IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

WILLAMETTE RIVERKEEPER, an Oregon non profit corporation and Bill Egan, an individual, Petitioners, vs. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Oregon Respondent, and BLUE HERON PAPER COMPANY, an Oregon corporation, and NORTHWEST PULP AND PAPER ASSOCIATION, Intervenors-Respondents.	Case No. 0606-06667 **OPINION AND ORDER**

This matter is before the court by way of an Amended Petition for Review of an order of respondent Department of Environmental Quality[1] issuing a 2006 National Pollutant Discharge Elimination System (NPDES) permit to Intervenor-Respondent Blue Heron Paper Company allowing effluent discharges into the Willamette River. The order is the result of an "other than contested case" proceeding of DEQ. The jurisdiction and function of the court on review are as prescribed by ORS 183.484. Counsel appeared as follows: Melissa Powers and Brett VandenHeuvel for Petitioners; Matthew Donahue and Karen Moynihan for Respondent DEQ; Richard Gleason and

[1] DEQ is an department of the Environmental Quality Commission, which is ultimately responsible for setting policy. *See, e.g.*, *City of Klamath Falls v. Environmental Quality Com'n*, 318 Or. 532, 536 (1994); ORS 468.015, .030. No party has suggested that EQC is a necessary party.

J. Mark Orford for Intervenor-Respondent Blue Heron Paper; and Laura Maffei for Intervenor-Respondent Northwest Pulp and Paper Association.

Petitioner Willamette River Keeper is a nonprofit entity formed to promote enforcement of environmental laws to restore and protect water quality and habitat of the Willamette River for the benefit of fishing, wildlife, and the recreational and aesthetic interests of its members, including Petitioner Bill Egan. Intervenor Northwest Pulp and Paper Association exists to promote the interests of its members, of which Blue Heron is one, in the regulatory process, and to collect and marshal evidence in support of its arguments that water quality can be achieved in a manner consistent with its members' operational and financial interests.

The parties' respective motions for summary judgment were argued to the court and submitted for decision on September 20, 2007.[2]

Petitioners contend that DEQ has allowed pollution harmful to salmon, other aquatic life, and beneficial uses of the Willamette river in violation of applicable federal and state law by relaxing and delaying enforcement of effluent limits on the turbidity and temperature impact of Blue Heron's discharges, and by failing to adopt a numerical limit for Blue Heron's discharge of aluminum. Respondents and Interveners contend that the NPDES permit in question is adequate to protect environmental interests, supportive of energy and water conservation and reductions in effluent temperature, and compliant with all applicable law.

The turbidity water quality standard, as approved by EPA in 1972, simply required that regulated activities not increase turbidity greater than 10 percent above background turbidity measured by "Jackson Turbidity Units" [JTU], units expressing the extent to which light can pass through water, and useful only when background turbidity is at or above 25 JTU. In 1991, DEQ

[2] On November 20, 2007, counsel for all parties provided further input in response to my *e*Mail request for comment concerning EPA's review of the 2006 permit.

revised the standard to rely on a more sensitive measurement technology, based on refraction of light caused by suspended matter in water, expressed in "Nephelometric Turbidity Units" [NTU]. NTU technology is feasible at a turbidity level as low as 1 NTU. The applicable water quality standard is expressed in OAR 340-041-0036, most recently approved by EPA on March 2, 2004.

DEQ, having previously applied the turbidity effluent limit to such operations as dredging, first applied the standard to "point sources" such as Blue Heron in 2000. Blue Heron's 2001 permit established turbidity limits of 40 NTU in the summer and 115 NTU in the winter.[3] That permit, however, included a compliance schedule allowing Blue Heron 1735 days in which to achieve those limits – and relaxing the limit to an average of 200 NTU until that deadline. About four days before the expiration of that 1735 days, and three months before the expiration of the 2001 permit, DEQ issued Blue Herron the 2006 permit here in issue. The 2006 permit retained the limits of 40 NTU in summer and 115 NTU in winter, but afforded Blue Heron another 54 months in which to comply with anything more stringent than the 200 NTU average. Blue Heron argues that the original compliance schedule reflects the new application of turbidity limits to its operations, and that the 2006 schedule corresponds with its plans to recycle wastewater by diverting filter backwash water through the plant's treatment system, allowing the plant to conserve water and reduce the heat of the ultimate discharge – but with the need to evaluate anew the implications for turbidity.

The 2006 permit also changes the regulation of the temperature of Blue Heron's discharge into the Willamette River. Because the 2006 permit in part allows a 33° C temperature while the 2001 permit limited the discharge to 30° C, the petitioners contend that the permit runs afoul of the CWA "anti-backsliding" provision, 33 USC §1342(o)(1). DEQ and Blue Heron respond that the

[3] Winter limits reflect the substantially greater flow of water in winter than in summer months.

regulation, taken as a whole, constitutes a more stringent regulation of the temperature effluent, and is therefore lawful.

With respect to aluminum in Blue Heron's discharge, petitioners contend that DEQ unlawfully failed to adopt a numeric limit, and has allowed discharges of aluminum at many times levels deemed toxic to aquatic life. Respondents argue that given the pH (acidity/alkalinity) and hardness levels of the Willamette, aluminum cannot be in *solution* at levels toxic to fish – that its impact when in suspension rather than solution is not as a toxin, but merely as a suspended solid in common with other substances adequately regulated by limits applicable generally to such suspended solids.

This court has no proper role in assessing the wisdom of DEQ's decisions or in performing fact finding and policy making functions delegated to DEQ. And, although the petitioners in essence contend that DEQ has betrayed its public responsibilities by allowing Blue Heron to damage the Willamette River, petitioners do not make or attempt to support allegations of corruption or misconduct. The issues before me come down to these: whether DEQ can *ever* delay enforcement of the relevant effluent limits through the device of a "compliance schedule;" whether, even if compliance schedules are sometimes lawful, DEQ has violated federal or state law in delaying enforcement in this permit; whether any of the challenged aspects of this permit amount to "backsliding" unlawful under federal or state law; and whether DEQ is legally required to adopt numerical limits for the discharge of aluminum. Although the parties each insisted the matter was properly resolved by summary judgment – that there was no need to "make" or supplement the factual record developed before the agency[4] – petitioners offered new factual material at argument

[4] Under *Norden v. Water Resources Dept.*, 329 Or 641 (2000), either side would presumably be entitled to "make a record" in Circuit court. Neither has asked for such an opportunity.

concerning aluminum and temperature issues, and DEQ has requested "an opportunity to address that late evidence" unless I disregard that material as untimely.

