

Central Valley Regional Water Quality Control Board
5/6 February 2015 Board Meeting

Response to Written Comments on
Tentative Time Schedule Order for the
Collins Pine Company
Chester Sawmill
Plumas County

At a public hearing scheduled for 5/6 February 2015, the Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) will consider adoption of a tentative time schedule order (TSO) for the Collins Pine Company's Chester Sawmill. This document contains responses to written comments received from interested parties in response to the tentative TSO. Written comments from interested parties were required to be received by the Central Valley Water Board by 21 November 2014 in order to receive full consideration. Comments were received prior to and on the deadline date from:

1. Churchwell White LLP on behalf of the Collins Pine Company (Discharger), (received 20 November 2014)
2. Aqua Terra Aeris Law Group on behalf of Community Health Watch and Global Community Monitor (ATA), (received 21 November 2014)

Written comments from the above interested parties are summarized below, followed by the response of Central Valley Water Board staff.

**COLLINS PINE COMPANY (DISCHARGER) COMMENTS
(SUBMITTED BY CHURCHWELL WHITE LLP)**

DISCHARGER COMMENT #1 – Initial Date of Request for a TSO

Collins Pine Company has been actively pursuing a time schedule order from the Regional Board since 24 September 2013, much earlier than the 7 January 2014 date referenced in the TSO.

RESPONSE:

Central Valley Water Board staff agrees that discussions regarding a TSO have been ongoing since 24 September 2013, but the Central Valley Water Board did not receive a written justification for additional time to comply with waste discharge requirements until 7 January 2014, and did not receive complete information until 16 June 2014.

DISCHARGER COMMENT #2 – Retroactive Application of a TSO

Collins Pine Company requests that the Regional Board amend the TSO to establish a shield from all the NOVs (Notices of Violation) and resulting MMPs (mandatory minimum penalties) that were issued after Collins first contacted the Regional Board to

establish a time schedule order on 24 September 2013, in addition to any new NOV that may be issued prior to adoption of the TSO.

RESPONSE:

Central Valley Water Board staff disagrees with amending the tentative TSO to begin on 24 September 2013. Issuance of a time schedule does not apply retroactively to excuse previous violations and provide an enforceable path towards compliance. A TSO is prospective in nature, not retrospective. Pursuant to Water Code section 13300, "Whenever a regional board finds that a discharge of waste is taking place or threatening to take place that violates or will violate requirements prescribed by the regional board, or the state board, or that the waste collection, treatment, or disposal facilities of a discharger are approaching capacity, the board may require the discharger to submit for approval of the board, with such modifications as it may deem necessary, a detailed time schedule of specific actions the discharger shall take in order to correct or prevent a violation of requirements." Having a time schedule operate retroactively defeats the purpose of a time schedule to address specific actions that correct or prevent a violation of requirements. See also Water Code section 13385, subdivision (j)(3), allowing for protection from MMPs for "A violation of an effluent limitation where the waste discharge is in compliance with either a cease and desist order issued pursuant to Section 13301 or a time schedule order issued pursuant to Section 13300 or 13308..."

In short, the purpose of a TSO is not to provide protection from past violations and granting of a TSO to provide protection from mandatory minimum penalties is discretionary.

AQUA TERRA AERIS LAW GROUP (ATA)

BACKGROUND:

On 5 February 2009 the Central Valley Water Board adopted Waste Discharge Requirements (WDR) Order R5-2009-0015 (National Pollutant Discharge Elimination System (NPDES) CA0004391) for Collins Pine Company's Chester Sawmill (Facility). A compliance schedule for maximum daily effluent limits (MDEL) was not specified in WDR Order R5-2009-0015. However, a compliance schedule for average monthly effluent limits (AMELs) was stipulated for copper (total recoverable) and lead (total recoverable) with compliance to be established by 18 May 2010.

The basis for MMP protection for copper and lead MDELs is provided, pursuant to Water Code section 13385, subdivision (j)(3)(C)(ii)(II), because the MDELs became applicable to WDR Order R5-2009-0015 at the time of permit adoption on 5 February 2009 and the initial five-year period expired 5 February 2014. Water Code section 13385, subdivision (j)(3)(C)(ii)(II), states in pertinent part that a time schedule may be extended beyond an initial five-year period if the discharger is in compliance with Water Code section 13385, subdivision (j)(3)(C)(ii)(II). The proposed TSO provides requisite findings to allow for an additional two years to comply with MDELs for copper and lead.

