



California Sportfishing Protection Alliance

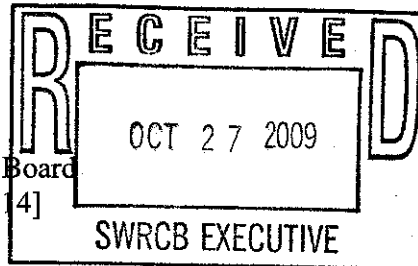
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26 October 2009

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 "I" Street, 24th Floor [958] 4]
P.O. Box 100
Sacramento, CA 95812-010
commentletters@waterboards.ca.gov



VIA: Electronic Submission
Hardcopy if Requested

RE: **Comments to A-1948 – November 3, 2009 Board Workshop:** Petition of California Sportfishing Protection (Waste Discharge Requirements Order NO. R5-2008-0104 [NPDES Order NO. CA0085286] for Soper Company Spanish Mine, Central Valley Water Board

Dear Ms. Townsend and Board:

The California Sportfishing Protection Alliance (CSPA) appreciates the opportunity to comment on the proposed Order in the above referenced matter. While CSPA supported the initial draft Order, with one exception, we have serious concerns with the revised draft Order and believe it no longer complies with explicit regulatory requirements.

Our specific comments are:

Page 2, second paragraph: "The permit contains numeric receiving water limitations, which ensure that water quality standards will be met in Poorman Creek downstream from the points of discharge."

The Permits numeric receiving water limitations specifically apply at monitoring locations RSW-1D and RSW-3D (Permit page 10, A. Surface Water Limitations No. 1). The points of compliance are downstream from the two point of discharge to surface waters. Compliance at these locations does not provide any protection for the ephemeral creek, identified in Permit attachments B and C, along Devils Canyon or the waters between discharge point 001 and RSW-1D along Poorman Creek any protection.

The added statement appears to be intentionally misleading. The statement does not mention non-compliance with water quality standards along the Devils Canyon ephemeral stream, from the point of discharge to below the confluence with Poorman Creek. The statement also does not mention an allowance to exceed water quality standards between discharge points 001 and receiving water sampling point RSW-1D along Poorman Creek.

Noncompliance with water quality standards in the receiving water between the points of discharge and the points of compliance constitute a mixing zone. A mixing zone analysis has not been completed. Therefore there is no knowledge of how much of the receiving water will actually be allowed to exceed water quality standards. The inserted comment fails to recognize that by definition a mixing zone is a specific area within a receiving stream where an exceedance of water quality standards is allowable.

It should be reiterated that this is currently a noncompliant discharge; a Cease and Desist Order was adopted along with the Permit granting a 5-year compliance schedule. The current maximum discharge concentration of pollutants is well above the proposed water quality standards. The Permit Fact Sheet, beginning on page F-3, Tables F-2, F-3, F-4, detail the degree to which water quality standards are being exceeded.

The Permit, page 16, *Mixing Zone and Dilution Study*, allows that: "If after completion of the mixing zone and dilution study, it is determined that the receiving water limits cannot be met or beneficial uses may be affected by the discharge, then the Order may be reopened and the discharge requirements modified." It is critical information in stating that the Permit will "ensure water quality standards will be met" and in considering an exception to the SIP which requires that water quality standards be met; that the Permit allows for modification of the limitations.

The Permit, page 10, states that: "The Discharger shall continue to develop and implement additional BMPs as necessary until the concentrations of arsenic, cadmium, cobalt, copper, iron, lead, manganese, nickel, and zinc at Discharge Points 001 and 003, are at or below the Receiving Water Limits contained in Table 6, Receiving Water Limits for Poorman Creek, or until the Regional Water Board determines all appropriate BMPs have been implemented." This appears to grant authority to the Regional Board to not require additional BMPs even though receiving Water Limitations are being exceeded.

Page 4, *Effluent Limitations, Discussion*: "The SIP only applies to priority pollutants. For non-priority pollutants and where an exception to the SIP has been granted, BMPs may be used in lieu of effluent limitations in compliance with federal regulations."

The State Board's Draft Order has been modified to add Page 10, Conclusions, 4: "The Central Valley Water Board properly applied the federal regulations to include BMPs rather than numeric effluent limitations for non-priority pollutants." A SIP exception has not been granted. The added sentence simply appears to be incorrect as the SIP does not apply to non-priority pollutants. The added sentence conflicts with the added conclusion no. 4 on page 10 of the Draft Order.

Page 6, first paragraph deletion: "~~In any event, given the feasibility of establishing numeric effluent limitations that are based on a substantial dilution credit allowed by the SIP and the high likelihood of compliance with water quality objectives by implementing only BMPs and, if needed, passive treatment systems, application of the SIPs case by case exception is not appropriate for this discharge.~~" Second paragraph: "In reviewing the Permit and determinations

of the Central Valley Water Board in this matter, it appears that a strong argument can be made for the issuance of a case-by-case exception. In particular, we note that the rationale provided in the Fact Sheet for applying BMPs in lieu of numeric effluent limitations can form the basis for an exception to the SIP. As noted in the Fact Sheet, this is a small mine in a remote mountainous location that was abandoned many years ago and for which BMPs, including passive treatment systems, may be most appropriate. Also, the receiving water limitations act to ensure that water quality standards will be met in the receiving waters. It is appropriate for the Central Valley Water Board to prepare a request to this Board for consideration of a case-by case exception to the SIP."

The cited examples of "a small mine in a remote location that was abandoned many years ago" does not address that exceptions to the SIP are for waterbodies that differ sufficiently from statewide conditions and where necessary to accommodate wastewater reclamation or water conservation.

First the State Board should understand that this is not an abandoned mine and there is a clearly identified property owner.

