



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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17 August 2006

Mr. Robert Schneider, Chairman
Ms. Pamela Creedon, Executive Officer
Mr. Kenneth Landau, Assistant Executive Officer
Mr. Matt Scroggins
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6144

VIA: Electronic Submission
Hardcopy if Requested

RE: Waste Discharge Requirements (NPDES No. CA0079197) and Time Schedule Order for City Of Atwater Wastewater Treatment Facility, Merced County

Dear Messrs Schneider, Landau, Scroggins and Ms. Creedon;

The California Sportfishing Protection Alliance, Watershed Enforcers and San Joaquin Audubon (CSPA) has reviewed the Central Valley Regional Water Quality Control Board's (Regional Board) tentative NPDES permit and Time Schedule Order (Order or Permit) for the City of Atwater (Discharger) Wastewater Treatment Facility (WWTF) and submits the following comments.

CSPA requests status as a designated party for this proceeding. CSPA is a conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's fishery resources and their aquatic ecosystems and associated riparian habitats. CSPA has actively promoted the protection of fisheries 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 populations of native California fish. CSPA members reside, boat, fish and recreate in and along waterways throughout the Central Valley.

We appreciate that Regional Board staff have acted to protect the beneficial uses of contact recreation, irrigated agriculture by requiring the WWTF upgrade to tertiary treatment and by establishing a protective electrical conductivity (EC) effluent limitation of 700 μ mhos/cm. However, we have a number of serious concerns regarding the permit.

- 1. The WWTF is operated in an extended aeration mode for nitrification to remove ammonia, yet fails to denitrify to remove nitrate.**

The permit states in Finding No. 4 that the WWTF is operated in an extended aeration mode. The result is the removal of ammonia and the proposed permit accordingly contains an ammonia effluent, for protection of the aquatic life beneficial use of the receiving stream. The WWTF however fails to denitrify, which is typically easily accomplished by recirculation in a facility capable of nitrification. Failure to denitrify results in excess concentrations of nitrates, and nitrogen compounds, being discharged presenting a reasonable potential to cause degradation of the municipal (MUN) and domestic beneficial uses of the receiving stream. The discharge of nitrogen compounds also causes or threatens to cause violation of Receiving Water Limitations prohibiting the discharge of Biostimulatory substances and dissolved oxygen (DO) deficits downstream.

Federal Regulations, 40 CFR 122.44, requires that an effluent limitation be established when a constituent presents a reasonable potential to exceed a water quality standard or objective. The Basin Plan includes CCR Title 22 drinking water maximum contaminant levels (MCLs) by reference; including a nitrate MCL, which would protect the MUN and DOM beneficial uses of the receiving stream. The Basin Plan also includes a narrative water quality objective for Biostimulatory Substances. We could not find a discussion in the proposed permit regarding the discharge of nitrates or nitrogen compounds as it relates to MUN and DOM beneficial uses of the receiving stream, nor a discussion of Biostimulatory substances. Clearly the maximum discharged concentration of nitrate (N)(Permit Finding No. 5) of 53 mg/l exceeds the primary MCL of 10 mg/l. Failure to require denitrification to remove nitrates is in violation of the cited Federal Regulation.

Failure to denitrify the wastestream also threatens groundwater quality since the receiving stream is characterized as ephemeral and wastes in the otherwise dry streambed will tend to percolate to groundwater. Further, a nitrate concentration in the sludge, which is currently discharged to unlined drying beds, threatens groundwater (which also is designated as having MUN and DOM beneficial uses).

2. Dechlorination with calcium thiosulfate likely raises the hardness of the effluent artificially masking the toxicity of hardness dependant metals

Permit Finding No. 4 states the discharge is dechlorinated with calcium thiosulfate. The addition of calcium could artificially raise the hardness level of the discharge masking toxicity from hardness dependant metals and the need for additional Effluent Limitations. According to the California Toxics Rule (CTR), Federal Register/Vol. 65, No. 97/Thursday May 18th, page 31718(4), and the State's *Policy for Implementation of Toxics Standards for Inland Waters, Enclosed Bays, and Estuaries of California* (SIP), Section 2.1, states that metals criteria must be properly adjusted for hardness (calcium carbonate (CaCO)). The lower the hardness the more toxic a metal. The addition of calcium thiosulfate would artificially raise the hardness of the discharge making it appear there is not reasonable potential for hardness dependant metals to exceed water quality standards. The permit does properly state that the upstream hardness was used to determine the need for effluent limitations. However, the Regional Board should reconsider allowing the use of calcium thiosulfate for dechlorination.

