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Pamela Creedon, Executive Officer
California Regional Water Quality Control Board
Central Valley Region (CVRWQCB)
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

pcreedon@waterboards.ca.gov

Zach Chandler, George Day
Stacy Gotham
CVRWQCB
415 Knollcrest Drive
Redding, CA 96002

stacy.gotham@waterboards.ca.gov
George.Day@waterboards.ca.gov
zach.chandler@waterboards.ca.gov

Via email
Anthony M. Barnes
amb@atalawgroup.com

Dear Pamela, George, Stacy, and Zach:

Please accept these comments on behalf of Community Health Watch ("CHW") and Global Community Monitor ("GCM") regarding the tentative time schedule order ("TTSO") allowing Collins Pine Company, Chester Sawmill Facility ("CPC" or "CPC Facility") two additional years until 2017 to achieve compliance with effluent limitations for copper and lead set in the Facility's 2009 NPDES permit. CHW and GCM's members live in and around the Sawmill in Chester California, and have been and will be affected by pollution discharges from the CPC Facility. Below we evaluate the rationales provided by the CPC Facility and, thus far, accepted by Central Valley Regional Water Quality Control Board ("Regional Board" or "RWQCB") staff, for the proposed TTSO.

I. Introduction

The TTSO is unnecessary, according to the CPC executive in charge of environmental compliance.

> *"Our process wastewater treatment system is capable of achieving compliance, and we believe the process changes we are making to allow more for treatment chemical contact time in our clarifiers and the improvements we are making to our ash settling basins will allow us maintain and achieve consistent compliance." – Jess Brown, Environmental Manager, Collins Companies, in an email to RWQCB, 4/18/2014*

This TTSO is not only untimely, it most importantly contains no requirements that the CPC Facility ever reach compliance with copper and lead discharges. It 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. Given the sophisticated, institutional expertise CPC has, any delay in compliance can only be said to be grounded in a profit-motive (framed as "shielding" them from penalties) and not one aimed at timely compliance, let alone protecting the environment or public health.

NPDES permit R5-2009-0015 was issued in February 2009. The permit itself included a TSO for average monthly effluent limits for lead and copper through May 17, 2010. During the NPDES issuance process and formulation of the original TSO, and thereafter, CPC represented it could achieve those limits. But through its own failings, and no fault of the Regional Board, CPC failed to effectively pursue and implement the changes required to comply. Even then, CPC did not raise the need for a TSO until late-2013 and early-2014, approximately 4 years after the original TSO was granted. The original TSO expired in 2010 and could only be extended to February 2014 – 5 years from issuance of the NPDES. Therefore, CHW and GCM respectfully request the Regional Board reject the staff's recommendation and reserve the Regional Board's authority to fully enforce, through appropriate compliance orders, the 2009 NPDES permit's effluent limitations.

The recently issued Administrative Civil Liability Complaint ("ACL") is limited in scope and remedy. It does not cover all violations. It fails to require any actual improvements. And yet 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"). The Basin Plan requires that toxics must not be discharged in harmful concentrations. Basin Plan at III-8.01 states: "All waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life." Lead is and has been a carcinogen known to the state of California since October 1992. (See Proposition 65 Chemical List.) Further, there are in excess of a dozen other Proposition 65 listed chemicals in the May 2014 of the CPC Facility's discharges, at levels which are either not allowed under the NPDES or industrial storm water permits and Basin Plan. Discharges of these other carcinogens and pollutants are simply not allowed in such significant amounts. The availability of a TSO to meet allowable limits for those components, does not exist. And the Basin Plan's general prohibitions certainly do not allow for TSO's to meet Effluent Discharge limits particularly when half of the original 2009 NPDES Permit effluent limitations subject to this TTSO were thought achievable in February 2009. And neither the TSO nor the ACL 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.

