



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

3536 Rainier Avenue, Stockton, CA 95204

T: 209-464-5067, F: 209-464-1028, E: deltakeep@aol.com, W: www.calsport.org

28 December 2008

Mr. Ken Landau, Assistant Executive Officer
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6144

VIA: Electronic Submission
Hardcopy if Requested

RE: Renewal Of Waste Discharge Requirements (NPDES No. CA0004596) for California Department of Fish & Game, Mount Shasta Fish Hatchery, Siskiyou County

Dear Mr. Landau,

The California Sportfishing Protection Alliance (CSPA) has reviewed the proposed Waste Discharge Requirements (NPDES No. CA0004596) for the California Department of Fish & Game, Mount Shasta Fish Hatchery (Permit) and submits the following comments on the two issues at hand.

CSPA requests status as a designated party for this proceeding. CSPA is a 501(c)(3) public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality and fishery resources and their aquatic ecosystems and associated riparian habitats. CSPA has actively promoted the protection of water quality and fisheries throughout California before state and federal agencies, the State Legislature and Congress and regularly participates in administrative and judicial proceedings on behalf of its members to protect, enhance, and restore California's degraded water quality and fisheries. CSPA members reside, boat, fish and recreate in and along waterways throughout the Central Valley, including Siskiyou County.

- 1. The proposed Permit is based on an incomplete Report of Waste Discharge (RWD) and in accordance with Federal Regulations 40 CFR 122.21(e) and (h) and 124.3 (a)(2) the State's Policy for Implementation of Toxics standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP) and California Water Code Section 13377 the permit should not be issued until the discharge is fully characterized and a protective permit can be written**

The proposed Permit, Findings I and J cite the National Toxics Rule, the California Toxics Rule and California's CTR implementation plan (SIP) as being applicable to the wastewater discharge. Finding J further states "requirements of this order implement the SIP". However, there is no information in the proposed Permit to indicate that the wastewater discharge has been characterized for California Toxics Rule (CTR), National Toxics Rule (NTR), drinking water MCLs and other pollutants which could degrade the beneficial uses of the receiving stream and exceed water quality standards and objectives. There is no presentation of a comprehensive Reasonable Potential Analysis. The proposed Permit does not contain a complete list of CTR, NTR, drinking water MCLs and other pollutants that would indicate that the Regional Board is basing the proposed Permit on adequate information. For the last several years the Regional Board's NPDES permits have contained a spreadsheet detailing the priority pollutant sampling which has, or has not, been monitored. Absent this spreadsheet, one can only conclude that the required priority pollutant sampling, which is necessary to characterize the discharge, has not

been conducted. The absence of data is contrary to precedential Water Quality Order WQO 2004-0013 for the City of Yuba City, "The findings or Fact Sheet should cite the specific data on which it relied in its calculations." Federal Regulation, 40 CFR 124.8 (b)(4) requires the Fact Sheet contain the basis for the permit conditions. An indication of whether the wastewater discharge has been fully characterized in accordance with the NTR, CTR and the SIP is a minimum basis for implementing and compliance with the applicable regulations and policies.

EPA established the CTR in May of 2000 (Federal Register / Vol. 65, No. 97 / Thursday, May 18, 2000 / Rules and Regulations, Environmental Protection Agency 40 CFR Part 131, Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California) which promulgates: numeric aquatic life criteria for 23 priority toxic pollutants; numeric human health criteria for 57 priority toxic pollutants; and a compliance schedule provision which authorizes the State to issue schedules of compliance for new or revised National Pollutant Discharge Elimination System permit limits based on the federal criteria when certain conditions are met. Section 3, *Implementation*, requires that once the applicable designated uses and water quality criteria for a water body are determined, under the National Pollutant Discharge Elimination System (NPDES) program discharges to the water body must be characterized and the permitting authority must determine the need for permit limits. If a discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the permitting authority must develop permit limits as necessary to meet water quality standards. These permit limits are water quality-based effluent limitations or WQBELs. The terms "cause," "reasonable potential to cause," and "contribute to" are the terms in the NPDES regulations for conditions under which water quality based permit limits are required (See 40 CFR 122.44(d)(1)).