3. The permit fails to include Receiving Water Limitations for temperature and turbidity

The permit has numerous conflicting statements regarding upstream flows. Principally, the permit fails to include Receiving Water Limitations for temperature and turbidity based on the statement that: “there is no natural background water in the Atwater Drain”. The proposed permit however, as stated in the previous comment utilized the upstream receiving water hardness to calculate reasonable potential. The permit states: on page 5, Finding No. 26, that there is typically 0.08 cfs of upstream flow within the Atwater Drain except during occasional storm events; on page 11, Finding No. 42, that the City submitted effluent data and upstream receiving water data for priority pollutants; on page 6 of the Monitoring and Reporting Program with regard to chronic toxicity testing that “Laboratory water shall be used for the dilution series if the Atwater Drain is dry...” It is apparently the Regional Board staff’s contention that the upstream flows in the Atwater Drain are not “natural”, the source principally being attributed to urban runoff, and therefore do not need to be fully protected for temperature and turbidity. The Basin Plan does not make a distinction of the source of upstream waters, “occasional storm events” would qualify as “natural” flow and there is no documentation of the sources of upstream water. The effluent has been reported, permit page 2, as high as 30°C (86°F) where warm water aquatic habitat has been a confirmed beneficial use. The proposed permit does not include any technical assessment of the water quality impacts of the proposal to eliminate Receiving Water Limitations for temperature and turbidity. The proposed permit does not protect the Basin Plan’s water quality objectives for temperature and turbidity and there is no technical or legal justification for failure to include the Receiving Water Limitations.

If Waste Discharge Requirements, Order No. 95-034, contains Receiving Water Limitations for temperature and turbidity, failure to include these limitations in the proposed permit renewal could constitute backsliding in accordance with Federal Regulations, 40 CFR 122.44 and 122.62.

4. The permit contains “floating” limits for ammonia, contrary to State Board presidential orders

The ammonia Effluent Limitation incorrectly utilized U.S. EPA’s temperature and pH dependant ambient criteria to establish a “floating” effluent limitation. The State Water Resources Control Board’s presidential Order (<http://www.waterboards.ca.gov/resdec/wqorders/2004/wgo/wgo2004-0013.pdf>) for Yuba City prohibits the use of “floating” effluent limitations and instead requires that limitations be based on a worst-case analysis.

5. The flow limitations in the Order fail to comport with federal regulations

The Federal Regulations, at 40 CFR 122.45 (b), require that POTW effluent limitations, standards, or prohibitions be based on design flow. Virtually every

engineering textbook includes *Ten States Standards* as standard engineering design and a recognized civil engineering basis for wastewater treatment plant (WWTP) design parameters. Pursuant to these standards;

Average Dry Weather Flow (ADWF) represents the daily average flow when groundwater is at or near normal and runoff is not occurring. Maximum Wet Weather Flow (MWWF) represents the total maximum flow received during any 24-hour period when the groundwater is high and runoff is occurring. Peak Hourly Wet Weather Flow (PHWWF) represents the total maximum flow received during one-hour when groundwater is high, runoff is occurring, and domestic and commercial flows are at their peak.

The PHWWF must be used to evaluate the effect of hydraulic peaks on the design of pumps, piping, clarifiers, and any other flow sensitive aspects.

The discharge flow limitations in the Tentative Permit are presented as average monthly for ADWF. Unfortunately, the technical basis for the flow limitations is not discussed in the permit. The monthly average ADWF is not acceptable WWTP design parameters. Consequently, the flow limitations contained in the permit are not based on acceptable WWTP design parameters and therefore fail to comply with federal regulations.

6. The limitation for acute toxicity is inconsistent with Basin Plan and federal requirements

Federal regulations, at 40 CFR 122.44 (d)(1)(i), require that limitations must control all pollutants or pollutant parameters which the Director determines are or may be discharged at a level which will cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality. The Water Quality Control Plan for the Sacramento/ San Joaquin River Basins (Basin Plan), Water Quality Objectives (Page III-8.00) for Toxicity is a narrative criteria which states that all waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life. This section of the Basin Plan further states, in part that, compliance with this objective will be determined by analysis of indicator organisms.