Standard of Review

Jurisdiction on review from this "order in other than a contested case" is provided by ORS 183.484, which also directs that

> The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.
>
> ORS 183.484(5)(c)

> The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:
> (A) Outside the range of discretion delegated to the agency by law;
> (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
> (C) Otherwise in violation of a constitutional or statutory provision.
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> ORS 183.484(5)(b)

On cross-motions for summary judgment, each side takes the position that it is entitled to prevail as a matter of law, an undertaking that typically requires that the court determine – without itself weighing evidence – whether the party seeking summary judgment has demonstrated that it is entitled to prevail as a matter of law, and that there is no material issue of fact after viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, *i.e.,* no issue of fact that must be resolved by trial before it can be determined which party is entitled to prevail. *E.g., Coquille School District 8 v. Castillo,* 212 Or App. 596, 600 (2007), and authorities cited. In *Coquille*, as here, however, the context is review of an administrative order in an "other than contested case" proceeding, and this court's role as to any material facts found by the agency is to determine whether the record, viewed as a whole, would permit a reasonable person to make

the factual findings that the agency made. *Coquille* at 600, citing *Powell v. Bunn*, 185 Or App 334, 338-339 (2002).[5]

Statutory and Regulatory Context

The federal Clean Water Act, 33 USC §§ 1251, *et seq*, establishes requirements for permits for industrial point source dischargers pursuant to a "National Pollutant Discharge Elimination System" (33 USC § 1342) in pursuit of the goal "that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 USC § 1251(a)(1). DEQ has authority to issue such permits (and the Environmental Quality Commission has authority to issue related regulations) pursuant to federal law that requires compliance with Clean Water Act "water quality standards" and substantial oversight by the United States Environmental Protection Agency [EPA]. 33 USC §1342(b), (c); 40 CFR Part 131. DEQ and NPDES permits are further regulated by state law. ORS Chapter 486B; OAR 340-041-0001, *et seq.* State law declares:

> Whereas pollution of the waters of the state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution in this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of the state:
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> (1) To conserve the waters of the state;
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> (2) To protect, maintain and improve the quality of the waters of the state for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses;
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> (3) To provide that no waste be discharged into any waters of this state without first receiving the necessary treatment or other corrective action to protect the legitimate beneficial uses of such waters;

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[5] That DEQ made findings (and that the parties agree that it must do so in issuing NPDES permits) obviates any consideration of the anomaly created by *Norden* and its progeny: Absent a requirement that an agency make findings of fact, the issue on review of an order in an other than contested case is whether the agency's *result* is one which a rational agency could reach – even if the court makes that determination based on facts developed in court that were never before the agency, even if the agency might have reached a contrary result in light of those facts, and even if this mechanism largely subverts review of whether the agency is indeed acting consistently with legislative intent.

(4) To provide for the prevention, abatement and control of new or existing water pollution; and
(5) To cooperate with other agencies of the state, agencies of other states and the federal government in carrying out these objectives.

ORS 468B.015

ORS 468B.010 provides:

> The water pollution control laws of this state shall be liberally construed for the accomplishment of the purposes set forth in ORS 468B.015.

Compliance Schedules *per se*

Petitioners contend that the NPDES permit at stake unlawfully delays Blue Heron's compliance with numerical turbidity limits through the unlawful use of "compliance schedules" which, by petitioners' calculations, have delayed compliance with the limits recognized in the 2001 permit[6] for a total of 9.25 years.[7] Petitioners contend that the applicable and underlying water quality standard, in effect since 1977, forbids discharges that result in "more than a ten percent cumulative increase in natural stream turbidities,"[8] and that DEQ has yet to enforce even that standard. Blue Heron concedes that measured by modern technology, there are "rare" circumstances under which

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[6] Those standards are 40 NTU in the summer, 115 NTU in the winter. "NTU" expresses turbidity by the amount of light scattered by particles in the water column, measured by ***N***ephalometric ***T***urbidity ***U***nits. The compliance schedules essentially permit turbidity not exceeding 200 NTU.

[7] Petitioners contend, and respondents do not dispute, that the 2001 permit allowed 4.75 years before Blue Heron had to meet turbidity limits, and that four days before that schedule expired, DEQ issued the 2006 permit allowing an additional 4.25 years before Blue Heron must comply.

[8] This standard is now codified in OAR 340-41-0036(1):

> Turbidity (Nephelometric Turbidity Units, NTU): No more than a ten percent cumulative increase in natural stream turbidities may be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:
> (1) Emergency activities: Approval coordinated by the Department with the Oregon Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare;
> (2) Dredging, Construction or other Legitimate Activities: Permit or certification authorized under terms of section 401 or 404 (Permits and Licenses, Federal Water Pollution Control Act) or OAR 141-085-0100 et seq. (Removal and Fill Permits, Division of State Lands), with limitations and conditions governing the activity set forth in the permit or certificate.

its discharge exceeds ten percent of background turbidity, but argues that changes in the sensitivity and units of measurement of turbidity, and modifications of its plant to conserve energy and reduce discharges, warrant DEQ's compliance schedules under the law.

Petitioners' first contention is that no compliance schedule can justify any delay in compliance with any water quality standard beyond – at the very latest – 1989. Petitioners cite 40 CFR § 122.47(a)(1), which provides "[a]ny schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA," and the Clean Water Act, 33 USC § 1311(b)(1)(C), in turn prescribes that deadline, even as to compliance with *state* water quality standards, as "not later than July 1, 1977," except for certain pollutants for which the deadline was "in no case later than March 31, 1989" (33 USC § 1311(b)(2)).[9]

There is ample authority to the effect that neither EPA nor the states can evade the "rigid guidepost" intended by these CWA provisions. *E.g.*, *Bethlehem Steel Corp v. Train*, 544 F2d 657, 661 (3d Cir 1976), *Safe our Bays & Beaches v. City & City of Honolulu*, 904 F Supp 1098, 1122-3 (D Hawaii 1994); *Northwest Environmental Defense Center v. Oregon Department of Environmental Quality*, Mult Co. No. 9905-05144, at pp. 21-26 (Redding, J., October 19, 2000)[*hereafter cited as* "NEDC v. DEQ"];[10] *See also Defenders of Wildlife v. Browner*, 191 F3d 1159, 1163 (9thCir 1999).

All parties cite and discuss a decision of the Environmental Appeals Board of the EPA, *In re Star-Kist Caribe,* 3 EAD 172, 1990 WL 324290 (1990), which seems to state the EPA position on compliance schedules: Neither the states nor EPA have any authority to extend compliance with

[9] Section 1311 has a clause permitting the "Administrator" to relax schedules after making certain findings with respect to "the maximum use of technology within the economic capability of the owner or operator [that] will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 USC §1311(c).

[10] As petitioners argue, *NEDC v. DEQ* held that the "rigid guidepost" deadlines established by the CWA do not apply to "total maximum daily load" [TMDL] limits under 33 USC §1313, while DEQ established the effluent limitations here at stake as water quality standards to comply with 33 USC § 1311(b).

water quality standards beyond the statutory deadlines, even as to state water quality standards more stringent than required by federal law, if those standards were in effect as of July 1, 1977. As to state water quality standards adopted after July 1, 1977, however, a compliance schedule is permissible if and only if the state adequately[11] provides for such schedules in its regulations. The notion seems to be that the CWA's concern with eliminating pollution is trumped by concepts of federalism, also recognized within the CWA, as to standards added by the states beyond the minima in place as a result of state and federal law as of July 1, 1977.

