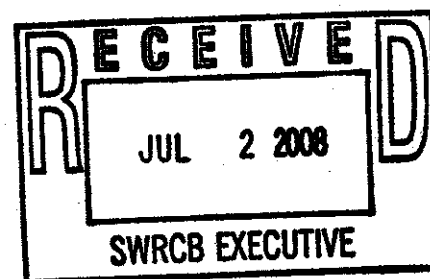


alazar@envirolaw.org
(510) 208-4555

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Submitted by electronic mail

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95812



SWRCB/OCC File A-1871

Re: Comments on Proposed State Board Order WQ 2008-XX, Remanding Order R5-2007-0064, Central Valley Regional Water Quality Control Board, Order on Berry Petroleum, Poso Creek /McVan Facility, Poso Creek Oil Field, Kern County.

Dear Board Members and Staff,

On behalf of the Environmental Law Foundation ("ELF"), I would like to thank the State Water Resources Control Board for considering our petition to review the Central Valley Regional Water Board's Order for Berry Petroleum, Poso Creek /McVan Facility. We wholeheartedly endorse remanding the order to the Central Valley Board

The State Board is aware that the Environmental Law Foundation has a long-term commitment to improving our State's water quality through effective implementation of federal and state anti-degradation requirements. To this end, ELF petitioned the State Board in July, 2007 to revise its anti-degradation policy. In June, 2008, the State Board agreed to initiate a Triennial Review of the Policy.

It is ELF's hope and goal that the Triennial Review results in a California antidegradation policy that addresses the wholesale absence of application and implementation procedures for the federal policy in its current iteration. Of course, this is understandable because the state policy was written before the federal policy. Yet the requirements set out at 40 C.F.R. § 131.12 are required to be included in the state policy as well. Therefore, until the Triennial Review (hopefully) rectifies the situation, it is

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critical that the state policy is administered according to the procedures set out by (a) SWRCB Chief Counsel William Attwater in his 1987 Memorandum, (b) in APU 90-004, and (c) in the 1986 State Board Water Quality Decision *In re Rimmon C. Fay*. If these State Board documents were followed, which EPA considers mandatory for full implementation of the federal policy, then many of the current misapplications would be avoided.¹

We offer the following comments on the State Board's Proposed Order:

A. ELF Agrees With the Board's Conclusions, However These Conclusions Support A Further Finding that the Regional Board Violated Federal and State Anti-Degradation Policy.

ELF would first like to express its overall agreement with the State Board's conclusions in its Discussion section, specifically:

- A(1), that there is no evidence in the record to justify less stringent pollution limitations, and therefore, the issuance of the Order with less stringent pollutant limitations than the 2001 Permit violates the anti-backsliding rule;
- A(2) the Central Board may not rely upon the "technical or legal mistake" exception to the anti-backsliding rule;
- B(1) For the Central Valley Regional Water Board to grant an exception to the anti-backsliding rule, it would have to explain why it is necessary to relax these limitations to accommodate important and social economic development in the discharge area, as required by federal antidegradation requirements.
- B(2) For the Regional Board to clarify the basis for its determination that there will not be impacts caused by flow.
- B(2) Basin Plan effluent limitations do not automatically provide adequate protection under state and federal anti-degradation requirements.

However, ELF observes that the State Board's conclusions in A(1) and B(1) support a further finding that the Regional Board has violated the state and federal anti-degradation laws and policies. No justification was provided for lowering of water quality, and the Regional Board did not demonstrate that the increase was necessary to meet important social and economic needs. These are both violations of 40 C.F.R. § 131.12 and State Resolution 68-16, and should be acknowledged as such.

B. The Draft Order Mandates Anti-Degradation Protection for a Tier 2 Water, Even Though No Tier 2 Water Designation Was Made.

¹ ELF does not agree, however, with APU 90-004's measure of baseline water quality, which should be based either on the 1968 water quality levels, when the state law was written, or 1975, when the Federal law was written. As noted later in this letter, APU 90-004 also fails to lay out in sufficient detail the requirements for a social and economic benefits analysis.

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In the Draft Order, the State Board instructs the Regional Board that “assuming this water body exceeds water quality standards for beneficial uses (“high quality waters”), then even though the receiving water had not been classified as a high quality water by the Regional Board. Specifically, the Board writes:

“Assuming Background Concentrations are lower than applicable water quality objectives and the quality is otherwise higher than necessary to protect all beneficial uses, this higher quality must be maintained...” (p. 10)

“If the background characterization indicates that high quality conditions discussed above exist...”