The Tentative Permit requires that the Discharger conduct acute toxicity tests and states that compliance with the toxicity objective will be determined by analysis of indicator organisms. However, the Tentative Permit contains a discharge limitation that allows 30% mortality (70% survival) of fish species in any given toxicity test. The permit should be revised to comply with Federal Regulations and the Basin Plan by simply prohibiting toxic discharges which would be determined by 100% survival in the acute toxicity test.

8. The Permit fails to contain an effluent limitation for chronic toxicity

Federal regulations, at 40 CFR 122.44 (d)(1)(i), require that limitations must control all pollutants or pollutant parameters which the Director determines are or may be discharged at a level which will cause, or contribute to an excursion above any State water quality standard, including state narrative criteria for water quality. The Water Quality Control Plan for the Sacramento/ San Joaquin River Basins (Basin Plan), Water Quality Objectives (Page III-8.00) for Toxicity is a narrative criteria which states that all waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life. The Tentative Permit states that the discharge has caused chronic toxicity and requires a TRE. However it fails to include a numeric discharge limitation.

9. Monitoring requirements are inadequate

Grab samples for metals and semi volatile constituents are inappropriate for effluent monitoring. Flow proportional 24-hour composite sampling for metals and semi-volatile constituents is necessary.

10. A significant number of the Effluent Limitations are not limited for mass

Most of the above effluent limitations do not have associated mass limitations. Mass limitations are required by Federal regulations, 40 CFR 122.45(f). 40 CFR §122.45(f) states that: *“All pollutants limited in permits shall have limitations...expressed in terms of mass except...[f]or pH, temperature, radiation, or other pollutants which cannot appropriately be expressed by mass...Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.”*

U.S. EPA’s Technical Support Document for Water Quality-Based Toxics Control (TSD), states in section 5.7.1, pp. 110-111 that: “Mass-based effluent limits are required by NPDES regulations at 40 CFR 122.45(f). The regulation requires that all pollutants limited in NPDES permits have limits, standards, or prohibitions expressed in terms of mass with three exceptions, including one for pollutants that cannot be expressed appropriately as mass. Examples of such pollutants are pH, temperature, radiation, and whole effluent toxicity. Mass limitations in terms of pounds per day or kilograms per day can be calculated for all chemical-specific toxics such as chlorine or chromium. Mass-based limits should be calculated using concentration limits at critical flows. For example, a permit limit of 10 mg/l of cadmium discharged at an average rate of 1 million gallons per day also would contain a limit of 38 kilograms/day of cadmium.

Mass-based limits are particularly important for control of bioconcentratable pollutants. Concentration-based limits will not adequately control discharges of these pollutants if the effluent concentrations are below detection levels. For these pollutants, controlling mass loadings to the receiving water is critical for preventing adverse environmental impacts.

However, mass-based effluent limits alone may not assure attainment of water quality standards in waters with low-dilution. In these waters, the quantity of effluent discharged has a strong effect on the instream dilution and therefore on the RWC [receiving water concentration]. At the extreme case of a stream that is 100 percent effluent, it is the effluent concentration rather than the effluent mass discharge that dictates the instream concentration. Therefore, EPA recommends that permit limits on both mass and concentration be specified for effluents discharging into waters with less than 100 fold dilution to ensure attainment of water quality standards.”

The permit should be modified to add mass based limitations and in compliance with Federal regulation, 40 CFR 122.45(b) which states that in the case of POTWs, permit effluent limitations, standards or prohibitions shall be calculated based on design flow.

11. The table footnote, No. 7, on page 2, Finding No. 6, cites the “highest monthly average 7-day median”. The phrase appears to have no mathematical meaning. The proposed permit goes to great lengths to undermine the receiving water designation for MUN without supporting documentation

The proposed permit, Finding No. 33, 34, 35, 43 (e and f) and Provision go to great lengths to undermine the MUN designation of the receiving stream. Finding No. 34 states, in part that: “...only MUN has no recent evidence or documentation of beneficial use in the Atwater Drain.” All this effort is put forth to eliminate effluent limitations for bromodichloromethane and chlorodibromomethane. The proposed permit does not discuss any specific evidence or riparian water uses (which may not be documented by water rights). The permit does also not discuss the use of UV disinfection, which would likely be a means of compliance for bromodichloromethane and chlorodibromomethane. UV disinfection is in wide use at wastewater treatment plants in the Central Valley and could be considered BPTC. The Regional Board is required to assure wastewater treatment systems provide BPTC and should at a minimum take a neutral scientific stance with regard to any possible dedesignation of receiving water beneficial uses.

