IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

En Banc

CITY OF BURBANK, et al.,

Plaintiffs and Petitioners,

vs.

STATE WATER RESOURCES CONTROL BOARD, et al.,

Defendants and Respondents.

Case No. S119248

Court of Appeal, Second Appellate District, Division Three
Nos. B150912, B151175 and B152562
Los Angeles Superior Court Nos. BS060960 and – BS060957
The Honorable Dzintra I. Janavs, Judge

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CITY OF BURBANK AND CITY OF LOS ANGELES

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I. INTRODUCTION

The Association of Metropolitan Sewerage Agencies ("AMSA") submits this brief as an *amicus curiae* in support of the Appellants, the City of Burbank and the City of Los Angeles (collectively, the "Cities"). AMSA is a trade association that represents the interests of nearly 300 of the nation's publicly-owned wastewater treatment agencies. AMSA membership includes 32 California agencies and more than 60 agencies within the jurisdiction of the Ninth Circuit Federal Court of Appeals. Collectively, AMSA member agencies serve the majority of the sewered population in the United States, and together treat and reclaim more than 18 billion gallons of wastewater each day.

AMSA members have a vital interest in the outcome of this appeal, because they are regulated by the Clean Water Act ("CWA"), including the National Discharge Elimination System ("NPDES") permit program, as implemented by the United States Environmental Protection Agency ("U.S. EPA") and through delegated state water quality control programs, such as the one implemented in California under the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq. A central function of AMSA is to represent the legislative and regulatory interests of its member wastewater treatment agencies. As a result, AMSA actively participates in state and federal court litigation raising important CWA implementation and policy issues that affect its members.

AMSA wishes to address two of the issues raised in this appeal (the third and fourth identified in the Cities' Statement of the Issues): (1) whether the state is authorized to include necessary schedules of compliance in discharge permits where immediate compliance is impossible, and (2) whether the state's imposition of numeric permit limits to implement a narrative water quality standard must comply with federal and state requirements for rulemaking, including the state's Administrative Procedures Act.

II. THE USE OF COMPLIANCE SCHEDULES TO ATTAIN POST-1977 WATER QUALITY STANDARDS IS AUTHORIZED BY STATE AND FEDERAL LAW

The incorporation of compliance schedules in NPDES permits, rather than in administrative enforcement orders, is of critical importance to POTWs in California and throughout the nation. As the Superior Court noted in its decision, compliance schedules in administrative orders outside of an NPDES permit only ensure that the state or federal permitting agency will exercise its prosecutorial discretion to refrain from enforcement of the applicable compliance deadline; they do not modify the terms of the permit and do not offer any protection against citizen suits that may be brought under the Clean Water Act. Statement of Decision at 13; *see Citizens for a Better Env't v. Union Oil Co.*, 861 F. Supp. 889, 902 (N.D. Ca. 1994); *United States v. City of Toledo*, 867 F. Supp. 603, 606-07 (N.D. Ohio 1994).

AMSA has closely followed the national controversy over the legality of including compliance schedules in NPDES permits for over a decade, including the federal administrative proceedings that culminated in decisions issued successively by U.S. EPA's Chief Judicial Officer ("CJO"), Administrator and Environmental Appeals Board ("EAB") in the NPDES permit appeal known as *In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5.[1] That series of decisions involved the question whether NPDES permits issued by U.S. EPA could include so-called "schedules of compliance" containing interim effluent limits that do not require immediate compliance with state water quality standards established after the Clean Water Act's July 1, 1977 deadline for such standards to be attained. Compliance schedules allow the discharger to postpone immediate compliance with limits that would meet the applicable state water quality standards and to phase in compliance over time.