The AMELs for copper and lead became new and effective after issuance of WDR Order R5-2009-0015 and under the terms of the compliance schedule that date was on 18 May 2010. Consequently, the initial five-year period for purposes of MMP protection for AMELs began on 18 May 2010 and expires on 18 May 2015. As a result, MMP protection after issuance of a tentative TSO and until 18 May 2015 may be granted pursuant to Water Code section 13385, subdivision (j)(3)(A) through (D). Compliance beyond 18 May 2015 may be provided in accordance with Water Code section 13385, subdivision (j)(3)(C)(ii)(II). The proposed TSO documents separate and independent grounds for protection from mandatory minimum penalties for copper and lead AMELs, depending on the time period in question.

ATA COMMENT #1 – Requirements for Compliance with Copper and Lead Effluent Limits

This TTSO (tentative time schedule order) is not only untimely, it most importantly contains no requirements that the CPC Facility [Collins Pine Company, Chester Sawmill] ever reach compliance with copper and lead discharges.

RESPONSE:

Central Valley Water Board staff disagrees that there are no requirements for the CPC Facility to meet compliance with copper and lead limits. Based on information provided by the CPC Facility and Central Valley Water Board staff's best professional judgment, the TSO provides for an enforceable schedule that will lead to compliance with the effluent limitations. If the Facility fails to comply with the TSO, then the Facility will be subject to MMPs pursuant to Water Code section 13385.

ATA COMMENT #2 – Time Extension in TTSO

It [The TTSO] contains an impermissible time extension for CPC to attempt to comply, and stops short of demanding compliance with old, existing and industry-wide achievable standards.

RESPONSE:

The Central Valley Water Board does not specify the methods that a discharger use to maintain compliance with WDRs. Central Valley Water Board establishes limits and it is up to a discharger to ensure compliance with such limits. Failure to comply with limits may result in enforcement actions, including issuance of MMPs. The purpose of the TSO is to provide the CPC Facility time to comply with limits established in their NPDES permit and avoid MMPs for violations of copper and lead MDELs or AMELs for so long as the CPC Facility is in compliance with a TSO.

ATA COMMENT #3 – Compliance Schedule in WDR Order R5-2009-0015 for Copper and Lead AMELs

The permit itself included a TSO for average monthly effluent limits for lead and copper through May 17, 2010.

RESPONSE:

Central Valley Water Board staff disagrees that WDR Order R5-2009-0015 already contains a TSO for copper and lead AMELs. WDR Order R5-2009-0015 contains a compliance schedule governed by the State Water Board's NPDES Compliance Schedule Policy. The permit itself did not contain a TSO and the compliance schedule in the permit was not issued pursuant to Water Code section 13300.

ATA COMMENT #4 –

The original TSO expired in 2010 and could only be extended to February 2014--5 years from issuance of the NPDES permit.

RESPONSE:

Central Valley Water Board staff does not agree. There was no TSO issued in WDR Order R5-2009-0015 pursuant to Water Code section 13300. Instead, a compliance schedule was established in WDR Order R5-2009-0015. AMELs for copper and lead became effective upon expiration of the compliance schedule in WDR Order R5-2009-0015 and became a new limit applicable to the permit at that time. The initial five-year period, for purposes of MMP protection, began when the compliance schedule in WDR Order R5-2009-0015 expired on 17 May 2010.

Water Code section 13385, subdivision (j)(3) provides in pertinent part that protection from mandatory minimum penalties may be provided for a period not to exceed five years in length if compliance is established with Water Code section 13385, subdivision (j)(3)(A) through (D). In addition, a time schedule may be extended for another five-year period to provide protection from MMPs assuming compliance with Water Code section 13385, subdivision (j)(3)(C)(ii)(II). The tentative TSO provides protection from MMPs for copper and lead AMELs and MDELs and is premised on the Facility's compliance with the terms and conditions of the tentative TSO. If the CPC Facility is not in compliance with the TSO, then the CPC Facility will be subject MMPs.

ATA COMMENT #5 –

The recently issued Administrative Civil Liability Complaint ("ACL") is limited in scope and remedy.

RESPONSE:

This comment is outside the scope of the Board's consideration of a proposed time schedule order and will not be addressed given a pending enforcement action.

ATA COMMENT #6 –

The TTSO elevates effluent limitations for levels for copper and lead by magnitudes well above those found to be violations of the ACL, thereby allowing the CPC Facility to continue to violate its permit and the fundamental requirements contained in the Sacramento River and San Joaquin River Basin Plan ("Basin Plan").

RESPONSE:

The issuance of a TSO does not excuse compliance with effluent limitations established for lead or copper in CPC's NPDES permit. The proposed time schedule order solely

provides protection from mandatory minimum penalties issued pursuant to Water Code section 13385 assuming that the terms of the TSO are complied with. In pertinent part, Water Code section 13300 states that whenever a regional board finds that a discharge of waste is taking place or threatening to take place that violates or will violate requirements prescribed by the regional board, the board may require the discharger to submit for approval of the board, with such modifications as it may deem necessary, a detailed time schedule of specific actions the discharger shall take in order to correct or prevent a violation of requirements.