12. The Discharger failed to adequately sample for 41 CTR constituents and is rewarded by a compliance schedule

Proposed permit Finding No. 44 states that the Discharger failed to adequately achieve minimum detection levels for 41 constituents when sampling for CTR compliance to characterize the wastewater discharge. The permit requires additional sampling and a permit reopening clause. While this is in accordance with SIP guidance, the insufficient sampling occurred in 2001 without any Regional Board enforcement or follow-up action. It is incredible that the Regional Board let five years pass and accepted submittal of an incomplete Report of Waste Discharge for permit renewal without any action to obtain adequate data. With a CRT final compliance date of May 2010, if additional pollutants of concern are detected, timely compliance is unlikely.

13. The reasonable potential analyses do not comport with federal requirements by failing to account for effluent variability

Federal regulations, 40 CFR § 122.44(d)(1)(ii), require reasonable potential analyses to account for the “variability of the pollutant or pollutant parameter in the effluent.” The procedures for computing variability are detailed in Chapter 3, pages 52-55, of USEPA’s *Technical Support Document For Water Quality-based Toxics Control* (TSD).

We realize the SIP ignores the federal requirements that reasonable potential analyses must account for the statistical variability of data. However, The fact that the SIP illegally ignores this fundamental requirement does not exempt the Regional Board from its legal obligation to consider statistical variability in compliance with federal regulations.

14. The groundwater limitations state that the wastewater discharge shall not cause “preventable” degradation

The Groundwater Limitations state that the wastewater discharge shall not cause “preventable” degradation. The term “preventable” is not defined. This language does not appear to be in compliance with the Antidegradation Policy. The term “preventable” should be removed from the requirement.

15. The proposed permit states that the City enter into an agreement with Gallo Ranch to divert up to the 6-mgd of wastewater discharged by the City from the receiving stream

Although the proposed permit states that the City must enter into an agreement with Gallo Ranch to divert up to the 6-mgd of wastewater discharged by the City from the receiving stream, the permit does not cite a water right being issued by the State Board for the diversion.

16. The permit, Provisions No. 6 and 7, require public notification that the water in the receiving stream is not fit for contact recreation or drinking

We commend the Regional Board that the permit, Provisions No. 6 and 7, require public notification that the water in the receiving stream is not fit for contact recreation or drinking. The proposed language in Provision No. 7 for warning signs should be modified to also include a warning against public contact.

17. Wastewater from the receiving stream is diverted to wetlands

Language should be added to the permit that wetlands intentionally attract wildlife and contact recreation is an expected use. This is especially critical, since the discharge has been found to produce chronic toxicity and is currently not fit for contact recreational uses. This information, and a copy of the proposed permit, should be passed

along to the Merced National Wildlife Refuge and the U.S. Fish and Wildlife Service, operators of the wetlands.

18. The Permit does not comply with antidegradation policies by failing to require best practicable treatment and control (BPTC)

The Antidegradation analysis states: “Some degradation of receiving water quality is allowable because the discharge as permitted is conducted in a manner that reflects the implementation of best practicable treatment and control measures.” Since an increase in flow or the mass of pollutants is not proposed to be increased, an antidegradation analysis is not necessarily required; however all wastewater dischargers must provide BPTC. The above comments include numerous references where BPTC of the discharge is not provided. Specifically: failure to denitrify the wastestream threatens groundwater quality, Receiving Water Limitations for Biostimulatory Substances and Dissolved Oxygen and the Chemical Constituents objective (primary drinking water MCL); unlined sludge disposal ponds which threaten groundwater quality are not BPTC; the requirement to add tertiary treatment addresses pathogens but does not necessarily address other limited pollutants (copper, lead, zinc, dioxins, bromodichloromethane, chlorodibromomethane), a treatability analysis was not presented in the fact sheet for these constituents; failure to eliminate bromodichloromethane and chlorodibromomethane by adding ultraviolet light (UV) disinfection is not providing BPTC. Failure to provide BPTC violates the state and federal antidegradation policies.