Rather, 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. And throughout this period, the CPC Facility has done nothing to effectively reduce effluent discharges, while advocacy submitted by CPC attorneys fervently argue that the Regional Board should use its authorities to "shield" CPC from compliance with state environmental and public health requirements. Meanwhile, facilities operating under the same SIC codes as CPC all throughout the state have come into compliance with CTR standards, and nothing about the CPC facility itself warrants the special treatment it argues it deserves.

II. Standard of Review

Analysis of administrative agency decisions starts with Code of Civil Procedure section 1094.5. This administrative mandamus provision describes judicial review procedures, and notes that the reviewing court must determine: 1) whether substantial evidence supports the administrative agency's findings; 2) and whether the findings support the agency's decision. Once a petition for writ of mandamus is filed, subdivision (b) dictates that the court's inquiry should extend, to whether "there was any prejudicial abuse of discretion." It then defines "abuse of discretion" to include instances in which the administrative order or decision "is not supported by the findings, or the findings are not supported by the evidence," or if the respondent agency "has not proceeded in a manner required by law."

Not surprisingly, proceeding pursuant to an invalid regulation [or an expired/sunsetted regulatory provision as in this case] is not proceeding in the manner required by law. (*See, Woods v. Superior Court* (1981) 28 Cal. 3d 668, 170 Cal. Rptr. 484, 620 P.2d 1032, 1981.) In California the remedy by mandamus has been extended so as to authorize the review of acts and decisions of administrative agencies in violation of law where no other adequate remedy is provided, and is available to an aggrieved party upon a showing that a regional water quality control board has refused to comply with their obligations under a basin plan and under the law. (*See, Bodinson Mfg. Co. v. California Employment Com.* (1941) 17 Cal. 2d 321; *See also, California Assn. of Sanitation Agencies v. State Water Resources Control Bd.* (2012, 1st Dist) 208 Cal. App. 4th 1438.)

Section 1094.5 (c) declares that "in all ... cases" other than those in which the reviewing court is authorized by law to judge the evidence independently, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." This section implicitly requires that the agency which renders the challenged decision set forth findings which reveal the analysis used to decipher the raw evidence to render the decision or order. (*See, Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 514, 515; *See also Zakessian v. City of Sausalito* (1972) 28 Cal. App.3d 794, 798.)

These standards ensure that an agency does not abuse its discretion, proceed in manners not proscribed by law, and provide only cursory analysis of the evidence to jump to unsupported conclusions, thereby clouding potential review by the petitioned court by making it all the more difficult to discern the path of analysis by the administrative agency and whether those decisions followed applicable law. We factually address the failure to proceed in a manner required by law in sections III and IV below; the agency's abuse of discretion in relation to evidence used to support findings is detailed in section V.

III. The TSO contradicts the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries.

The California State Water Resources Control Board ("SWRCB") enacted the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries ("State Implementation Plan" or "SIP") to implement the water quality standards in the California Toxics Rule, including policies related to compliance schedules. See, SWRCB Resolutions 2000-0015, 2000-0030, 2005-0019. The SIP states that:

The schedule of compliance for point source dischargers in an NPDES permit shall be as short as practicable but in no case exceed the following: . . . In no case (unless an exception has been granted in accordance with section 5.3) shall a compliance schedule for these dischargers exceed, from the effective date of this Policy: (a) 10 years to establish and comply with CTR criterion-based effluent limitations.

(SIP at 21.) The California Code of Regulations, summarizing the SIP, similarly states that the SIP "[a]uthorizes the RWQCBs to grant compliance schedules up to five years from permit issuance, reissuance, or modification to comply with water quality-based effluent limitations for CTR priority pollutants, . . . ; [but] requires compliance with CTR criterion-based effluent limitation within 10 years from the effective date of the Policy." (Cal. Code Regs., tit. 23, § 2914, subd. (b)(1).)

