



ENVIRONMENTAL LAW FOUNDATION

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

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

**Re: Tentative Order R5-2007-_____, NPDES Permit No. CA0084271
Waste Discharge Requirements for the Mountain House Community Services
District**

Dear Mr. Marshall:

On behalf of the Environmental Law Foundation, a non-profit, public interest organization dedicated to protecting water quality throughout California, I would like to thank you for the opportunity to submit comments on Tentative Order R5-2007-_____, NPDES Permit No. CA0084271 authorizing the discharge of waste by the Mountain House Community Services District into Old River. It is our hope that this discharge will not degrade Old River and the Sacramento/San Joaquin Delta—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.*)

B. *The Tentative Order Impermissibly Allows Degradation of Old River in Violation of California’s Antidegradation Policy*

The Tentative Order concludes that the proposed discharge is consistent with the state’s antidegradation policy because (1) the Order does not provide for an expansion from previously

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.”).

authorized discharges that have been determined to be consistent with the state's antidegradation policy, and (2) that even if the discharges do degrade water quality, such degradation is still consistent with the state's antidegradation policy. These findings, however, are insufficient to support the conclusion that the proposed discharge is consistent with the state's antidegradation policy, first because reliance on the 1998 finding is improper, and second because in reconsidering the state's antidegradation policy, the Tentative Order misapplies that policy.

1. Changed Circumstances Preclude Reliance on Previous Findings

In concluding that the proposed discharge is consistent with the state's antidegradation policy, the Tentative Order relies on the finding in Order 98-192, the discharger's previous permit, that the discharge of up to 5.4 mgd of treated waste was consistent with the state's antidegradation policy. According to the Tentative Order, because the Order does not authorize any expansion from the previously authorized discharge rate, there is nothing to disturb the previous permit's finding.

The Tentative Order, however, ignores changed circumstances that have arisen since the 1998 permit was issued, namely the listing of the Old River as impaired on the state's 303(d) list. That listing occurred in 2002. The Board, in Order 98-192, therefore, could not have considered and did not consider this status as is required in any antidegradation analysis. (*See* EPA Guidance, p. 4 ("Prior to proceeding with a detailed analysis of these or similar actions, the affected water body should be assessed to determine whether or not it falls into either Tier 1 or Tier III.")) Given that the previous finding did not consider the Old River's status as impaired, and given that the present analysis must consider that status, it would be arbitrary and capricious to rely on this previous finding.

2. The Board's Application of the State's Antidegradation Policy Is Flawed

The Tentative Order does not solely rely on the 1998 finding for its present finding that the discharge is consistent with the state's antidegradation policy. In the alternative, the Order also supposedly "reconsiders" that policy in full. According to the Order

although this Order may allow some degradation of the quality of waters of the state, it is consistent with Resolution 68-16 because (1) such degradation is consistent with the maximum benefit to the people of the state, (2) the discharge is the result of wastewater utility service that is necessary to accommodate housing and economic expansion, and (3) it results in a high level of treatment of sewage waste.

(Tentative Order, p. F-8.)

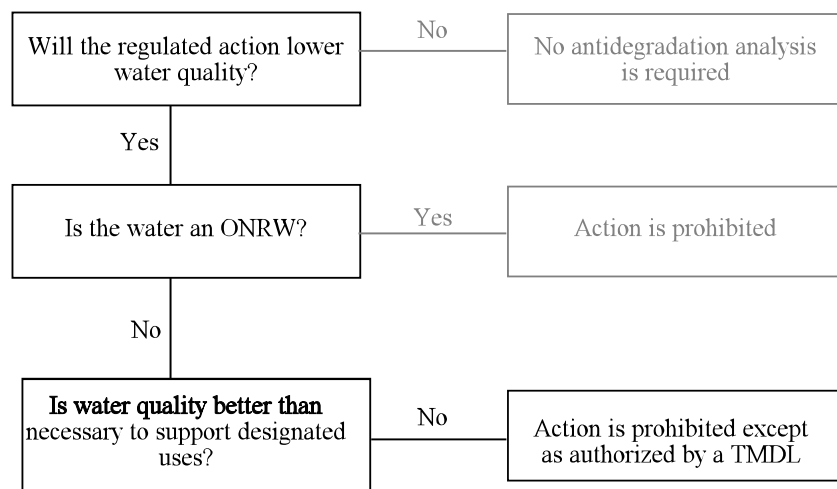
This "implementation" of the state's antidegradation policy, however, is flawed, first because it fails to implement Tier 1 of the state's antidegradation policy, and second because it fails to properly make and support the findings necessary under Tier 2 of that policy.

