



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

3536 Rainier Avenue, Stockton, CA 95204

Tel: 209-464-5067, Fax: 209-464-1028, E: deltakeep@aol.com

22 October 2006

Mr. Robert Schneider, Chairman
Ms. Pamela Creedon, Executive Officer
Mr. Kenneth Landau, Assistant Executive Officer
Mr. James C. Pedri, Assistant Executive Officer
Mr. Brian Smith, Senior WRC Engineer
Mr. Daniel Warner, WRC Engineer
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 Order No. 5-00-124 and NPDES Permit No. CA0078441 for City of Dunsmuir Wastewater Treatment Plant, Siskiyou and Shasta Counties

Dear Messrs. Schneider, Landau, Pedri, Smith, Warner and Ms. Creedon:

The California Sportfishing Protection Alliance and Watershed Enforcers (CSPA) has reviewed the Central Valley Regional Water Quality Control Board's (Regional Board) tentative Waste Discharge Requirements Order No. 5-00-124 and NPDES Permit No. CA0078441 (Order or Permit) for City of Dunsmuir Wastewater Treatment Plant, Siskiyou and Shasta Counties (Discharger) and submits the following comments.

CSPA requests status as a designated party for this proceeding. CSPA is a 501(c)(3) public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality and fishery resources and their aquatic ecosystems and associated riparian habitats. CSPA has actively promoted the protection of water quality and 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 California's degraded surface and ground waters and associated fisheries. CSPA members reside, boat, fish and recreate in and along waterways throughout the Central Valley, including Siskiyou and Shasta Counties.

- 1. The proposed Permit does not contain an Effluent Limitation for ammonia in violation of Federal Regulations 40 CFR 122.44 and California Water Code, Section 13377**

The proposed Permit is for a domestic wastewater treatment plant. Domestic wastewater treatment plants, by their nature, receive ammonia in concentrations ranging from 30 mg/l to 60 mg/l and present a reasonable potential to exceed the Basin Plan narrative toxicity water quality objective. Ammonia is toxic to aquatic life in fairly low concentrations. The Central Valley Regional Board has a long established history of including ammonia limitations in NPDES permits based on U.S. EPA's ambient criteria for the protection of freshwater aquatic life, which has established BPTC for POTWs. Failure to operate a wastewater treatment plant in a nitrification mode allows ammonia concentrations to pass through the system. The nitrification process can be a fairly unstable treatment process; even POTWs that employ nitrification should be limited for ammonia to ensure the system is properly operated. The California Water Code (CWC), Section 13377 states in part that: "...the state board or the regional boards shall...issue waste discharge requirements...which apply and ensure compliance with ...water quality control plans, or for the protection of beneficial uses..." Section 122.44(d) of 40 CFR requires that permits include water quality-based effluent limitations (WQBELs) to attain and maintain applicable numeric and narrative water quality criteria to protect the beneficial uses of the receiving water. Where numeric water quality objectives have not been established, 40 CFR §122.44(d) specifies that WQBELs may be established using USEPA criteria guidance under CWA section 304(a), proposed State criteria or a State policy interpreting narrative criteria supplemented with other relevant information, or an indicator parameter. Failure to include an effluent limitation for ammonia in the proposed permit violates 40 CFR 122.44 and CWC 13377.

2. The proposed Permit does not contain an Effluent Limitation for nitrate and nitrite in violation of Federal Regulations 40 CFR 122.44 and California Water Code, Section 13377

