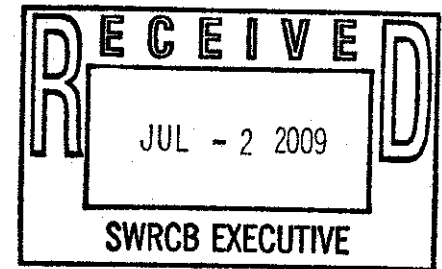


  
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July 2, 2009



Via Electronic and U.S. Mail

Charles Hoppin, Chair, and Members  
State Water Resources Control Board  
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Via email to: Ms. Jeanine Townsend, Clerk to the Board  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**SUBJECT: CITY OF LODI RESPONSE TO REVISED DRAFT STATE WATER BOARD ORDER (SWRCB OCC FILE NO. A-1886)—JULY 7, 2009 BOARD MEETING**

Dear Chair Hoppin and Members of the Board:

On behalf of the City of Lodi (City), this letter provides comments on the revised Draft Order, dated June 19, 2009, regarding the waste discharge requirements (WDRs) issued for the City's Water Pollution Control Facility (WPCF) by the Central Valley Regional Water Quality Control Board (Regional Water Board). (SWRCB OCC File NO. A-1886.) The City is disappointed that while the revised Draft Order reflects significant revisions to the discussion and rationale for the proposed Order, the conclusions are unchanged from the prior draft. We again urge the State Water Resources Control Board (State Water Board) to reject the Draft Order and allow the permit to stand, for the reasons articulated in the comments previously submitted by the City and the Regional Water Board. This letter focuses on two key issues raised by the most recent revisions.

**A. The Reclamation Exemption is Applicable to the City's Activities.**

The discussion in the Draft Order regarding the City's recycling activities is improved. The Draft Order now recognizes that the City's land application to agricultural fields is reuse rather than disposal. (Draft Order at p. 10.) However, the Draft Order concludes that the reclamation exemption does not apply to the City's activities because the City's application to land includes "wastes that are neither treated nor salvaged from waste." (*Ibid.*) This conclusion presumes that the only treatment of wastes that qualifies for the reuse exemption is treatment by a publicly owned treatment works. Yet the cannery wastes and other industrial source waters the

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Draft Order characterizes as "untreated" are subject to the City's approved Pretreatment Program, regulated by Clean Water Act Section 307(b), (c) or (d) or 40 CFR 403.3(i), in accordance with Lodi Municipal Code Section 13.12. City of Lodi waste discharge permits are issued to all dischargers that are subject to the pretreatment regulations. Moreover, the Draft Order takes an unnecessarily narrow view of what "salvaged" from waste means. Webster's New World Dictionary defines salvage as something "extracted (as from rubbish) as valuable or useful." The definition does not speak to treatment being required. As articulated more fully in the Regional Water Board comments, diversion of industrial and cannery waters for a beneficial use that would otherwise have to be discharged or disposed of comes within the scope of the reclamation exemption.<sup>1</sup>

**B. The Proposed Order Fails to Consider Relevant Evidence That Directly Rebutts the Conclusion that the City's Wastewater Facility has Caused Groundwater to Exceed Basin Plan Objectives.**

On April 1, 2009, the City submitted a written request for reconsideration of its motion to present additional evidence regarding more recent groundwater quality data. (Letter from Roberta L. Larson to Charles Hoppin, April 1, 2009.) The City's request to admit the evidence, which had been timely submitted with our January 23, 2009 comments, was denied by the Board Chair during the March 17, 2009 hearing. To date, the City has not received a response regarding the request for reconsideration. However, it is clear that the State Water Board has not considered the additional evidence in reaching its conclusions, as the evidence demonstrates that one of the conclusions of the Order is incorrect: The releases of wastewater from the City's storage ponds have "caused the underlying groundwater to contain nitrate and EC levels that exceed Basin Plan objectives." (Draft Order, Conclusion 4.)