The *Star-Kist* case began when a discharger requested an Evidentiary Hearing with the Regional Administrator of U.S. EPA's Region II to determine whether it was entitled to a compliance schedule in the NPDES permit issued by Region II for the discharger's facility in

[1] The unusual sequence of decisionmakers in this proceeding reflects the evolution of U.S. EPA's administrative procedures between 1988 and 1992. At the outset of the case, the Chief Judicial Officer had been delegated the authority to consider petitions for review of Regional NPDES permit decisions. The EAB replaced the CJO in the administrative appeal process when it was created on March 1, 1992. 57 Fed. Reg. 5320 (Feb. 13, 1992).

Puerto Rico. When the Regional Administrator denied that request, the discharger filed a Petition for Review with the Chief Judicial Officer of U.S. EPA. The CJO upheld the Regional Administrator in an *Order Denying Petition for Review*, 2 E.A.D. 758, 1989 EPA App. LEXIS 38 (March 8, 1989). However, Region II filed a petition for reconsideration of the CJO's order, arguing that the order was too broad and went beyond the arguments presented in the case. Specifically, the Region asked that the CJO's order be modified to make it clear that the Clean Water Act does not categorically prohibit all compliance schedules for post-1977 water quality standards.

The CJO's Order was upheld in a lengthy opinion by the Administrator of U.S. EPA, in which he stated that it was incorrect to read the CJO's decision as barring all schedules of compliance in permits issued after 1977, and clarified the circumstances under which compliance schedules can be used. *Order on Petition for Reconsideration*, 3 EAD 172, 1990 EPA App. LEXIS 45 (April 17, 1990) (LAA XV 4366-4401). Following the issuance of the Administrator's order in 1990, U.S. EPA's Office of General Counsel joined Region II in filing a Petition for Modification in which they sought to have the Administrator's decision altered so as not to prohibit U.S. EPA from issuing compliance schedules where a state's regulations were merely "silent" as to whether compliance schedules were allowed. After a two-year delay (during which time Region

II was asked to review and provide a report on the status of compliance schedule regulations in all 50 states), this request was denied by the newly-created Environmental Appeals Board of U.S. EPA. *Order Denying Modification Request*, 4 EAD 33, 1992 EPA App. LEXIS 51 (May 26, 1992).

As an initial matter, it should be noted that *Star-Kist* directly addressed only the question whether U.S. EPA could include compliance schedules in federally-issued permits. The gravamen of the Administrator's 1990 opinion was that the decision whether or not to allow schedules for achieving delayed compliance with state water quality standards was up to the states who established those standards. As the Administrator explained,

> Congress intended the states, not EPA, to become the proper authorities to define appropriate deadlines for complying with their own state law requirements. Just how stringent such limitations are, or whether limited forms of relief such as variances, mixing zones, and compliance schedules should be granted are purely matters of state law, which EPA has no authority to override.

Star-Kist, 3 E.A.D. at ___, 1990 EPA App. LEXIS 45, *19-20 (LAA XV 4380-4381). Accordingly, the Administrator determined that "the only instance in which the permit may lawfully authorize a permittee to delay compliance after July 1, 1977 [the Clean Water Act deadline to achieve compliance with state water quality standards] is when the water quality standard itself (or the state's implementing regulations) can be fairly

construed as authorizing a schedule of compliance." *Star-Kist*, 3 E.A.D. at ___, 1990 EPA App. LEXIS 45, *6-*7.

Because of the procedural posture in which the case arose, much of the Administrator's decision in *Star-Kist* is phrased in the negative (*i.e.*, that U.S. EPA may not include compliance schedules unless they are authorized by state law, and the permittee was not entitled to a compliance schedule in that case). However, the decision is equally important for the affirmative principal it established beyond dispute – namely, that the Clean Water Act does allow the use of compliance schedules for post-1977 water quality standards, and they can be included in NPDES permits if they are authorized by the state which established those standards.

