

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

OFFICE OF WATER

SEP 21 1990

MEMORANDUM

SUBJECT: Stay Granted in Star-Kist Caribe

FROM: Ephraim S. King, Chief
Program Implementation Branch (EN-336)

TO: Regional Water Permits Branch Chiefs

On April 16, 1990, the Administrator issued an Order denying Region II's petition to reconsider a ruling by the Chief Judicial Officer in an appeal from the denial of an NPDES evidentiary hearing by Star-Kist Caribe, Inc. In the April 16, 1990 Order, the Administrator held that schedules of compliance for water quality-based permit limitations may not be included in NPDES permits unless explicitly authorized by the State in its water quality standards or implementing regulations. (EPA had requested reconsideration of Chief Judicial Officer (CJO) McCallum's March 8, 1989 decision that EPA lacks the authority to include in permits compliance schedules for water quality-based permit limitations for water quality standards adopted after July 1, 1977.)

On August 13, 1990, EPA asked the Administrator to modify his reconsideration order and to stay the order.

On September 4, 1990, the CJO granted a stay of the April 16, 1990 order pending the Administrator's review of the modification request. Attached is a copy of the Stay of the Order on Petition for Reconsideration regarding the matter of Star-Kist Caribe, Inc. The effect of the stay is that EPA and the States may continue issuing permits with compliance schedules for water quality-based limits where it is consistent with State policy. The stay also directs the Office of Water to continue to develop guidance to implement the Administrator's April 16, 1990 decision on the use of compliance schedules for water quality standards if the earlier decision is not withdrawn or modified. We are working with staff in the Criteria and Standards Division to develop such guidance and hope to provide it to you for your review in the next few weeks.

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Please contact me (FTS 475-9541) or have your staff contact Katharine Dowell (FTS 475-7050) if you have any questions.

Attachment

cc: Cynthia Dougherty
Rick Brandes
Jim Taft
Dave Sabock, OWRS
Lee Schroer, OGC

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

SEP 6 1990

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Stay Granted in Star-Kist Caribe

FROM: Susan G. Lepow
Associate General Counsel
Water Division (LE-132W)

TO: LaJuana S. Wilcher
Assistant Administrator for Water (WH-556)

Attached for your information is a decision by the Chief Judicial officer granting our request for a stay of the Administrator's April 16, 1990 "Order on Petition for Reconsideration" in Star-Kist Caribe. The effect of the stay is to allow compliance schedules for water quality-based limits to be included in permits where it is consistent with state policy. The stay encourages the Office of Water to continue to work with the states to encourage them to include any policies allowing schedules of compliance in their regulations or standards.

Please feel free to call me, Lee Schroer, or Cathy Winer if you have questions.

Attachment

cc: Don Elliott
Gerald Yamada
Ray Ludwiszewski
Jim Elder
Martha Prothro
Cynthia Dougherty
Bill Diamond
Bill Painter
Regional Counsel, Water Branch Chiefs, I-X
Regional Water Management Division Directors, I-X
Water Division Attorneys

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C

In the Matter of
Star-Kist Caribe, Inc.
Petitioner

NPDES Permit No. PR0022012

NPDES Appeal No. 88-5

STAY OF ORDER ON PETITION FOR RECONSIDERATION

By petition dated August 13, 1990, ✓ EPA Region II asked the Administrator to modify his reconsideration order of April 16, 1990, where he held, inter alia, that:

[T]he Clean Water Act does not authorize EPA to establish schedules of compliance in the permit that would sanction pollutant discharges that do not meet applicable state water quality standards. In my opinion, the only instance in which the permit may lawfully authorize a permittee to delay compliance after July 1, 1977, pursuant to a schedule of compliance, is when the water quality standard itself (or the State's implementing regulations) can be fairly construed as authorizing a schedule of compliance. The Agency's powers in this respect * * * are no greater than the States'.