Untreated domestic wastewater contains ammonia. Nitrification is a biological process that converts ammonia to nitrite and nitrite to nitrate. Denitrification is a process that converts nitrate to nitrite or nitric oxide and then to nitrous oxide or nitrogen gas, which is then released to the atmosphere. Nitrate and nitrite are known to cause adverse health effects in humans. The Basin Plan's chemical constituents water quality objective prohibits chemical constituents in concentrations that exceed drinking water Maximum Contaminant Levels (MCLs) published in Title 22 of the California Code of Regulations or that adversely affect beneficial uses. Municipal and domestic water supply is a beneficial use of the Sacramento River. The California Department of Health Services (DHS) has adopted Primary Maximum Contaminant Levels (MCLs) for the protection of human health for nitrite and nitrate that are equal to 1 mg/l and 10 mg/l (measured as nitrogen), respectively. Title 22 CCR, Table 64431-A, also includes a primary MCL of 10,000 mg/l for the sum of nitrate and nitrite, measured as nitrogen. The discharge from the this wastewater treatment plant has a reasonable potential to cause or contribute to an in-stream excursion above water quality standards for nitrite, and nitrate. Effluent limits for nitrite and nitrate are properly based on the MCLs. Effluent Limitations for nitrite and nitrate must be included in the proposed Permit to assure the treatment process adequately nitrifies and denitrifies the waste stream to protect the beneficial uses of municipal and domestic supply. The California Water Code (CWC), Section 13377

states in part that: "...the state board or the regional boards shall...issue waste discharge requirements...which apply and ensure compliance with ...water quality control plans, or for the protection of beneficial uses..." Section 122.44(d) of 40 CFR requires that permits include water quality-based effluent limitations (WQBELs) to attain and maintain applicable numeric and narrative water quality criteria to protect the beneficial uses of the receiving water. Drinking water MCLs are included in the Basin Plan Chemical Constituents water quality objective by reference. Failure to include an effluent limitation for nitrate in the proposed permit violates 40 CFR 122.44 and CWC 13377. The proposed Permit does not contain Effluent Limitations for chronic toxicity and therefore does not comply with Federal regulations, at 40 CFR 122.44 (d)(1)(i), despite finding a reasonable potential to exceed the Basin Plan narrative toxicity water quality objective

The proposed Permit Fact Sheet, page E-29, Chronic Aquatic Toxicity, states that: "Based on annual whole effluent chronic toxicity testing performed by the Discharger from 2000 through 2005, the discharge has a reasonable potential to cause or contribute to an instream excursion above the Basin Plan's narrative toxicity objective." Despite finding that the discharge presents a reasonable potential to cause or contribute to an instream excursion above the Basin Plan's narrative toxicity objective, the proposed permit does not contain an Effluent Limitation for chronic toxicity and does not at a minimum require the Discharger conduct a toxicity reduction evaluation (TRE). The proposed Permit simply requires on going annual chronic toxicity monitoring. The proposed Permit does nothing with regard to the discharge being toxic.

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: "...to ensure compliance with the Basin Plan's narrative toxicity objective, the discharger is required to conduct whole effluent toxicity testing...". However, sampling does not equate with or ensure compliance. As stated above, toxicity from this discharge has already been found. The Tentative Permit requires the Discharger to conduct an investigation of the possible sources of toxicity if a threshold is exceeded, yet despite finding the discharge to be toxic, the proposed Permit does nothing to remedy the situation. This language is not a limitation and essentially eviscerates the Regional Board's authority, and the authority granted to third parties under the Clean Water Act, to find the Discharger in violation for discharging chronically toxic constituents. An effluent limitation for chronic toxicity must be included in the Order. In addition, the Chronic Toxicity Testing Dilution Series should bracket the actual dilution at the time of discharge, not use default values that are not relevant to the discharge. Accordingly, the proposed Permit must be revised to prohibit chronic toxicity in accordance with Federal regulations, at 40 CFR 122.44 (d)(1)(i).

3. The proposed Permit does not contain an Effluent Limitation for oil and grease in violation of Federal Regulations 40 CFR 122.44 and California Water Code, Section 13377

The proposed Permit is for a domestic wastewater treatment plant. Domestic wastewater treatment plants, by their nature, receive oil and grease in concentrations from home cooking and restaurants that present a reasonable potential to exceed the Basin Plan water quality objective for oil and grease (Basin Plan III-5.00). Confirmation sampling is not necessary to establish that domestic wastewater treatment systems contain oil and grease in concentrations that present a reasonable potential to exceed the water quality objective. The Central Valley Regional Board has a long established history of including oil and grease limitations in NPDES permits at 15 mg/l as a daily maximum and 10 mg/l as a monthly average, which has established BPTC for POTWs. The California Water Code (CWC), Section 13377 states in part that: "...the state board or the regional boards shall...issue waste discharge requirements...which apply and ensure compliance with ...water quality control plans, or for the protection of beneficial uses..." Section 122.44(d) of 40 CFR requires that permits include water quality-based effluent limitations (WQBELs) to attain and maintain applicable numeric and narrative water quality criteria to protect the beneficial uses of the receiving water. Where numeric water quality objectives have not been established, 40 CFR §122.44(d) specifies that WQBELs may be established using USEPA criteria guidance under CWA section 304(a), proposed State criteria or a State policy interpreting narrative criteria supplemented with other relevant information, or an indicator parameter. Failure to include an effluent limitation for oil and grease in the proposed permit violates 40 CFR 122.44 and CWC 13377.