A. Compliance Schedules May Be Used When They Are Authorized Either in the State's Water Quality Standards Or in the State's Implementing Regulations, Including the State's NPDES Permit Regulations

The Water Boards correctly observe in their Answer Brief that the Administrator's decision in *Star-Kist* has been repeatedly affirmed. Answer Brief at 40. However, they seriously mischaracterize the fundamental holding of this important decision when they suggest that compliance schedules are impermissible unless the actual text of the water quality standards themselves specifically allows them. *Id.* The Administrator's decision in *Star-Kist* repeatedly emphasized that the authorization for compliance schedules can be found either in the state's

water quality standards or in the state's implementing permit regulations. For example, the Administrator's decision states that compliance schedules may be placed in NPDES permit pursuant to "authorization contained in the state water quality standards or the State's regulations implementing the standards." *Star-Kist*, 3 E.A.D. at ___, 1990 EPA App. LEXIS 45, *24 (emphasis added); *see also id.* at *11 (state may lay the necessary groundwork "in its standards or regulations;" necessary enabling language may be in the "state water quality standards or regulations") (emphasis added).

In its *Order Denying Modification Request*, the EAB expressed this principal even more forcefully, noting that "29 jurisdictions have provisions in their laws (water quality standards or related regulations, including permit regulations) that explicitly authorize schedules of compliance in NPDES permits" (emphasis added). 4 EAD 33, 36 n.9, 1992 EPA App. LEXIS 51, * 7 (LAA XV 4397). In connection with this statement, the EAB makes reference to an April 3, 1992 Status Report it had requested concerning U.S. EPA's effort to develop guidance for the States respecting implementation of the Administrator's Order. That Status Report, which is contained in the record for this appeal, included a Declaration by Gary W. Hudiburgh, Jr., Chief of U.S. EPA's Regulatory Implementation Section, NPDES Program Branch, Permits Division, Office of Wastewater Enforcement and Compliance, which set forth a detailed listing of those

states that had explicitly authorized schedules of compliance in their regulations, either "NPDES or standards." As the Cities note in their Reply Brief, at 24, California was identified among those states that had explicitly authorized compliance schedules by provisions in "their water quality standards or related regulations." BAA XI 3285-3285, 3292-3293 (emphasis added).

Subsequent rulings by U.S. EPA have consistently followed the holding in *Star-Kist* that compliance schedules may be authorized either in a state's water quality standards or in its implementing regulations. *See, e.g., In re: Arizona Municipal Storm Water NPDES Permits*, 7 E.A.D. 646, 659, n.21, 1998 EPA App. LEXIS 86, *28 (EAB, 1998) (the authority to include a schedule of compliance in an NPDES permit "is contingent upon authorization in the State's standards *or implementing regulations*"); *In re: City of Ames, Iowa*, 6 E.A.D. 498, 501 n.1, 1996 EPA App. LEXIS 11, *9 (finding that compliance schedules were authorized by the statute governing the issuance of NPDES permits to POTWs and by the implementing regulations specifying "Terms and Conditions of NPDES Permits" in Iowa Admin. Code § 567-64.7).

In this case, as the Cities have argued, and as U.S. EPA itself concluded in its 1992 *Star-Kist* status report, California law explicitly provides for the use of compliance schedules in the implementing regulations governing the requirements to be included in state-issued

NPDES permits. *See* Cal. Water Code § 13263(c) (Deering 2004) ("The requirements may contain a time schedule, subject to revision in the discretion of the board"); Cal. Code Regs. tit. 23 § 2231(a) (2004).

B. U.S. EPA's Objection Letter is not Entitled to Deference from this Court Because it is Not Final Agency Action and it is Inconsistent with Other Statements by the Agency

The Water Boards argue in their Answer Brief that it would have been "futile" to include compliance schedules in the permits under appeal because a comment letter it received from Region IX of U.S. EPA (erroneously) suggested that compliance schedules were inconsistent with the Clean Water Act and that U.S. EPA might veto the final permit if they were not removed. The Water Boards characterize this letter as a "determination" that compliance schedules are not allowed, and assert that this "decision" by U.S. EPA is entitled to *Chevron* deference from this Court. Answer Brief at 41.