I agree with petitioners that this court is not bound by EPA's reading of federal law (*e.g.*, *Salem College & Academy, Inc. v. Employment Div.*, 298 Or. 471, 478 (1985)), although it is appropriate to give substantial deference to an agency's interpretation with law with which it is most familiar (*See, e.g., Porter v. Hill*, 314 Or. 86, 95 (1992)). I am not entirely persuaded by *Star-Kist Caribe*'s reasoning. *Star-Kist Caribe*'s notion that Congress's repeated insistence on fixed deadlines even for compliance schedules (33 USC § 1311(b)) amounted to a "grace period" so that the Act could be properly read after the deadline "as if the deadline had never appeared in the statute" (*Star-Kist Kirby*, footnote 21) inappropriately minimizes the CWA's theme of insistence upon ending water pollution. For example, 33 USC § 1311(b)(1)(C) provides that "In order to carry out the objective of [the CWA] there shall be achieved – "

> Not later than July 1, 1977, *any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulation* . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.
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> (*emphasis added*)

[11] I will reach below the parties' debate whether a compliance schedule must be part of the water quality standard *per se*.

It is significant that this deadline expressly addresses "more stringent" limitations adopted by states, and that it expressly includes "schedules of compliance" established by states. Equally intolerant of delay are the provisions in 33 USC § 1311(b)(2) for specified categories of pollutants for which limitations must be achieved "in no case later than March 31, 1989." The CWA's "backsliding" prohibitions (33 USC §1342(o)(1)) discussed below evince a similar spirit.

Star-Kist Caribe's citations to provisions of CWA recognizing the importance of the role of states in enforcing more stringent water quality standards in the context of federalism are not persuasive in light of provisions making it abundantly clear that EAB has the obligation not only to insist that states adopt sufficiently stringent standards in a timely fashion, but also to promulgate standards binding on states when a state fails to adopt sufficient standards – or fails to adopt standards at all. *E.g.,* 32 USC § 1313(a)(1), (a)(2), (a)(3)(C), (b)(2), (c)(3), (d)(2).

> When the United States Congress first enacted the Federal Water Pollution Control Act in 1948, the Congress relied primarily on state and local enforcement efforts to remedy water pollution problems. (*Middlesex Cty. Sewerage Auth. v. Sea Clammers* (1981) 453 U.S. 1, 11, 101 S.Ct. 2615, 69 L.Ed.2d 435; *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1433, 259 Cal.Rptr.132.) However, by the early 1970's, it became apparent that this reliance on local enforcement was ineffective and had resulted in the "accelerating environmental degradation of rivers, lakes, and streams...." (*Natural Resources Defense Council, Inc. v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1371 (*Costle*); see *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 203, 96 S.Ct. 2022, 48 L.Ed.2d 578.) In response, in 1972 Congress substantially amended this law by mandating compliance with various minimum technological effluent standards established by the federal government and creating a comprehensive regulatory scheme to implement these laws. (See *EPA v. State Water Resources Control Board, supra*, 426 U.S. at pp. 204-205, 96 S.Ct. 2022.) The objective of this law, now commonly known as the Clean Water Act, was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (§ 1251(a).)
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> *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd,* 124 Cal App 4th 866, 872, 22 Cal Rptr 3d 128, 131 (2004)

Blue Heron argues that various provisions of the CWA recognize the right of states to adopt their own water policies (CWA § 101(b), 33 USC § 1251(b))[12] and direct EPA to approve state plans including compliance schedules:

> (3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:
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> (A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;
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> * * * *
>
> (C) total maximum daily load for pollutants in accordance with subsection (d) of this section;
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> * * * *
>
> (F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;
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> * * * *
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> 33 USC § 1313(e)(3) [CWA §303(e)(3)], *emphasis added*

Subsection (c), in turn, requires participating states to review "applicable water quality standards" at least every three years, and to submit any resulting "revised or new standard" to the EPA for approval.

Although 33 USC § 1251 does nothing to mitigate the unambiguous deadlines of 33 USC § 1311, 33 USC § 1313(e)(3)(F) seems equally unambiguous in its cognizance of compliance schedules with respect to "revised or new water quality standards" notably free of references to 33 USC § 1311(b), which are, in contrast, expressly applicable to effluent limitations and compliance schedules mentioned in subsection 1313 (e)(3)(A).[13] This reading would support the *Star-Kist*

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[12] "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter . . . ."

[13] In other words, while subsection (3)(A) makes it clear that the Administrator, in reviewing state continuing processes, shall approve only those plans that contain "limitations and schedules of compliance at least as stringent" as those required by section 1311(b), subsection 3(F) contains no equivalent mention of section 1311(b) requirements in

Caribe result to the extent that states may adopt compliance schedules for new or revised water quality standards. *Accord, Communities for a Better Environment v. State Water Resources Control Bd.*, 132 Cal App 4th 1313, 1335, 34 Cal Rptr 3d 396, 410 (2005); *In re New England Plating Co.*, 9 EAD 726, 2001 WL 328213 (2001).

Petitioners do not directly address 33 USC § 1313(e)(3)(F). They correctly argue that 33 USC § 1313(e)(3)(A) requires that state compliance schedules be "at least as stringent"as any requirements of 33 USC § 1311(b), which invokes unambiguous statutory deadlines. The only argument I glean from petitioners' briefs that might reach subsection (e)(3)(F) is the notion that *NEDC v. DEQ*, in exempting TMDL limits from section 1311(b) time limits, recognized that but for that exception, compliance schedules cannot escape section 1311(b) deadlines. Although *NEDC v. DEQ* did indeed suggest this logic, the opinion hardly answers the question before me – which, at this stage of the analysis, comes down to why or how section 1313(e)(3)(F) fails to support the *Star-Kist Caribe* result as to revised or new water quality standards.[14]

NEDC v. DEQ did acknowledge the strength of the petitioners' contentions in all other respects, but found that "the 'timetable for achievement of objectives' limitations of section 1311 do not apply to section 1313 TMDL effluent limitations," citing (and quoting) *Longview Fiber Co. v. Rasmussen*, 980 F2d 1309 (9th Cir 1992). *Longview Fiber* was directly concerned whether the exclusion of section 1313 from 33 USC § 1369(b) – which gives the Court of Appeals jurisdiction to review an EPA action concerning any effluent limitation "under section 1311, 1312, 1316, or 1345" – left that court without jurisdiction to review an EPA action concerning a TMDL under

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requiring that the Administrator approve "revised or new water quality standards" resulting from the (at least) triennial state review process mandated by section 1313(c). The clear implication is that the 1311(b) limits do not apply to 1313(c) "revised or new" water quality standards.

