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Via Electronic Mail (amamidi@waterboards.ca.gov)

Anand Mamidi
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

Re: Tentative Order R5-2007-XXXX, NPDES Permit No. CAXXXXXXX Waste Discharge Requirements for the City of Angels Wastewater Treatment Plant

Dear Mr. Mamidi:

On behalf of the Environmental Law Foundation, a non-profit, public interest organization dedicated to protecting water quality throughout California, and the California Sportfishing Protection Alliance, I would like to thank you for the opportunity to submit comments on Tentative Order R5-2007-XXXX, NPDES Permit No. CAXXXXXXX authorizing the discharge of waste by the City of Angels into Angels Creek, a tributary of the Stanislaus River. It is our hope that this discharge will not degrade Angels Creek and the Stanislaus–a requirement under California's antidegradation policy, which requires that water quality be maintained. (*See* State Water Resources Control Board Resolution 68-16 (Oct. 24, 1968); 40 C.F.R. § 131.12.) As discussed further below, however, we believe that the Tentative Order does not comply with that policy. Accordingly, we ask the Regional Board to provide more information and revise the Tentative Order so as to ensure that no degradation will occur as a result of this discharge.

A. California's Antidegradation Policy

The State Water Resources Control Board first announced a policy to maintain existing water quality in 1968 in Resolution 68-16. In that resolution, the State Board announced its intent that water quality that exceeds water quality standards "shall be maintained to the maximum extent possible." (State Water Resources Control Board, Resolution 68-16 (Oct. 24, 1968).) Accordingly, the Board ordered that

> Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will

> not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.

(*Id.*) To implement this policy the State Board mandated that

> Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.

(*Id*.)

Since then, the State Board has interpreted Resolution 68-16 to also incorporate the federal antidegradation policy set out at 40 C.F.R. § 131.12 wherever that policy applies.[1] That policy mandates that a state must maintain and protect existing instream water uses and the level of water quality necessary to protect those uses–Tier 1 protection. (40 C.F.R. § 131.12(a)(1).) Furthermore, where water quality exceeds the level necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water, the federal policy mandates that that quality be maintained and protected unless (1) the state finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the state's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) the state assures water quality adequate to protect existing uses fully; and (3) the state assures that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control–Tier 2 protection. (*Id*. § 131.12(a)(2).)

The State Board has also interpreted the state's antidegradation policy to apply on a pollutant-by-pollutant basis. (*In re Environmental Health Coalition*, SWRCB Order No. 91-10, p. 10 (Sept. 26, 1991).) Thus, appropriate findings must be made for each pollutant in a discharge stream, with different findings and evidence for each different "tier" of the receiving water's water quality. (*Id*.)

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[1] *See In re Rimmon C. Fay*, SWRCB WQO 86-17, at p. 20 ("The federal antidegradation policy is part of the Environmental Protection Agency's water quality standards regulations, and has been incorporated into the state's water quality protection requirements."); *see also id*. at p. 23, fn. 11 ("For waters subject to the federal antidegradation policy, both the requirements of the federal antidegradation policy and the express requirements of State Board Resolution No. 68-16 should be satisfied.").

B. The Tentative Order Impermissibly Allows Degradation of Angels Creek in Violation of California's Antidegradation Policy

The Tentative Order authorizes a new discharge to Angels Creek. Thus, the usual shortcuts in performing an antidegradation analysis cannot apply. So, for instance, the Regional Board cannot in this instance rely blindly on past performance or on CEQA documents regarding the plant expansion that are now over four and five years old to determine whether or not the proposed discharge will degrade water quality. The CEQA documents are particularly inapposite given that CEQA analyses are based on a different baseline than antidegradation analyses. Under CEQA, present water quality serves as the baseline for determining the extent of a project's impacts. (Cal. Code Regs. tit. 14, § 15125(a) (environmental conditions as they exist at the time the notice of preparation serve as the baseline for CEQA analyses).) Under the state's antidegradation policy, however, present water quality can only be the baseline for antidegradation purposes if that water quality is the best that has existed since 1968 or it has resulted through actions consistent with the state's antidegradation policy. (*See* APU 90-004, p. 4.)

