ENVIRONMENTAL LAW FOUNDATION

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June 7, 2007

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

Mr. Bryan Smith
Central Valley Regional Water Quality Control Board
415 Knollcrest Drive, Suite 100
Redding, CA 96002

Re: Tentative Order No. R5-2007-XXXX, NPDES No. CA0078051 Waste Discharge Requirements for the City of Mt. Shasta Wastewater Treatment Plant, Siskiyou County

Dear Mr. Smith:

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 No. R5-2007-XXXX, NPDES No. CA0078051, authorizing the discharge of waste by the City of Mt. Shasta Wastewater Treatment Plant, into the Sacramento River. It is our hope that this discharge will not degrade water quality–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.) It is not clear from the Tentative Order, however, how the Order is consistent with that policy. Accordingly, we ask the Regional Board to provide more information and revise the Tentative Order as necessary 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.*)

After adopting Resolution 68-16, the State Board interpreted it in 1986 to also incorporate the federal requirements for such a policy that are set out at 40 C.F.R. § 131.12.[1] Those requirements mandate that a state must maintain and protect existing instream water uses and the level of water quality necessary to protect those uses. (40 C.F.R. § 131.12(a)(1).) This is commonly referred to as Tier I protection. 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. (*Id.* § 131.12(a)(2).) This is commonly referred to as Tier II protection.

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 (Nov. 20, 1986), 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 Fails to Demonstrate That It Is Consistent with the State's Antidegradation Policy

In the present case, the Tentative Order explains that it is consistent with the state's antidegradation policy because (1) the Order only "provides for a small increase in the volume and mass of pollutants discharged"; (2) that increase "will not have significant impacts on aquatic life, which is the beneficial use most likely affected by the pollutants discharged"; (3) that increase "allows wastewater utility service necessary to accommodate housing and economic expansion in the area"; (4) that increase "is considered to be a benefit to the people of the State"; and (5) the best practicable treatment or control is being applied to the discharge. (Tentative Order, pp. F-37 to F-38.) These justifications for the degradation, however, fall far short of what is needed under the state's antidegradation policy to warrant degradation of the Sacramento River in the present case.[2]

First, the Tentative Order states that it is consistent with the state's antidegradation policy because it "provides for a small increase in the volume and mass of pollutants discharged." The level of degradation, though, is irrelevant to determining whether or not degradation is consistent with the state's antidegradation policy. The substantive and procedural commands of that policy apply regardless of the level of degradation. After all, both Resolution 68-16 and the federal requirements for Tier II simply state that existing high water quality "shall be maintained" unless certain findings are made. (40 C.F.R. § 131.12(a)(2).) They do not say that some degradation is permissible as long as it is not somehow "significant." Moreover, EPA has stated that to comply with the federal requirements for an antidegradation policy, a "State must find that any action which would lower water quality is necessary to accommodate important economic and social development" *whether or not water quality is significantly lowered*. (Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12 (June 3, 1987), p. 7 [hereafter "EPA Guidance"].) Consequently, the "significance" of the degradation is irrelevant, and injecting such a concept into the Board's decision making is an abuse of discretion. (Cal. Code Civ. Proc. § 1094.5(b) (abuse of discretion is established when order is not supported by the findings); *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 516 (noting that "a findings requirement serves to conduce the administrative body to draw legally relevant subconclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions"); *City and County of San Francisco v. Board of Permit Appeals* (1989) 207 Cal.App.3d 1099, 1110-1111 (dismissing irrelevant findings supported by substantial evidence as inadequate to support administrative order).)

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[2] The following comments assume that the Sacramento River is subject to Tier II protection. Before proceeding, though, the Board must itself first establish that the Sacramento is not subject to either Tier 1 or Tier 3. (Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12 (June 3, 1987), 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.").) This, the Tentative Order has not explicitly done.

Furthermore, it is not at all clear that this finding–that the degradation is insignificant–is even supported by substantial evidence given that the analysis in the Tentative Order uses present water quality as the baseline against which degradation is measured. Present water quality, though, cannot be the baseline for analysis given that such a baseline results in a skewed antidegradation analysis that underestimates and misrepresents the extent of the degradation that will cumulatively occur.[3] For that reason, EPA's guidance requires that baseline water quality "remain fixed unless some action improves water quality." (EPA Guidance, p. 6).) In this connection, other state's prohibit the use of present water quality as the baseline. (*See* Arizona Dept. of Environmental Quality, *Antidegradation Implementation Procedures* (March 2005), p. 4-3 ("Antidegradation policy generally does not allow a lowering of BWQ [baseline water quality]. That is, BWQ is not a moving target, unless it moves in the direction that reflects improving water quality."); *see also id*. p. 1-3 (degradation is determined "from BWQ, not ambient water quality at the time a project application is submitted").) After all, a 10% reduction from present-day water quality may not seem so significant, but the same degradation cumulatively measured from the best water quality in a waterbody will be much more significant and much more representative of the actual degradation that the discharge will cause. Despite this, the Tentative Order clearly uses present water quality to determine the extent of the degradation that will arise. This amounts to a prejudicial abuse of discretion.

