



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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2 October 2006

Mr. Robert Schneider, Chairman
Ms. Pamela Creedon, Executive Officer
Mr. Loren J. Harlow, Principal WRCE
Mr. Bert E. Van Voris, Supervising WRC Engineer
Ms. Jo Anne Kipps, Sr. WRC Engineer
Ms. Alexis Phillips-Dowell
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: Cease and Desist Order for City of Livingston Industrial Wastewater Treatment Facility, Merced County

Dear Messrs. Schneider, Harlow, Van Voris and Mesdames Creedon, Kipps, Phillips-Dowell:

The California Sportfishing Protection Alliance and Watershed Enforcers (CSPA) has reviewed the Central Valley Regional Water Quality Control Board's (Regional Board) tentative Cease and Desist Order (Order or CDO) for City of Livingston Industrial Wastewater Treatment Facility, Merced County (IWWTF or Discharger) and submits the following comments.

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 surface and ground waters and associated fisheries. CSPA members reside, boat, fish and recreate in and along waterways throughout the Central Valley, including Merced County.

1. Shades of Hilmar

The IWWTF is operated by City of Livingston solely to accommodate wastewater disposal for Foster Farms. There are numerous similarities between the proposed Order

with that of the Regional Board's debacle at Hilmar Cheese. We note the following similarities between the two enforcement cases:

- a. Both sites are managed by the Regional Board's Fresno office,
- b. The proposed CDO does not restrict the flow rate to the facility despite the Order's findings that the facility is significantly over capacity,
- c. Regional Board staff have promised not to enforcement against Foster Farms in to order allow them to discharge illegally without having WDRs to new disposal areas,
- d. The Regional Board has encouraged and approved a piecemeal approach to the California Environmental Quality Act (CEQA), revised WDRs and enforcement orders involving the Discharger's plant expansion projects,
- e. The CDO fails to assess any monetary penalties for the past and ongoing violations (calculations employing USEPA's BEN model, as recommended by the State Board's Enforcement Policy, reveals that the CDO allows the Discharger to keep approximately 1.8 million dollars in economic benefit derived from delaying the compliance date for the project),
- f. The groundwater underlying the facility is polluted,
- g. The CDO does not require the Discharger to conduct any cleanup or investigation activities for the polluted groundwater or the evaluate the degree of hydraulic conductivity to the Merced River,
- h. The Regional Board has failed to protect the public health by not notifying the surrounding property owners or downstream riparian owners that the groundwater is polluted.

The apparent purpose of the CDO is not to institute enforcement for egregious violations but, as stated in the staff report on page 1, simply to "memorialize the City's latest IWWTF Upgrade Project implementation schedule." The additional time is necessary because the Discharger failed to keep the first schedule to upgrade the facility. The Discharger informed the Regional Board approximately six-years ago that the updated facility would be completed by December 2006. To date, the Discharger has not broken ground to start the project. The time extension for the 17-20 million dollar project has resulted in some 1.8 million dollars in accrued economic benefits to the Discharger. The CDO not only fails to disclose the degree of groundwater degradation but also does not even require an investigation to determine the extent of the pollution.

The Regional Board's Fresno Office has comprised itself to the extent that CSPA believes that enforcement for this case can no longer be managed through the Fresno office. Fresno Office staff has promised Foster Farms that it "**would not initiate enforcement against Foster Farms should it discharge to the Expanded Reclamation Site before 30 October 2006.**" According to the Discharger's consultant (staff report page 8), the "flow increase was previously approved as a result of the Regional Water Board staff concurrence with the Upgrade Project." Apparently, Fresno staff has been approving modifications of Permit conditions and now is asking the Regional Board to approve the changes after the fact.

CSPA believes the Regional Board should immediately put these projects on hold, restrict the discharge volume to the IWWTF and transfer the sites to the Sacramento office non15/Title 27-unit.

2. The proposed Order fails to include a Time Schedule Order

California Water Code (CWC) Section 13000 states, in part, that Legislature declares "...that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." CWC Section 13000 demonstrates the Legislative intent that the "state must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state from degradation originating inside or outside the boundaries of the state." In order to fulfill the Legislative intent to protect water quality, the State Water Resources Control Board adopted the Water Quality Enforcement Policy (Enforcement Policy) February 2002.

