

Bill Jennings
California Sportfishing Protection Alliance
3536 Rainier Avenue
Stockton, CA 95204
Tel: 209-464-5067
Fax: 209-464-1028
E-mail: deltakeep@aol.com

Mike Jackson
Law Office of Mike Jackson
P.O. Box 207
429 W. Main Street
Quincy, CA 95971
Tel: 530-283-1007
Fax: 530-283-0712
E-mail: mjatty@sbcglobal.net

VIA: Electronic Submission
Hardcopy to Follow

Andrew Packard
Law Office of Andrew Packard
319 Pleasant Street
Petaluma, CA 94952
Tel: 707-763-7227
Fax: 707-763-9227
E-mail: andrew@packardlawoffices.com

For Petitioner California Sportfishing Protection Alliance

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

**In the Matter of Cease And Desist Order For City of
Livingston Industrial Wastewater Treatment Facility,
Merced County, California Regional Water Quality
Control Board – Central Valley Region Order No.
R5-2006-0112**

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) **PETITION FOR REVIEW**
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Pursuant to Section 13320 of California Water Code and Section 2050 of Title 23 of the California Code of Regulations (CCR), California Sportfishing Protection Alliance (“CSPA” or “petitioner”) petitions the State Water Resources Control Board (State Board) to review and vacate the final decision of the California Regional Water Quality Control Board for the Central Valley Region (“Regional Board”) in adopting Cease and Desist Order for City of Livingston Industrial Wastewater Treatment Facility on 26 October 2006. *See* Order No. R5-2006-0112. The issues raised in this petition were raised in timely written comments and direct testimony.

1. NAME AND ADDRESS OF THE PETITIONERS:

California Sportfishing Protection Alliance
3536 Rainier Avenue
Stockton, California 95204
Attention: Bill Jennings, Executive Director

2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE PETITION:

Petitioner seeks review of Order No. R5-2006-0112, Cease and Desist Order for Livingston Industrial Wastewater Treatment Facility. Copies of the orders adopted by the Regional Board at its 26 October 2006 Board meeting are attached hereto as Attachments A.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

26 October 2006

4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

CSPA submitted a detailed comment letter on 2 October 2006. This letter, the following comments and oral remarks presented during the 26 October 2006 public hearing set forth in detail the reasons and points and authorities why CSPA believes the Order fails to comport with statutory and regulatory requirements. The specific reasons the adopted Orders are improper are:

A. Shades of Hilmar

The IWWTF is operated by City of Livingston solely to accommodate wastewater disposal for Foster Farms. There are numerous similarities between the Order with that of the Regional Board's debacle at Hilmar Cheese. We note the following similarities between the two enforcement cases:

1. Both sites are managed by the Regional Board's Fresno office,
2. The CDO does not restrict the flow rate to the facility despite the Order's findings that the facility is significantly over capacity,
3. Regional Board staff have promised not to enforcement against Foster Farms in to order allow them to discharge illegally without having WDRs to new disposal areas,

4. The Regional Board has encouraged and approved a piecemeal approach to the California Environmental Quality Act (CEQA), revised WDRs and enforcement orders involving the Discharger's plant expansion projects,
5. The CDO fails to assess any monetary penalties for the past and ongoing violations (calculations employing USEPA's BEN model, as recommended by the State Board's Enforcement Policy, reveals that the CDO allows the Discharger to keep approximately 1.8 million dollars in economic benefit derived from delaying the compliance date for the project),
6. The groundwater underlying the facility is polluted,
7. The CDO does not require the Discharger to conduct any cleanup or investigation activities for the polluted groundwater or to evaluate the degree of hydraulic conductivity to the Merced River,
8. The Regional Board has failed to protect the public health by not notifying the surrounding property owners or downstream riparian owners that the groundwater is polluted.