However, it is well-established in federal case law that mere comment letters, and even formal objections by U.S. EPA to NPDES permits proposed by a state are not final agency action. Even if U.S. EPA actually vetoed the state permit and issued a federal permit in its place, the permittee would still have the right to challenge U.S. EPA's interpretation through the appropriate federal administrative and judicial appeals. Only U.S. EPA's final decision to grant or deny a federally-issued permit is a final action subject to judicial review. *See American Paper Institute v.*

EPA, 890 F.2d 869, 874 (7th cir. 1989); *Champion Int'l Corp. v. EPA*, 820 F.2d 182 (4th Cir. 1988); *City of Ames, Iowa v. Reilly*, 986 F.2d 253 (8th Cir. 1993).

Recent U.S. Supreme Court decisions have limited the application of *Chevron* deference to situations in which Congress has delegated authority to the agency generally to make rules carrying the force of law, "and the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226-227 (2001). Interpretations such as those in opinion letters, which are not arrived at after formal adjudication, along with interpretations contained in policy statements, agency manuals, and enforcement guidelines – all of which lack the force of law – do not warrant *Chevron*-style deference. *Christenson v. Harris County*, 529 U.S. 576, 587 (2000). Interpretations contained in formats such as opinion letters may be "entitled to respect," but only to the extent that those interpretations are "persuasive," *id.*, quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), or "cogent." *Alaska Department of Environmental Conservation v. EPA*, ___ U.S. ___, 124 S. Ct. 983, 1001 (2004).

Here, U.S. EPA's interpretation of the law in the comment letter cited by the Water Boards is entitled to neither deference nor respect because it is inconsistent with the Agency's previous, authoritative statements in the *Star-Kist* decision and in subsequent formal rulings on the

same issue. Courts have consistently recognized that one important factor in determining whether an agency's interpretation is entitled to deference is whether it is inconsistent with previous agency positions. *See Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *accord Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997); *Service Employees Int'l Union, Local 102 v. San Diego*, 60 F.3d 1346, 1359 (9th Cir. 1994). "[A]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretations is entitled to considerably less deference than a consistently held agency view." *Beno v. Shalala*, 30 F.3d 1057, 1071 (9th Cir. 1994) (quoting *Cardoza-Fonseca*, 480 U.S. at 446 n.30).

Accordingly, the position expressed in the comment letter which the Water Boards received from Region IX is not entitled to deference and should not be followed by this Court.

III. FORMAL NOTICE AND COMMENT RULEMAKING IS REQUIRED TO TRANSLATE NARRATIVE TOXICITY LIMITS INTO NUMERIC PERMIT LIMITS

AMSA is committed to the principle of developing sound policy through the procedures and mechanisms established by our democratic form of government. The rulemaking procedures established by federal and state administrative procedures acts are some of the most important procedures for seeking appropriate input to develop sound policies because they are designed to "assure fairness and mature consideration of rules of

general application." *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 781 (1969). Rulemaking notice and comment requirements, such as those contained in the federal Administrative Procedure Act and the California Administrative Procedures Act (Cal. Gov't Code § 11340 *et seq.*), exist "to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and . . . to see to it that the agency maintains a flexible and open-minded attitude towards its own rules . . . ." *National Tour Brokers Ass'n v. United States of America*, 591 F.2d 896, 902 (D.C. Cir. 1978).

Additionally, notice and comment procedures "ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public." *New Jersey v. Department of Health & Human Servs.*, 670 F.3d 1262, 1281 (3d Cir. 1981). Failure to require agency compliance with rulemaking procedures "promotes neither the agency's ultimate mission nor respect for the law by ignoring the agency's indiscretion or condoning the agency's shortcut." *Id.*

In this case, as the Superior Court recognized, the Water Boards improperly circumvented the California Administrative Procedures Act in setting effluent limits by adopting numerical criteria derived verbatim from informal water quality criteria (including federal water quality guidance, previous state-wide plans, drinking water standards and proposed

regulations), none of which had ever been adopted as regulations or even derived as part of an approved methodology for translating the applicable narrative criterion into NPDES permit limits. Statement of Decision at 14-15.

