



ENVIRONMENTAL LAW FOUNDATION

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May 7, 2007

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

Mr. Dane Mathis
Central Valley Regional Water Quality Control Board
1685 E Street
Fresno, CA 93706

**Re: Tentative Order R5-2007-XXXX, NPDES No. CA0078867
Waste Discharge Requirements for Berry Petroleum Company, Poso
Creek/McVan Facility, Kern County**

Dear Mr. Mathis:

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-XXXX, NPDES No. CA0078867 authorizing the discharge of waste by the Berry Petroleum Company, Poso Creek/McVan Facility, Kern County. It is our hope that this discharge will not degrade either Poso Creek or groundwater in and around the facility—a requirement under California's antidegradation policy, which requires that water quality—including groundwater 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, nor does the Order comply with the Clean Water Act's prohibitions against backsliding. Accordingly, we ask the Regional Board to revise the Tentative Order so as to ensure that no degradation will occur as a result of this discharge.

A. The Tentative Order Illegally Relaxes Existing Effluent Limitations

The Tentative Order relaxes existing effluent limitations for EC, chloride, and boron. No justification for this relaxation is provided, though, other than that the discharger has requested it. The Clean Water Act, however, requires that such relaxation be justified. (33 U.S.C. § 1342(o).) Existing monitoring data suggest that the discharger can meet the existing limitations, even with the practice of steamflooding. The Fact Sheet points out that the discharger has been employing steamflooding since April 2004. Since then, monitoring data demonstrate that the discharger has consistently met the effluent limitations in Order No. 5-01-133. For instance, the highest daily discharge for EC was 426 umhos/cm in June 2006—well into the period during which the discharger was already employing steamflooding. The prior permit's limit for EC was 700 umhos/cm. Thus, the discharger can plainly perform within the prior permit's limits. The same is true with chloride (highest: 86.2 mg/L in September 2006; limit: 106 mg/L) and boron

(highest: 0.37 mg/L in September 2006; limit: 0.75 mg/L). It is not clear, then, why less stringent effluent limitations are needed given that there appears to be plenty of room within the existing limitations for the discharger to utilize steamflooding.

Furthermore, it is not clear why the limitations need to be relaxed especially when the basis for the prior limits—the August 2000 edition of *A Compilation of Water Quality Goals*—is still a valid basis for supporting effluent limitations for discharges, such as this one, that can impact agricultural water quality.

The only reason provided for the relaxation is that such relaxation is needed to facilitate the recovery of oil. Granted, steamflooding will likely increase pollutant concentrations in the waste discharge, but that does not translate into a need to increase the effluent limitations to the maximum provided in the basin plan—essentially using up 100% of the assimilative capacity, all while there exists at least one other oil production facility that similarly uses some proportion of the watershed's assimilative capacity. (See Order No. 5-01-133, Information Sheet, p. 1 (“There is one other oil production facility that has an NPDES permit to discharge treated wastewater to the unnamed ephemeral stream channel.”).) Instead, the Board strikes a Faustian bargain exchanging “additional operational latitude provide [sic] by greater salinity effluent limitations” for the discharger completing “a Salinity Evaluation and Minimization Plan to discover whether there are other opportunities for salinity reductions.” (Tentative Order, p. F-17.) This, though, is not a fair trade given that the discharger should be made to complete such a study regardless. After all, the focus of the Clean Water Act is to force technology. The Tentative Order squanders that focus by removing any incentive to implement more effective means to limit the pollution arising from the facility. Indeed, the prior permit required that the discharge “shall not contain waste constituents in concentrations greater than naturally occurring concentrations of the waste constituents in produced water.” (Order No. 5-01-133, Information Sheet, p. 3.) It is not clear why the increase in the production of oil necessitates forgoing such requirements especially when the Board found in the prior order that degradation associated with the discharge is *not* consistent with the maximum benefit to the people of the state. (Order No. 5-01-133, Finding 21.)

Overall, then, there does not appear to be sufficient justification to warrant relaxing the prior effluent limitations in the present Order.

B. The Tentative Order Unlawfully Allows Groundwater to be Degraded

The Tentative Order authorizes a discharge to groundwater through the percolation that takes place in Sump #2. (See Tentative Order, p. F-5 (“The produced water from the wash tanks and stock tanks are directed to Sump #2 for evaporation and percolation.”)) The Order, though, only imposes a narrative limitation that the discharge shall not cause greater salinity degradation of the underlying groundwater than authorized by salinity effluent limitations and provisions specified herein. This is not sufficient, though, in light of the state's antidegradation policy. That policy requires 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.

(Resolution 68-16.) The Order's limitation, though, fails to meet these requirements. First, according to the Fact Sheet, the discharge to groundwater via percolation occurs in the *middle* of the facility's treatment train. Thus, that discharge does not have the advantage of the treatment received via the air flotation unit between Sumps #2 and #3 or the clarification that occurs in Sump #3. The best practical treatment or control ("BPTC"), therefore, is not being applied to the discharge. That ensures that groundwater will be degraded given that the effluent discharged to groundwater will almost assuredly exceed the effluent limitations placed at the end of the pipe for the surface water discharge.

Second, the limitations completely subsume any remaining assimilative capacity that might exist in the groundwater beneath the facility given that the limits are set at levels derived from the Basin Plan's water quality standards. This clearly cannot result in the highest water quality consistent with the maximum benefit of the people of the state given that there is at least one other oil production facility in the area that contributes pollution into the groundwater basin.

Last, it is not clear how this discharge is in the maximum benefit to the people of the state when the prior order specifically found that "[d]egradation of groundwater by this discharge is *not* consistent with maximum benefit to the people of the State." (Order No. 5-01-133, Finding 21 (emphasis added).)

C. The Tentative Order Unlawfully Allows Surface Water to Be Degraded

The Tentative Order concludes that the degradation that will arise by relaxing the effluent limitations and increasing the discharge flow satisfies the state's antidegradation policy because the degradation is necessary to facilitate an increase in crude oil production and that that is considered to be a benefit to the people of the State. (Tentative Order, p. F-19.) The state's antidegradation policy, though, requires that the degradation be in the *maximum* benefit to the people of the state. For increased oil production to merely be a benefit, therefore, is not enough.

The Order also only requires that the discharger investigate potential impacts to designated uses arising from the discharge. Studies, though, cannot amount to the best practical treatment or control given that during the time that the studies are ongoing, degradation will continually occur. Consequently, absent requiring first that the best practical treatment or control

Mr. Dane Mathis
Comments re: Tentative WDRs for Berry Petroleum Co.
May 7, 2007
Page 4

be applied for all pollutants in the discharge stream, the discharge cannot be authorized consistent with the state's antidegradation policy.

Overall, then, it cannot be said that the present discussion in the Tentative Order clearly demonstrates compliance with the state's antidegradation policy. The Regional Board, therefore, cannot issue the permit in its present state without either revising the order to preclude such degradation or establishing via substantial evidence that no degradation will actually occur as a result of the discharge.

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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