The apparent purpose of the CDO is not to institute enforcement for egregious violations but as stated in the staff report on page 1, simply to "memorialize the City's latest IWWTF Upgrade Project implementation schedule." The additional time is necessary because the Discharger failed to keep the first schedule to upgrade the facility. The Discharger informed the Regional Board approximately six-years ago that the updated facility would be completed by December 2006. To date, the Discharger has not broken ground to start the project. The time extension for the 17-20 million dollar project has resulted in some 1.8 million dollars in accrued economic benefits to the Discharger. The CDO not only fails to disclose the degree of groundwater degradation but also does not even require an investigation to determine the extent of the pollution.

B. The Order fails to Comply with the State Boards Enforcement Policy and California Water Code

California Water Code (CWC) Section 13000 states, in part, that Legislature declares "...that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." CWC Section 13000 demonstrates the Legislative intent that the "state must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state from degradation originating inside or outside the boundaries of the state." In order to fulfill the Legislative intent to protect water quality, the State Water Resources Control Board adopted the Water Quality Enforcement Policy (Enforcement Policy) February 2002.

The Enforcement Policy states, "The primary goal of this Enforcement Policy is to create a framework for identifying and investigating instances of noncompliance, for taking enforcement actions that are appropriate in relation to the nature and severity of the violation, and for prioritizing enforcement resources to achieve maximum

environmental benefits. Toward that end, it is the intent of the SWRCB that the RWQCBs operate within the framework provided by this Policy.”

According to the staff report (page 1), the Discharger has already been afforded six-years to complete the facility improvements. The staff report states, in part, “Disagreements between the City and Foster Farms over which treatment technology to select for the IWWTF Upgrade Project has delayed its construction and implementation for more than two years. Recent events unrelated to the IWWTF Upgrade Project has strained the working relationship between the City and Foster Farms. The latest implementation schedule submitted by the City projects completion of the IWWTF Upgrade Project by January 2007.” To date, the Discharger has not completed the necessary CEQA documentation and has not broken ground to start the project.

The Enforcement Policy, page 19, states, “California Water Code section 13308 authorizes the RWQCB to issue a Section 13308 Time Schedule Order (13308 TSO) which prescribes a civil penalty if compliance is not achieved in accordance with the time schedule. The RWQCB may issue a 13308 TSO if there is a threatened or continuing violation of a cleanup and abatement order, cease and desist order, or any requirement issued under California Water Code sections 13267 or 13383.” The Discharger has demonstrated a recalcitrant pattern of behavior towards the CWC and Regional Board Orders yet the Regional Board failed to follow the Enforcement Policy and did not issue a 13308 Order.

The Enforcement Policy classifies groundwater pollution as a priority violation for which an Administrative Civil Liability Order is appropriate. Inexplicably, the Order fails to assess any penalties and is silent on the amount of economic benefit the Discharger has received from delaying compliance and not completing the improvement project. The Enforcement Policy, page 40, defines “Economic benefit is any savings or monetary gain derived from the acts that constitute the violation.” We have calculated economic benefit using the U. S. EPA BEN model, as recommended by the State Board’s Enforcement Policy. Using the assumptions: a) for tax purposes, the Discharger was considered a public agency, b) a project cost of 17-20 million dollars and c) an average interest rate of approximately 4.5 percent; the additional time extension authorized by the CDO allows the Discharger to keep approximately 1.8 million dollars in economic benefits. At a minimum, the Regional Board must issue an ACL that recovers the economic benefit the Discharger has achieved. The Enforcement Policy, page 41, also states “Staff costs may be one of the “other factors that justice may require”, and should be estimated when setting an ACL. The Order fails to show the amount of cost that the Regional Board has incurred for this Order. Given the six-year pattern of recalcitrant behavior shown by this Discharger collection of cost recovery for staff time spent developing the CDO is appropriate. However, the Regional Board has failed to assess any penalties for the violations over the past six years including cost recovery for resource spent on the CDO.