4. The proposed Permit does not comply with the Board's Antidegradation Policy by failing to require an assessment of groundwater quality

The proposed Permit, Fact Sheet, Rationale for Monitoring and Reporting Requirements, D, 2, Groundwater, states that: "This Order does not require the Discharger to conduct groundwater monitoring." The proposed Permit, Land Discharge Specifications and Findings, the Fact Sheet, the attached map and the WWTP schematic show that the Discharger utilizes land disposal via "percolation" ponds from 15 June and 15 September, annually. As is shown in the map, attachment B, and the Flow Schematic, Attachment C, the facilities 5 "percolation" ponds are situated on the banks of the Sacramento River. It is highly that the ponds are located on highly permeable river sediments. The use of the phrase "percolation" ponds indicates that wastewater will percolate. Wastewater will percolate to groundwater and possibly commingle with Sacramento River water. The percolation of wastewater to groundwater and surfacewater poses a threat to degrade water quality.

California's antidegradation policy is composed the State Board's Resolution 68-16 which is included as a part of the Basin Plan. As part of the state policy for water quality control, the antidegradation policy is binding on all of the Regional Boards. Implementation of the state's antidegradation policy is guided by the State

Antidegradation Guidance, SWRCB Administrative Procedures Update 90-004, 2 July 1990 (“APU 90-004”) and Water Quality Order 86-17.

The Regional Board must apply the antidegradation policy whenever it takes an action that will lower water quality. (State Antidegradation Guidance, pp. 3, 5, 18) Application of the policy does not depend on whether the action will actually impair beneficial uses. (State Antidegradation Guidance, p. 6. Actions that trigger use of the antidegradation policy include issuance, re-issuance, and modification of NPDES and Section 404 permits and waste discharge requirements, waiver of waste discharge requirements, issuance of variances, relocation of discharges, issuance of cleanup and abatement orders, increases in discharges due to industrial production and/or municipal growth and/or other sources, exceptions from otherwise applicable water quality objectives, etc. (State Antidegradation Guidance, pp. 7-10) The State Board’s APU 90-004 specifies guidance to the Regional Boards for implementing the state antidegradation policy and guidance. The guidance establishes a two-tiered process for addressing these policies and sets forth two levels of analysis: a simple analysis and a complete analysis. A simple analysis may be employed where a Regional Board determines that: 1) a reduction in water quality will be spatially localized or limited with respect to the waterbody, e.g. confined to the mixing zone; 2) a reduction in water quality is temporally limited; 3) a proposed action will produce minor effects which will not result in a significant reduction of water quality; and 4) a proposed activity has been approved in a General Plan and has been adequately subjected to the environmental and economic analysis required in an EIR. A complete antidegradation analysis is required if discharges would result in: 1) a substantial increase in mass emissions of a constituent; or 2) significant mortality, growth impairment, or reproductive impairment of resident species. Regional Boards are advised to apply stricter scrutiny to non-threshold constituents, i.e., carcinogens and other constituents that are deemed to present a risk of source magnitude at all non-zero concentrations. If a Regional Board cannot find that the above determinations can be reached, a complete analysis is required.

