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For Petitioner California Sportfishing Protection Alliance

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the Matter of a Conditional Waiver of Waste)
Discharge Requirements for Small Food Processors)
and Small Wineries; California Regional Water) **PETITION FOR REVIEW**
Quality Control Board – Central Valley Region)
Order No. R5-2009-0097)

Pursuant to Section 13320 of California Water Code and Section 2050 of Title 23 of the California Code of Regulations (CCR), California Sportfishing Protection Alliance (“CSPA” or “petitioner”) petitions the State Water Resources Control Board (State Board) to review and vacate the final decision of the California Regional Water Quality Control Board for the Central Valley Region (“Regional Board”) in adopting a Conditional Waiver of Waste Discharge

Requirements for Small Food Processors and Small Wineries, on 8 October 2009. *See* Order No. R5-2009-0097. The issues raised in this petition were raised in timely written comments.

1. NAME AND ADDRESS OF THE PETITIONERS:

California Sportfishing Protection Alliance
3536 Rainier Avenue
Stockton, California 95204
Attention: Bill Jennings, Executive Director

2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE PETITION:

Petitioner seeks review of Order No. R5-2009-0097, a Conditional Waiver of Waste Discharge Requirements for Small Food Processors and Small Wineries. A copy of the adopted Order is attached as Attachment No. 1.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

8 October 2009

4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

CSPA submitted a detailed comment letter on 28 August 2009. The comment letter and the following comments set forth in detail the reasons and points and authorities why CSPA believes the Order fails to comport with statutory and regulatory requirements. The specific reasons the adopted Orders are improper are:

Waivers of Waste Discharge Requirements may be made in accordance with California Water Code § 13269. “Waiver (a)(1) On and after January 1, 2000, the provisions of subdivisions (a) and (c) of Section 13260, subdivision (a) of Section 13263, or subdivision (a) of Section 13264 may be waived by the state board or a regional board as to a specific discharge or type of discharge if the state board or a regional board determines, after any necessary state board or regional board meeting, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest.”

The waiver of Waste Discharge Requirements would allow for the discharge of up to 120,000 gallons per year of wastewater from “small food processors” and wineries where the waste has been characterized as follows:

<u>Constituent</u>	<u>Units</u>	<u>Wineries</u>	<u>Food Processors</u>
pH	Std units	2 to 11	5 to 9
BOD	mg/l	300 to 12,000	300 to 2,000
Total Dissolved Solids (TDS)	mg/l	80 to 6,000	400 to 2,300
Total nitrogen	mg/l	1 to 50	1 to 150

At a wastewater flow rate of 120,000 gallons per year the maximum annual loading of the described pollutants to land would be: 12,000 pounds of BOD, 6,000 pounds of TDS and 150 pounds of nitrogen.

1. A pH of 2 is a hazardous waste. Title 22, section 66261.22.: Characteristic of Corrosivity. (a) A waste exhibits the characteristic of corrosivity if representative samples of the waste have any of the following properties: (1) it is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using either the EPA test method for pH or an equivalent test method approved by the Department pursuant to section 66260.21... (b) A waste that exhibits the characteristic of corrosivity specified in subsection (a)(1) or (a)(2) of this section has the EPA Hazardous Waste Number of D002." Hazardous waste may not be discharged to land based on a waiver of Waste Discharge Requirements. The Regional Board, in late revisions to the waiver, prohibited the discharge of hazardous substances. However, low pH can cause mobilization of metals from the soils structure, allowing the metals to migrate to groundwater. Low pH conditions contribute to increased solubility of numerous substrate elements, particularly metals. The extreme pH values allowed to be discharged under the waiver at least threaten to increase pollutant migration to groundwater.
2. TDS levels above 450 mg/l threaten to exceed the agricultural water quality goal and above 500 threaten to exceed the secondary drinking water maximum contaminant level (MCL). MCLs are incorporated into the Central Valley Board's Basin Plan as water quality objectives for groundwater. Levels of TDS up to 6,000 mg/l at a minimum threaten to exceed the MCL of 500 mg/l and degrade the drinking water beneficial use of groundwater. Such threat is not in compliance with CWC Section 13269 since the water quality control plan (Basin Plan) Chemical Constituents water quality objective for MCLs could be violated.