Here, there have been no recent actions that would have lowered water quality given that the facility has not discharged to Angels Creek since 1976. Present water quality, therefore, can only be the baseline if that quality is the best since 1968, which is highly unlikely given the development that has recently occurred in the area. The Regional Board, therefore, must determine what the best water quality in Angels Creek since 1968 is, and then it must determine how much of the Creek's assimilative capacity the discharge will consume. To do that, the Regional Board must conduct some actual water quality modeling to determine whether or not the proposed discharge will have an effect on water quality. Absent such modeling, there is simply no valid basis upon which to ground the antidegradation analysis, particularly in light of the admission by the discharger that "[d]ischarging to Angels Creek has many unknowns, *primarily the ability of the creek to have assimilative capacity to receive the discharge*." (City of Angels, Feasibility Study for Achieving Compliance with Wastewater Permit Requirements (2002), p. 40 (emphasis added).)

That the discharge will receive tertiary treatment is not enough, especially given that the Tentative Order determines that there is a reasonable potential for the discharge to cause exceedances of several water quality standards.[2] While it may seem "insignificant" to the Board that it is authorizing the degradation of potentially high quality waters down to the water quality standard, that is not supposed to occur under the state's antidegradation policy barring some *important* socioeconomic reasons for such degradation.

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[2] In this connection, it is insufficient simply to analyze the discharge relative to whether water quality standards or beneficial uses will be maintained given that "[t]he requirement that the federal antidegradation policy be applied does not depend upon identification of any discernible impact on beneficial uses." (Chief Counsel to the State Water Resources Control Board, William Attwater, mem. to Regional Board Executive Officers, Oct. 7, 1987, p. 5.) What matters is that degradation will occur.

Here, though, it is not clear what these *important* socioeconomic reasons are. For one, the Tentative Order only mentions the discharge is "necessary" to accommodate population growth. Absent is any characterization of the importance of that development in relation to any socioeconomic baseline. Indeed, it is not clear exactly what are the economic and social benefits associated with this discharge. Is this growth connected to any employment growth in the area or are we talking about vacation homes? Will the increased population increase the tax base in a necessary and critical way? Provide other important direct and indirect income effects? Critically, *what will happen if the growth is not accommodated*? If there are no socioeconomic costs associated with forgoing the development, then is the anticipated growth actually "important" as it is must be in order to justify degraded water quality? (40 C.F.R. § 131.12(a)(2).)

The Regional Board must address such issues. As stated in APU 90-004, "[t]o accurately assess the impact of the proposed project, the projected baseline socioeconomic profile of the affected community without the project should be compared to the projected profile with the project." (APU 90-004, p. 5.) The Tentative Order, however, does not even attempt such an analysis.

This failure, moreover, cannot be excused even if the Board finds that the potential degradation is minimal.[3] Under Tier 2 of the state's antidegradation policy, the Board must still make findings that economic and social development *will* occur and that this development *requires* the lowering of water quality. (Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12 (June 3, 1987), p. 7 (stating that these findings must be made "whether or not water quality is significantly lowered").) That means that before the Board can authorize the discharge, the Board must first determine that the degradation cannot be mitigated through reasonable means and that there are no feasible additional or alternative control measures that would lessen or preclude the likely degradation otherwise permitted by the Tentative Order. (*Id*.)

Here, again though, the Board cannot rely on the outdated documents provided by the discharger.[4] For instance, the CEQA documents fail to consider any alternative to the discharge other than the "no project" alternative. (*See* Environmental Report for City of Angels Wastewater Treatment Plant (2003), p. ER-8.) The feasibility study submitted by the discharger, moreover, does not state that alternatives to the discharge are not "feasible." It only states that

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[3] The Board must take note of the fact that the discharger proposes the discharge to be fairly constant and not sporadic as the Tentative Order characterizes the discharge. (*See* Feasibility Study, p. 38 ("because of the limit on the period when discharge could be made and considering that there can be substantial rainfall in May (particularly in a very wet year), *the City will be looking for, and taking advantage of every opportunity to discharge effluent to Angels Creek in the November through April period*" (emphasis added)).) The degradation that will likely occur, therefore, will not be temporally dissipated but will be fairly constant.

