

Submitted Electronically

March 15, 2012

Mr. Ken Landau, Assistant Executive Officer
Ms. Diana Messina, Supervising WRCE
Ms. Elizabeth Thayer
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, California 95670

Re: *Renewal of Waste Discharge Requirements (NPDES No. CA0085171) for the State of California Department of Parks and Recreation, Empire Mine State Historic Park, Nevada County*

Dear Mr. Landau, Ms. Messina, and Ms. Thayer:

Please accept these comments on the renewal of NPDES Permit No. CA0085171, *Waste Discharge Requirements for the State of California Department of Parks and Recreation, Empire Mine State Historic Park, Nevada County* (“the Proposed Permit”), submitted on behalf of San Francisco Baykeeper (“Baykeeper”). Baykeeper thanks the Regional Water Quality Control Board for the Central Valley Region (“Regional Board”) for the opportunity to comment on the Proposed Permit.

San Francisco Baykeeper works to reverse the environmental degradation of the past and promote new strategies and policies to protect the water quality of the San Francisco Bay and its tributaries. Using the many tools at our disposal – advocacy, water quality monitoring and science, on-the-water patrols, public education, and, when necessary, legal action – we compel polluters to stop contaminating our waterways and hold government agencies accountable for safeguarding and restoring the waters that belong to all of us.

For over a decade, Baykeeper has been actively involved in addressing the water quality issues created by the historical mining operations at Empire Mine (now Empire Mine State Historic Park). Notably, the Department of Parks and Recreation (“Parks”) first submitted an application for a permit for its discharge from Magenta Drain as a result of a lawsuit filed by Baykeeper. Under the settlement entered to resolve that lawsuit, Baykeeper has been and continues to monitor Parks’ compliance with its current NPDES permit for the Magenta Drain discharge.

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Environmental Setting

The Proposed Permit will regulate the discharge of pollutants from the historical mine drain (“the Magenta Drain”), which conveys water from the historical Empire Mine to an unnamed drainage (referred to as the “Magenta Drain Channel”). The Magenta Drain Channel flows continuously as a result of the discharge from the Magenta Drain, and runs through a public park in Grass Valley, California. This park is frequented by residents of Grass Valley, including by families with children of all ages.

Immediately after leaving this park, the Magenta Drain Channel enters the South Fork of Wolf Creek, which flows to Bear Creek, and eventually enters the Sacramento River and Delta. The waters downstream of the Magenta Drain discharge provide habitat for aquatic organisms, and serve as a drinking water supply for California residents. These downstream waters, including those in the public park through which the Magenta Drain Channel flows, also provide opportunities for contact and non-contact recreation. They also provide riparian habitat and important sources of drinking water for terrestrial species.

Comments on the Proposed Permit

The Regional Board cannot legally adopt the Proposed Permit as drafted. The Proposed Permit fails to incorporate effluent limitations and other requirements required by the Clean Water Act and its implementing regulations. Baykeeper refers the Regional Board to, and incorporates herein by reference, the specific comments on the Proposed Permit submitted by the California Sportfishing Protection Alliance (“CSPA”). CSPA’s comments provide a detailed legal, scientific and technical analysis of the failures of the Proposed Permit to meet federal and state requirements on a pollutant by pollutant basis. The Regional Board must revise the Proposed Permit to address each of the issues raised in CSPA’s letter. Baykeeper’s comments below highlight critical issues that the Regional Board must address before the Proposed Permit may be legally adopted.

(1) The Proposed Permit Is Illegal as It Backslides on Effluent Limitations (including by eliminating some effluent limitations entirely) Without Legal or Technical Justification, and the Regional Board Failed to Conduct Reasonable Potential Analyses or an Antidegradation Analysis that Meets Applicable State and Federal Requirements

The 2006 NPDES permit for the Magenta Drain discharge, Order No. R5-2006-0058 (“2006 Permit”), properly included effluent limitations for the pollutants that available data demonstrated had potential to negatively impact the downstream receiving waters. The effluent limitations established in the 2006 Permit were based on available data regarding the pollutants found in discharges from Magenta Drain, and were developed to ensure that the water quality in the receiving waters would not be adversely impacted by those discharges.

Because Parks’ had no treatment system to meet the effluent limitations for many of the pollutants present in its discharges, the 2006 Permit included a compliance schedule, and the

Regional Board concurrently adopted a Time Schedule Order (“TSO”). The compliance schedule and TSO provided Parks’ until May 2010 to develop and install a treatment system capable of meeting the final effluent limitations. Parks failed to comply with this timeline, and, in fact, did not even complete construction of the treatment system until November 2011, a year and one half after its May 2010 deadline.