The SWRCB adopted the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP) to implement the CTR. Section 1.2 Data Requirements and Adjustments, of the SIP requires that it is the discharger's responsibility to provide all data and other information requested by the RWQCB before the issuance, reissuance, or modification of a permit to the extent feasible. When implementing the provisions of this Policy, the RWQCB shall use all available, valid, relevant, representative data and information, as determined by the RWQCB.

The SIP required the Regional Board's to require dischargers to characterize their discharges for priority pollutants. On 10 September 2001, the Regional Board mailed out a California Water Code Section 13267 letter to dischargers requiring that minimum sampling be conducted for priority pollutants, pesticides, drinking water constituents, and other pollutants. There is no indication that any this data was ever received or that it was utilized in preparing the proposed permit.

SIP Section 1.3 requires that the Regional Board conduct a reasonable potential analysis for each priority pollutant to determine if a water quality-based Effluent Limitation is required in the permit. Absent the data, the Regional Board cannot possibly comply with SIP requirement of Section 1.3. There is no analysis or discussion in the proposed Permit that indicates the Regional Board complied with the requirements of SIP Section 1.3. Failure to include this information, if received, would be in violation of Federal Regulation 40 CFR 124.8 (A)(2), which requires Fact Sheets contain an assessment of the wastes being discharged.

Federal Regulation, 40 CFR 122.21(e) states in part that: "The Director shall not issue a permit before receiving a complete application for a permit except for NPDES general permits. In accordance with 40 CFR 122.21 (e) and (h) and 124.3 (a)(2) the Regional Board shall not adopt the proposed permit without first a complete application, in this case for industrial landfill, for which the permit application requirements are extensive. An application for a permit is complete when the Director receives an application form and any supplemental information, which are

completed to his or her satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity.”

State Report of Waste Discharge form 200 is required as a part of a complete Report of Waste Discharge. Form 200, part VI states that: “To be approved, your application must include a complete characterization of the discharge.” The Federal Report of Waste Discharge forms also require a significant characterization of a wastewater discharge. Federal Application Form 2A, which is required for completion of a Report of Waste Discharge for municipalities, Section B.6, requires that Dischargers whose flow is greater than 0.1 mgd, must submit sampling data for ammonia, chlorine residual, dissolved oxygen, total kjeldahl nitrogen, nitrate plus nitrite nitrogen, oil and grease, phosphorus and TDS. Federal Application Form 2A, Section D, requires that Discharger’s whose flow is greater than 1.0 mgd, conduct priority pollutant sampling. Federal Regulation, 40 CFR 122.21(g)(7) requires for existing manufacturing, commercial or mining facilities that a significant list of priority pollutants be sampled to characterize the effluent discharge. This has apparently not been completed.

As the proposed Permit states; the California Toxics Rule (CTR)(40 CFR 131, Water Quality Standards) contains water quality standards applicable to this wastewater discharge. The final due date for compliance with CTR water quality standards for all wastewater dischargers in California is May 2010. The State’s *Policy for Implementation of Toxics standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (SIP), Section 1.2, requires wastewater dischargers to provide all data and other information requested by the Regional Board before the issuance, reissuance, or modification of a permit to the extent feasible.

Federal Regulation, 40 CFR 122.21(e) states in part that: “The Director shall not issue a permit before receiving a complete application for a permit except for NPDES general permits.

California Water Code, section 13377, requires that: “Notwithstanding any other provision of this division, the state board and the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.”

Absent an analysis and discussion of the priority pollutants sampling data, one can only conclude the application for permit renewal is incomplete, or the information utilized to write the proposed Permit is incomplete, and in accordance with the CWC, Federal Regulations and the SIP the proposed Permit should not be adopted.

2. The proposed Permit establishes Effluent Limitations for metals based on the hardness of the effluent as opposed to the ambient upstream receiving water hardness as required by Federal Regulations, the California Toxics Rule (CTR, 40 CFR 131.38(c)(4)).