Even a minimal antidegradation analysis would require an examination of: 1) existing applicable water quality standards; 2) ambient conditions in receiving waters compared to standards; 3) incremental changes in constituent loading, both concentration and mass; 4) treatability; 5) best practicable treatment and control (BPTC); 6) comparison of the proposed increased loadings relative to other sources; 7) an assessment of the significance of changes in ambient water quality and 8) whether the waterbody was a ONRW. A minimal antidegradation analysis must also analyze whether: 1) such degradation is consistent with the maximum benefit to the people of the state; 2) the activity is necessary to accommodate important economic or social development in the area; 3) the highest statutory and regulatory requirements and best management practices for pollution control are achieved; and 4) resulting water quality is adequate to protect and maintain existing beneficial uses.

The proposed action here is renewal of an NPDES permit although the applicable provisions being discussed for land disposal are not federally mandated, an antidegradation analysis is required. Any antidegradation analysis must comport with

implementation requirements in State Board Water Quality Order 86-17 and State Antidegradation Guidance. The discharge of wastewater to unlined ponds at a minimum threatens groundwater quality, mandating monitoring of groundwater quality to determine if degradation has occurred and to what degree. Groundwater monitoring must be required to determine if the wastewater discharge is degrading groundwater quality and commingling and degrading surface water.

5. The proposed Permit fails to require tertiary treatment in accordance with the Findings in the Fact Sheet

Final Effluent Limitations (including Table 7) limit BOD, TSS and coliform organisms to tertiary levels; but do not require that the wastestream be filtered and coagulated not the a tertiary level of treatment be achieved. There is no indication in the proposed Permit that the facilities sand filters can provide an equivalent level of treatment to that required by Title 22 nor that coagulation is provided. Turbidity monitoring is not prescribed to assure the filtration system operates reliably. Without required filtration, coagulation and turbidity monitoring, the facility may be capable of meeting reduced BOD and TSS levels, but there is no assurance that pathogens are effectively removed.

The Fact Sheet, page E-13, Applicable Technology-Based Effluent Limitations, First paragraph, states that: “However, tertiary treatment is necessary to minimize degradation and protect the beneficial uses of the receiving stream.” The beneficial uses of Sacramento River include contact recreation uses and irrigation. To protect these beneficial uses, the proposed Permit found that the wastewater must be treated to a tertiary level; yet the proposed permit does not “require” tertiary treatment technologies, or equivalent, be applied. The principal infectious agents (pathogens) in wastewater that may be present in raw sewage may be classified into three broad groups: bacteria, parasites, and viruses. Tertiary treatment, consisting of chemical coagulation, sedimentation, and filtration, has been found to remove approximately 99.5% of viruses. Filtration is an effective means of reducing viruses and parasites from the waste stream. The wastewater must be treated to tertiary standards (filtered) to protect contact recreational and food crop irrigation uses.

The California Department of Health Services (DHS) has developed reclamation criteria, California Code of Regulations, Title 22, Division 4, Chapter 3 (Title 22), for the reuse of wastewater. Title 22 requires that for spray irrigation of food crops, parks, playgrounds, school yards, and other areas of similar public access, wastewater be adequately disinfected, oxidized, coagulated, clarified, and filtered, and that the effluent total coliform levels not exceed 2.2 MPN/100 ml as a 7-day median. Title 22 is not directly applicable to surface waters; however, it is appropriate to apply DHS’s reclamation criteria because the Sacramento River is used for irrigation of agricultural land and for contact recreation purposes. The stringent disinfection criteria of Title 22 are appropriate since the undiluted effluent may be used for the irrigation of food crops. Coliform organisms are intended as an indicator of the effectiveness of the entire treatment train and the effectiveness of removing other pathogens.

In addition to BOD, TSS and coliform testing, a turbidity effluent limitation should be applied, as required in Title 22, as a second indicator of the effectiveness of the treatment process and to assure compliance with the required level of treatment. The tertiary treatment process, or equivalent, must be capable of reliably meeting a turbidity limitation of 2 nephelometric turbidity units (NTU) as a daily average. Failure of the filtration system such that virus removal is impaired would normally result in increased particles in the effluent, which result in higher effluent turbidity. Turbidity has a major advantage for monitoring filter performance, allowing immediate detection of filter failure and rapid corrective action. Coliform testing, by comparison, is not conducted continuously and requires several hours, to days, to identify high coliform concentrations.

