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VIA E-MAIL AND US MAIL

Ms. Jeanine Townsend, Acting Clerk
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: **Draft Compliance Schedule Policy for NPDES Permits**

Dear Ms. Townsend:

We write on behalf of Mirant California, Inc. Mirant operates three electrical generation facilities in California, each of which operates under an individual NPDES permit and under the statewide General Industrial Stormwater Permit. Mirant takes pride in its facilities' history of permit compliance.

Compliance schedules are an important aspect of permitting. No permit holder ever wants to be out of compliance with its permit, but with time and new technologies, standards change. New sampling techniques can detect constituents that were not detected previously. New scientific information can counsel for more stringent water quality objectives or more stringent effluent limits. Conversely, new information can discredit previous assumptions and can show that more relaxed objectives or limits can be appropriately protective. And of course, if new treatment technologies need to be implemented, it can take time to design, gain regulatory approval, construct and test the facilities for those technologies.

Compliance schedules allow regulatory agencies to issue permits with which the permit holder can comply while assuring that appropriate water quality objectives are achieved and that beneficial uses of the waters of the state are protected. In addition, they assure both the public and the regulated community that reasonable and necessary controls will be implemented in a timely and cost-effective fashion. Accordingly, Mirant supports the State Board's efforts to draft a consistent, state-wide policy for including compliance schedule in NPDES permits.

Mirant does, however, have concerns regarding some specific aspects of the current proposal for such a state-wide policy (Draft Policy). Mirant appreciates this opportunity to share its concerns with the State Board. These concerns include:

- The compliance schedule policy should allow compliance schedules for non-numeric standards in industrial storm water permits;
- Compliance schedules should be available for new *applications* of existing standards, not just for new *interpretations*;
- Compliance schedules should allow time for studies to evaluate whether alternative compliance strategies would be appropriate, not just to build new treatment facilities or to implement new programs;
- The compliance schedule policy should not arbitrarily limit compliance periods to five years; and
- The compliance schedule policy should apply to NTR and CTR constituents, too.

DISCUSSION

THE COMPLIANCE SCHEDULE POLICY SHOULD ALLOW COMPLIANCE SCHEDULES FOR NON-NUMERIC STANDARDS, SUCH AS THOSE IN INDUSTRIAL STORM WATER PERMITS

The Draft Policy allows for compliance schedules only for a "new, revised, or newly interpreted water quality standard." (Draft Policy, page A-3, paragraph 2). In the definitions, a "newly interpreted water quality standard" is limited to the application or "interpretation" of a narrative water quality objectives that results in "a *numeric* permit limitation more stringent than the limit in the prior NPDES permit to the discharger." (Draft Policy, page A-3, paragraph 1.e; emphasis added).

Industrial facilities such as Mirant generally follow the requirements of the Statewide Industrial Stormwater NPDES Permit. Compliance is based upon implementing "best management practices" ("BMPs"). Implementing BMPs is an iterative process in which past experience guides future actions. What constitutes BMPs may change with time and experience and, if new or modified BMPs are indicated, it may take time to develop and implement them. Compliance schedules may be necessary. However, as shown above, the present Draft Policy only authorizes compliance schedules for a permit limit where a narrative standard results in a *numeric* permit limit. The Draft Policy should be revised to allow compliance schedules for non-numeric permit requirements, as well. A revised section that would address this issue is set out at the end of Mirant's next comment.

COMPLIANCE SCHEDULES SHOULD BE AVAILABLE FOR NEW *APPLICATIONS* OF EXISTING STANDARDS, NOT JUST FOR NEW *INTERPRETATIONS*

As the Draft Policy is currently written, compliance schedules would be available only for a newly adopted or revised water quality standard or when a new *interpretation* of an existing *narrative* standard results in a new or more stringent effluent limit. The Draft Policy would not authorize compliance schedules where an existing *numeric* standard is applied for the first time. Experience shows this limitation is too narrow.

NPDES permitting experience in recent years shows that constantly improving analytical techniques have resulted in analytical detections of constituents that were not known to exist in a facility's effluent. Additionally, changing conditions or random variability, particularly of ambient conditions, could result in a finding of "Reasonable Potential" where it did not exist before. Thus, it seems that each permitting cycle for almost any facility anywhere in the state finds "Reasonable Potential" for a new constituent that was not regulated in the facility's prior permit. While this may be the result of a new interpretation of a narrative standard, it is also often just the result of applying existing standards to newly discovered constituents in effluent or in the ambient water body. In either circumstance, a facility often cannot immediately comply with new effluent limits.