In this case, the purpose of the proposed time schedule order issued pursuant to Water Code section 13300 is to provide time for the discharger to comply with MDELs and AMELs for copper and lead and provide protection from mandatory minimum penalties that such funds may otherwise be used for the necessary facility modifications and/or upgrades.

ATA COMMENT #7 –

The TSO doesn't require the Facility to fundamentally change their practices to come into compliance with nationally recognized toxic effluent limitations to meet Water Quality Standards drastically important to California.

RESPONSE:

The TSO requires an enforceable series of steps to ensure the Facility comes into compliance with the lead and copper limits in the Facility's NPDES permit. If the Facility does not maintain compliance with the TSO, then the Board may seek mandatory minimum penalties and/or discretionary liability or other judicial remedies for violations of the NPDES permit.

ATA COMMENT #8 –

The TTSO allows the CPC Facility to further delay implementing the discharge water effluent reduction treatment technology it should have implemented well over five years ago. Because the CPC Facility never fully complied with copper or lead, or numerous other required effluent limits, CPC discharges have created a nuisance and polluted existing and potential drinking water sources with pollutants, including but not limited to, copper, lead, total suspended solids, chemical oxygen demand, turbidity, and pH.

RESPONSE:

The purpose of the TSO is solely to allow for protection from mandatory minimum penalties for MDELs and AMELs for copper and lead that may be issued pursuant to Water Code section 13385. The TSO does not excuse facility performance but includes a schedule by which the Facility must come into compliance with the lead and copper limits in its NPDES permit or face additional mandatory minimum penalties. In addition, protection from mandatory minimum penalties does not preclude other enforcement action, include discretionary civil liability and protection from mandatory minimum penalties for copper and lead is predicated on compliance with the TSO. If the Facility does not comply with the TSO, then the Facility is no longer protected from mandatory minimum penalties.

ATA COMMENT #9 –

The TSO contradicts the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries. Now, the Regional Board seeks to do that which the SIP expressly prohibits, by extending the schedule of compliance with CTR [California Toxics Rule] criteria for copper and lead beyond 10 years after their adoption. The TTSO attempts to (but does not) follow along with the SIP's requirements for crafting compliance schedules, simply ignoring this single provision expressly prohibiting any compliance extension beyond 2010. Neither the SIP nor the State Water Board's Enforcement Policy provide for interim effluent limits of CTR pollutants in this instance. The controlling authority dictates no extension of time for compliance with metals subject to the CTR beyond May 18, 2010, as implicitly authorized in the original TTSO.

RESPONSE:

The comment is misplaced. The copper and lead limits in the 2009 Permit included a compliance schedule in the NPDES permit for compliance by 18 May 2010. Upon expiration of the compliance schedule, the limits became effective as to the Discharger. TSOs are not compliance schedules for purposes of the NPDES regulations or the Compliance Schedule Policy. Thus, even where a discharger has a compliance schedule in an NPDES permit, the discharger can have protection from mandatory minimum penalties pursuant to Water Code section 13385, subdivision (j)(3).

ATA COMMENT #10 –

The 2009 NPDES permit and accompanying original TSO only contained interim limits for monthly averages of copper and lead, not maximum daily limits, which were achievable in 2009.

RESPONSE:

As noted previously, there was no original TSO. There was a compliance schedule in the NPDES Permit for average monthly effluent limits for copper and lead.

ATA COMMENT #11 –

The effluent limits in question are not "new."

RESPONSE:

In the case of the MDELs for copper and lead, the limits are not new for purposes of seeking protection from mandatory minimum penalties pursuant to Water Code section 13385, subdivision (j)(3)(A) through (D) and the time to seek protection from mandatory minimum penalties under this subdivision expired five years from the time that the MDELs became effective on 5 February 2014. However, the Discharger has the ability to seek additional time for protection from mandatory minimum penalties beyond 5 February 2014 pursuant to Water Code section 13385, (j)(3)(C)(ii)(II).

In the case of the AMELs for copper and lead, the Discharger has a portion of the time remaining to seek protection from mandatory minimum penalties pursuant to Water

Code section 13385, subdivision (j)(3)(A) through (D) and additional time pursuant to Water Code section 13385, subdivision (j)(3)(C)(ii)(II). The new average monthly effluent limitations for copper and lead became effective on 18 May 2010. An additional time schedule may be granted until 18 May 2015 pursuant to Water Code section 13385, subdivision (j)(3)(A) through (D) and additional time beyond 18 May 2015 may be granted pursuant to Water Code section 13385, subdivision (j)(3)(C)(ii)(II).