[14] It is worth noting that althugh *NEDC v. DEQ* is helpful, it is not binding precedent as it is from a co-equal court.

section 1313. In holding that the exclusion of section 1313 from that list was indeed fatal to jurisdiction, *Longview Fiber* reasoned, essentially, that Congress intended to exclude TMDL review from the list of sections. 980 F2d at 1310-1314. Emphasizing *Longview*'s reflection that a section 1313 TMDL determination "is not the same thing as a section 1311(b)(1)(C) limitation," (909 F2d at 1312), *NEDC v. DEQ* reasoned that

> Had the [*Longview*] court determined that section 1311 compliance deadlines do apply to section 1313 TMDL's [*sic.*], the court could not have come to the conclusion that the two types of effluent limitations are entirely distinct for the purposes of section 1369(b)(1)(E). Therefore, having specifically considered the applicability of section 1311 compliance deadlines, the court must have determined that section 1311 compliance deadlines do not apply to section 1313 effluent limitations.
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> *NEDC v. DEQ* at 28

I am not at all persuaded that *Longview* intended to address or resolve the issue whether "section 1311 compliance deadlines do not apply to section 1313 effluent limitations." To the contrary, 33 USC § 1313(e)(3)(A) and (C) quite clearly suggest that section 1311 deadlines *do* apply to "effluent limitations and schedules of compliance" referenced under subparagraph A, but not necessarily to TMDLs adopted as contemplated by subsection (d) (subparagraph C), or to "adequate implementation, including schedules of compliance *for revised or new water quality standards* under subsection (c)" (subparagraph F). In any event, neither *NEDC v. DEQ* nor *Longview* convince me that petitioners have explained why new or revised water quality standards cannot have "schedules of compliance" as obviously contemplated by 33 USC § 1313(e)(3)(F). TMDLs established under 33 USC § 1313(d) are beyond the category of effluent limitations covered by section 1311, but it hardly follows that section 1313(e)(3)(F) cannot authorize compliance schedules for effluent limitations that are not TMDLs.

It might be argued that 33 USC § 1313(f) imposes section 1311 time deadlines on *all* section 1313 standards:

> Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance *required by any State to be implemented prior to the dates set forth in sections 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.
>
> (*emphasis added*)

But the fair reading of this language is that it does not allow relaxation of any effluent limitation or compliance schedule that *existed* and was required by "any State" to be implemented before the section 1311 deadlines. The language does not address standards not in existence before those deadlines. Congress has amended section 1313 after section 1311 deadlines passed. Pub.L. 100-4, §404(b); Pub.L. 106-284, §2. Subsection (c) continues to contemplate new and revised standards as a result of continuing reviews at least every three years, and subsection (e)(3)(F) unavoidably contemplates that such new and revised standards may have "schedules of compliance" as part of their "adequate implementation." I agree with the result in *Star-Kist Caribe* to this extent.

Petitioners reasonably argue that the compliance schedule here at issue is not the result of a "triennial review" that has become common under section 1313(c)'s requirement for review "at least once each three year period" (33 USC § 1313(c)(1)). But section 1313(c) requires DEQ (or EQC[15]) to hold hearings "from time to time" *no less frequently than every three years* for purposes of reviewing and modifying standards. I can find no basis for finding unlawful DEQ's practice of reviewing and modifying standards as part of the hearings such as those resulting in this permit. What it takes to make any resulting "new or revised" standards effective is another matter.[16]

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[15] See note 1, *supra*.

[16] I reject the Petitioners' contention, in essence, that the limitations here in question, dating from the 1991 conversion to Nephelometric Turbidty Units, are so tenured that the permit limitations cannot be "new" or "revised" by reason of the age of the underlying water quality standard alone. The purposes of the CWA are undermined rather than promoted by a construction that is destructive of improvements in water quality control – particularly a construction that increases its antagonism to improvement with the age of the standard in place. If newer technology promises improvement, all things being equal, older technology is most likely to need that improvement.

The Compliance Schedule in This Permit

Petitioners contend that even if compliance schedules can sometimes be lawful under the CWA after 1989, DEQ had no lawful authority to allow the compliance schedule here in question. Petitioners argue that under *Star-Kist Caribe*, only a "water quality standard" approved by the EPA can afford authority for a compliance schedule, and that the regulations invoked by respondents do not and cannot authorize this compliance schedule. Much[17] of the debate centers on OAR 340-041-0061(4)(b). Petitioners contend that subsection (4) does not authorize the compliance schedule in question, and that even if it purported to do so it cannot – because it is not part of a "water quality standard" approved by EPA and because it violates federal regulations. Subsection (4)(b) provides:

> (4) Minimum design criteria for waste treatment and control facilities prescribed under this plan and other waste treatment and controls deemed necessary to ensure compliance with the water quality standards contained in this plan must be provided in accordance with specific permit conditions for those sources or activities for which permits are required and the following implementation program.
> * * * *
> (b) For existing waste loads or activities, additional treatment or control facilities necessary to correct specific unacceptable water quality conditions must be provided in accordance with a specific program and timetable incorporated into the waste discharge permit for the individual discharger or activity. In developing treatment requirements and implementation schedules for existing installations or activities, consideration will be given to the impact upon the overall environmental quality, including air, water, land use, and aesthetics.

Petitioners plausibly argue from the language and history of this subsection that it intentionally addresses facility "design criteria" *to avoid* amounting to a water quality standard or limitation on effluents, and that it cannot authorize compliance schedules for effluent limits. I agree

[17] OAR 340-041-0016(16) provides that "the department may include compliance schedules for the implementation of effluent limits derived from water quality criteria in this division [but] only for water quality based effluent limits that are newly applicable to the permit and must comply with provisions in 40 CFR §122.47 (including the requirement that water quality criteria must be achieved as soon as possible)." The parties agree that DEQ could not rely on this provision because it was not approved by EPA until July 2, 2007, well after this permit was issued. The issues whether the limits in question are "newly applicable" or comply with 40 CFR §122.47 are relevant nonetheless, and are discussed below.

that OAR 340-041-0061(4)(b) is not a water quality standard, but at best part of Oregon's implementing regulations. *Star-Kist Caribe's* recognition that a state cannot permit compliance schedules for new or revised water quality standards unless "the schedule is added pursuant to authorization contained in the state water quality standards *or* the State's *regulations implementing the standards*" hardly compels the result that as old and obscure an "authorization" as this language can authorize *any* compliance schedule regardless of its consequences for water quality. It makes perfect sense to conclude that a state cannot implement compliance schedules that delay water quality enforcement unless the state's standards or implementing regulations authorize such schedules. It hardly follows that *any* compliance schedule is lawful simply because there is a generic recognition in implementing regulations that compliance schedules can be employed.

As the parties agree, OAR 340-041-0061(4)(b) was approved by the EPA in 1972[18] – well before the statutory deadlines of 1977 and 1989. When approved by EPA in 1972, it could be reasonably read as requiring timelines for permittees to accomplish "waste treatment and controls deemed necessary to ensure compliance with the water quality standards" *within* those statutory deadlines. Although it is not dispositive, this reading is entirely consistent with the several DEQ statements suggesting that the agency long understood OAR 340-041-0061(4)(b) not to authorize compliance schedules beyond those deadlines, with DEQ's obvious conclusion that it needed to gain EPA approval for OAR 340-041-0016(16) at least to "clarify" its authority to adopt compliance schedules, and EPA's reflection, during review of the 2001 draft permit, that Oregon's "water quality standards do not allow for compliance schedules."