The Order indicates that both Foster Farms and the Discharger IWWTP have polluted the underlying groundwater. State Board Resolution No. 92-49 establishes the

policy and procedures the investigation and cleanup and abatement of discharges under Water Code Section 13304. This Policy states, in part, “It is not the intent of the State or Regional Water Boards to allow dischargers, whose actions have caused, permitted, or threaten to cause or permit conditions of pollution, to avoid responsibilities for cleanup.” These policies and procedures apply to all investigations, and cleanup and abatement activities, for all types of discharges subject to Section 13304 of the CWC. The discharge of waste from the existing IWWTP and the proposed new IWWTP is a source of pollution that is subject to Water Code Section 13304. The Policy states “The Regional Water Board shall apply the following procedures in determining whether a person shall be required to investigate a discharge under WC Section 13267, or to clean up waste and abate the effects of a discharge or a threat of a discharge under WC Section 13304.” Furthermore, the Policy requires the Regional Board to “Ensure that dischargers are required to clean up and abate the effects of discharges in a manner that promotes attainment of either background water quality, or the best water quality which is reasonable if background levels of water quality cannot be restored...” The Regional Board has failed in every aspect of the Policy in that the Regional Board has not started an investigation or required the Discharge to cleanup and abatement the pollution as detailed in the Policy

The Regional Board has failed to take timely enforcement against the Discharger for the historical pollution cause by the existing IWWTP. The Regional Board has already been afforded time, six years, to issue an enforcement order but has failed to do so. Justice delayed is justice denied.

C. The Order fails to control flow rate to the IWWTF

The City of Livingston owns and operates an industrial wastewater treatment plant solely for the wastewater discharge from Foster Farms’ chicken processing complex. The Cease and Desist Order (CDO) states that the facility currently operates under Waste Discharge Requirements (WDRs) Order No. 79-209, which limits the flow to 3.5 million gallons per day. The CDO states that the wastewater practices at the facility have degraded groundwater, specifically with nitrogen compounds. The Discharger has to construct a nutrient removal system to reduce nitrogen compounds. The CDO requires completion of the nutrient removal system by 31 December 2008.

The CDO states that the Discharger has requested an increase in the flow rate on several occasions. A complete Report of Waste Discharge (RWD) is required by 15 March 2007. In addition to the documented groundwater degradation, the CDO states that the facility frequently was found to have inadequate freeboard and threatened to overflow. The CDO should be amended to prohibit any increase in the flow rate to the facility to limit groundwater degradation to the current level and to reduce the threat of wastewater overflows.

Title 23, California Code of Regulations, Section 2244(b) states: “Prohibitions or appropriate restrictions on additional discharges should be included in a cease and desist order if the further addition in volume, type, or concentration of waste entering the sewer

system would cause and increase in violation of waste discharge requirements or increase the likelihood of violation of requirements.” The Order states that the flow rate from Foster Farm has already exceed the capacity of the IWWTF. However, The Order fails to limit the volume of wastewater discharged by Foster Farms to the IWWTF.

D. The Order fails to require the Discharger to comply with Title 27 requirements

The discharge of designated waste requires that Discharger comply with Title 27. According to CWC Section 13173 “Designated waste” means either of the following: (a) hazardous waste that has been granted a variance from hazardous waste management requirements pursuant to Section 25143 of the Health and Safety Code or (b) nonhazardous waste that consists of, or contains, pollutants that, under ambient environmental conditions at a waste management unit, could be released in concentrations exceeding applicable water quality objectives or that could reasonably be expected to affect beneficial uses of the waters of the state as contained in the appropriate state water quality control plan.”

The discharge is compromised primarily of industrial waste from Foster Farms that is known to exceed water quality objectives. The discharge has already polluted the underlying groundwater at the IWWTF and Foster Farms disposal site and is, therefore, a designated waste.

State regulations that prescribe procedures for detecting and characterizing the impact of waste constituents from waste management units on groundwater are found in Title 27, California Code of Regulations (CCR), Section 20050 et seq. (Title 27). Title 27 requires the discharge of designated waste to a Class I or Class II facility. The treatment and storage facilities associated with the discharge, including for discharges of residual sludge and solid waste, must comply with the requirements Title 27. The Order fails to require the Discharge to comply with Title 27 regulations as detailed below:

1. The RWD submitted by the Discharger does not contained the information required for a complete RWD as detailed in Title 27 section 21750.
2. Title 27 section 20210 requires that liquid designated waste shall only be discharged to a Class II impoundment with a double liner and leachate collection system. The Order fails to require the Discharger to construct a Class II impoundment or handle the sludge, which is also a designated waste in a manner that complies with Title 27 regulation.
3. Title 27 section 21720 requires the Regional Board to adopt waste discharge requirements that implement the applicable provisions of this title. The Order fails to implement Title 27 regulations.