[4] The feasibility study is five years old; the CEQA documents are four years old.

discharging to Angels Creek is the *cheapest* of the alternatives. Indeed, that study recognizes that land disposal is the best means available to handle the wastes, concluding that "the seasonal discharge may not ultimately be the most reliable disposal alternative." (Feasibility Study, p. 49.) By contrast, "[e]xisting Land application and reclamation facilities have capacity to accommodate disposal needs beyond the year 2022 at the projected growth rate." (*Id*., p. 27.)

Feasibility under the state's antidegradation policy does not translate into "cheapest." After all, it is always going to be cheapest to dump wastes into the state's waters. The point behind the Porter-Cologne Act and the state's antidegradation policy, though, is that "[i]t costs much less in the long run–and the result is much more certain–to spend the money needed for an effective water quality control program than to try to salvage water resources that have been allowed to become unreasonably degraded." (Final Report of the Study Panel to the California State Water Resources Control Board (Mar. 1969), p. 1.) An unwillingness to raise rates, therefore, simply does not equate to infeasibility. Nor are alternatives "infeasible" because they do not provide complete solutions to the problem. So, for instance, water conservation measures and infiltration/inflow management are best practices that are entirely feasible, yet absent from consideration in the Tentative Order. Indeed, the feasibility study identified seven conservation BMPs that are not being implemented despite being "readily implementable." Such measures may not remove the need for the discharge, but they will help minimize whatever degradation might be associated with the discharge, and minimizing the degradation is the Regional Board's primary duty. (*See* Water Code § 13000 ("the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation").)

The absence of these and other eminently feasible practices begs the question of whether the Tentative Order is consistent with the state's antidegradation policy. The main problem facing the discharger is a lack of short-term storage. It seems plain that the solution most consistent with the state's antidegradation policy is to have the discharger develop more storage.

Lastly, the antidegradation analysis presently fails to take into account "the cumulative impacts of all previous and proposed actions and reasonably foreseeable actions which would lower water quality below the established baseline." (EPA Guidance, p. 6.) In this connection, the Board must consider other "dischargers" along Angels Creek, including the Murphys Sanitation District that in November 2006 spilled 150,000 gallons of raw sewage into Angels Creek upstream of the proposed discharge. (See Brandenburg, *Murphys District Cited for Sewage Spill*, Union Democrat (Mar. 16, 2007) at http://www.uniondemocrat.com/news/story.cfm?story_no=22992.) What is the combined impact of such incidents along with the regular discharge being authorized by the Tentative Order? Indeed, will this new discharge serve as a precedent all along Angels Creek for allowing previously prohibited direct discharges with dramatic cumulative effects?

Furthermore, what is the likelihood of compliance by the discharger given that the only assurance against significant degradation according to the Tentative Order is that the discharger comply with the Order's terms? (*See* Tentative Order, p. F-23 ("Compliance with these

requirements will result in the use of best practicable treatment or control of the discharge and the impact on existing water quality will be insignificant.").) Similarly sized treatment facilities often experience compliance issues. (*See* Order No. R5-2003-0167 (administrative civil penalty assessment against City of Colfax).) It can be expected, then, that compliance issues will also occur at the discharger's facility, again amounting to potentially detrimental cumulative impacts to water quality.

All told, then, the Tentative Order fails to demonstrate proper compliance with the state's antidegradation policy. That policy, therefore, precludes the Regional Board from issuing the Tentative Order until the above issues are addressed.

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Thank you for your time in considering these comments. If you have any questions, please do not hesitate to contact me. I look forward to working with you and the Regional Board to address these concerns.

Sincerely,

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on behalf of

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