Groundwater level data clearly demonstrate that the mounding observed near the water pollution control plant originates from a source located to the northwest, and *upgradient of*, the facility and its unlined storage ponds. (Memorandum from Kenneth Loy to Charles Swimley, January 21, 2009, Attachment A to City of Lodi Comments.)<sup>2</sup> The Draft Order states: "...it is *clear* that the EC concentrations currently existing with the downward and outward flowing groundwater mound *could only have been caused* by the ongoing downward percolation of wastewater discharged *within* the Facility." (Draft Order at p. 18 (emphasis added).) Yet, the recently collected data demonstrates that the mounding is not associated with the Facility. The City agrees that some of the past activities may have *contributed* to observed groundwater degradation; however, to state that the City's practices have *caused* this degradation (suggesting

<sup>1</sup> The City contends the wastewater or sewage exemptions are also applicable, as described in previous comments. In addition, we concur with the Regional Water Board's interpretation, as set forth in its previous comments on the Draft Order, that the City's activities are exempt from Title 27 by virtue of the facility's status as a municipal wastewater treatment plant. (Letter from Pamela C. Creedon to Jeanine Townsend, January 23, 2009 at pp. 5-6.)

<sup>2</sup> This memorandum is included in the evidence that is the subject of the City's April 1, 2009 Request for Reconsideration.

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the elevated levels would not exist but for the City's Facility) is not accurate nor does it reflect the best evidence available.

During the March 17, 2009 hearing, the State Water Board staff indicated that the additional monitoring information should not be admitted because it was not before the Regional Water Board at the time the permit was adopted, and that the new information can be considered by the Regional Water Board on remand. While we appreciate the constraints of "on the record" review, we emphasize that the rules governing administrative decisions expressly contemplate circumstances in which additional evidence is proper. (23 Cal. Code Regs. section 2050.6(a)(2).) As noted in our April 1, 2009 request for reconsideration, a party may submit to a court exercising independent judgment additional evidence or information that transpired after the administrative agency's decision so as to supplement the evidence previously submitted to that agency. (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 356; *Windigo Mills v. Unemployment Insurance Appeals Bd.* (1979) 92 Cal.App.3d 586, 596-597.) That is, the party may present "new evidence" to the court that was previously unavailable for the party to provide to the agency. (*Ibid.*)

The additional groundwater data was not only unavailable at the time of the permit adoption, but the installation of the additional upgradient well was a requirement of the permit now proposed to be overturned. The Regional Water Board recognized the need for this data in order to make *the very determination regarding the causes of the elevated nitrate and EC levels in groundwater that the State Water Board now proposes to make without this key information.* The State Water Board does not function as a strictly appellate body. Whereas a court has authority only to accept or reject and remand the decision of a lower tribunal, the State Water Board has the power to modify the Regional Water Board's actions or issue its own orders as if it were a Regional Water Board. (Indeed, in this case, review of the City's permit is pursuant to the Board's "own motion.") Thus, the State Water Board's duty is to issue a correct decision based on *all the relevant facts*, and to "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515-16.)

While the City continues to believe the permit as adopted is lawful, the City is also confident that consideration of the excluded evidence by the Regional Water Board on remand will lead to a different finding than that proposed in Conclusion 4 of the Draft Order. However, we are very concerned that others will attempt to use the conclusion regarding the cause of groundwater exceedances to assert that the City has full responsibility or liability for conditions that are in fact the result of multiple activities and actions in a complex and not well-characterized basin. It is at least arguable that a State Water Board Order may be given preclusive effect in a separate unrelated court proceeding. (See, e.g., *Miller v. City of Santa Cruz* (1994) 39 F.3d 1030 (an unreviewed administrative agency action may be entitled to collateral estoppel effect).) For this reason, the City will be compelled to file a judicial challenge to the final order to preserve its rights in other forums.

Charles Hoppin, Chair, and Members, SWRCB

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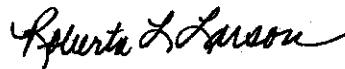
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We offer two ways of addressing this concern. The first is to admit the additional evidence submitted by the City pursuant to our April 1, 2009 request for reconsideration, and direct State Water Board staff to revise the order in light of the new information. A second option would be to revise the problematic conclusion and discussion so as not to foreclose the City's ability to demonstrate, both to the Regional Water Board and any other tribunal, that the City has not caused the groundwater to exceed Basin Plan objectives. Conclusion 4 is not critical to the State Water Board's proposed resolution of this matter through remand to the Regional Water Board for appropriate determinations and findings regarding Title 27 exemptions/compliance. We strongly urge the State Water Board to:

1. Delete in its entirety the first full paragraph on page 18 of the Draft Order.
2. Delete Conclusion 4 on page 24 of the Draft Order.

In conclusion, the City renews its request that the revised Draft Order be rejected. At a minimum, however, in the event of a remand, deletion or revision of Conclusion 4 as requested above is necessary for the accuracy of a final Order.

Sincerely,



Roberta L. Larson

cc: See next page

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