A. Numeric Criteria and Mechanisms for Interpreting or Translating Narrative Water Quality Criteria Must Be Promulgated as Regulations Pursuant to the State's Administrative Rulemaking Procedures

Federal law requires that numeric translators of State water quality standards be properly enacted under the State's rulemaking procedures. 40 C.F.R. § 25.10(b). Moreover, almost every state, including California, requires that water quality objectives or criteria be promulgated as rules pursuant to the State's administrative procedures act. *See* Cal. Water Code § 13241 (Deering 2004); Cal. Gov't Code § 11353(b) (Deering 2004). The use of unpromulgated numeric water quality criteria such as those used in this case has been struck down by courts in other jurisdictions because of a state agency's failure to follow the applicable administrative procedures for rulemaking.

One such criterion was struck down by the Supreme Court of Washington in *Simpson Tacoma Kraft Co. v. Department of Ecology*, 835 P.2d 1030 (Wash. 1992). *Simpson Tacoma Kraft* involved a judicial challenge to an unpromulgated effluent discharge criterion for dioxin which had been established by the Washington Department of Ecology ("WDOE")

as part of WDOE's efforts to implement its narrative water quality standard for toxicity. The dioxin standard was based on federal guidance, but was not promulgated as a regulation. The dioxin standard was applied in a uniform manner to every point source in Washington regardless of the waterbody into which the point source was discharging. The Washington Supreme Court held that the dioxin standard clearly met the definition of "rule" under Washington's administrative procedures act, and that WDOE lacked the authority to establish such a standard without following the notice and comment procedures established by Washington's administrative procedures act.

Similarly, in *Wisconsin Elec. Power Co. v. Department of Natural Resources*, 287 N.W.2d 113 (Wis. 1980), the Supreme Court of Wisconsin struck down an unpromulgated numeric criterion establishing chlorine limitations for Wisconsin's utility plants. The numeric chlorine limitation was not based on any regulation, but was rather based on guidance from U.S. EPA as to what U.S. EPA believed was necessary to ensure compliance with Wisconsin's water quality standard for toxicity. The Supreme Court of Wisconsin acknowledged that the U.S. EPA guidance, in and of itself, did not have the force and effect of law, but concluded that "the adoption and uniform application of recommendations for chlorine limitations contained in [the guidance]" amounted to the adoption of an unpromulgated

regulation by the Wisconsin Department of Natural Resources ("WDNR"). *Id.* at 120.

Courts have stricken unpromulgated numeric criteria in cases outside of the environmental arena as well. In *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia Circuit struck down an unpromulgated numeric criterion established by the Food and Drug Administration ("FDA") for the purpose of determining whether certain food products would be considered as contaminated. The D.C. Circuit concluded that even though the numeric criterion was characterized by FDA as an informal action level that did not necessarily bind the agency or food producers, it still had the practical effect of narrowing FDA's discretion in terms of what would be considered as contaminated food, and must thus be considered as a substantive rule. *Id.* at 948-49. Since the numeric criterion had not been promulgated as a regulation, the D.C. Circuit struck it down. *Id.* at 950.

As with the numeric criteria in the cases discussed above, many of the limits placed in the permits at issue in this case were never subject to formal rulemaking procedures, but instead were based upon criteria that had merely been proposed by the state, recommended in guidance by U.S. EPA, or contained in obsolete or inapplicable regulations not adopted specifically as discharge criteria for California or the basin in question. In doing so, as the Superior Court correctly observed, the Water Boards essentially, *de*

facto, amended, supplemented and/or revised the applicable Basin Plan by creating new numeric water quality objectives without observing the proper administrative procedures. *See* LAA XVII 5003. This effectively deprived the POTWs subject to regulation by those objectives of any meaningful opportunity to participate in the standards-setting process as contemplated by federal and state administrative law.