The SIP became "effective on May 18, 2000 with respect to the priority pollutant criteria promulgated by the U.S. EPA through the California Toxics Rule." (SWRCB Resolution 2005-0019.) Not coincidentally, the interim effluent limits for copper and lead provided for in R5-2009-0015-2 terminated on May 17, 2010. ***Now, the Regional Board seeks to do that which the SIP expressly prohibits, by extending the schedule of compliance with CTR criteria for copper and lead beyond 10 years after their adoption.***

Remarkably, the TTSO attempts to (but does not) follow along the SIP's requirements for crafting compliance schedules, simply ignoring this single provision expressly prohibiting any compliance extension beyond 2010. While the California Water Code section 13385 may permit holding mandatory minimum penalties in abeyance during such time as an interim effluent limit is appropriately put in place, 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.

The TTSO offers interim effluent limits and a compliance schedule for copper and lead. The TTSO states that "[e]fluent limitations specified in Order R5-2009-0015 for copper and lead were new limits based on implementation of the California Toxics Rule . . . ." But as further explained below in section IV, 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. And yet five years on, now both limits can't be met despite purported CPC Facility infrastructure upgrades, repairs, flow changes, chemical additions and more. And the Regional Board's response is to provide public documentation now suggesting these maximum daily limits are novel and subject to further leeway without mandatory minimum penalties while the CPC Facility tries anew to meet standards that are no longer flexible.

The EPA enacted special water quality standards for California for certain toxic pollutants in May 2000 due to California's failure to come under compliance with previous standards. (California Toxics Rule, 40 C.F.R. § 131.38 (2002); 65 Fed.Reg. 31682, 31711 et seq. (May 18, 2000); see 33 U.S.C. § 1313(c)(4).) The CTR provides for schedules of compliance where prompt compliance with a new or more restrictive effluent limitation is infeasible. (40 C.F.R. § 131.38(e)(3), (4).) The State Board enacted a comprehensive policy to implement these standards established under the CTR, water quality control plans, and other authority. (Cal.Code Regs., tit. 23, § 2914, summarizing the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California.) The implementation policy provides for schedules of compliance for toxic pollutants listed in the CTR or National Toxics Rule (40 C.F.R. § 131.36(d)(10) (2002)). (See Cal.Code Regs., tit. 23, § 2914, subd. (b)(1), (2).) Water

Boards acknowledge that the CTR and State Board's implementing policy authorize schedules of compliance and interim effluent limitations for covered pollutants, so provided a permit is new, it can include schedules of compliance for those pollutants. (*See, City of Burbank v. State Bd*., 4 Cal. Rptr. 3d 27.)

IV. The effluent limits in question are not "new"

A time schedule order may be entered when the Regional Board finds that a discharger will violate discharge requirements. The Regional Board can then require a detailed schedule of actions the discharger will take to correct or prevent a WDR violation. (California Water Code section 13300.) However, California Water Code 13385(j)(3)(B)(i) requires that for issuance of a TSO, "The effluent limitation is a new, more stringent, or modified regulatory requirement that has become applicable to the waste discharge after the effective date of the waste discharge requirements and after July 1, 2000, new or modified control measures are necessary in order to comply with the effluent limitation, and the new or modified control measures cannot be designed, installed, and put into operation within 30 calendar days."

Here, the TTSO assumes that the original 5 year TSO can be extended in non-consecutive years over a period of time greater than 5 years. The record lacks legal or factual justification for this rationale. Also, since there was no TSO originally granted for daily effluent limits, the TTSO cannot bootstrap the prior TSO to include new interim effluent limits that were deemed achievable in 2009, and not raised until months before the expiration of the current NPDES permit. The extension granted in TTSO is under the authority of the first 5 year TSO period, which is erroneous and misplaced since the TTSO will extend until 2017 – 7 year after the NPDES permit was issued. Thus, the record lacks substantial evidence and legal justification for the TTSO, as proposed.