19. The compliance schedules are not compatible with achieving compliance within the required time frame

The proposed permit contains numerous compliance time schedules, Permit Provisions No. 9 through No. 13. Compliance schedule deadlines are for bromodichloromethane and chlorodibromomethane by 22 September 2009, copper, lead, zinc and dioxin by 18 May 2010, a TRE workplan by 22 March 2007, and proposed numeric temperature and turbidity numeric limitations by 22 September 2008 and tertiary treatment by 22 September 2011. One assumes that the City would principally comply through the construct of an upgraded treatment process, including tertiary treatment. The tertiary treatment schedule however lags behind the other schedules by years. For example, if the tertiary modifications are meant to be the means of compliance for copper, lead, zinc and dioxin, compliance would not be met for 16 months beyond the CTR based deadline of 18 May 2010. If UV disinfection is ultimately the means of compliance for bromodichloromethane and chlorodibromomethane, tertiary treatment would be necessary for the process to disinfect effectively and compliance again lags by two years. The timing of the current compliance schedules will ultimately result in non-compliance and should be altered based on compliance with the mandated CTR compliance date of 18 May 2010.

20. The Proposed permit does not comply with the SIP for inclusion of compliance time schedules in the permit

Proposed Permit Finding No. 45 states with regard to the SIP, that: “Section 2.1 further states that a compliance schedule may be included in NPDES permits provided that the following justification has been submitted: “(a) *documentation that diligent efforts have been made to quantify pollutant levels in the discharge and identify the sources of the pollutant in the waste stream; (b) documentation of source control measures and/or pollution minimization measures efforts currently underway or completed; (c) a proposal for additional or future source control measures, pollutant minimization actions, or waste treatment (i.e., facility upgrades); and (d) a demonstration that the proposed schedule is short as practicable.*”” The quote at best takes liberties with the actual language of the SIP in that the opening part of the paragraph from which the quote is taken states that “The discharger shall submit to the RWQCB the following justification *before* compliance schedules may be authorized in a permit...” (emphasis added) A little further back, the opening sentence of SIP Section 2.1 states that: “Based on an existing dischargers request and demonstration that it is infeasible for the discharger to achieve immediate compliance with a CTR criterion, or with an effluent limitation based on a CTR criterion, the RWQCB may establish a compliance schedule in an NPDES permit.” It is the clear intent of the SIP that the required request, documentation and justification for a compliance schedule be submitted prior to drafting the permit, presumably with the permit application for renewal. Since this information has not been submitted, as required by the SIP, a compliance schedule for CTR based effluent limitations cannot be included in the proposed permit and the permit must be revised accordingly to remove the compliance schedules to a Cease and Desist Order. Provisions G.9 and G.10 of the Order must be deleted.

21. Regional Board Authority to Issue Compliance Schedules under the CTR Has Now Lapsed

40 C.F.R. section 131.38(e)(3) formerly authorized compliance schedules delaying the effective date of WQBELs being set based on the NTR and CTR. Pursuant to 40 C.F.R. section 131.38(e)(8), however, this compliance schedule authorization *expressly expired* on May 18, 2005, depriving the State and Regional Boards with any authority to issue compliance schedules delaying the effective date of such WQBELs. Indeed, the EPA Federal Register Preamble accompanying the CTR stated as much, noting, “EPA has chosen to promulgate the rule with a sunset provision which states that the authorizing compliance schedule provision will cease or sunset on May 18, 2005.”

The Regional Board may contend that the EPA Federal Register Preamble has effectively extended this compliance schedule authority when the Preamble observed, “[I]f the State Board adopts, and EPA approves, a statewide authorizing compliance schedule provision significantly prior to May 18, 2005, EPA will act to stay the authorizing compliance schedule provision in today’s rule.” It is true that the State Board subsequently adopted its Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, enacted by State Board Resolution No. 2000-015 (March 2, 2000) (“State Implementation Plan” or “SIP”) and that the SIP provides for compliance schedules without imposing a May 18, 2005 cutoff. EPA, however, *has not* acted to stay 40 C.F.R. section 131.38(e)(8) by the only means it

can lawfully do so: notice and comment rulemaking that amends 40 C.F.R. section 131.38(e)(8). Without such a rulemaking, 40 C.F.R. section 131.38(e)(8) remains the law and it unequivocally ends authorization to issue compliance schedules after May 18, 2000. *See Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006).