As their opponents contend, petitioners have not asserted inconsistent agency conduct (ORS 183.494(5)(b)(B)) as a basis for reversal in their petition. Accordingly, I do not need to decide

[18] The provision was then numbered OAR 340-041-0120(3).

whether the DEQ agency statements cited by petitioners amount to official agency policy or an "agency practice." Nor do I need to conduct an analogous factual analysis of the ultimate significance of EPA's 2000 reflection that Oregon's standards "do not allow for compliance schedules." It appears that the disputed issue is otherwise resolvable as a matter of law.

Star-Kist Caribe ultimately rests on 33 USC §1313(e)(3)(F) for authority that a state can create compliance schedules that arguably have the impact of undermining water quality standards that were in effect as recognized by the EPA. Although *Star-Kist Cairibe* also makes much of the provisions of the CWA that require *state* review of *EPA-issued* permits, the overriding statutory purpose is to avoid erosion of standards established by the states. 33 USC § 1341. As apparent from the history recounted in *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd, supra,* 124 Cal App 4th at 872, the purpose of such provisions is not to defer to state prerogative, but to ensure effective regulation of water quality. In this light, the notion that 33 USC §1313(e)(3)(F) constitutes blanket authority for state compliance schedules whenever the state deems a standard "new" or "revised" overlooks a crucial protection: Subsection (3)(F) contemplates schedules of compliance "for revised or new water quality standards, under subsection (c) of this section," and subsection (c) unambiguously requires EPA review of such "revised or new standard." 33 USC § 1313(c)(2).

In this case, the underlying water quality standard for turbidity prohibited discharges that raise turbidity more than 10 percent above background. The standard was arguably "revised" in 1991 when DEQ changed the units of measurement from JTU to NTU, and approved by EPA at least as long ago as March, 2004. As I read 33 USC § 1313(e)(2) and (3), EPA must review subsection (3)(F) *compliance schedules* to ensure that the resulting planning process is "at all times consistent with this chapter" – *i.e.,* the CWA. Thus, subparagraphs (A) through (H) of subsection (e)(3)

amount to a list of prerequisites for EPA approval of any state's "continuing planning process" submitted for review, and subparagraph (F) includes among those prerequisites "adequate implementation, including schedules of compliance, for revised or new water quality standards."

It is not a question of whether the compliance schedule "is" a water quality standard or merely contained in implementing regulations. If there is no state authority for a compliance schedule, that is fatal under the analysis of *Star-Kist Caribe*. State law authorization for a compliance schedule is prerequisite to but not dispositive of its validity for purposes of the CWA. The question is whether the resulting impact on water quality is consistent with the CWA, and EPA review under 33 USC §1313 (c) and (e) is a critical step intended to avoid undermining effective regulation in pursuit of water quality.[19] To the extent that *Star Kist Caribe* intended to suggest that a state may provide itself with generic authority to allow any compliance schedules without the necessity of EPA approval, I disagree with that suggestion, and conclude that the readily apparent intent of Congress in the CWA is to assure EPA review as a protection against subversion of the CWA through erosion of water quality standards. The EPA may or may not balk at the notion that a standard adopted in 1991 cannot be "revised or new" so as to allow further delay in enforcement through a compliance schedule, or that the 2001 permit deadline may properly be delayed by issuing a new or revised permit with another 54 month delay in achieving compliance even with the long-standing 10 percent limit.

The critical step of EPA review is also a complete answer to Blue Heron's suggestion that 40 CFR § 131.13 authorizes the compliance schedule at stake:

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[19] None of the authorities cited by respondent or intervenors is to the contrary. The EAD decisions all involve review after the EPA has approved a compliance schedule. *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd., supra*, concerned a compliance schedule and permit that had been approved by the "administrative agencies in this case, including the EPA."

> States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval.

Assuming, reasonably, that a compliance schedule is a policy affecting the application and implementation of turbidity limits, this section requires EPA review and approval.[20]

The 2006 permit was provided to EPA under 40 CFR § 123.43. I need not decide whether in the course of such a discretionary review EPA can sufficiently validate a compliance schedule within the meaning of 33 USC § 1313(e), for it is clear that EPA chose only to address the temperature standard in its review of the 2006 permit, and stopped short of "approving" even that standard.[21]

Respondent and intervenors argue that the compliance schedule here in issue is authorized by 40 CFR § 122.47, which provides in relevant part:

> (a) General (applicable to State programs, see §123.25[22]). The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.
>
> (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.
>
> (2) The first NPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of discharge.

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[20] Oregon's reference to variances recognizes the necessity of EPA review. OAR 340-041-0061(2), approved by the EPA March 2, 2004.

[21] The review commented "that the State has not back-calculated the permit limits from the most stringent requirement" and that "[t]here is not enough information provided to discern whether the permit is allowing a higher temperature than (1) the current discharge, and/or (2) the previous permitted level." DEQ00415.

[22] 40 CFR § 123.25 applies a long list of such regulations to participating states, and notes "States need not implement provisions identical to the above listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions."

> (3) Interim dates. Except as provided in paragraph (b)(1)(ii) of this section, if a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.
>
> (i) The time between interim dates shall not exceed 1 year, except that in the case of a schedule for compliance with standards for sewage sludge use and disposal, the time between interim dates shall not exceed six months.
>
> (ii) If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.
>
> Note: Examples of interim requirements include: (a) Submit a complete Step 1 construction grant (for POTWs); (b) let a contract for construction of required facilities; (c) commence construction of required facilities; (d) complete construction of required facilities.[23]

A plain reading of this section supports the notion that it only authorizes compliance schedules before the "statutory deadlines" of the CWA - 1977, and 1989 at the latest.[24] This plain reading is complicated by the circumstance that the regulation was adopted after the 1977 deadline, and modified once before and twice after the 1989 deadline.[25] The courts have not squarely confronted this issue, although some post-1989 opinions refer in passing to the option of compliance schedules under 40 CFR § 122.47 as mitigation of the regulatory impact those courts were discussing.[26] As petitioners argue, apparently assuming that the regulation is not limited to this plain reading, Blue Heron is by no means a "new source" or a "new" or "recommencing" discharger, at

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[23] The omitted portion of the regulation contemplates a permittee's option of ceasing operations, of parallel schedules with compliance or cessation to result within the same time limit.

[24] See text accompanying note 8, *supra*.

[25] 49 Fed Reg 38050, Sept. 26, 1984; 50 Fed Reg 6940, Feb. 19, 1985; 54 Fed Reg 18784, May 2, 1989; 65 Fed Reg 30909, May 15, 2000.