Federal Regulation 40 CFR 131.38(c)(4) states that: “For purposes of calculating freshwater aquatic life criteria for metals from the equations in paragraph (b)(2) of this section, for waters with a hardness of 400 mg/l or less as calcium carbonate, the actual ambient hardness of the surface water shall be used in those equations.” (Emphasis added). The proposed Permit states that the effluent hardness, not the receiving water hardness, was used to calculate Effluent Limitations for metals (copper).

The Federal Register, Volume 65, No. 97/Thursday, May 18th 2000 (31692), adopting the California Toxics Rule in confirming that the ambient hardness is the upstream hardness, absent the wastewater discharge, states that: “A hardness equation is most accurate when the relationship between hardness and the other important inorganic constituents, notably alkalinity and pH, are nearly identical in all of the dilution waters used in the toxicity tests and in the surface waters to which the equation is to be applied. If an effluent raises hardness but not alkalinity and/or pH, using the lower hardness of the downstream hardness might provide a lower level of protection than intended by the 1985 guidelines. If it appears that an effluent causes hardness to be inconsistent with alkalinity and/or pH the intended level of protection will usually be maintained or exceeded if either (1) data are available to demonstrate that alkalinity and/or pH do not affect the toxicity of the metal, or (2) the hardness used in the hardness equation is the hardness of upstream water that does not include the effluent. The level of protection intended by the 1985 guidelines can also be provided by using the WER procedure.”

The result of using a higher effluent or downstream hardness value is that metals are toxic at higher concentrations, discharges have less reasonable potential to exceed water quality standards and the resulting Permits have fewer Effluent Limitations. The comparative Effluent Limitation values presented to defend the unsupported statements regarding which is more protective. Once again the public is subject to a bureaucrat simply choosing to ignore very clear regulatory requirements. The Regional Board staff have chosen to deliberately ignore Federal Regulations placing themselves above the law. There are procedures for changing regulations if peer reviewed science indicates the need to do so, none of which have been followed. The proposed Permit failure to include Effluent Limitations for metals based on the actual ambient hardness of the surface water is contrary to the cited Federal Regulation and must be amended to comply with the cited regulatory requirement.

3. The proposed Permit contains an inadequate antidegradation analysis that does not comply with the requirements of Section 101(a) of the Clean Water Act, Federal Regulations 40 CFR § 131.12, the State Board’s Antidegradation Policy (Resolution 68-16) and California Water Code (CWC) Sections 13146 and 13247.

The antidegradation analysis in the proposed Permit is not simply deficient, it is literally nonexistent. The brief discussion of antidegradation requirements, in the Findings and Fact Sheet, consist only of skeletal, unsupported, undocumented conclusory statements totally lacking in factual analysis. NPDES permits must include any more stringent effluent limitation necessary to implement the Regional Board Basin Plan (Water Code 13377). The Tentative Permit fails to properly implement the Basin Plan’s Antidegradation Policy.

CWC Sections 13146 and 13247 require that the Board in carrying out activities which affect water quality shall comply with state policy for water quality control unless otherwise directed by statute, in which case they shall indicate to the State Board in writing their authority for not complying with such policy. The State Board has adopted the Antidegradation Policy (Resolution 68-16), which the Regional Board has incorporated into its Basin Plan. The Regional Board is required by the CWC to comply with the Antidegradation Policy.

Section 101(a) of the Clean Water Act (CWA), the basis for the antidegradation policy, states that the objective of the Act is to “restore and maintain the chemical, biological and physical integrity of the nation’s waters.” Section 303(d)(4) of the CWA carries this further, referring explicitly to the need for states to satisfy the antidegradation regulations at 40 CFR § 131.12 before taking action to lower water quality. These regulations (40 CFR § 131.12(a)) describe the federal antidegradation policy and dictate that states must adopt both a policy at least as stringent as the federal policy as well as implementing procedures.

California's antidegradation policy is composed of both the federal antidegradation policy and the State Board's Resolution 68-16 (State Water Resources Control Board, Water Quality Order 86-17, p. 20 (1986) ("Order 86-17"); Memorandum from Chief Counsel William Attwater, SWRCB to Regional Board Executive Officers, "federal Antidegradation Policy," pp. 2, 18 (Oct. 7, 1987) ("State Antidegradation Guidance")). As a state policy, with inclusion in the Water Quality Control Plan (Basin Plan), the antidegradation policy is binding on all of the Regional Boards (Water Quality Order 86-17, pp. 17-18).