22. The Regional Boards' Approach to Compliance Schedules is Unlawful under the CWA.

Even if 40 C.F.R. section 131.38(e)(8) did not preclude issuing compliance schedules which delay the effective date of WQBELs set under the NTR and CTR, the CWA itself precludes such compliance schedules—and any compliance schedule which delays the effective date of WQBELs past 1977.

A. CWA Section 301(b)(1)(C) establishes a firm deadline for complying with WQBELs

Numerous courts have held that neither the EPA nor the States have the authority to extend the deadlines for compliance established by Congress in CWA section 301(b)(1). 33 U.S.C. §1311(b)(1); *See State Water Control Board v. Train*, 559 F.2d 921, 924-25 (4th Cir. 1977) (“Section 301(b)(1)’s effluent limitations are, on their face, unconditional”); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976), *cert. denied sub nom. Bethlehem Steel Corp. v. Quarles*, 430 U.S. 975 (1977) (“Although we are sympathetic to the plight of Bethlehem and similarly situated dischargers, examination of the terms of the statute, the legislative history of [the Clean Water Act] and the case law has convinced us that July 1, 1977 was intended by Congress to be a rigid guidepost”).

This deadline applies equally to technology-based effluent limitations and WQBELs. *See Dioxin/Organochlorine Ctr. v. Rasmussen*, 1993 WL 484888 at *3 (W.D. Wash. 1993), *aff'd sub nom. Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517 (9th Cir. 1995) (“The Act required the adoption by the EPA of ‘any more stringent limitation, including those necessary to meet water quality standards,’ by July 1, 1977”) (citation omitted); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312 (9th Cir. 1992) (“[Section 1311(b)(1)(C)] requires achievement of the described limitations ‘not later than July 1, 1977.’”) (citation omitted). Any discharger not in compliance with a WQBEL after July 1, 1977, violates this clear congressional mandate. *See Save Our Bays and Beaches v. City & County of Honolulu*, 904 F. Supp. 1098, 1122-23 (D. Haw. 1994).

Congress provided no blanket authority in the Clean Water Act for extensions of the July 1, 1977, deadline, but it did provide authority for the States to foreshorten the deadline. CWA section 303(f) (33 U.S.C. § 1313(f)) provides that: “[n]othing in this section [1313] shall be construed to affect any effluent limitations or schedule of compliance required by any State to be implemented prior to the dates set forth in section 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring

compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.”

Because the statute contains explicit authority to expedite the compliance deadline but not to extend it, the Regional Board may not authorize extensions beyond this deadline in discharge permits.

B. The July 1, 1977 deadline for WQBELs applies even where WQS are established after that date

The July 1, 1977, deadline for achieving WQBELs applies equally even if the applicable WQS are established after the compliance deadline. 33 U.S.C. section 1311(b)(1)(C) requires the achievement of “more stringent limitations necessary to meet water quality standards . . . established pursuant to any State law . . . or required to implement any applicable water quality standard established pursuant to this chapter.” Congress understood that new WQS would be established after the July 1, 1977, statutory deadline; indeed, Congress mandated this by requiring states to review and revise their WQS every three years. *See* 33 U.S.C. § 1313(c). Yet, Congress did not draw a distinction between achievement of WQS established before the deadline and those established after the deadline.

Prior to July 1, 1977, therefore, a discharger could be allowed some time to comply with an otherwise applicable water quality-based effluent limitation. Beginning on July 1, 1977, however, dischargers were required to comply as of the date of permit issuance with WQBELs, including those necessary to meet standards established subsequent to the compliance deadline.

C. Congress has authorized limited extensions of CWA deadlines for specific purposes, precluding exceptions for other purposes

In the Clean Water Act Amendments of 1977, Congress provided limited extensions of the July 1, 1977, deadline for achieving WQBELs. In CWA section 301(i), Congress provided that “publicly-owned treatment works” (“POTWs”) that must undertake new construction in order to achieve the effluent limitations, and need Federal funding to complete the construction, may be eligible for a compliance schedule that may be “in no event later than July 1, 1988.” 33 U.S.C. § 1311(i)(1) (emphasis added). Congress provided for the same limited extension for industrial dischargers that discharge into a POTW that received an extension under section 1311(i)(1). *See* 33 U.S.C. § 1311(i)(2). In addition, dischargers that are not eligible for the time extensions provided by section 1311(i) but that do discharge into a POTW, may be eligible for a compliance schedule of no later than July 1, 1983. *See* 33 U.S.C. § 1319(a)(6).