E. The Order fails to consider the state’s Antidegradation Policy and the facilities potential flooding and hydraulic connection with surface waters

The CDO states that the IWWTP is situated within the Merced River flood plain (Finding No. 5). While the CDO discusses inadequate freeboard, it fails to discuss the possibility of river flood stage flows overtopping the levees. The recently adopted NPDES permit for Linda County Water District required the ponds located within the Feather River floodplain to be closed, since any resulting overflows constituted an unregulated surface water discharge. While groundwater degradation is discussed in the CDO, possible degradation from hydraulic continuity between the wastewater disposal ponds and the Merced River is ignored.

The antidegradation Findings (No. 10 and 20) conclude that allowing degradation of water quality is in the best interest of the people of California because the Discharger (Foster Farms) is a large employer that contributes to the economy. This statement is unsupported by fact. Clearly there has not been a complete socioeconomic analysis as required by the Antidegradation Policy. Such an analysis may have concluded that Foster Farms would raise the price of a chicken a few cents. To immediately conclude they would be forced out of business if required to comply with water quality parameters is, at best, premature and unfounded. A complete antidegradation analysis should be conducted rather than relying on unsupported conclusory statements. The CDO should be amended to require an actual analysis conducted in accordance with the Board’s Antidegradation Policy.

The CDO, Finding No. 15, states that: “Comparison of other waste constituents in groundwater, including salinity for the protection of other beneficial uses (e.g. municipal and agricultural) will be evaluated as part of a separate future action.” Sampling and analysis for salinity, conductivity or EC is simple and inexpensive. To require the Discharger to undertake remedial modification of the ponds and construction of nutrient facilities, without first evaluating the full range of water quality problems, is potentially wasting significant resources and likely setting the Discharger up for failure. Constructing wastewater system improvements without knowledge of the full extent of water quality problems at the facility is simply irresponsible. Without a full characterization of water quality, any new facility could be in noncompliance upon completion. The CDO must be amended to require a complete water quality characterization of the wastewater, groundwater and surface water quality, a constituent-by-constituent antidegradation and treatability analysis and CEQA compliance. Failure to do less is contrary to the goals of the Board’s Antidegradation Policy and is ultimately unfair to the Discharger.

F. The Order Fails to Protect Public Health and Notify Interested Parties

The Regional Board has failed to protect the public health in that it has not notified the surrounding property owners or downstream property owners with riparian

water rights that the groundwater is polluted. The Order does not require the Discharger to test and provide alternate drinking water for domestic wells that are impacted. State Board Policy No. 93-62 requires that the Regional Board notify and send an agenda package to any person, which are known to be affected by the discharge. In this case the adjacent landowners were not notified despite that fact that the pollution has or may migrate to their property and groundwater wells.

G. The Order Selects the Method of Compliance for The Discharger

According to the Regional Board's staff report, page 2, "Foster Farms submitted a RWD in October 2005 in support of enlarging the Reclamation Site by 150 acres (Expanded Reclamation Site). Regional Water Board staff letter dated 18 November 2005 determined the RWD complete. On 1 August 2006, the City approved a mitigated negative declaration for the Expanded Reclamation Site in accordance with CEQA. Compliance with the CWC §13264(2)(d) requires Foster Farms to delay until 30 October 2006 its initiation of discharge to the Expanded Reclamation Site. By 30 August 2006 letter, Regional Board staff advised the City and Foster Farms that it **would not initiate enforcement against Foster Farms should it discharge to the Expanded Reclamation Site before 30 October 2006.**" As of the date of the Regional Board meeting, the City had not completed CEQA for the project. It is most disturbing that the Regional Board would approve an operation that is illegal and then promise not to enforce the law.