ATA COMMENT #12 –

The TSO fails to include evidence to support its findings or conclusions. The Regional Board provided no evidence concurrently with the public notice of opportunity to comment on the TSO to support the choice of timeframe and no apparent narrative analysis with data to support the tentative TSO. While additional information has been obtained through public records act requests, this has substantially shortened the time available for full public review of the tentative order, and we therefore request additional time be added to the public comment period.

RESPONSE:

The request for additional time will be considered by the Board Chair at the Central Valley Water Board's 5/6 February Board Meeting when this item is considered by the full Board. A 30-day public notice and comment period was previously provided to allow for written comments. Aqua Terra Aeris will be allowed a brief period of time to provide oral comments at the hearing.

ATA COMMENT #13 –

What is apparent is the need for immediate attention to compliance, not the issuance of the TTSO.

RESPONSE:

The TSO provides for "immediate attention to compliance" through the issuance of enforceable milestones in the TSO to ensure compliance with MDELs and AMELs for copper and lead in the Facility's NPDES permit.

ATA COMMENT #14 –

The Regional Board responded with proposed interim increases for copper and lead, with multipliers ranging between 3.2 and 5.5 over the limits imposed by the 2009 NPDES permit. Ordering a two-year time schedule in light of repeated violations over five years, wherein the CPC Facility will come up with a plan to meet copper and lead effluent limits required under both the CTR and the original 2009 NPDES permit is inappropriate, not justified legally nor based on substantial evidence.

RESPONSE:

The interim limits established in the tentative TSO are based on the Facility performance and are set as enforceable ceilings for the duration of the TSO until the Facility can come into full compliance with the effluent limits contained in the NPDES permit. After considering ATA's comment, staff has revised the tentative TSO to tighten the interim MDEL for copper and lead. Effluent water quality data for past performance

indicates that with only one anomalous exception the Facility should be able to comply with the revised interim MDELs in the proposed time schedule order. The interim MDEL for copper was reduced from 49.1 ug/L to 26.0 ug/L, and the interim MDEL for lead was reduced from 32.8 ug/L to 12.8 ug/L. Staff recommends that the interim AMELs are appropriate and they have not been adjusted.

ATA COMMENT #15 –

There are no evidentiary bases for these new interim limits. And with limits this high, there are no incentives for the CPC Facility to try to adjust any current practices until the year 2015, and more likely late-2016.

RESPONSE:

The evidentiary bases for these new interim limits come in part from the discharger in their submittals of 7 January 2014, 3 March 2014, and 16 June 2014 and the Board's professional judgment in evaluating what limits the Facility could comply with while working expeditiously in the next two years to ensure compliance with the MDELs and AMELs for lead and copper in the Facility's 2009 NPDES Permit. As discussed above, after considering ATA's comments, staff revised the tentative TSO to tighten (reduce) the interim MDELs.

ATA COMMENT #16 –

The TTSO violates the state's antidegradation policy.

RESPONSE:

The antidegradation policy provides that where a regional board is permitting an activity that may produce waste that will discharge into existing high quality waters, it may permit such activity if it makes certain findings. The requisite findings were made when the Facility's NPDES permit was adopted in 2009.

ATA COMMENT #17 –

Nothing in Section 13300 authorizes the Regional Board to approve a time schedule in order for a discharger to be relieved of mandatory minimum penalties. This is especially true where, as here, the discharger was already provided a five year compliance schedule to achieve the copper and lead limits in its 2009 NPDES permit.

RESPONSE:

Central Valley Water Board staff disagrees. As noted previously, Water Code section 13300 authorizes the Regional Board to approve a time schedule whenever a regional board finds that a discharge of waste is taking place or threatening to take place that violates or will violate requirements prescribed by the regional board. In this case, there are violations or threatened violations of the MDELs and AMELs for copper and lead.

ATA COMMENT #18 –

The Regional Board does not have sufficient evidence to find that the proposed lead and copper schedule achieves compliance as soon as possible. It should not take the CPC Facility two additional years (on top of the five years that have frittered away) to

install a necessary treatment system, or replace infrastructure and start anew for limits established in 2000.

RESPONSE:

Limits were not established in 2000 but in 2009 for MDELs for copper and lead and 2010 for AMELs for copper lead when the limits became applicable to the discharger. Allowing for two additional years is permissible under Water Code section 13385, subdivision (j)(3). As justified in the tentative TSO, the Discharger has made diligent efforts to achieve compliance including improvements to wastewater treatment processes at the Facility, but requires additional time to achieve full compliance.