Second, there is no wastewater reclamation or water conservation associated with this discharge.

Third, the added statement that water quality standards will be met in the receiving stream is, as cited above, at best misleading. The permit requires water quality standards to be met at the monitoring points, the points of compliance. The instream monitoring points are downstream of the points of discharge. In the case of the ephemeral stream along Devils Canyon the point of compliance is not reached until after the confluence with Poorman Creek. A mixing zone analysis, which could define how much of the stream is being donated to the wastewater Discharger, has not been completed.

Fourth, the remoteness of the location has not stopped past mining activities and does not prevent logging operations. It appears that the remoteness as assessed by the Water Boards would only limit pollution control.

Page 6, third paragraph, continued to page 7: "The SIP authorizes the State Board to grant case-by-case exceptions where "site specific conditions in individual water bodies or watersheds differ sufficiently from statewide conditions and those differences cannot be addressed through other provisions of the SIP." While this language appears to imply that the distinction for sites where an exception is warranted depend on a difference in the water quality in the area of the discharge, the examples provided by the SIP illustrate that the case-by-case exception may be invoked based on the type of discharge. Thus the SIP provides examples of situations where a case-by-case exception would be appropriate are "where necessary to accommodate wastewater reclamation or water conservation. As a matter of practice we have found that for certain types of discharges, a case-by-case exception may be appropriate. In order to grant a case by case exception, the State Water Board must determine that the exception will protect beneficial uses of the receiving water and that the public interest will be served."

The mine drainage does not accommodate wastewater reclamation or water conservation. The above comments detail that the Permit does not protect beneficial uses of the receiving water within the defacto mixing zone between the points of discharge and the downstream monitoring points (points of compliance). How is the public interest served by allowing a private timber harvesting operation to continue a mine drainage discharge to surface waters that cannot meet water quality standards without utilizing public water for dilution rather than providing adequate treatment?

Page 8, Other Pollutants: The SIP does not apply to cobalt, iron or manganese because they are not priority pollutants. It is appropriate to apply the federal regulations concerning issuance of BMPs in lieu of numeric effluent limitations for these constituents. EPA regulations generally require numeric effluent limitations in NPDES permits. This requirement does not apply for storm water permits, or for other permits where inclusion of numeric effluent limitations is infeasible. The Central Valley Water Board relied upon the infeasibility exception in the federal regulation to authorize BMPs in lieu of numeric effluent limitations in the Permit. For these pollutants we agree that the Central Valley Water Board has discretion to apply the federal infeasibility exception to authorize BMPs in lieu of numeric effluent limitations if it demonstrates that the infeasibility exception applies. The State Water Board, in Order WQ 2006-0012 (Boeing), has made clear that "feasibility" refers to "the ability or propriety of establishing" numeric limits, as opposed to the feasibility of compliance."

As is stated in the Draft Order, "The State Water Board, in Order WQ 2006-0012 (Boeing), has made clear that "feasibility" refers to "the ability or propriety of establishing" numeric limits, as opposed to the feasibility of compliance." All of the discussion in the Regional Board's Permit and the State Board's Draft Order of BMPs has been about compliance, not the feasibility of developing effluent limitations. Remote locations do not make establishing effluent limitations infeasible. The subject mine is not abandoned and there is a property owner. However, abandonment of a property would not make the development of effluent limitations infeasible. Varying flow does not make developing effluent limitations infeasible. We note that the mine drainage Permit at Empire Mine has numeric effluent limitations despite varying flow rates and pollutant concentrations.

The Permit and the State Board's Draft Order has not presented a single reason why the measures currently defined as BMPs cannot be implemented to comply with numeric effluent limitations as opposed to the numeric receiving water limitations developed in the adopted Permit. The development of Effluent Limitations for this discharge is feasible and does not meet the test for an exception from the federal regulations 40 CFR 122.44(k)(2).

Page 9, second paragraph: "The BMPs in the Permit appear to be appropriate to the location and protective of water quality."

Please see the above comments regarding BMPs and compliance with water quality standards. This sentence is unfounded.

Page 9, last paragraph: "We agree that, until the mixing zone study is completed, it is appropriate to protect water quality by including receiving water limitations that are at least as stringent as the water quality standards.

Water Quality Standards apply throughout the waterbody. The Permits numeric receiving water limitations specifically apply at monitoring locations RSW-1D and RSW-3D (Permit page 10, A. Surface Water Limitations No. 1). The points of compliance are downstream from the two points of discharge to surface waters. Compliance at these locations does not provide any protection for the ephemeral creek, identified in Permit attachments B and C, along Devils Canyon or the waters between discharge point 001 and RSW-1D along Poorman Creek. The Permit currently does not protect all surface water quality. The Draft Order does not correct the allowance of a defacto mixing zone prior to completion of a mixing zone analysis.

Page 10, Conclusions, 4: "The Central Valley Water Board properly applied the federal regulations to include BMPs rather than numeric effluent limitations for non-priority pollutants."

As is stated in the Draft Order, "The State Water Board, in Order WQ 2006-0012 (Boeing), has made clear that "feasibility" refers to "the ability or propriety of establishing" numeric limits, as opposed to the feasibility of compliance." All of the discussion in the Regional Board's Permit and the State Board's Draft Order of BMPs has been about compliance, not the feasibility of developing effluent limitations. Remote locations do not make writing effluent limitations infeasible. The subject mine is not abandoned because there is a property owner. However, abandonment of a property would not make the development of effluent limitations infeasible. Varying flow does not make developing effluent limitations infeasible: the mine drainage Permit at Empire Mine has numeric effluent limitations despite varying flow rates and pollutant concentrations.

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Sincerely,



Bill Jennings, Executive Director
California Sportfishing Protection Alliance

Cc: Service List
Interested Parties