[26] *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 451 F.3d 77, 85 -86 (2d Cir 2006); *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd., supra*, 124 Cal.App.4th at 890; *City of Burbank v. State Water Resources Control Bd.*, 4 Cal.Rptr.3d 27, 43 (2003), *superseded* 79 P.3d 1199, 7 Cal.Rptr.3d 1, *affirmed*, 35 Cal.4th 613, 108 P.3d 862, 26 Cal.Rptr.3d 304, *reh denie*d (2005).

least with respect to the 2006 permit.[27] Blue Heron argues that all this means is that subsection (2) does not apply, and contends, apparently, that subsection (3) *independently* authorizes a compliance schedule after the "statutory deadlines" if the schedule includes "interim requirements." Petitioners argue, plausibly, that the compliance schedule of over nine years (adding the delays of both permits) cannot pass the "as soon as possible" test of subsection (a)(1) and that the interim requirements imposed by DEQ do not amount to meaningful progress as contemplated by subsection (a)(3). If these were material issues, it might well be a close question whether Blue Heron's laudable desire to reroute discharge to conserve energy and lower the temperature of discharge can be sufficient to satisfy an "as soon as *possible*" test. I have no difficulty, however, in concluding that DEQ could at least rationally determine that interim reports after collecting seasonal data and completion of a feasibility study are sufficient "meaningful steps."

On the other hand, subsection (a)(3) is not and does not purport to be an independent source of authority to provide compliance schedules, but amounts to a further condition on compliance schedules otherwise issued: if such schedules call for delaying compliance for more than a year from the date a permit is issued, they must include interim requirements and dates for their completion.

Nor am I persuaded that DEQ or Respondents have established that subsection (1)(a) does not mean what it says, or that it does not refer to the 1977 and 1989 deadlines discussed above: "*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*." Perhaps the "statutory deadline" language remains viable for statutes that contemplate later deadlines under circumstances not here present.[28] In any event, even EPA regulations cannot violate statutory restrictions, and the only

[27] Blue Heron acquired an existing facility.

[28] Petitioners suggest as such a statutory deadline 33 USC § 1311(c), which contemplates improvement in effluent limitations based upon best available control technology.

available statutory authorization for compliance schedules requires EPA review and approval – 33 USC §1313. So, even if a section 1313 compliance schedule amounts to a post-1989 "applicable statutory deadline,"and even if the fact that this permit was issued well after 1989 means that there *is* no "*applicable* statutory deadline," this regulation cannot and does not dispense with the requirement of EPA review and approval.

Petitioners also argue that because the 2006 permit authorizes an interim effluent limit of 200 NTU while the *final* limits established by the 2001 permit (and the 2006 permit) of 40 NTU in summer months and 115 NTU in winter months, the compliance schedule is independently unlawful under 33 USC § 1342(o)(3), which prohibits "backsliding." The statute provides, in relevant part:

> (o) Anti-backsliding
> (1) General prohibition
> In the case of *effluent limitations* established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of *effluent guidelines* promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the *comparable effluent limitations in the previous permit*. In the case of *effluent limitations* established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain *effluent limitations* which are less stringent than the *comparable effluent limitations in the previous permit* except in compliance with section 1313(d)(4) of this title.
> (2) Exceptions
> A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if–
> (A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;
> (B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or
> (ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification). Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an *effluent limitation* which is less stringent than required by *effluent guidelines in effect at the time* the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

[*emphasis added*]

Petitioners also cite 40 CFR § 122.44(*l*), which provides:

(*l*) Reissued permits.

(1) Except as provided in paragraph (*l*)(2) of this section when a permit is renewed or reissued, *interim effluent limitations*, standards or conditions must be at least as stringent as the *final effluent limitations*, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)

(2) In the case of *effluent limitations* established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent

limitations which are less stringent than the *comparable* effluent limitations in the previous permit.

(i) Exceptions--A permit with respect to which paragraph (*l*)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if--

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B) (1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) Limitations. In no event may a permit with respect to which paragraph (*l*)(2) of this section applies be renewed, reissued, or modified to contain an *effluent limitation* which is less stringent than required by *effluent guidelines* in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

The parties offer many contentions about these provisions. Petitioners contend that by allowing 200 NTU average turbidity, the 2006 permit unlawfully violates these provisions because that level of turbidity exceeds the limitations of 40 NTU in summer and 115 NTU in winter established by the 2001 permit, particularly because those lower limits were the "final" limitation

established by the 2001 permit and because they permit violation of the underlying water quality standard prohibiting turbidity in excess of 10 percent of background.

DEQ argues that there is no violation because the 40/115 NTU and 200 NTU limits are the same in both permits, and because the regulation and statute recognize exceptions for plant modifications. Blue Heron agrees, and adds that the *comparable* limitations in the 2006 and 2001 permits are the same, and that the disputed compliance schedule is part of the water quality standard so that there is no violation of the underlying water quality standard.[29]

It appears to me that 40 CFR § 122.44(*l*)(2) by its reference to "Section 402(a)(1)(B) of the CWA" reaches only EPA-issued permits (covered by subsection (a) of section 402(a) of the CWA, 33 USC § 1342(a)), and that the exceptions and limitations of section 122.44(*l*)(2) therefore have no application to a state-issued permit under subsection (b) of section 402 of the CWA, 33 USC § 1342 (b). Thus, the provision of section 122.44(*l*)(1)[which is not limited to EPA-issued permits] that "when a permit is renewed or reissued, *interim effluent limitations*, standards or conditions must be at least as stringent as the *final effluent limitations*, standards, or conditions in the previous permit" is subject only to its own exception, "unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62." The latter provision states, in relevant part:

> (a) Causes for modification. The following are causes for modification but not revocation and reissuance of permits except when the permittee requests or agrees.

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[29] The parties also disagree as to the usefulness of *Citizens for a Better Env't v. Union Oil Company*, 83 F3d 1111 (9th Cir 1996)[*UNOCAL*]. While I agree with Respondents that the relevant language is dicta and therefore not authoritative, and that the case is in any event not binding, I tend to agree with the *UNOCAL*'s reflection that "a modified NPDES permit that does not contain a strict effluent limitation that had been about to come into effect is, indeed, "less stringent" than the previous, unmodified NPDES permit-regardless of whether the limitation had yet taken effect." 83 F3d at 1120. *UNOCAL* expressly declined to consider statutory exceptions discussed below in this opinion.

> (1) Alterations. There are material and substantial alterations or additions to the permitted facility or activity (including a change or changes in the permittee's sludge use or disposal practice) which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

This view largely reconciles the regulation with the statute, of which section 1342(o)(1) applies to both EPA- and state-issued permits, to which, in turn, subsection (o)(2) exceptions and (o)(3) limitations apply as well. At least one significant distinction appears: while the statute forbids "*effluent limitations* which are less stringent than the *comparable effluent limitations* in the previous permit," the regulation requires that "*interim effluent limitations, standards or conditions* . . . be at least as stringent as the *final effluent limitations, standards, or conditions* in the previous permit."