The Enforcement Policy states, "The primary goal of this Enforcement Policy is to create a framework for identifying and investigating instances of noncompliance, for taking enforcement actions that are appropriate in relation to the nature and severity of the violation, and for prioritizing enforcement resources to achieve maximum environmental benefits. Toward that end, it is the intent of the SWRCB that the RWQCBs operate within the framework provided by this Policy."

According to the staff report (page 1), the Discharger has already been afforded six-years to complete the facility improvements. The staff report states, in part, "Disagreements between the City and Foster Farms over which treatment technology to select for the IWWTF Upgrade Project has delayed its construction and implementation for more than two years. Recent events unrelated to the IWWTF Upgrade Project has strained the working relationship between the City and Foster Farms. The latest implementation schedule submitted by the City projects completion of the IWWTF Upgrade Project by January 2007." To date, the Discharger has not completed the necessary CEQA documentation and has not broken ground to start the project.

The Enforcement Policy, page 19, states, "California Water Code section 13308 authorizes the RWQCB to issue a Section 13308 Time Schedule Order (13308 TSO) which prescribes a civil penalty if compliance is not achieved in accordance with the time schedule. The RWQCB may issue a 13308 TSO if there is a threatened or continuing violation of a cleanup and abatement order, cease and desist order, or any requirement issued under California Water Code sections 13267 or 13383." The Discharger has demonstrated a recalcitrant pattern of behavior towards the CWC and Regional Board Orders and there is no reason to believe the Discharger will comply now. CSPA believes, a 13308 TSO must be issued in conjunction with the CDO is appropriate.

3. The proposed Order fails to assess monetary penalties for flagrant violations

The Enforcement Policy classifies groundwater pollution as a priority violation for which an Administrative Civil Liability Order is appropriate. Inexplicably, the Order fails to assess any penalties and is silent on the amount of economic benefit the Discharger has received from delaying compliance and not completing the improvement project. The Enforcement Policy, page 40, defines “Economic benefit is any savings or monetary gain derived from the acts that constitute the violation.” We have calculated economic benefit using the U. S. EPA BEN model, as recommended by the State Board’s Enforcement Policy. Using the assumptions: a) for tax purposes, the Discharger was considered a public agency, b) a project cost of 17-20 million dollars and c) an average interest rate of approximately 4.5 percent; the additional time extension authorized by the CDO allows the Discharger to keep approximately 1.8 million dollars in economic benefits. At a minimum, the Regional Board must issue an ACL that recovers the economic benefit the Discharger has achieved.

The Regional Board is aware that 10 percent of the Dischargers consume 80 percent of staff resources. The Enforcement Policy, page 41, states “Staff costs may be one of the “other factors that justice may require”, and should be estimated when setting an ACL. Staff should estimate the cost that investigation of the violation and preparation of the enforcement action(s) has imposed on government agencies. This can include all activities of a progressive enforcement response that results in the ACL. Staff costs should be added to the amount...” The Order fails to show the amount of cost that the Regional Board has incurred for this Order. Given the six-year pattern of recalcitrant behavior shown by this Discharger, the CDO must consider “other matters that justice may require” and collect cost recovery for staff time spent developing the CDO.

Regional Board members and staff have frequently blamed their failure to protect water quality on a shortage of staff resources. Yet, the CDO inexplicably fails to require the Discharger to pay for cost recovery associated with the Regional Board’s staff time. CCR Title 23 Section 2200 states, “Each person for whom waste discharge requirements have been prescribed pursuant to section 13263 of the Water Code shall submit, to the State Board, an annual fee in accordance with the following schedules. The fee shall be submitted for each waste discharge requirement order issued to that person.” The State Water Control Board is required to collect annual fees from dischargers based on the threat and complexity of the discharge, which is determined by the Regional Board. The Discharger clearly has a much high threat and complexity than an otherwise compliant non-15 discharger. The Order should include a finding that the threat and complexity rating is 1A until such time as the Discharger achieves compliance and he CDO is rescinded.