Implementation of the state's antidegradation policy is guided by the State Antidegradation Guidance, SWRCB Administrative Procedures Update 90-004, 2 July 1990 ("APU 90-004") and USEPA Region IX, "Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12" (3 June 1987) ("Region IX Guidance"), as well as Water Quality Order 86-17.

The Regional Board must apply the antidegradation policy whenever it takes an action that will lower water quality (State Antidegradation Guidance, pp. 3, 5, 18, and Region IX Guidance, p. 1). Application of the policy does not depend on whether the action will actually impair beneficial uses (State Antidegradation Guidance, p. 6). Actions that trigger use of the antidegradation policy include issuance, re-issuance, and modification of NPDES and Section 404 permits and waste discharge requirements, waiver of waste discharge requirements, issuance of variances, relocation of discharges, issuance of cleanup and abatement orders, increases in discharges due to industrial production and/or municipal growth and/or other sources, exceptions from otherwise applicable water quality objectives, etc. (State Antidegradation Guidance, pp. 7-10, Region IX Guidance, pp. 2-3). Both the state and federal policies apply to point and nonpoint source pollution (State Antidegradation Guidance p. 6, Region IX Guidance, p. 4).

Even a minimal antidegradation analysis would require an examination of: 1) existing applicable water quality standards; 2) ambient conditions in receiving waters compared to standards; 3) incremental changes in constituent loading, both concentration and mass; 4) treatability; 5) best practicable treatment and control (BPTC); 6) comparison of the proposed increased loadings relative to other sources; 7) an assessment of the significance of changes in ambient water quality and 8) whether the waterbody was a ONRW. A minimal antidegradation analysis must also analyze whether: 1) such degradation is consistent with the maximum benefit to the people of the state; 2) the activity is necessary to accommodate important economic or social development in the area; 3) the highest statutory and regulatory requirements and best management practices for pollution control are achieved; and 4) resulting water quality is adequate to protect and maintain existing beneficial uses. A BPTC technology analysis must be done on an individual constituent basis.

Any antidegradation analysis must comport with implementation requirements in State Board Water Quality Order 86-17, State Antidegradation Guidance, APU 90-004 and Region IX Guidance. The conclusory, unsupported, undocumented statements in the Permit are no substitute for a defensible antidegradation analysis, specifically:

- The proposed Permit states that: "This Order allows for the use of aquaculture drugs and chemicals including oxytetracycline, penicillin G, florfenicol, amoxicillin, trihydrate, erythromycin, Romet-30, MS-222, carbon dioxide, sodium bicarbonate, Aqui-S, PVP, iodine, hydrogen peroxide, potassium permanganate, acetic acid, and chloramine-T. Staff has reviewed NPDES permits for aquaculture facilities in the states of Oregon, Idaho, and Washington, in addition to California and other states. None of these states have promulgated water quality standards for these types of chemicals. While research is currently being conducted on the possible aquatic and human health impacts of these types of chemicals, no criteria exist to establish defensible numerical WQBELs." The water quality impacts of the discharge of these chemicals are unknown; however the

proposed Permit does not address the potential impacts to water quality and the beneficial uses of the receiving stream. There is significant uncited literature regarding the discharge and potential impacts to surface waters of “constituents of emerging concern” (CECs) such as antibiotics. The Antidegradation Policy discussion does not address treatability of the listed chemicals whether treatment would constitute BPTC rather than to allow an essentially unregulated discharge to surface waters of such chemicals when the impacts are unknown. Is activated carbon effective at removing antibiotics? Is simple settling effective at significantly reducing chemicals added to fish food? A cost analysis of capture and treatment of the waters to which the chemicals have been added, which is a limited volume or discharged for a limited period of time, has not been assessed. Is the wholesale discharge of these chemicals without treatment or effective control, when the water quality and beneficial use impacts are unknown in the best interest of the people of California? The proposed permit is incorrect in stating without any supporting documentation that BPTC is being provided.