Second, the Tentative Order states that it is consistent with the state's antidegradation policy because the increased degradation that will arise from the discharge "will not have significant impacts on aquatic life, which is the beneficial use most likely affected by the pollutants discharged." Again, though, the Tentative Order refers to irrelevant factors that do not affect the substantive and procedural commands of the state's antidegradation policy, which are triggered whenever water quality is degraded, not when beneficial uses are impacted. (William Attwater, Chief Counsel to the State Water Resources Control Board, mem. to Regional Board Executive Officers, Oct. 7, 1987, p. 5 ("The requirement that the federal antidegradation policy be applied does not depend upon identification of any discernible impact on beneficial uses.").) What matters is whether water quality will be degraded from baseline water quality. (*See* WQO 86-17, at pp. 21-22 ("Even assuming that instream beneficial uses will be maintained and protected, it must be demonstrated, under the second part of the federal antidegradation policy, that any reduction in water quality is 'necessary to accommodate important economic or social development.'").) A finding that beneficial uses will not be impacted, therefore, is irrelevant and cannot support the Tentative Order. *(City and County of San Francisco*, *supra*, 207 Cal.App.3d at pp. 1110-11.)

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[3] Granted, the selection of present water quality as the baseline for analysis is in line with State Board guidance on implementing the state's antidegradation policy as long as present water quality was authorized under the state's antidegradation policy. In this connection, however, there is nothing in the Tentative Order that demonstrates that the prior order was issued consistent with the state's antidegradation policy such as to authorize the use of present water quality as the baseline under APU 90-004. Furthermore, that portion of APU 90-004 is inconsistent with EPA guidance regarding the establishment of a baseline and is therefore inapposite.

Third, the Tentative Order states that it is consistent with the state's antidegradation policy because the increased discharge "allows wastewater utility service necessary to accommodate housing and economic expansion in the area." This finding, though, as with the previous findings before, fails to support issuing the Tentative Order given that the finding fails to find that the degradation is accommodating "important" housing and economic expansion in the area. (40 C.F.R. § 131.12(a)(2).) This is not simply a trivial omission given that "absent important social or economic benefit, degradation under tier 2 *must not be allowed*." (63 Fed.Reg. 36742, 36784 (July 7, 1988) (emphasis added).) In this connection, the Tentative Order not only fails to ascribe the necessary importance to housing and economic expansion, it also completely fails to mention or discuss any housing or economic expansion that is occurring and that needs to be accommodated. Rather, the only reason given for the increase in the discharge is that the discharger requested it as a result of improvements to the facility that have increased the facility's capacity. This is not adequate. In order for the degradation to be consistent with the state's antidegradation policy, the Board must first find that important social or economic development would otherwise not occur but for the degradation.[4]

The finding that the Tentative Order is consistent with the state's antidegradation policy because the degradation is "necessary to accommodate housing and economic expansion in the area" is not only deficient in that it fails to find that the expansion is "important," it is also deficient in that there is no analysis to support the finding that the degradation is in fact "necessary." This finding is "among the most important and useful aspects of an antidegradation program and potentially an extremely useful tool in the context of watershed planning." (63 Fed.Reg. 36742, 36784 (July 7, 1998).) To support such a finding, the Regional Board must first "ensure[] that all feasible alternatives to allowing the degradation have been adequately evaluated, and that the least degrading reasonable alternative is implemented." (*See* 63 Fed.Reg. at 36784; *see also* 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").) In the present case, though, there is no analysis of any alternatives nor is there any explanation of how likely alternatives, such as increasing the capacity of the sub-surface leachate field or obtaining other or expanded reclamation opportunities, are not feasible.[5] This, the Board must do before it can

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[4] In this connection, the Regional Board must compare "the projected baseline socioeconomic profile of the affected community without the project . . . [with] the projected profile with the project." (APU 90-004, p. 5.) Otherwise, there will be no substantial evidence to support the finding that social and economic development–if any is even occurring–is important.

[5] Other alternatives include initiation of a conservation program and an inflow and infiltration control program. In this connection, it is important to keep in mind that "feasibility" does not translate into "cheapest." Alternatives under the state's antidegradation policy should only be considered "infeasible" if they are technologically impracticable or if their cost is unreasonable. (*See* 63 Fed.Reg. at 36784 ("where less-degrading alternatives are more costly than the pollution controls associated with the proposal, the State . . . should determine whether the costs of the less degrading alternative are reasonable.").) 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.) Indeed, the State Board

rationally conclude that the degrading discharge is in fact "necessary." (*See Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515-16.)

Finally, the Tentative Order states that it is consistent with the state's antidegradation policy because the increased degradation is subject to the best practical treatment or control ("BPTC"). In the case of domestic wastewater, the best practical treatment or control is tertiary treatment. The Tentative Order, though, acknowledges that the discharge is subject only to secondary treatment during most of the time that the discharge occurs. Consequently, it is not clear how the Tentative Order actually applies the best practical treatment or control. As noted above, cost-savings alone cannot demonstrate that secondary and advanced secondary are BPTC. (*See supra* note 5.)

Overall, then, it is not clear on what basis the Regional Board can find that the Tentative Order is consistent with the state's antidegradation policy. Accordingly, the Board cannot adopt the Tentative Order absent revisions. (WQO 86-17, p. 24.)

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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

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has said that "[c]ost savings alone, absent any demonstration as to how these costs savings are necessary to accommodate important social and economic development, are not a sufficient basis for determining consistency with the federal antidegradation policy." (WQO 86-17, p. 22, fn. 10.)