Furthermore, the "new" permit was issued in 2009, with TSO allowance for interim standards for copper and lead for average monthly calculations until the final deadline date for compliance with CTR, May 18, 2010. The timeline for that TSO extension for monthly averages of copper and lead has expired. And new permits, or the stand-alone TSO, cannot include schedules of compliance that allow delayed compliance with effluent limitations that are necessary to achieve water quality standards in California. (*See*, *City of Burbank v. State Bd*., *supra,* at p. 27.)

The effluent limits applicable to copper and lead were adopted in 2009 for both Maximum Daily Effluent Limitations ("MDEL") and Average Monthly Limitations ("AMEL"). Here, the 2009 permit did not contain an interim MDEL for copper and lead, only an interim AMEL. Therefore, even accepting that, following the expiration of the interim limits, the copper and lead limits are new, this is only true for the AMELs; the MDELs are not new. The 2009 permit states that "The Discharger can currently meet the final MDEL for copper and lead but is unable to meet the final AMEL for copper and lead. Therefore, only an interim limitation for the AMEL has been calculated." *See*, 2009 NDPES Permit.

Even where interim limits were in place, for AMELs, the final limits had been adopted, and were known to the permittee, since at least February 2009. Thus, the CPC Facility has had since early 2009 to come into compliance with these limits – five years to alter practices, upgrade facilities, and employ other means to meet the state's water quality objectives, and cease the illegal discharges of effluents, including, but certainly not limited to, copper and lead, the effluents subject to these erroneous extensions tentatively issued by the Regional Board.

V. The TSO fails to include evidence to support its findings or conclusions.

A full analysis of evidence used to support findings which lead to the ultimate decision is required for Administrative Agency decisions. 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. Based on review of information available thus far, none appears to support the conclusions of the TSO.

For example, the CPC Facility's submissions to the Regional Board, dated December 23, 2013 and February 28, 2014, contradict the conclusions reached by the Regional Board. The first submission, prepared by Kennedy/Jenks Consultants, propose achievable lead and copper interim effluent limitations well below those published by the Regional Board in the TSO (see chart directly below). Two months later Kennedy/Jenks raises the proposed interim limitations for copper, but significantly reduces them for lead (see chart). The TTSO allows limits far higher for both copper and lead, albeit for a shorter overall time period. Each set of these standards represent substantial increases over the 2009 NPDES permit (see chart), in violation of the California Toxics Rule. CHW and GCM expected narrative evidence providing justification for these increases above what the CPC Facility, through Kennedy/Jenks, stated they could meet at the end of 2013. Evidence of on-site activity at the CPC Facility and evidence presented in meetings between the CPC Facility and the Regional Board that led to the decision to significantly increase copper and lead effluent limitations over a shorter period of time, rather than decrease them from the Kennedy/Jenks-suggested and CPC Facility-requested limits over a shorter period of time, runs contrary to the evidence, backslides from the NPDES permit standards by making the TTSO limits de facto NPDES limits, and ultimately harms the environment and people.

Effluent Limitations[1]	*Copper ug/l*		*Lead ug/l*	
NPDES	7.44 AMEL	14.92 MDEL	2.95 AMEL	5.92 MDEL
Kennedy/Jenks (12/23/14)	19.2 AMEL	25.8 MDEL	11.4 AMEL	15.7 MDEL
Kennedy/Jenks (2/28/14)	20 AMEL	26 MDEL	7.2 AMEL	9.7 MDEL
TTSO	**26 AMEL**	**49.1 MDEL**	**12.8 AMEL**	**32.8 MDEL**

The mere fact that this permittee has repeatedly violated its permit does not automatically mean compliance is impossible. The capital investments made by the CPC Facility have simply not been sufficient or effective, and not for lack of notice, time, sophistication, financial ability or opportunity on CPC's behalf.