The fact that Congress explicitly authorized certain extensions indicates that it did not intend to allow others, which it did not explicitly authorize. In *Homestake Mining*, the Eighth Circuit held that an enforcement extension authorized by section 1319(a)(2)(B) for technology-based effluent limitations did not also extend the deadline

for achievement of WQBELs. 595 F.2d at 427-28. The court pointed to Congress' decision to extend only specified deadlines: “[h]aving specifically referred to water quality-based limitations in the contemporaneously enacted and similar subsection [1319](a)(6), the inference is inescapable that Congress intended to exclude extensions for water quality-based permits under subsection [1319](a)(5) by referring therein only to Section [1311](b)(1)(A). *Id.* at 428 (citation omitted). By the same reasoning, where Congress extended the deadline for achieving effluent limitations for specific categories of discharges and otherwise left the July 1, 1977, deadline intact, there is no statutory basis for otherwise extending the deadline.

D. Schedules of compliance may be issued only to facilitate, not to avoid, achievement of effluent limitations by the statutory deadline

The Clean Water Act defines the term effluent limitation as: “any restriction established . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C. § 1362(11).

The term schedule of compliance is defined, in turn, 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). The purpose of a compliance schedule is to facilitate compliance with an effluent limitation by the applicable deadline by inserting interim goals along the way: “[a] definition of effluent limitations has been included so that control requirements are not met by narrative statements of obligation, but rather are specific requirements of specificity as to the quantities, rates, and concentration of physical, chemical, biological and other constituents discharged from point sources. It is also made clear that the term effluent limitation includes schedules and time tables of compliance. The Committee has added a definition of schedules and time-tables of compliance so that it is clear that enforcement of effluent limitations is not withheld until the final date required for achievement.” S. Rep. No. 92-414, at 77, *reprinted in* 1972 U.S.C.C.A.N. 3668 (Oct. 28, 1971) (emphasis added). Thus, Congress authorized compliance schedules, not to extend its deadlines for achievement of effluent limitations, but to facilitate achievement by the prescribed deadlines.

In *United States Steel Corp.*, the industry plaintiff argued that 33 U.S.C. § 1311(b)(1)(C) allows the July 1, 1977, deadline to be met simply by beginning action on a schedule of compliance that eventually would result in achieving the technology- and water quality-based limitations. 556 F.2d at 855. The Court of Appeals disagreed: “[w]e reject this contorted reading of the statute. We recognize that the definition of ‘effluent limitation’ includes ‘schedules of compliance,’ section [1362(11)], which are themselves defined as ‘schedules . . . of actions or operations leading to compliance’ with limitations imposed under the Act. Section [1362(17)]. It is clear to us, however, that section [1311(b)(1)] requires point sources to achieve the effluent limitations based on BPT or state law, not merely to be in the process of achieving them, by July 1, 1977.” *Id.* Thus,

compliance schedule may not be used as a means of evading, rather than meeting, the deadline for achieving WQBELs.

E. States may not issue permits containing effluent limitations that are less stringent than those required by the Clean Water Act

Finally, a compliance schedule that extends beyond the statutory deadline would amount to a less stringent effluent limit than required by the CWA. States are explicitly prohibited from establishing or enforcing effluent limitations less stringent than are required by the CWA. *See* 33 U.S.C. § 1370; Water Code §§ 13372, 13377. The clear language of the statute, bolstered by the legislative history and case law, establishes unambiguously that compliance schedules extending beyond the July 1, 1977, deadline may not be issued in discharge permits. The Permit, however, purports to do just that. By authorizing the issuance of permits that delay achievement of effluent limitations for over thirty years beyond Congress' deadline, the Permit makes a mockery of the CWA section 301(b)(1)(C) deadline and exceeds the scope of the Regional Board's authority under the Clean Water Act and the Porter-Cologne Act. 33 U.S.C. § 1311(b)(1)(C).

Thank you for considering these comments. If you have questions or require clarification, please don't hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Jennings". The signature is written in a cursive, flowing style.

Bill Jennings, Executive Director
California Sportfishing Protection Alliance