B. Federal Regulations Requiring the States to Implement their Narrative Water Quality Standards Do Not Excuse a Failure to Comply with Applicable Rulemaking Procedures

In this case, the Court of Appeal held that the state's narrative objective for toxicity contains sufficiently "detailed information" to justify its implementation through the use of unpromulgated and inapplicable numeric limits, "particularly when viewed in conjunction with a federal regulation that explains how to establish effluent limitations based on narrative criteria." Decision at 27, citing and quoting 40 CFR § 122.44(d). The Water Boards make a similar argument in their Answer Brief, at 45-46.

However, the fact that 40 CFR § 122.44(d) allows a state to choose between several approaches to implementing its narrative criteria in NPDES permits does not abrogate the need for the state to comply with its own Administrative Procedures Act when electing which of those alternatives to follow. For example, 40 CFR §122.44(d)(vi)(A) allows the state to use "an explicit State policy or regulation interpreting its narrative

water quality criterion," but even the Court of Appeal and the Water Boards would have to agree that such a policy or regulation would require appropriate notice and comment rulemaking. Similarly, 40 CFR § 122.44(d)(vi)(A) allows a state to develop numeric effluent limits using "a proposed State criterion" (the approach apparently used for some of the numeric limits at issue in this case), but that cannot exempt the criteria themselves from promulgation in accordance with state and federal law. State law does not authorize "proposed" objectives to be used to set permit limits. Finally, 40 CFR § 122.44(d)(vi)(B) allows a state to establish numeric effluent limits on a case-by-case basis using U.S. EPA's published water quality criteria (another approach used in this case), but this approach does not alter the basic statutory scheme established in the Clean Water Act, under which U.S. EPA is required to develop "recommended" water quality criteria that must be formally adopted by each state (and approved by U.S. EPA) before they become enforceable water quality standards. *See* CWA § 303(c), 33 U.S.C. § 1313(c).

The Water Boards argue, illogically, that if the Cities are correct nearly every NPDES permit proceeding in California will be converted into formal APA rulemaking. Answer Brief at 46. To the contrary, only the numeric standards (or the formal policy for deriving those standards) must go through the APA rulemaking process, and they must go through it only once. It would be absurd to imagine that the state actually intends to apply

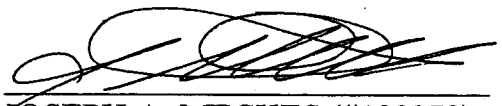
a different standard in every permit it issues. Thus, contrary to the Water Board's argument, the approach advocated by the Cities and required by the Administrative Procedures Act would actually reduce the administrative burden created by the type of *ad hoc*, case-by-case standard setting that gave rise to this appeal.

IV. CONCLUSION

For each of the foregoing reasons, AMSA supports the arguments set forth by the Cities in connection with the third and fourth issues identified in their Statement of the Issues, and urges the Court to reverse the decision of the Court of Appeal.

Dated: April 26, 2004

Respectfully submitted,



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CERTIFICATE OF WORD COURT

(California Rules of Court 14(c)(1) and 29.1(c)(1))

I hereby certify that the text of the *Amicus Curiae* Brief consists of 4,096 words as counted by the Microsoft Word software utilized to prepare this document.

Dated: April 26, 2004

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PROOF OF SERVICE

I am a resident of the State of California. I am over the age of 18 and not a party to the within action. My business address is One Maritime Plaza, Suite 300, San Francisco, California 94111-3492.

On April 26, 2004, I served, in the manner indicated below, the foregoing document described as:

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CITY OF BURBANK AND CITY OF LOS ANGELES

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 26, 2004, at San Francisco, California.

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SUPERIOR / APPELLATE COURTS

Honorable Dzintra I. Janavs
SUPERIOR COURT OF CALIFORNIA
County of Los Angeles - Central District
111 North Hill Street
Los Angeles, CA 90012-3117
(213) 974-5889 (Telephone)
(Case Nos. BS060960 & BS060957)
(1 Copy)

Clerk of the Court
California Court of Appeal
Second Appellate District, Division 3
300 South Spring Street
North Tower - 2nd Floor
Los Angeles, CA 90013-1213
(1 Copy)