[1] GCM and CHW want to be clear that this comment is not aimed at lowering the TTSO limits. Rather, the comments are intended to alert the Regional Board to legal concerns related to the conflict with the CTR and failure to satisfy the elements otherwise capable of justifying the issuance of a TSO. Additionally, GCM and CHW believe the factual record, when reviewed together with CPC's own admissions and those of its consultant, does not justify with substantial factual evidence the bases to issue the TTSO.

For example, in correspondence with the Regional Board, CPC's Environmental Manager reminded Regional Board staff that:

> I do want to mention one thing to you so you can avoid making mistakes like you did yesterday during our call. . . . Operators like Jeff [Miller] who bring more than 30 years of boiler and associated pollution control device operating experience probably know more than the majority of the wet[-]behind[-]the[-]ears, lower charge-out-rate consulting engineers who are tasked with being sent to the field to gather information. I can say that since I possess nearly 30 years of consulting experience and expertise, and I know the skill sets and levels of experience of most field engineers I have managed on my own projects completed over the years. Most wet[-]behind[-]the[-]ears engineers may know theory and physics but cannot discern beans from buckshot when actually in the field and having to comprehend how systems and equipment operate. They rely heavily on the knowledge, experience and expertise of field operators. Subsequently (*sic*), please take this into consideration the next time any of our facility operators are participating in conference calls and/or meetings. – *Jess Brown, Environmental Manager, Collins Companies, in an email to RWQCB, 4/18/2014*

Although it would seem that with over 60+ years of "boiler and associated pollution control device operating experience" and "consulting experience and expertise" CPC should not be having any problems complying with effluent discharge limitations, the problems persist. Granting the TTSO would simply allow for continued, excessive and unnecessary water pollution, where CPC's "experience and expertise" should have it under control by now. Lack of compliance at this point, despite the self-proclaimed expertise, can only be the result of conscious, deliberate and intentional decisions aimed at financial gain, not environmental compliance.

And this infectiveness bleeds beyond the metals discussed herein. While many facts, or a lack of facts, are obfuscated within the record reviewed by CHW and GCM thus far (on limited time and only by virtue of a public records act request), what is apparent is the need for immediate attention to compliance, not the issuance of the TTSO. Otherwise, the surface waters, groundwater, local residents, and affected animal and aquatic life will be subject to further illegal and unwarranted pollution from the CPC Facility. CPC has been in the sawmill and biomass conversion business for decades, and under a NPDES permit since 2014. Surely, its "expertise" and resources are sufficient to timely comply with known well-established water quality standards.

Under California Water Code section 13300, a regional board finding that a discharge of waste violating or threatening to violate effluent limit requirements, may require the discharger to submit a detailed time schedule of specific actions the discharger shall take in order to correct or prevent a violation of requirements. Here, presented with more ineffective half-remedies, 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.

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. These limits will be difficult or impossible for CPC Facility to violate. Is that the intent? This facility has backslid from limits thought by all involved to be achievable in 2009, and has done so with the Regional Board's tacit approval, interspersed with mandatory minimum fines and penalties. Has the Facility technology become worse, more outdated? Have woody biomass fuels used to produce electricity become more toxic? From the record CHW and GCM have reviewed thus far, the answer is "no" to such questions.

VI. The TSO violates California's Antidegradation.

The TTSO violates the state's antidegradation policy because the Regional Board's mechanism for ensuring that surface water is not degraded is insufficient in light of these new interim limits. Moreover, the TTSO fails to include any of the required analysis pursuant to the State Water Board's antidegredation policy.

VII. Conclusion

The key motivator behind the CPC's repeated requests for issuance of a TSO is to avoid mandatory minimum penalties and maximize profit. 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.

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.

For each of the reasons detailed above, CHW and GCM request that the Regional Board reject the staff's recommendation to protect the CPC Facility from administrative civil penalties or other enforcement for their impending copper and lead discharges, and not issue a TSO. If you have any questions regarding the above comments, please do not hesitate to call on ATA Law Group.

Sincerely,

Anthony M. Barnes, Partner
Aqua Terra Aeris Law Group