Mirant suggests the Draft Policy be revised so that compliance schedules will be authorized any time a facility's permit contains a new or more stringent effluent limit, assuming the other preconditions for a compliance schedule are met. Mirant believes this issue, and that of the previous comment, could be accomplished by revising the Draft Policy as follows:

> "Newly interpreted water quality standard" means a ~~narrative~~ water quality objective that, when interpreted *or applied* during NPDES permit development (using appropriate scientific information and consistent with state and federal law) to determine the permit limitations necessary to implement the objective, results in a *new permit limitation or a* ~~numeric~~ permit limitation more stringent than the limit in the prior NPDES permit issued to the discharger.

(revising Draft Policy, page A-3, paragraph 1.e).

COMPLIANCE SCHEDULES SHOULD ALLOW TIME FOR STUDIES TO EVALUATE WHETHER ALTERNATIVE COMPLIANCE STRATEGIES WOULD BE APPROPRIATE, NOT JUST TO BUILD NEW TREATMENT FACILITIES OR TO IMPLEMENT NEW PROGRAMS

The Draft Policy states, "It is the intent of the State Water Board that compliance schedules for NPDES permits only be granted when the discharger must design and construct facilities or implement new or significantly expanded programs and secure financing, if

necessary, to support these activities in order to comply with permit limitations . . .." (Draft Policy, page A-2, paragraph 9.) Further, the Draft Policy would allow a Regional Board to issue a compliance schedule only where the discharger must design and construct facilities or implement new or significantly expanded programs to comply with a permit limit. (Draft Policy, page A-3, paragraph 2.) Mirant suggests the Draft Policy be modified so that compliance schedules could include the time necessary to conduct additional studies to evaluate whether alternate compliance strategies would produce a more appropriate result.

Mirant understands that EPA Region IX has expressed the view that compliance schedules are appropriate only for "hard construction" projects or to allow the permit holder to implement new operations or new pollution prevention programs to meet Water Quality Based Effluent Limits (WQBELs). EPA has expressed the view that compliance schedules are not appropriate to allow time to conduct studies for TMDL development, to establish site-specific objectives, to conduct a use attainability analysis, or to otherwise verify whether calculated WQBELs are actually appropriate. Mirant respectfully disagrees with EPA's position. When Congress enacted the Clean Water Act, it expressed its clear preference that the states should take the lead in implementing the Act, 33 U.S.C. §1251 (b), and California has been so authorized. Moreover, EPA has recognized that, "The State and RWQCBs have broad discretion to adopt a provision, including discretion on reasonable lengths of time for final compliance with WQBELs." (65 Fed. Reg. 31704). In addition, Congress expressed its intent that funds be spent on the most economical solutions available. (*See*, e.g., 33 U.S.C §1298(b) (Before issuing a CWA grant, EPA must, "determine that the facilities plan of which such treatment works are a part constitutes the ***most economical and cost-effective*** combination of treatment works over the life of the project to meet the requirements of this chapter.") Mirant believes the states have discretion to develop their own compliance schedule programs that avoid the unnecessary and wasteful expenditure of public and private funds.

The Clean Water Act defines "schedule of compliance" 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) (emphasis added). First, Congress' use of the term "including" does not signal that what follows is an exclusive list of options. As *Black's Law Dictionary* (7th ed.) states, the "participle *including* typically indicates a partial list <the plaintiff asserted five tort claims, including slander and libel>." A "partial list" includes listed items, but it does not exclude unlisted items. Courts have repeatedly held that the word "include" is one of illustration and enlargement, not limitation. See *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) ("including" introduces an "illustrative list" without "any suggestion that Congress intended [it] to be complete"); *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of general principle"); *In re Yochum*, 89 F.3d 661, 668 (9th Cir. 1996) ("in terms of statutory construction, use of the word 'includes' does not connote limitation"). It would be wrong to conclude that congress intended to *limit* compliance options by "including" an illustrative list of options in is definition.

Moreover, nowhere in Congress' definition of "schedule of compliance" did Congress limit the "actions or operations" to hard construction projects. Clearly, investigating alternative compliance strategies, such as conducting studies to support intake credits, mixing zones, water effects ratios, site specific objectives, and TMDLs can all lead to "compliance with an effluent limitation." An effluent limitation, after all, is not just a raw number existing in the abstract. It is the result of a "reasonable potential" calculation intended to protect the beneficial uses of a water body, recognizing that "it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." Water Code § 13241.

The State Board's own decisions have endorsed compliance schedules as an appropriate means of developing information which is likely to result in compliance with "an effluent limitation," even if not the precise numeric limit calculated at the outset. (*See, e.g.,* In re: Tosco, (WQ Order No. 2001-06, March 7, 2001, at pp. 21 and 22, *affirmed, Communities for a Better Environment v. SWRCB*, 109 Cal.App.4th 1089, 1107 (2003); *also see* In re: City of Vacaville, WQ Order No. 2002-0015 (October 3, 2002) at p. 58).