(i) *The Proposed Discharge Is Impermissible Under Tier 1 of the State’s Antidegradation Policy*

The Tentative Order recognizes that Old River is presently impaired by low dissolved oxygen, and that the western portion of the Sacramento/San Joaquin Delta ,of which the Old River is a part, is impaired by diazinon and chlorpyrifos, organo-chlorine Group A pesticides, DDT, mercury, electrical conductivity, and unknown toxicity. (Tentative Order, p. F-13.) The Tentative Order also recognizes that it “may allow some degradation of the quality of waters of the state.” (Tentative Order, p. F-8.) Such degradation, however, is impermissible with regard to the pollutants that presently impair the Old River given that the Old River is a Tier 1 water body with respect to these pollutants and, under the state’s antidegradation policy, no degradation by these pollutants is permissible unless authorized by a TMDL, regardless of the level of control applied to the degrading discharge. (40 C.F.R. § 131.12(a)(1); see Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 (June 3, 1987), p. 2 (“In cases where water quality is lower than necessary to support these uses, the requirements in Section 303(d) of the Act, 40 CFR 131.10 and other pertinent regulations must be satisfied.”); see also Chief Counsel to the State Water Resources Control Board, William Attwater, mem. to Regional Board Executive Officers, Oct. 7, 1987, p. 11 [hereafter “Attwater Memo”] (“[T]he requirement that existing instream uses be protected is not satisfied if existing instream beneficial uses will be impaired, even for a portion of a water body.”).)

Here, no approved TMDLs exist for the Old River. Therefore, the degradation is impermissible despite the Tentative Order’s purported application of BPTC. (See Figure 1 (displaying an excerpt of the decision making flow chart attached to EPA’s guidance on how to properly implement the federal antidegradation policy).) The level of control is irrelevant—it does not matter that the Tentative Order “requires the Discharger, in accordance with specified compliance schedules, to meet requirements that will result in the use of BPTC of the discharge.” (Tentative Order, p. F-9.) The resulting degradation is still prohibited. (40 C.F.R. § 131.12(a)(1).)

Figure 1



Source: Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12 (June 3, 1987), p. 10.

(ii) *Proper Implementation of Tier 2 Protection Requires Additional Findings Supported by Evidence in the Record*

Even if the Old River only warrants Tier 2 protection for some of the pollutants in the discharge, proper implementation of the state's antidegradation policy requires that the Regional Board make more extensive findings regarding the potential degradation. These findings, moreover, must be properly supported by evidence in the record. Presently, the Tentative Order simplistically justifies the potential degradation "because (1) such degradation is consistent with the maximum benefit to the people of the state, (2) the discharge is the result of wastewater utility service that is necessary to accommodate housing and economic expansion, and (3) it results in a high level of treatment of sewage waste." (Tentative Order, p. F-8.) Such findings, though, are entirely inadequate.

First, the findings have no basis in the record. For instance, what housing and economic expansion needs to be accommodated in this particular instance? Is this expansion connected to growth in employment in the area? 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 must be in order to justify degraded water quality? (40 C.F.R. § 131.12(a)(2).) In this connection, the Tentative Order fails to even specify that the purported expansion *is* "important." All the Tentative Order states is that the discharge "is necessary to accommodate housing and economic expansion." (Tentative Order, p. F-9.) How, then, can the degradation be permissible under Tier 2, which requires that expansion be "important"? Clearly, the Regional Board must conduct a more detailed analysis than it presently does.² Instead, the Tentative Order strictly relies on conclusory statements without any support in the record—the hallmark of arbitrary and capricious decision making.³ For instance, the Fact Sheet states that the Order "requires tertiary treatment or equivalent, which is a high level of treatment that is considered best practicable treatment or control (BPTC) for *most* constituents in the wastewater." (Tentative Order, p. F-9 (emphasis added).) What about the other constituents? For those, what level of treatment is provided and is that level the best practicable treatment available to control those discharges?