I agree with petitioners that "limitations, standards or conditions" includes the 200 NTU "limitation" and that it is in excess of the 40 NTU Summer and 115 NTU Winter "final" limitations of the 2001 permit. I reject any contention that this meaning exceeds EPA's statutory authority, because the "effluent limitations" language of the statute is broad enough to encompass "standards and conditions" within the authority of the EPA to construe and implement the statute. As distinguished from regulations that would loosen the statutory controls on compliance schedules, this interpretation furthers rather than conflicts with the apparent Congressional purpose and intent to deal seriously with pollution. But this conclusion merely brings the analysis to the exception invoked by DEQ and the Respondents.

The statutory exception[30] is applicable when

> material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation
>
> 33 USC § 1342(o)(2)(A)

[30] Although I see the otherwise corresponding regulatory exception and its limitation as inapplicable to state-issued permits, the analysis in the text for the statutory exception and limitation would apply to the regulatory versions were they applicable.

The corresponding statutory limitation is:

> In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an *effluent limitation* which is less stringent than required by *effluent guidelines in effect at the time* the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

33 USC § 1342(o)(3)

Although Petitioners point to no turbidity effluent "guideline," they do stress that the compliance schedule continued in the 2006 permit allows occasional violation of the existing water quality standard. DEQ and Blue Heron minimize but do not dispute this contention. At least to this extent, the exception invoked by Blue Heron cannot authorize the compliance schedule concerning turbidity, even if EPA had approved that compliance schedule.

Although the parties do not substantially address the issue, I note without deciding that the statutory (and regulatory) exception contemplates accomplished rather than proposed facility alterations as a basis for an exception to "backsliding," while the 2006 permit and DEQ's analysis appear to invoke proposed alterations to the Blue Heron facility as a basis for pushing back the turbidity compliance deadline.

To summarize, although compliance schedules are not foreclosed under the CWA, the compliance schedule challenged by Petitioners is unlawful because it has never been approved by EPA, and the sole applicable statutory authority for compliance schedules requires such approval. Moreover, the compliance schedule in the 2006 permit is also in violation of 40 CFR § 122.44(*l*)(1) because it allows turbidity in excess of the *final* limitations of the 2001 permit; any authorization by reason of statutory exceptions for facility modifications are ineffective to the extent that the

compliance schedule permits exceeding the underlying water quality standard by permitting even occasional increases in turbidity above 10 percent of background turbidity.[31]

Temperature Limitations

Petitioners argue that because the 2001 permit contained a maximum seven-day *average temperature* effluent limitation of 30 degrees Centigrade, and the 2006 permit "increased the maximum 7-day average temperature effluent limitations to 33 degrees C.," the permit violates the "backsliding" prohibitions discussed above. DEQ argues that the 2006 temperature limit is more stringent than the comparable limit in the previous permit because it uses a seven-day *average of daily maximum* temperatures and reduces the allowable excess heat load limit by 20 percent. Petitioners insist that the temperature and relative heat load restrictions are distinct effluent limitations, each of which must be complied with. Blue Heron points out that the 2001 permit allowed it to achieve compliance by compliance with *either* the temperature limit or the relative heat load.[32] In reply, Petitioners argue that the temperature limitations remain "comparable" for purposes of the backsliding prohibition.

Ultimately, the issue of the relative *stringency* of "comparable" limits is a question of fact, and it is stringency upon which backsliding analysis depends. *See* 33 USC § 1342(o); 40 CFR § 122.44(*l*). Unlike the turbidity issue, which turns on issues of law as to the availability and validity

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[31] Much of Respondents' arguments assert that only through their reading of the law can environmentally friendly innovations be encouraged, and that Petitioners' views would make business for point sources like Blue Heron infeasible. But Respondents have made no attempt at showing that Blue Heron *cannot* meet the final turbidity effluent limits of the 2001 permit until any facility modification is complete (see 33 USC § 1342(o)(2)(E)), and have not even attempted to show that the assertedly rare occasions on which turbidity exceeds 10 percent of background cannot be avoided by adjustments in processing rates or other variables with the control of Blue Heron. At argument, Blue Heron claimed that it "had no trouble" meeting the standard, but was allowed to exceed it under the disputed compliance schedule. Nor have Respondents shown that their legitimate business needs cannot be accommodated via a schedule incorporated within an appropriate enforcement mechanism that responds to violations of effluent limits (*E.g., UNOCAL, supra*, 83 F3d at 1119-20). In any event, the point of the CWA is in large part to leverage interests in business success to obtain compliance with water quality standards, not to compromise those standards to encourage business. *See, e.g., Defenders of Wildlife v. Browner*, *supra*, 191 F3d at 1163, and authorities cited.

[32] Gleason aff, Exhibit 2, p.8 (2001 NPDES Renewal, Schd. A., condition A8).

of compliance schedules, this issue of fact must be resolved in favor of DEQ if the record, viewed as a whole, would permit a reasonable person to make the factual findings that the agency made. *Coquille School District 8 v. Castillo, supra*, 212 Or App at 600, and authorities cited.. DEQ's analysis, set out at pp. 26-30 of the 2006 permit "Fact Sheet/Permit Evaluation Report,"[33] concludes:

> With the combination of the new maximum daily temperature limits, average temperature limits applicable regardless of load, new excess thermal limits, and relative thermal load limits comparable to the 2001 limits, the proposed permit limits are significantly more restrictive than the 2001 limits.

Even if the DEQ analysis as to temperature were not abundantly persuasive,[34] I am required to uphold it because it surely passes the reasonableness test of *Castillo* and related authorities.

Aluminum

Petitioners seek summary judgment on grounds DEQ unlawfully failed to establish effluent limitations for aluminum. The relevant *narrative* standard recites:

> Toxic substances may not be introduced above natural background levels in waters of the state in amounts, concentrations, or combinations that may be harmful, may chemically change to harmful forms in the environment, or may accumulate in sediments or bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety, or welfare or aquatic life, wildlife, or other designated beneficial uses.
>
> OAR 340-041-0033(1)

Petitioners argue that if a discharge of a toxic pollutant may be harmful to aquatic life, DEQ has a duty to establish effluent limits to avoid that harm, and that Oregon must assess whether a discharge may exceed narrative criteria citing 40 CFR 122.44(d)(1)(ii):

> When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of

[33] Pets. Exhibit 4 at 26-30.

[34] Which I find it to be, a circumstance of no legal significance.

> pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

Petitioners cite EPA recommendations that numeric limits for aluminum be 750 μ/L[35] for acute exposure and 87 μ/L for chronic exposure,[36] and DEQ's acknowledgment that Blue Heron discharge has achieved 19,300 μ/L,[37] to submit that the potential for harm is obvious and the need for numerical effluent limitations undeniable. Accordingly, Petitioners argue that DEQ violated the CWA when it failed to perform a "reasonable potential analysis"[38] under 40 CFR 122.44(d)(1)(iii):

> When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

DEQ noted that it had proposed but not yet adopted EPA's aluminum limits, and that

> [T]he proposed aluminum criterion applies a pH values below 6.6 and hardness values below 12 mg/L (as $CaCO_3$). Those values are not observed in this section of the Willamette River. Therefore there is no reasonable potential for the discharge to exceed the water quality standard for aluminum and the aluminum is not considered a toxic substance in this discharge.
>
> Fact Sheet/Permit Evaluation Report at 31-32[39]

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[35] Petitioner's initial brief cites the lower figures as *milligrams* per liter rather than as micrograms per liter - an error of substantial magnitude - but the figures and units in this text are correct.

[36] 53 Fed Reg 33178.

[37] Respondents note that this figure is for outfall 002, which the 2006 permits requires to be eliminated. The existing figures for outfall 001 are within the proposed limits. Respondents argue that the closure of outfall 002 moots the issue as aluminum will be removed from the rerouted effluent, while Petitioners argue that this just shifts the problem to outfall 001. These issues are hardly susceptible to resolution on summary judgment on this record.

[38] DEQ's reasonable potential analysis for outfall 002 did not include aluminum, while it reasonable potential analysis for outfall 001 *did* address aluminum. Compare Fact Sheet/Permit Evaluation Report, App. C, with App. D, Pets. Exhibit 4 at 89, 91.

[39] Pets. Exhibit 4 at 31-32.

Petitioners assert that DEQ's reasoning is flawed because its conclusion that aluminum discharges meet narrative criteria at expected pH and hardness levels is "based on"[40] the notion that DEQ's proposed criteria are not applicable at those levels. Although there is room for debate here, the notion that aluminum "is not considered a toxic substance" at those levels is surely rationally related to the issue whether aluminum "may be harmful" under the narrative standard.

In the same vein, DEQ's determination that aluminum "is not considered a toxic substance" at expected pH and hardness levels can support a conclusion that a reasonable potential analysis is not required.

I agree with Petitioners, however, that the mere fact that DEQ is considering a proposed standard for aluminum that would be *inapplicable* at pH and hardness levels present in the Willamette does not logically support the finding that aluminum poses no hazards at those levels. Nor does the circumstance that EPA recommended that states consider pH and hardness variations itself provide logical support for the finding that aluminum poses no hazards at those levels. Likewise, that EPA or others have voiced "strong reservations" regarding EPA's1988 aluminum standard provides no logical support for the finding that aluminum poses no hazards at those levels. The same is true of data that suggests aluminum toxicity is "highly dependent" upon pH and hardness. In short, that there may be good reasons for limiting EPA's proposed limits to certain pH and hardness conditions does not logically imply that aluminum has no potential for harm at vastly different levels.[41]

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[40] DEQ's Response to Comments (April 28, 2006) at 20, Pets. Exhibit 6 at 20.

[41] For what it is worth, I find entirely plausible the suggestion by counsel for Blue Heron at argument that beyond the pH and acidity ranges addressed by DEQ's proposed numerical standard, aluminum *has no toxicity* because it cannot go into solution, and presents only as a suspended solid sufficiently addressable as such for water quality purposes. But counsel's suggestion is not part of the record that I must view as a whole to find rational support for that conclusion, which is apparently critical to DEQ's determination not to provide aluminum effluent limitations in this permit. Moreover, my suspicions that DEQ may readily supply or obtain the missing bases for its conclusions cannot substitute for such support in the record viewed as a whole.

I am to affirm if an agency could reasonably reach its conclusion if the record, viewed as a whole, provides support for that conclusion. *Coquille School District 8 v. Castillo, supra*, 212 Or App at 600, and authorities cited. The only piece of evidence in the record to which I can find a citation that even responds to the need for logical support is DEQ's reference to the deposition of Robert Baumgartner, Deputy Administrator of the Water Quality Division of DEQ:

> Q. . . . The permit evaluation report notes that – says, "In addition, the proposed aluminum criterion applies [at] pH valued below 6.6 and hardness values below 12. These values are not observed in the section of the Willamette, therrefore, there's no reasonable potential for discharge to exceed the water quality standard for aluminum. Aluminum is not considered a toxic substance in this discharge."
>
> Isn't it correct that aluminum could still exceed the narrative water quality standards?
>
> A. I think for aluminum to exceed the narrative water quality standard wold have to have some measure indication that it was causing a toxic effect. And I don't believe we have that.
>
> Q. What kind of indication would that entail?
>
> A. That would be either bio assays or the follow-ups identified or pointed at aluminum as being the cause of a measured toxicity.
>
> Q. Would there be a reasonable potential to violate the narrative standard if there was very high concentrations of aluminum discharged?
>
> A. No, I don't believe so.
>
> Q. Isn't it true that a high concentration of a pollutant could cause a violation of the narrative water quality standard?
>
> * * * *
>
> A. For many metals it depends on the form of the metal that is toxic. The most toxic form of aluminum is, of course, the free aluminum. And that's the reason why we're looking at the low pH, largely to identify what form it is in.
>
> So it's quite conceivable and very reasonable based on our knowledge of equilibrium partitioning that the aluminum would not be in its toxic form.
>
> Bumgartner Deposition 42, *l* 8, to 43, *l* 25.

For the most part, this exchange parallels the arguments made in the parties' briefs and at oral argument. The exchange does add some conclusions in the form of opinions by an apparently qualified witness. These opinions cannot provide the requisite support in this record for the conclusion that aluminum cannot have any toxicity at the concentrations and conditions of pH and

hardness here in question for at least the combined force of these reasons: they do not purport to address identified concentrations of aluminum or levels of pH and hardness that are in fact expected at Blue Heron's outfalls, and they reveal no basis for the conclusions sufficient to allow anyone to assess the weight to which they may be entitled or the circumstances under which they are persuasive. In short, the opinions themselves are insufficient to provide rational support for the conclusion that aluminum cannot be toxic at expected concentrations under the relevant pH and hardness conditions, or for the conclusion that therefore DEQ need not conduct a "reasonable potential analysis" for aluminum.

Were aluminum the only issue in this review, it might make sense to deny summary judgment and allow the parties to supplement the record as contemplated by *Norden v. Water Resources Dept.*, *supra*, 329 Or 641 (2000). Inasmuch as the compliance schedule resolution requires a remand, and since petitioners have persuaded me that DEQ's resolution of the aluminum issue cannot be supported by this record viewed as a whole as it now exists, I am persuaded that a remand is both the lawful and expedient resolution.

CONCLUSION

1. Petitioners' motion for summary judgment with respect to turbidity compliance limits is GRANTED;
2. The motions for summary judgment of DEQ and Intervernor-Respondents regarding temperature limits are GRANTED;
3. Petitioners' motion for summary judgment with respect to aluminum is GRANTED;
4. All other motions for summary judgment are DENIED;

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5. The order subject to review is REMANDED to the Oregon Department of Environmental Quality for further proceedings consistent with this Opinion and Order.

December 19, 2007

Michael H. Marcus, Judge