The history of bis (2-ethylhexyl) phthalate ("bis (2)") is a classic example of appropriate compliance schedules avoiding the wasteful construction of unnecessary capital facilities. By now, the story is well-known. Bis (2) was showing up in CTR sampling by permit holders across the state, which, as a result, were found to have Reasonable Potential for bis(2) and were receiving numeric effluent limits with which they could not comply. There was strong suspicion that the bis (2) hits were the result of laboratory contamination. Faced with he choice of building extremely expensive and energy intensive Reverse Osmosis facilities to "remove" bis (2), permit holders requested and received compliance schedules to allow for further investigation. Sure enough, as cleaner sampling and analytical techniques were developed, the bis (2) hits vanished as did Reasonable Potential for bis (2). These additional studies took time, but the result was appropriate data, compliance with water quality objectives, and avoiding the wasting of public and private funds.

TMDL development is another area where compliance schedules for non-construction-related activities are clearly appropriate, despite EPA Region IX's stated views to the contrary. For example, development of the San Francisco Bay Mercury TMDL has taken many years and gone through many iterations. The Regional Board initiated interim limits and compliance schedules to allow the TMDL to be developed before final effluent limits for mercury would take effect. As a result, the underlying water quality objective was rescinded and replaced with a more appropriate fish-tissue objective. Without appropriate compliance schedules, however, private and public permit holders around the Bay might have been designing and building expensive treatment facilities aimed at meeting a target that ultimately proved to be inappropriate.

Mirant respectfully submits that the State Board's prior approach, allowing compliance schedules to include the time necessary to conduct the scientific investigation necessary to evaluate alternative compliance strategies, is the more reasonable approach. Mirant urges the State Board to revise the Draft Policy to allow compliance schedules to perform that

investigations necessary to evaluate alternate compliance strategies by adding in appropriate locations in the Draft Policy (e.g., at pages A-1 paragraphs 6 and 9, A-3 paragraph 2, and A-4 paragraphs 3 and 4):

> ". . . or to gather additional data or conduct additional studies necessary to evaluate alternative means of establishing and meeting appropriate effluent limitations."

THE COMPLIANCE SCHEDULE POLICY SHOULD NOT ARBITRARILY LIMIT COMPLIANCE PERIODS TO FIVE YEARS

Neither the Clean Water Act nor the EPA's regulations specify a maximum allowable time for a compliance schedule. Federal regulations require only that the time period allowed by a compliance schedule assure compliance with an effluent limit "as soon as possible." 40 CFR 122.47(a)(1), but they do not impose specific limitations on the length of compliance schedules. Curtailing Regional Boards' authority to allow schedules long enough to accomplish the tasks required would be an arbitrary act and one which could jeopardize the entire effort to adopt a consistent, state-wide policy. The state-wide policy should incorporate the requirement that compliance schedules be as short as practicable, but it should not impose arbitrary and unsupportable time limits.

In its present form, the Draft Policy would limit compliance schedules to no more than five years, with just two limited exceptions, one for "unforeseen circumstances, beyond the control of the discharger" and a second for TMDL-related implementation plans. If compliance will require construction of additional treatment facilities, five years often is not sufficient time to complete those efforts. More importantly, any hard and fast rule would, of necessity, be arbitrary. The State Board cannot anticipate every circumstance that might arise in the future. Who would have predicted the permitting changes that have occurred in just the past ten years? The Draft Policy includes new requirements that permit holders and Regional Boards justify the need and length of compliance schedules and limits those schedules to the minimum time necessary to achieve compliance. (Draft Policy, page A-2, paragraph 9; page 4, paragraph 3; page 4-5, paragraph 5.a).

Mirant submits that the appropriate policy choice would be to simply require "compliance as soon as possible." Any "bright-line" time limit is unnecessary to accomplish the purpose of the Policy. Since any absolute time limit is necessarily arbitrary, including an absolute limit will ultimately invite litigation and threaten the entire policy.

THE COMPLIANCE SCHEDULE POLICY SHOULD APPLY TO NTR AND CTR CONSTITUENTS, TOO

The Draft Policy carves out from it scope compliance schedules for effluent limits established for NTR and CTR constituents. (Draft Policy at page A-3, paragraph 2.b and c.) There is no reason to exclude these particular constituents from the Policy, particularly since the principal goal of the Policy is to insure consistency throughout the state. NTR and CTR constituents pose some of the most problematic issues in NPDES permitting, and in many cases are the subject of ongoing TMDL development. Compliance schedules for these constituents are just as important as compliance schedules for conventional pollutants. Having different compliance schedule policies for different constituents would promote confusion and invite inconsistency. The Draft Policy should be revised to apply equally to NTR and CTR constituents.

Mirant appreciates the opportunity to share its concerns with the Board. It looks forward to discussing these issues in greater detail and answering any questions Board Members may have at the upcoming workshop on March 18, 2008.

Very truly yours,

ARCHER NORRIS

Peter W McGaw

PWM

cc: Ron Kino
Steve Bauman
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