Order on Petition for Reconsideration at 5 (hereafter the "April order"). The petitioner also asked for a stay of the April order, claiming, inter alia, that it was causing "undue confusion and disruption" in some unspecified sense. This claim was made somewhat more specific in a subsequent submission by the

✓ 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 the General Counsel (Headquarters) and Region II's Office of Regional Counsel.

petitioner on August 24, 1990,^{2/} but still leaves much to the imagination.^{3/} Nevertheless, petitioner's sincerity in its concern for the effects of the April order on the administration of the affected aspects of the NPDES program is obvious. Therefore, I am hereby granting a stay of the April order pending the Administrator's consideration of the modification request.

In the meantime, however, even if the April order is eventually modified (or withdrawn), the goals of the Clean Water Act will be served if States that want the flexibility of using schedules of compliance make their standards and criteria for establishing such schedules explicit. In States that have not adopted explicit provisions governing the establishment of

^{2/} Supplemental Materials, dated August 24, 1990. This submission was made at the request of the Agency's Chief Judicial Officer by letter to petitioner's representatives, dated August 15, 1990.

^{3/} Although petitioner furnishes information respecting the high number of NPDES permits the States and EPA plan to issue during the last quarter of the fiscal year, the supplemental materials do not provide any clues as to what fraction of those permits would be affected by the April order. To get some grasp of that figure it first would be necessary to determine how many States have defined policies sanctioning compliance schedules but which are nevertheless not reflected in their water quality standards or implementing regulations. Then it would be necessary to determine which of the permits in those States require compliance schedules. Only then could an informed judgment be made of the actual effects of the April order. Petitioner's supplemental materials do not answer these critical questions. Nor do they provide a particularly compelling rationale for the great stress petitioner places on how burdensome it would be for the States to amend their water quality standards (to incorporate explicit provisions governing compliance schedules). By law, 33 USCA §1313(c), all States must routinely update and make necessary modifications to their water quality standards--not less than once every three years (in contrast, NPDES permits are normally issued for a term of five years).

compliance schedules, i.e., in those States whose regulations and water quality standards "can [not] be fairly construed" (id.) as authorizing schedules of compliance, or are otherwise silent on their use, the general public may presently believe, erroneously, as it turns out, that every newly issued permit will always mandate strict and immediate compliance with the State's water quality standards. That reasonable expectation, however, is not the case. In reality, some dischargers obtain a grace period to come into compliance with applicable state water quality standards. Although these grace periods are subject to challenge in individual permit proceedings, the public would have to monitor each individual permit a State or EPA issues to discover the existence of these special permit features. A strong argument can be made that the public should not bear such an onerous burden.

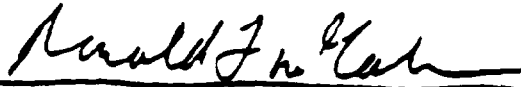
Accordingly, I do not believe that any stay of the April order should suspend efforts to open up the processes for establishing these compliance schedules. Therefore, EPA's Office of Water should continue its efforts to develop guidance for the States while the stay is in effect, thereby avoiding further delay in implementing the April order if the order, contrary to petitioner's wishes, is either not withdrawn or is not modified (in a manner that would allow State and federal permit issuers to continue establishing compliance schedules in an unrestricted manner). The Office of Water should inform the States of such a

possibility, to enable them to make any needed contingency plans.

So ordered. ^u

Dated:

SFP 0 4 1990


Ronald L. McCallum
Chief Judicial Officer

^u The Chief Judicial Officer, as the Administrator's delegatee, has the authority to issue orders in NPDES permit proceedings, 40 CFR §124.72.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Stay of Order on Petition for Reconsideration 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.
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P.O. Box 57
Pittsburgh, Pennsylvania 15230-0057

By interoffice mail:

Susan G. Lepow
Office of General Counsel
U.S. EPA, Headquarters
LE-132W Room W509
Washington, DC 20460

Dated: SEP 04 1990

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