limitations less stringent than are required by the CWA. *See* 33 U.S.C. § 1370; Water Code §§ 13372, 13377. The clear language of the CWA, bolstered by the legislative history and case law, establishes unambiguously that compliance schedules extending a WQBEL compliance deadline beyond July 1, 1977 may not be issued in NPDES permits. The Permit, however, purports to do just that. By delaying the effective date of WQBELs for over thirty years beyond Congress' deadline, the Permit makes a mockery of the CWA section 301(b)(1)(C) deadline and exceeds the scope of the Regional Board's authority under the Clean Water Act and the Porter-Cologne Act. 33 U.S.C. § 1311(b)(1)(C).