



ENVIRONMENTAL LAW FOUNDATION

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April 24, 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. CA0078174
Waste Discharge Requirements for the Calmat Co., Walter A. and Elizabeth A.
Baun, and Darrell B. and Janet Delevan
Sanger Sand and Gravel Plant, Fresno 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. CA0078174 authorizing the discharge of waste by the Sanger Sand and Gravel Plant. It is our hope that this discharge will not degrade either the Kings River 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. 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. 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.*) This policy applies equally to surface as well as to ground water.

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.*) Thus, these two requirements must be met *prior* to any action by the Regional Board that might impact groundwater quality.

The State Board has also interpreted Resolution 68-16 to 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).)

Lastly, the State Board has interpreted the state’s antidegradation policy to apply on a pollutant-by-pollutant basis. (*In re Environmental Health Coalition*, SWRCB Order No. 91-10,

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.”).

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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 Groundwater Degradation in Violation of California’s Antidegradation Policy

The Central Valley Regional Water Quality Control Board does not have a good history of implementing the state’s antidegradation policy with regard to regulating discharges that adversely impact groundwater. For instance, with regard to food processing facilities, Board staff admitted in 2005 that the Board has placed

[1]ittle emphasis . . . on assuring conformance with all of the required elements of the State Water Resources Control Board Resolution No. 68-16, *Statement of Policy With Respect to Maintaining High Quality Waters In California* (hereafter Antidegradation Policy), which is incorporated by reference in the Basin Plan. Waste discharge requirements have allowed wastewater storage and percolation-disposal from unlined or poorly-lined impoundments and application of wastewater to cropland at “agronomic rates” for the nutrients contained in the wastewater. Management measures were largely focused on prevention of nuisance conditions (e.g., stillage guidelines from the wine industry) without test plots or other direct demonstration that they would be effective in preventing unreasonable degradation of groundwater quality.

* * *

Although required by the State Board’s Antidegradation Policy, dischargers have not been required to implement “best practicable treatment and control practices” (“BPTC”; i.e., the best of treatment or control practices that have been demonstrated to be technologically practicable and economically feasible) to ensure that any affect on groundwater quality was the minimum reasonably achievable.

(Central Valley Regional Water Control Board, Staff Report accompanying Item 23 on the Board’s Jan. 28, 2005 meeting agenda, p. 4, at http://www.swrcb.ca.gov/rwqcb5/available_documents/waste_to_land/FoodProcessingInfoItem/StaffRpt.pdf.) The result in the context of food processing facilities is that over 90% of the food processors that monitor groundwater are known to have or suspected to have degraded groundwater with salts, nitrates, and other pollutants.

Here, it seems as though the Regional Board has learned nothing from its experience with food processors given that the present Tentative Order—like the ineffective waste discharge requirements of the past for food processors—defers the imposition of substantive requirements to protect groundwater. Instead, the Tentative Order allows the discharger to continue to operate in accordance with current practices that include discharging waste to unlined ponds located in highly permeable soils including sands and gravels. (Tentative Order, p. F-4.) The discharger, in fact, *relies* on the percolation of an estimated 1.1 million gallons of wastewater from their settling pond each day as part of their waste disposal strategy. This percolation continually doses groundwater in the area with contaminants above background levels. (See Tentative Order, p. F-21 (“Percolation from the unlined pond may result in an increase in the concentration of these constituents in groundwater.”).) It is incumbent on the Regional Board, then, to ensure that the discharge satisfy the best practical treatment or control requirement set out in the state’s antidegradation policy *before* these practices can be reauthorized, especially given that groundwater in the area is of “good quality.” (Tentative Order, p. F-4.)

The Tentative Order, though, instead defers the imposition of any more stringent requirements pending further monitoring. (See Tentative Order, p. F-21 (“This Order requires the Discharger to install groundwater monitoring wells. If these wells indicate groundwater degradation, it also requires evaluation of consistency of that degradation with Resolution 68-16.”).) Implementing the state’s antidegradation policy in this manner, though, is *completely backward*. That policy requires the implementation of the best practicable treatment or control of a discharge *prior* to degradation occurring. The trigger is the potential for degradation, which can be determined independent of groundwater monitoring. It is enough to analyze soil permeability, the construction of the containment ponds, and the result of similar practices throughout the state of California. If, based on these factors *alone*, there is the potential for groundwater degradation, then the Order must require the best practicable treatment or control for the waste discharges. Period.² After all, “[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.) As such, the state’s antidegradation policy does not authorize the “wait and see” approach adopted by the Regional Board. Rather, any activity that produces a waste that may degrade water quality *must be required* to meet waste discharge requirements that will result in the best practicable treatment or control of the discharge *before* the discharge is authorized. (See Resolution 68-16.)