6. The proposed Permit allows for an illegal bypass of treatment processes in violation of Federal Regulation, 40 CFR 122.41(m)(1), CWC 13377 and 40 CFR 40 CFR 122.4 (a), (d) and (g)

The proposed Permit, Effluent Limitations and Discharge Specifications and Final Effluent Limitations Table 6, allows a “secondary” wastewater to be discharged to the Sacramento River from 16 November through 30 April, annually. Federal Regulation, 40 CFR 122.41(m)(1) prohibits bypasses of treatment processes. The cited Federal regulation defines a bypass as an “intentional diversion of wastestreams from any portion of a treatment facility” (See U.S. EPA Enforcement Alert, Volume 3, Number 4, Office of Regulatory Enforcement, April 2000).

The proposed Permit does not discuss the rationale for allowing the bypass or any discussion that the generous allowance is in any way protective of water quality or the beneficial uses of the receiving stream. To the contrary, as cited above, the Fact Sheet, page E-13, Applicable Technology-Based Effluent Limitations, First paragraph, states that: “However, tertiary treatment is necessary to minimize degradation and protect the beneficial uses of the receiving stream.” There is no information discussing that a level of treatment less than tertiary meets the requirements of California Water Code, section 13377, which requires that: “Notwithstanding any other provision of this division, the state board and the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.”

Federal Regulation, 40 CFR 122.4 (a), (d) and (g) require that no permit may be issued when the conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA, when imposition of conditions cannot ensure compliance with applicable water quality requirements and for any discharge inconsistent with a plan or plan amendment approved under Section 208(b) of the CWA.

The proposed Permit is simply void of discussion of why a level of treatment less than tertiary would produce an effluent quality that protects the beneficial uses of the receiving stream. The proposed Permit also fails to discuss the allowance for bypass of the filtration process and the implications of 40 CFR 122.41(m)(1).

In accordance with the cited regulations, the proposed Permit should not be issued but revised to require year-round tertiary treatment.

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

The proposed Permit contains compliance schedules for copper and dichlorobromomethane within the Effluent Limitation Tables. 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).

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.

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.

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.

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.

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.

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).

8. The proposed Permit misquotes and misapplies the SIP justification requirements for including compliance schedules in a permit

The proposed Permit 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

- 9. The Proposed Permit contains a typographical error by leaving the “μ” off the Effluent Limitations for copper, dichlorobromomethane and zinc in Table 6**
- 10. The proposed Permit contains an Effluent Limitation for acute toxicity that allows mortality that exceeds the Basin Plan water quality objective and does not comply with Federal regulations, at 40 CFR 122.44 (d)(1)(i)**

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.

For an ephemeral or low flow stream, allowing 30% mortality in acute toxicity tests allows that same level of mortality in the receiving stream, in violation of federal regulations and contributes to exceedance of the Basin Plan’s narrative water quality objective for toxicity. Accordingly, the proposed Permit must be revised to prohibit acute toxicity in accordance with Federal regulations, at 40 CFR 122.44 (d)(1)(i).

- 11. The Proposed Permit contains an inadequate reasonable potential analysis by using incorrect statistical multipliers**

Federal regulations, 40 CFR § 122.44(d)(1)(ii), state “when determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, **the variability of the pollutant or pollutant parameter in the effluent**, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.” Emphasis added.

The reasonable potential analyses for CTR constituents fail to consider the statistical variability of data and laboratory analyses as explicitly required by the federal regulations. For example, the maximum effluent concentration (MEC) was directly compared to the applicable water quality standard for CTR constituents instead of the required multiplier factors necessary to properly evaluate reasonable potential. 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*.

The reasonable potential analyses for CTR constituents are flawed and must be recalculated. The fact that the SIP illegally ignores this fundamental requirement does not exempt the Regional Board from its obligation to consider statistical variability in compliance with federal regulations.

12. The proposed sampling requirement for metals in the Monitoring and Reporting Program is inappropriate

The Monitoring and Reporting Program requires that grab samples be collected for metals. The metals sampling should be flow proportional 24-hour composite samples to accurately characterize the wastewater discharge.

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

Sincerely,



Bill Jennings, Executive Director
California Sportfishing Protection Alliance