The Magenta Drain discharge is variable, and the levels of pollutants in the discharge fluctuate dramatically. The nature of the discharge from the Magenta Drain has not changed since adoption of the current Permit in 2006, and it still contains dozens of pollutants at varying levels. Sampling data collected over the last 6 years pursuant to the 2006 Permit demonstrates discharges from the Magenta Drain often exceed effluent limitations that the Regional Board previously determined are necessary to protect water quality. As this data demonstrates, the nature of the discharge from the Magenta Drain has not changed since adoption of the 2006 Permit. Notably, the discharge from the Magenta Drain regularly exceeds effluent limitations for arsenic, iron, and manganese that are necessary to protect water quality and support beneficial uses.

Today, discharges from the Magenta Drain contain all the same pollutants it did in 2006. The treatment system developed by Parks is brand new, untested and admittedly incapable of achieving many of the current and proposed effluent limitations. Nevertheless, in the Proposed Permit the Regional Board completely removes effluent limitations for pollutants known to be in discharges from the Magenta Drain. Moreover, the Regional Board proposes to remove effluent limitations for these known contaminants, even though recent and historical sampling demonstrates that these pollutants have been discharged from the Magenta Drain at levels harmful to the beneficial uses of downstream waters – including at levels that exceed current effluent limitations based on both aquatic health and human health criteria.

CSPA’s comments, which are incorporated herein by reference, explain in great detail the legal and technical defects in the Regional Board’s rationale and bases for removing and relaxing the effluent limitations currently applicable to discharges from the Magenta Drain. In short, there is no defensible new information or demonstrated change in the quality of the water discharged from the Magenta Drain. The pollutants present in the discharges from the Magenta Drain in 2006 are still present in discharges today. Any conclusion that the new treatment system will in fact eliminate the threat to water quality presented by the discharge of these pollutants is, at this point, speculative. Thus, the Regional Board’s reasonable potential analyses, its antidegradation analysis, and its recalculation of effluent limitations for the Proposed Permit are arbitrary, capricious, and illegal under the Clean Water Act and the Porter-Cologne Water Quality Control Act.

(2) The Regional Board Cannot Substitute Its Conclusory Claim that Water Quality Will Not Be Degraded for the Required Antidegradation Analysis

Discharging pollutants is a privilege, not a right. The Regional Board has a legally mandated duty to protect the public’s right to clean and safe water. The antidegradation requirements of the Clean Water Act and Porter-Cologne Act embody these concepts, and

mandate that the Regional Board perform a complete antidegradation analysis when authorizing a discharger to discharge pollutants.

Rather than engage in the robust antidegradation analysis required by the law, the Regional Board states, “[t]his Order does not allow for an increase in flow or mass of pollutants to the receiving water. Therefore, a complete antidegradation analysis is not necessary.” Proposed Permit at F-48. There is no legal basis for this conclusion. The Regional Board attempts to justify its conclusion by arguing that:

The Order requires compliance with applicable federal technology-based standards and with WQBELs where the discharge could have the reasonable potential to cause or contribute to an exceedance of water quality standards. The permitted discharge is consistent with the antidegradation provisions of 40 CFR 131.12 and State Water Board Resolution No. 68-16. Compliance with these requirements will result in the use of best practicable treatment or control of the discharge.

Id. However, there are numerous defects in the Regional Board’s legal and technical analysis regarding appropriate effluent limitations. Likewise, its justifications for backsliding are unsupported and illegal. The defects in the Regional Board’s reasonable potential analyses and antibacksliding conclusions mean that there is no guarantee that the discharges will not cause unacceptable degradation of the downstream receiving waters – in violation of State and Federal antidegradation requirements. Because the bases underlying the Regional Board’s antidegradation conclusion is flawed, the conclusion itself is flawed.

Further, as CSPA’s comments point out, the Regional Board has made no effort whatsoever to specifically address the factors required by the State and Regional Board’s Antidegradation Policy or the Antidegradation requirements contained in the NPDES federal regulations. These defects must be addressed, and a proper antidegradation analysis must be conducted, before the Regional Board may legally adopt any NPDES permit that will authorize the discharge of harmful pollutants to waters of the State.

Conclusion

Baykeeper thanks staff and the Board for its efforts. However, the Proposed Permit contains illegal terms and conditions. Nor has the Regional Board conducted the required analyses before it may issue a permit that will allow toxic and harmful pollutants to be discharged to the environment.

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Comments on NPDES Permit No. CA0085171
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Page 5 of 5

We look forward to the Regional Board rejecting the permit as proposed, and instead directing staff to address the issues raised here, and in CSPA's comment letter, to ensure that any permit it adopts that allows discharges of pollutants from the Magenta Drain will protect the public's right to clean and healthy water.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'D Hunt', is positioned above the typed name.

Drevet Hunt
Lawyers for Clean Water, Inc.
on behalf of San Francisco Baykeeper

cc: Jason Flanders, Esq., San Francisco Baykeeper