



ENVIRONMENTAL LAW FOUNDATION

1736 Franklin Street, 9th Floor, Oakland, California 94612 • 510/208-4555 • Fax 510/208-4562
www.envirolaw.org • envlaw@envirolaw.org

April 6, 2007

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 R2-2007-_____, NPDES Permit No. CA0079154
Waste Discharge Requirements for the City of Tracy, Tracy Wastewater
Treatment Plant**

Dear Mr. Marshall:

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 R2-2007-_____, NPDES Permit No. CA0079154 authorizing the discharge of waste by the City of Tracy 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

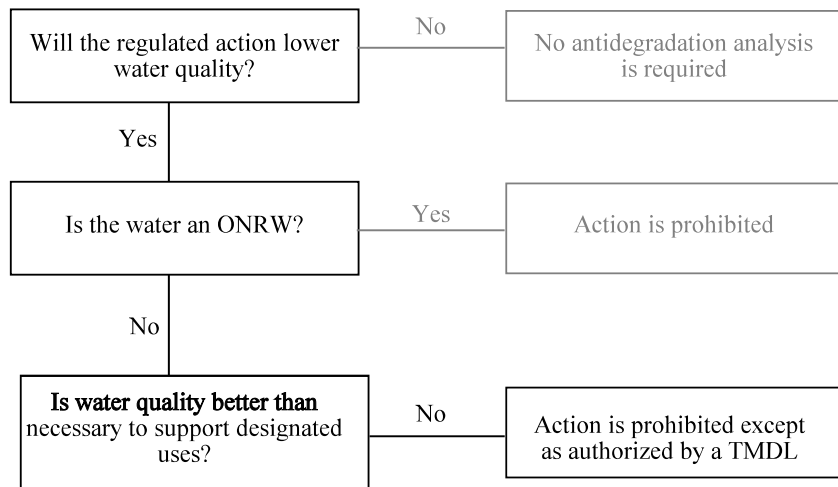
The Tentative Order authorizes discharges that the Fact Sheet recognizes may degrade the Old River. (Fact Sheet, p. F-8 (“this Order may allow some degradation of the quality of waters of the state”).) Table F-1 even catalogues the increased mass loading of a number of pollutants

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.”).

under the Tentative Order, including nitrate—a substantial contributor to low dissolved oxygen problems that plague the Old River.²

Such an increase in mass loadings, however, is impermissible under the state’s antidegradation policy, particularly those elements of the policy that implement the federal antidegradation requirements, because the Old River is presently impaired by low dissolved oxygen and the “discharge from the facility may currently cause or contribute to exceedances of applicable water quality objectives for certain constituents as described in this Order.” (Tentative Order, p. F-8.) As such, the Old River is a Tier 1 water with regard to all these impairing pollutants, and under Tier 1, no further water quality degradation can be allowed unless authorized by a TMDL regardless of the level of control. (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.”).) No such TMDL exists for the Old River, though.

Therefore, the degradation is impermissible despite the 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.” (Order at p. F-8.) The resulting degradation is still prohibited. (40 C.F.R. § 131.12(a)(1).)



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

² The Fact Sheet also recognizes that degradation will occur through the implementation of interim limits on numerous pollutants. (Fact Sheet, F-59 (“Discharge of constituents in concentrations in excess of the final effluent limitations, but in compliance with the interim effluent limitations, can significantly degrade water quality and adversely affect the beneficial uses of the receiving stream on a long-term basis.”).)

The remaining degradation predicted in Table F-1 by other pollutants that do not presently impair the Old River, moreover, can only be permitted subject to more extensive fact-finding by the Board with additional and more detailed analysis than is presently contained in the Tentative Order.³ For instance, the Fact Sheet presently justifies the degradation by concluding that the Tentative Order “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.)

Such findings, however, are inadequate. First, 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. After all, the Old River is a water of the United States and subject to Tier 2 protection with regard to all the non-impairing pollutants in the discharge. (*See* Tentative Order § II.B; 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”).)

Absent as well are other findings that are required under the federal 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. The Tentative Order, however, fails to make any such determinations or consider alternatives. For instance, water conservation measures and infiltration/inflow management are best practices that are entirely feasible and can help reduce the need for any expansion in plant capacity, yet such measures are not considered anywhere in the Tentative Order. In this connection, feasibility under the state’s antidegradation policy does not translate into “cheapest.” (*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”).) 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

³ Some elements of the Order, however, will remain contrary to the state’s antidegradation policy even with more extensive findings. For instance, the Tentative Order fails to provide for public review and comment of the discharger’s pollution reduction plan for salinity, which is to be developed after the Order’s issuance. This is contrary to the requirement under the state’s antidegradation policy that any degradation be subject to public review. (40 C.F.R. § 131.12(a)(2).)

Resources Control Board (Mar. 1969), p. 1.) An unwillingness to raise rates, therefore, simply does not equate to infeasibility. Thus, what alternatives exist to the degrading discharges and why hasn't the Board required such alternatives?

Second, 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 this expansion is "important." How can the degradation be permissible, therefore, under Tier 2? Clearly, 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.) This, the Tentative Order does not do.

Instead, the Tentative Order strictly relies on conclusory statements without any support in the record—the hallmark of arbitrary and capricious decision making.⁴ 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." (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? The Fact Sheet improperly tries to avoid this question by concluding that "[t]he increase [in pollution] will not cause significant impacts to aquatic life." In this context, though, that is irrelevant given that "[t]he requirement that the federal antidegradation policy be applied does not depend upon identification of any discernible impact on beneficial uses." (Attwater Memo, p. 5.) What matters is whether a discharge will degrade water quality in relation to the baseline. So, what level of control is provided for these other degrading pollutants? They too need to have the best practical treatment or control applied to them. The Order, though, fails to require this. It cannot be fairly concluded, then, that the Tentative Order is consistent with the state's antidegradation policy.⁵

⁴ *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 unspecific, "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").

⁵ It is not even clear from the Tentative Order how application of the Order's requirements will even result in attaining water quality standards in the first place. How do we know, for example, that the current level of performance with regard to salinity, which is the limit imposed in the Order on salinity, is not already causing impermissible degradation where the baseline for determining degradation is not present water quality but the best quality of the receiving water that has existed since 1968? (*See* APU 90-004, p. 4.)

Mr. James Marshall
Comments re: NPDES Permit No. CA0079154
April 6, 2007
Page 6

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 fail to demonstrate proper compliance with the state’s antidegradation policy. Despite finding that degradation will occur through increased pollutant loadings, the Fact Sheet demonstrates that the Regional Board has not considered any alternatives to the discharge. The Fact Sheet also demonstrates that the Regional Board has failed to fully analyze with any substantial depth and support the rationale justifying the proposed discharge. The state’s antidegradation policy, therefore, precludes the Regional Board from issuing the Tentative Order until these issues are addressed.

* * *

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
Environmental Law Foundation
1736 Franklin St., Ninth Fl.
Oakland, CA 94612

on behalf of

Bill Jennings
California Sportfishing Protection Alliance
3536 Rainier Avenue
Stockton, CA 95204