4. The proposed Order fails to control flow rate to the IWWTF

The City of Livingston owns and operates an industrial wastewater treatment plant solely for the wastewater discharge from Foster Farms’ chicken processing complex. The proposed Cease and Desist Order (CDO) states that the facility currently operates under Waste Discharge Requirements (WDRs) Order No. 79-209, which limits the flow to 3.5 million gallons per day. The CDO states that the wastewater practices at

the facility have degraded groundwater, specifically with nitrogen compounds. The Discharger has proposed to construct a nutrient removal system to reduce nitrogen compounds. The proposed CDO requires completion of the nutrient removal system by 31 December 2008.

The CDO states that the Discharger has requested an increase in the flow rate on several occasions. A complete Report of Waste Discharge (RWD) is required by 15 March 2007. In addition to the documented groundwater degradation, the CDO states that the facility frequently was found to have inadequate freeboard and threatened to overflow. The CDO should be amended to prohibit any increase in the flow rate to the facility to limit groundwater degradation to the current level and to reduce the threat of wastewater overflows.

Title 23, California Code of Regulations, Section 2244(b) states: “Prohibitions or appropriate restrictions on additional discharges should be included in a cease and desist order if the further addition in volume, type, or concentration of waste entering the sewer system would cause and increase in violation of waste discharge requirements or increase the likelihood of violation of requirements.” The Order must be revised limit the volume of wastewater discharged by Foster Farms to the IWWTF. In addition, the Order must require the Discharger to monitor the freeboard elevations on a daily basis starting when the pond has less than three feet freeboard remaining.

5. The proposed Order fails to require a spill plan

The Discharger must develop a spill plan to prevent overtopping and catastrophic failures of the ponds berms. The Discharger must develop a detailed spill prevention and mitigation plan (the Order is silent on this point) that describes in detail the steps to be taken to prevent and minimize the discharge of wastewater to surface waters. The spill plan must incorporate a monitoring plan with maps of the receiving waters, public access points, and sample locations so that sample can be collected and signage posted when sewage spills occur. The Order must also require that the Discharger demonstrate that they have the necessary manpower and equipment available to fully implement the spill plan. The spill plan must consider pumping and hauling wastewater from the IWWTF to another permitted wastewater treatment plant in order to prevent overtopping of the berms. The Discharger may have to arrange lease agreements for additional vector trucks and large storage tanks if equipment cannot be purchased in time.

6. The proposed Order fails to require the Discharger to comply with Title 27 requirements

The discharge of designated waste requires that Discharger comply with Title 27. According to CWC Section 13173 “Designated waste” means either of the following: (a) hazardous waste that has been granted a variance from hazardous waste management requirements pursuant to Section 25143 of the Health and Safety Code or (b) nonhazardous waste that consists of, or contains, pollutants that, under ambient environmental conditions at a waste management unit, could be released in

concentrations exceeding applicable water quality objectives or that could reasonably be expected to affect beneficial uses of the waters of the state as contained in the appropriate state water quality control plan.”

The discharge is compromised primarily of industrial waste from Foster Farms that is known to exceed water quality objectives. The discharge has already polluted the underlying groundwater at the IWWTF and Foster Farms disposal site and is, therefore, a designated waste.

State regulations that prescribe procedures for detecting and characterizing the impact of waste constituents from waste management units on groundwater are found in Title 27, California Code of Regulations (CCR), Section 20050 et seq. (Title 27). Title 27 requires the discharge of designated waste to a Class I or Class II facility. The treatment and storage facilities associated with the discharge, including for discharges of residual sludge and solid waste, must comply with the requirements Title 27. The Order fails to require the Discharger to comply with Title 27 regulations.