CWC Section 13360 prohibits the Regional Board from specifying the manner of compliance. In that the Regional Board has promised not to enforce if the Discharger operate the facility in a fashion preapproved by the Regional Board, then the Discharger can hardly be expected to select an alternate manner of compliance other than the method dictated by the Regional Board for which enforcement actions will not be taken.

5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED.

CSPA is a non-profit, environmental organization that has a direct interest in reducing pollution to the waters of the Central Valley. CSPA's members benefit directly from the waters in the form of recreational hiking, photography, fishing, swimming, hunting, bird watching, boating, consumption of drinking water and scientific investigation. Additionally, these waters are an important resource for recreational and commercial fisheries.

Central Valley waterways also provide significant wildlife values important to the mission and purpose of the Petitioners. This wildlife value includes critical nesting and feeding grounds for resident water birds, essential habitat for endangered species and other plants and animals, nursery areas for fish and shellfish and their aquatic food organisms, and numerous city and county parks and open space areas.

CSPA's members reside in communities whose economic prosperity depends, in part, upon the quality of water. CSPA has actively promoted the protection of fisheries and water quality throughout California before state and federal agencies, the State

Legislature and Congress and regularly participates in administrative and judicial proceedings on behalf of its members to protect, enhance, and restore declining aquatic resources.

CSPA member's health, interests and pocketbooks are directly harmed by the failure of the Regional Board to develop an effective and legally defensible program addressing discharges to waters of the state and nation.

6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS.

Petitioners seek an Order by the State Board to:

Vacate Order No. R5-2006-0112 and remand to the Regional Board with instructions prepare and circulate a new tentative order that comports with regulatory requirements.

Petitioners, however, request that the State Board hold in abeyance further action on this Petition for up to two years or further notice by Petitioners, whichever comes first. Petitioners, along with other environmental groups, anticipate filing one or more additional petitions for review challenging decisions by the Regional Board concerning the issues raised in this Petition in the coming months. For economy of the State Board and all parties, Petitioners will request the State Board to consolidate these petitions and/or resolve the common issues presented by these petitions by action on a subset of the petitions. Accordingly, Petitioners urge that holding this Petition in abeyance for now is a sensible approach.

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION.

CSPA's arguments and points of authority are adequately detailed in the above comments, our 2 October 2006 comment letter that was accepted into the record and our oral testimony presented to the Regional Board on 26 October 2006. Should the State Board have additional questions regarding the issues raised in this petition, CSPA will provide additional briefing on any such questions.

The petitioners believe that an evidentiary hearing before the State Board will not be necessary to resolve the issues raised in this petition. However, CSPA welcomes the opportunity to present oral argument and respond to any questions the State Board may have regarding this petition.

8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGERS, IF NOT THE PETITIONER.

A true and correct copy of this petition, without attachment, was sent electronically and by First Class Mail to Ms. Pamela Creedon, Executive Officer, Regional Water Quality Control Board, Central Valley Region, 11020 Sun Center Drive #200, Rancho Cordova, CA 95670-6114.

A true and correct copy of this petition, without attachment, was sent to the Discharger in care of Mr. Richard H. Warne, City Manager, City of Livingston, 1416 C Street, Livingston, CA 95334.

9. A STATEMENT THAT THE ISSUES RAISED IN THE PETITION WERE PRESENTED TO THE REGIONAL BOARD BEFORE THE REGIONAL BOARD ACTED, OR AN EXPLANATION OF WHY THE PETITIONER COULD NOT RAISE THOSE OBJECTIONS BEFORE THE REGIONAL BOARD.

CSPA presented the issues addressed in this petition to the Regional Board in live oral testimony at the 26 October 2006 hearing on the Order or in comments submitted to the Regional Board on 2 October 2006 that were accepted into the record.

If you have any questions regarding this petition, please contact Bill Jennings at (209) 464-5067 or Mike Jackson at (530) 283-1007.

Dated: 24 November 2006

Respectfully submitted,



Bill Jennings, Executive Director
California Sportfishing Protection Alliance

Attachments:

- A. Order No. R5-2006-0112