



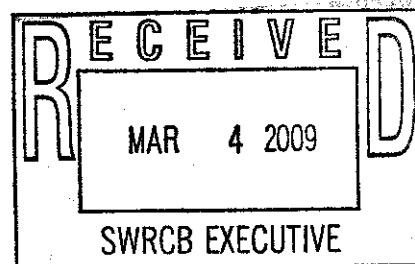
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March 4, 2009

VIA E-MAIL

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RE: A-1846(a) and A-1846(b)--March 17, 2009 Board Meeting

Dear Ms. Townsend,

Thank you for the opportunity to comment on the State Water Resources Control Board's ("State Board") Draft Order SWRCB/OCC File No. A-1846 (a) and (b) ("Draft Order"), regarding our petition of the Waste Discharge Requirements Order No. R5-2007-0036 and NPDES Permit No. CA0079154 for the City of Tracy Wastewater Treatment Plant ("Tracy Permit"). As a preliminary matter, we concur with, and incorporate herein by reference, the March 3, 2009 comments of California Sportfishing Protection Alliance (CSPA) regarding the above-captioned matter. We also concur with the findings and requirements of the Draft Order with respect to CSPA's petition, with the exceptions outlined in CSPA's comment letter.

However, the State Board seems to base its dismissal of Environmental Law Foundation's ("ELF") Petition for Review ("Petition") on the fact that the State Board has initiated a review of the application of State Water Board Resolution 68-16, the Statement of Policy for Maintaining High Quality of Waters in the State of California ("anti-degradation policy").¹ It is untenable to argue that the Central Valley Water Board ("Regional Board") is excused from performing its legal duties under the anti-degradation policy simply because the State Board, in an unrelated matter, is currently reviewing the application of that policy.

¹ ELF presumes that the State Board dismissed ELF's Petition based on its belief that its review of the anti-degradation policy justifies the dismissal. However, the dismissal of ELF's petition is not based on any factual or legal analysis, and the State Board's justification for doing so is not clear based on the Draft Order.

The Regional Board still has a duty to perform an anti-degradation analysis and ensure that the Tracy Permit does not violate the anti-degradation policy.

For purposes of the State Board's convenience, we present a summary of the anti-degradation policy as it applies to the Tracy Permit. The State Water Resources Control Board first announced the anti-degradation policy 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.*)

Since then, the State Board has interpreted Resolution 68-16 to also incorporate the federal anti-degradation policy set out at 40 C.F.R. § 131.12 wherever that policy applies.² 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.³ (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

² 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.”).

³ The beneficial uses of the receiving waters, the Old River, downstream of the discharge, are municipal and domestic supply, agricultural supply, agricultural stock watering, industrial process water supply, industrial service supply, water contact recreation, other non-contact water recreation, warm freshwater aquatic habitat, cold freshwater aquatic habitat, warm fish migration habitat, cold fish migration habitat, warm spawning habitat, wildlife habitat, and navigation. (Tracy Permit, p. F-14.)

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).)

The Tracy Permit authorizes discharges that the Fact Sheet recognizes may degrade the Old River. (Fact Sheet, p. F-8 ("this Order may allow some degradation of the quality of waters of the state").) Table F-1 catalogues the increased mass loading of a number of pollutants under the Tracy Permit, including nitrate - a substantial contributor to low dissolved oxygen problems that plague the Old River. The Fact Sheet justifies the degradation by concluding that the Tracy Permit is consistent with Resolution 68-16 because (1) such degradation is consistent with the maximum benefit to the people of the state, (2) the discharge is the result of wastewater utility service that is necessary to accommodate housing and economic expansion, and (3) it results in a high level of treatment of sewage waste. (Tracy Permit, p. F-8.)

These anti-degradation findings, however, are inadequate for a variety of reasons. First, they are conclusory, simply stating that the anti-degradation policy has been complied with, without performing the analysis required to make it so, and without basis in the record.

Second, the limited analysis that *is* available to support the anti-degradation findings is flawed and based on improper assumptions. For example, as explained in ELF's Petition, the Regional Board erred by utilizing an improper baseline for water quality analysis. The Regional Board used present water quality as the baseline against which they evaluated potential degradation in the Old River. However, baseline should be measured as the best water quality since 1968, unless subsequent lowering was due to regulatory action consistent with the anti-degradation policy. EPA Guidance requires that the baseline "remain fixed until some action improves water quality." (Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 (June 3, 1987) ("EPA Guidance"), p. 6.) Using current water quality as the baseline, in conflict with the state policy and federal guidance, results in a skewed anti-degradation analysis that underestimates and misrepresents the extent of the degradation that will occur.

In addition, as discussed in ELF's Petition, the findings are flawed because the Regional Board failed to conduct the appropriate socioeconomic and alternatives analyses. Where, as here, any increase in pollutant loading will occur, it must be determined that the degradation is necessary for and consistent with the maximum benefit to the people of the State. Thus, a "State must find that any action which would lower water quality is *necessary* to accommodate important economic and social development" and that the development "requires the lowering of water quality which cannot be mitigated through reasonable means." (EPA Guidance, p. 7, emphasis added.) In other words, the Regional Board must analyze the socio-economic costs and benefits of - and the potential alternatives to - the proposed discharge on order to determine that the degradation is "necessary". To state that an action is necessary for social and economic development, without examining alternatives to the action which might achieve the same purpose with less or no degradation, and without providing a more than cursory analysis of the costs and benefits, is insupportable. The Regional Board failed to provide a thorough socio-economic analysis, and alternatives analysis, for the proposed discharge. Therefore, the required finding that the action is

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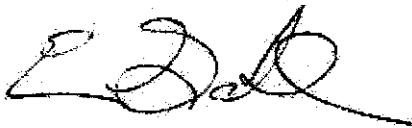
necessary to accommodate important social and economic development is not supported by the record.

Third, absent from the discussion are the findings required under 40 C.F.R. § 131.12, which are required "whether or not water quality is significantly lowered." (EPA Guidance, p.7; *see* April 6, 2007 ELF letter regarding Tentative Order R2-2007-____, NPDES Permit No. CA0079154.) This includes, for example, 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. (40 C.F.R. § 131.12(a)(2).) This finding is necessary given that federal policy applies to the Old River. Moreover, the anti-degradation policy requires that any activity which may increase the volume or concentration of waste must meet requirements which result in the best practicable treatment or control ("BPTC") of the discharge. However, as detailed in CSPA's March 3, 2009 comment letter, the Tracy Permit fails to require BPTC in several respects.

Thus, the Tracy Permit fails to demonstrate proper compliance with the anti-degradation policy. This failure is not excused by the mere fact that the State Board is *considering* revision of the application of the policy. The fact that the application of a policy may (or may not), at some point in the future, be revised by the State Board in no way excuses the regional boards from performing their legal duties under the policy as it currently stands. Even if the State Board's reference to its review of the application of the anti-degradation policy in the Draft Order expresses an implied promise that, at some later date, the Regional Board will be required to conform the Tracy Permit to whatever new requirement for anti-degradation analysis arises out of the review, this would still be unacceptable. Deferring required analysis of environmental impacts until some later date is inappropriate; deferring analysis based on the occurrence of an event which will likely take place after the Tracy Permit is already in place, and which may never occur at all, is unacceptable.

ELF therefore respectfully requests that the State Board amend its Draft Order remanding the Tracy Permit to require the Regional Board to comply with the anti-degradation policy, as described in ELF's Petition.

Best regards,



Erin Ganahl

Environmental Law Foundation