7. The proposed Order fails to consider the state’s Antidegradation Policy and the facilities potential flooding and hydraulic connection with surface waters

The CDO states that the IWWTP is situated within the Merced River flood plain (Finding No. 5). While the CDO discusses inadequate freeboard, it fails to discuss the possibility of river flood stage flows overtopping the levees. The recently adopted NPDES permit for Linda County Water District required the ponds located within the Feather River floodplain to be closed, since any resulting overflows constituted an unregulated surface water discharge. While groundwater degradation is discussed in the proposed CDO, possible degradation from hydraulic continuity between the wastewater disposal ponds and the Merced River is ignored. The CDO should be amended to require a study of the migratory pathways and possible connection to surface waters and inundation of the ponds by floodwaters.

The antidegradation Findings (No. 10 and 20) conclude that allowing degradation of water quality is in the best interest of the people of California because the Discharger (Foster Farms) is a large employer that contributes to the economy. This statement is unsupported by fact. Clearly there has not been a complete socioeconomic analysis as required by the Antidegradation Policy. Such an analysis may have concluded that Foster Farms would raise the price of a chicken a few cents. To immediately conclude they would be forced out of business if required to comply with water quality parameters is, at best, premature and unfounded. A complete antidegradation analysis should be conducted rather than relying on unsupported conclusory statements. The CDO should be amended to require an actual analysis conducted in accordance with the Board’s Antidegradation Policy.

The CDO, Finding No. 15, states that: “Comparison of other waste constituents in groundwater, including salinity for the protection of other beneficial uses (e.g. municipal and agricultural) will be evaluated as part of a separate future action.” Sampling and

analysis for salinity, conductivity or EC is simple and inexpensive. To require the Discharger to undertake remedial modification of the ponds and construction of nutrient facilities, without first evaluating the full range of water quality problems, is potentially wasting significant resources and likely setting the Discharger up for failure. Constructing wastewater system improvements without knowledge of the full extent of water quality problems at the facility is simply irresponsible. Without a full characterization of water quality, any new facility could be in noncompliance upon completion. The CDO must be amended to require a complete water quality characterization of the wastewater, groundwater and surface water quality, a constituent-by-constituent antidegradation and treatability analysis and CEQA compliance. Failure to do less is contrary to the goals of the Board's Antidegradation Policy and is ultimately unfair to the Discharger.

8. The proposed Order Fails to Protect Public Health

The Order fails to disclose all the contamination that has been created from the discharge. According to Finding No. 15 "Comparison of other waste constituents in groundwater, including salinity for the protection of other beneficial uses (e.g., municipal and agricultural), will be evaluated as part of a separate future action." The CDO does not require the Discharger to commence any cleanup or investigation activities for the polluted groundwater or the amount of hydraulic conductivity to the Merced River. Compliance schedules to investigation of the extent of the pollution and hydraulic conductivity must be incorporated into the Order.

The Regional Board has failed to protect the public health in that it has not notified the surrounding property owners or downstream property owners with riparian water rights that the groundwater is polluted. The Order does not require the Discharger to test and provide alternate drinking water for domestic wells that are impacted.

9. The proposed Order fails to enforce against illegal discharges

According to the Regional Board's staff report, page 2, "Foster Farms submitted a RWD in October 2005 in support of enlarging the Reclamation Site by 150 acres (Expanded Reclamation Site). Regional Water Board staff letter dated 18 November 2005 determined the RWD complete. On 1 August 2006, the City approved a mitigated negative declaration for the Expanded Reclamation Site in accordance with CEQA. Compliance with the CWC §13264(2)(d) requires Foster Farms to delay until 30 October 2006 its initiation of discharge to the Expanded Reclamation Site. By 30 August 2006 letter, Regional Board staff advised the City and Foster Farms that it **would not initiate enforcement against Foster Farms should it discharge to the Expanded Reclamation Site before 30 October 2006.**"

The disposal area is a critical component for the IWWTF and must be included in the CDO and any revised WDRs for the facility. As previously discussed, the WWTP is subject to Title 27 regulations and the application of sludge and wastewater must also conform to these requirements. The RWD submitted by the Foster Farms does not

contain the information specified in Title 27; nor has the Regional Board attempted to bring revised WDRs.

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 written in a cursive, flowing style.

Bill Jennings, Executive Director
California Sportfishing Protection Alliance