- The Antidegradation Policy discussion does not discuss the Fact that the Discharger utilizes unlined ponds, which percolate waste constituents to groundwater. The proposed Permit, page 16, requires an assessment of groundwater degradation from the discharge of wastewater. The Regional Board does not currently know whether the Discharger has degraded or polluted underlying groundwater; surely this warrants an Antidegradation Policy discussion. The requirements of CCR Title 27 requirements are not discussed with regard to whether an exemption applies for wastewater disposal that has degraded groundwater quality.
 - The proposed Permit requires a *Salinity Evaluation and Minimization Plan*, page 18, yet the impacts of salt increases to surface waters are not discussed in the Antidegradation Policy assessment.
- 4. The proposed Permit does not contain Effluent Limitations for acute and chronic toxicity and therefore does not comply with Federal regulations, at 40 CFR 122.44 (d)(1)(i) and the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP)*.**

Proposed Permit, State Implementation Policy states that: “On March 2, 2000, the State Water Board adopted the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (State Implementation Policy or SIP). The SIP became effective on April 28, 2000 with respect to the priority pollutant criteria promulgated for California by the USEPA through the NTR and to the priority pollutant objectives established by the Regional Water Board in the Basin Plan. The SIP became effective on May 18, 2000 with respect to the priority pollutant criteria promulgated by the USEPA through the CTR. The State Water Board adopted amendments to the SIP on February 24, 2005 that became effective on July 13, 2005. The SIP establishes implementation provisions for priority pollutant criteria and objectives and provisions for chronic toxicity control. Requirements of this Order implement the SIP.” The SIP, Section 4, Toxicity Control Provisions, Water Quality-Based Toxicity Control, states that: “A chronic toxicity effluent limitation is required in permits for all dischargers that will cause, have a reasonable potential to cause, or contribute to chronic toxicity in receiving waters.” The SIP is a state *Policy* and CWC Sections 13146 and 13247 require that the Board in carrying out activities which affect water quality shall comply with state policy for water quality control unless otherwise directed by statute, in which case they shall indicate to the State Board in writing their authority for not complying with such policy.

Federal regulations, at 40 CFR 122.44 (d)(1)(i), require that limitations must control all pollutants or pollutant parameters which the Director determines are or may be discharged at a

level which will cause, or contribute to an excursion above any State water quality standard, including state narrative criteria for water quality. There has been no presented argument that the discharge contains toxic substances and presents a reasonable potential to cause toxicity. The Water Quality Control Plan for the Sacramento/ San Joaquin River Basins (Basin Plan), Water Quality Objectives (Page III-8.00) for Toxicity is a narrative criteria which states that all waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life.

The Proposed Permit states that toxicity limitations are not being since chemical specific limitations are being utilized to limit pollutant discharges (page F-34). The proposed Permit then contradicts itself by stating for most of the chemicals aquaculture discharged (oxytetracycline, penicillin G, florfenicol, amoxicillin, trihydrate, erythromycin, Romet-30, MS-222, carbon dioxide, sodium bicarbonate, Aqvi-S, PVP, iodine, hydrogen peroxide, potassium permanganate, acetic acid, and chloramine-T) there are no promulgated water quality standards and Effluent Limitations are not being developed. Even forgoing the contradictions, the proposed permit is incorrect since the SIP, Section 4, Toxicity Control Provisions, Water Quality-Based Toxicity Control, states that: "A chronic toxicity effluent limitation is required in permits for all dischargers that will cause, have a reasonable potential to cause, or contribute to chronic toxicity in receiving waters." Clearly the Fact Sheet discussion of the individual aquatic chemicals shows analyses by the California Department of Fish and Game (DFG) that establishes the potential for toxicity in the discharge.

Thank you for considering these comments. If you have questions or require clarification, please don't hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Jennings". The signature is fluid and cursive, with the first name "Bill" and last name "Jennings" clearly distinguishable.

Bill Jennings, Executive Director
California Sportfishing Protection Alliance