² For instance, to accurately assess the impact of the proposed project, the Regional Board must compare the projected baseline socioeconomic profile of the affected community without the project to the projected profile with the project. (APU 90-004, p. 5.) This, the Tentative Order does not do.

³ *Healing v. California Coastal Comm.* (1994), 22 Cal. App. 4th 1158, 1167 ("A conclusory statement in findings, unsupported by any evidence in the record . . . is per se insufficient."); *Southern California Edison Co. v. State Water Resources Control Bd.* (1981), 116 Cal. App. 3d 751, 759; *see also Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974), 11 Cal. 3d 506, 516; *Glendale Memorial Hosp. & Health Center v. Dept. of Mental Health* (2001), 91 Cal. App. 4th 129, 140-42 (holding unspecified, "boilerplate" findings insufficient where greater detail was necessary to determine whether there was support for the agency determination); *City of Rancho Palos Verdes v. City Council of Rolling Hills Estates* (1976), 59 Cal. App. 3d 869, 889 (holding city council resolution invalid due to lack of findings on "the sub-issues leading to the ultimate decision").

Second, the findings focus solely on the express requirements of Resolution 68-16. Absent from the discussion are the findings required under 40 C.F.R. § 131.12 such as the finding that 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 have been “achieved.” (40 C.F.R. § 131.12(a)(2).) This finding is necessary given that the federal policy applies to the Old River as a water of the United States. (Attwater Memo, p. 3 (“the State and Regional Boards must apply the federal antidegradation policy to all ‘waters of the United States’ within the State of California”).)

Also absent are other findings that are required under the state’s antidegradation policy “whether or not water quality is significantly lowered.” (EPA Guidance, p. 7.) For instance, under Tier 2, the Board must make findings that economic and social development *will* occur and that this development *requires* the lowering of water quality. (*Id.*) 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 predicted degradation permitted by the Tentative Order.

In this connection, however, feasibility does not mean “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.) Yet, the Tentative Order relies on outdated assessments by the discharger of alternative means of disposal,⁴ which simply conclude that year-round discharge is the most *cost-effective* disposal method. But unless the alternatives are cost-prohibitive, i.e., the costs of preventing degradation far exceed the costs associated with the degradation, such alternatives must be required. (*See* Resolution 68-16 (degradation must be consistent with the maximum benefit to the people of the state); *see also* Water Code § 13000 (board “must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation”).)

It is the Board’s responsibility, therefore, under the state’s antidegradation policy to perform a balancing between the need for the discharge, the extent of the discharge, and the resulting degradation. The Tentative Order, however, begs off requiring the discharger to do more to lessen the degradation, buying lock, stock, and barrel the discharger’s characterization that doing so would cost “too much.” (*See* Tentative Order, p. F-11 (“the current plan to produce tertiary effluent for discharge to Old River is considered by the Discharge to be superior to all other alternatives because of cost-effectiveness”).) This is entirely insufficient, especially where there is no counterbalancing assessment of the negative impacts associated with the

⁴ The original assessments were performed in 1998, with a subsequent update in 2003.

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discharge to Old River.⁵ Any balancing actually being performed lacks transparency—the Tentative Order does not even recite the discharger’s costs that render any alternatives “infeasible.”

Lastly, the antidegradation analysis is insufficient because it 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 discharges to the Old River. Any analysis without a consideration of cumulative impacts will simply be worthless.

All told, then, the Tentative Order and Fact Sheet quite simply fail to demonstrate proper compliance with the state’s antidegradation policy. Absent is any consideration of the changed circumstances during the last permit term and Tier 1 protections for the Old River. Furthermore, the Order’s Tier 2 implementation lacks evidentiary support and is wholly inadequate in light of regulatory requirements. Until these deficiencies are corrected, the state’s antidegradation policy precludes the Regional Board from issuing the Tentative Order.

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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,



Dan Gildor

⁵ Ironically, the impacts of the discharge to groundwater appear to be so sufficiently severe so as to preclude discharging to land, begging the question of how the discharge to the surface water can be so innocent as warrant such a discharge without requiring more.