Based on these statements, it is clear that the Regional Board must first make an initial determination as to the quality of the receiving waters before it can make further determinations under the anti-degradation procedures. This “tiering” process is referenced in FN 34 of the Draft Order, and should be followed by the Regional Board in making its tiering determination. The State Board should therefore make this determination an explicit, required step in its remand.

C. The Draft Order Requires the Regional Board to Consider “Important Social and Economic Development” and “Maximum Benefit to People of the State” Without Explaining What These Processes Entail.

The Draft Order agrees with ELF’s contention that water quality was degraded without considering whether the increases in pollutants levels were necessary to accommodate important social and economic development (conclusion 3), and whether these increases were consistent with the maximum benefit to the people of the State (conclusion 4).

ELF notes that some factors to be considered in these analyses are laid out in APU 90-004. As ELF noted in its petition, however, the 90-004 procedural update does not adequately describe the analysis required under federal anti-degradation law. Based on the requirements in other states, the State Board should require the following additional factors, and use the corresponding language, when it orders a Regional Board to conduct an antidegradation social and economic benefit analysis.²

“Necessary”:

The Draft Order concludes that the Regional Board must determine on remand whether lower water quality is “necessary to accommodate important economic or social

² This language is from materials provided by Merrit Frey and Gail Killiam of the River Network, Portland, Oregon, and Albert Ettinger of the Environmental Law and Policy Center, Chicago, IL. The language is drawn from IL, OH, and WA State rules and procedures and the MO draft rule, as of May, 2007. These documents are included by reference for the sole purpose of citation.

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development in the area in which the waters are located." The Draft Order must provide more specificity as to what it means to be "necessary" in this context. Specifically, a proposed lowering of water quality is not "necessary" and therefore prohibited unless the Regional Board assures that all technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity.

The State Board should add that Regional Board must determine whether the proposed lowering of water quality is "necessary" by considering the availability, reliability, cost effectiveness and technical feasibility of non-degrading, less-degrading, or mitigative technique alternatives.

Such alternatives may include, as appropriate³:

- i. manufacturing processes that include pollution prevention techniques or alternative production methods
- ii. additional or enhanced treatment levels, including no discharge alternatives;
- iii. discharge of waste to alternate locations, including POTW's
- iv. recycle/reuse of waste by-products or production materials and fluids;
- v. application of water conservation methods
- vi. improved operation and maintenance of existing treatment systems;
- vii. seasonal or controlled discharge options to avoid critical conditions of water quality;
- viii. establishing buffer areas with effective limits on activities;
- ix. land application or infiltration to capture pollutants and reduce surface runoff.

The State Board's remand Order should require that the Regional Board deny some or all of the request to lower water quality if cost-effective measures that would prevent or minimize the proposed degradation are reasonably available and the applicant has chosen not to implement these measures.

"Important"

The Draft Order concludes that the Regional Board must determine on remand whether economic and social development is "important." The remand should therefore specify that economic or social development is not considered "important," and therefore a proposed lowering of water quality is prohibited, unless the Regional Board assures that the proposed activity will benefit the community at large through consideration of the following factors, as appropriate:

- i. The condition of the local economy, the changes in jobs expected as a result of the proposed activity, additional state and local tax revenue to be generated;
- ii. The anticipated impact on human health
- iii. The benefits associated with maintaining a higher level of water quality for uses

³ As these are considerations that should be included with all social and economic benefit analyses, they may not apply to a particular discharger, based on reasonable judgment.

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- such as fishing, recreation, tourism and other commercial activities; aesthetics, or other use and enjoyment by humans;
- iv. Benefits of preserving assimilative capacity for future industry and development;
 - v. Any other information regarding the proposed activity and the affected water body that the Regional Board considers appropriate.

The State Board's order should require the Regional Board to allow degradation only where the social and economic development is important and will benefit the community at large because the benefits demonstrated by the applicant outweigh the social economic costs associated with the lowering of water quality. This determines whether the lowering of water quality is of "maximum benefit to the people of the state."

With these additions, ELF believes that the revised Berry Petroleum order can better provide the required level of protection under state and federal antidegradation procedures. Moreover, these suggested additions serve only to compliment and substantiate the same conclusions that the State Board has already drawn.

Thank you for your time and consideration of these comments.

Respectfully,

Adam Lazar