² To the extent that the Order focuses on groundwater monitoring to determine whether groundwater is already degraded (i.e., not high quality waters) such that the state’s antidegradation policy should not apply, that goes beyond the pale. California’s Porter-Cologne Act requires the Board “to exercise its *full power* and jurisdiction to protect the quality of waters in the state from degradation.” (Water Code § 13000 (emphasis added).) Thus, where it is eminently feasible to avoid any further degradation, the Regional Board should not stand on the sideline and wait for proof.

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All told, then, the Regional Board cannot issue this permit without first either finding conclusively that no groundwater degradation will occur or requiring the best practical treatment or control for the discharges.

C. The Tentative Order's Antidegradation Analysis with Regard to Discharges to the Kings River Is Confusing and Inadequate

The Tentative Order's implementation of the state's antidegradation policy is not only deficient in terms of the groundwater impacts of the Order, it is also deficient regarding the discharge to the Kings River. One problem is that the discussion in the Tentative Order regarding the discharge is completely confusing and befuddling. For instance, that discussion states that

[t]he discharge may contain suspended solids from the operation, as well as minimal increases in concentrations of salts due to evaporative losses in the ponds. Therefore, the discharge at a minimum meets BPT standards and is considered BPTC with respect to the surface water discharge.

(Tentative Order, p. F-21.) This makes no sense, however, given that the second statement has nothing to do with the first. The first relates to the degrading potential of the discharge. The second, is a conclusory statement that the discharge meets BPT standards. Absent, however, is any explanation of how.

Furthermore, it is not clear from the discussion how the Tentative Order is in fact consistent with the state's antidegradation policy, specifically the federal components of that policy. First, the Order fails to determine which protective tier applies to the discharge. This is critical given that the protective tier determines the requirements that the discharge must meet. Not surprisingly, EPA concluded that this is the very first step to conducting any antidegradation analysis. (Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 (June 3, 1987), p. 4 [hereafter "EPA Guidance"] ("Prior to proceeding with a detailed analysis . . . the affected water body should be assessed to determine whether or not it falls into Tier 1 or Tier III.")) The Tentative Order, though, ignores this critical analytical step.

Second, the Tentative Order fails to specify the baseline for each pollutant in the discharge against which degradation is to be measured. It appears, as though the Order assumes that present water quality is the baseline. Present water quality, though, can only serve as the baseline if that water quality is (1) the best that has existed since 1968 or (2) has been specifically authorized consistent with the state's antidegradation policy. (State Water Resources Control Board, Administrative Procedures Update No. 90-004, p. 4 (July 2, 1990) [hereafter "APU 90-004"].) Here, there is no demonstration that any prior order was properly found to be consistent with the state's antidegradation policy. It is not clear that present water quality, then, is the proper baseline for the Board's antidegradation analysis.

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Third, the discussion focuses 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” and that the degradation is *necessary* to support *important* economic expansion. (40 C.F.R. § 131.12(a)(2).) These findings must be made “whether or not water quality is significantly lowered.” (EPA Guidance, p. 7.) Thus, 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, feasibility does not mean “cheapest.” After all, it is always going to be cheapest to dump wastes into the state’s waters. As mentioned above, though, the point behind the Porter-Cologne Act and the state’s antidegradation policy 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 fails to consider or evaluate any alternatives that might lessen or prevent the degradation arising from the discharge. Where discharges degrade high quality waters, it is imperative that the Board do all it can to prevent that degradation. (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”).)

Fourth, 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; *see also* Arizona Dept. of Environmental Quality, Antidegradation Implementation Procedures (March 2005), p. 3-12 (“The antidegradation review for individually AZPDES-permitted facilities will be based upon the assigned protection level and baseline water quality . . . of the receiving water, . . . [and] cumulative impacts from other pollutant sources”); State of New Mexico Continuing Planning Process (Appendix A), Antidegradation Policy Implementation Procedure (Dec. 14, 2004), p. 2.) In this connection, the State Board has instructed the Regional Board to consider “all available pertinent information” in determining whether or not a discharge is consistent with the intent and purpose of the state’s antidegradation policy. (APU 90-004, p. 2.) Cumulative impacts are obviously “pertinent” where any one discharge may be the discharge that breaks the proverbial camel’s back that leads to water quality degradation in the Kings River.

Lastly, the antidegradation analysis is insufficient because it fails to take into account the discharger’s compliance history. That history portends what the actual impact to the Kings River will be as a result of issuing the Tentative Order given that noncompliant discharges will very likely degrade the Kings River. Here, the Tentative Order recognizes that the discharger “has sporadically violated or threatened to violate the turbidity, pH, and DO receiving water

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limitations.” Such violations are synonymous with degradation. Yet the Order’s antidegradation analysis ignores this, requiring only that the discharger “conduct a discharge point and receiving water-monitoring evaluation to determine whether an alternative discharge point and/or alternative sampling points are appropriate.” (Tentative Order F-7.) Again, the Tentative Order inappropriately defers application of more stringent requirements—such as actually requiring an alternative discharge point or discharge method—all in contravention of the state’s antidegradation policy that requires such requirements be implemented *before* the discharge is authorized.

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.

* * *

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