3. Nitrate levels above 10 mg/l exceed the primary drinking water MCL which is incorporated into the Central Valley Regional Board's Basin Plan. Levels of nitrate up to 150 mg/l at a minimum threaten to exceed the MCL and degrade the drinking water beneficial use of groundwater. Such threat is not in compliance with CWC Section 13269 since the water quality control plan (Basin Plan) could be violated.

4. The Central Valley Regional Board has under the existing waiver allowed winery wastewater discharges to geological areas of fractured bedrock with very little soil cover. This can be readily observed in the Counties of Amador and Stanislaus. There are other areas along the Valley floor, such as documented around Lodi, where groundwater elevations are very near the ground surface and migration of pollutants to groundwater has been observed. Lake County has significant porous volcanic rock at times with little or no overlying soil allowing immediate migration of pollutants to ground or surface water supplies. The proposed waiver of Waste Discharge Requirements does not contain any requirement for wastewater disposal areas that is protective of groundwater quality. The proposed waiver has no minimum standard for soils in the disposal area or depth to groundwater. The allowances to discharge to areas which allow for immediate or rapid migration of pollutants to groundwater at a minimum threatens the beneficial uses of groundwater quality and exceedance of water quality standards as documented for nitrate and TDS.

A BOD of greater than 300 mg/l is a high strength waste as defined by virtually all Wastewater Engineering Texts. A wastewater with a BOD of 12,000 mg/l is an extremely high strength wastewater. In the cited areas there is no or little means of reduction of BOD levels prior to migration to groundwater.

5. The waiver allows for the land application of residual solids from wineries. Ms. Joann Kipps, a senior Engineer with the Regional Board's Fresno Office, has written a letter dated 20 July 2009 and posted on the Regional Board's web site at http://www.swrcb.ca.gov/centralvalley/board_decisions/tentative_orders/0908/triennial_rvw/triennial_review_kipps_com.pdf. This letter details the problems associated with the discharge of stillage wastes from wineries and that the Regional Board's practices are not protective of groundwater quality. We request that this letter be considered prior to adoption of the proposed waiver of Waste Discharge Requirements.

6. The threats to water quality, at a minimum the threats to exceed the MCLs for nitrate and TDS, associated with the proposed waiver would violate the Antidegradation Policy (Resolution 68-16) which is incorporated into the Basin Plan. The Antidegradation Policy prohibits exceedance of water quality standards

by wastewater discharges.

7. The waiver discusses monitoring for fixed dissolved solids (FDS), not total dissolved solids. This brings up at least two issues; 1) water quality standards and objectives are listed in terms of total dissolved solids and sampling for fixed will not be capable of determining whether the discharge complies with standards and objectives, 2) volatile dissolved solids can migrate and degrade groundwater quality and contribute to pollution. The proposed sampling for FDS would be a waste of limited Discharger resources since it is useless in determining compliance with water quality standards and objectives.
8. Generally, the waiver is designed to cover wastewater discharges from wineries. Wine is not a life sustaining product and is sometimes associated with snobbery, the upper crust. Wine and other alcoholic beverages are associated with a myriad of social problems including alcoholism and drunk driving. Alcohol use is also forbidden by some religions. The Regional Board however feels that requiring these waste producers to treat their wastewater rather than allow California's groundwater to be degraded is not in the public's interest. Is the cost of a bottle of wine going to increase to levels that cause wine drinkers to stop their leisurely sipping if wastewater treatment is provided? The Regional Board did not assess the costs associated with providing treatment or the increase to a bottle of wine.

The waiver was modified in late changes based on CSPA's comments to contain an attempt at an antidegradation analysis. The attempted analysis only contains unsubstantiated, unsupported, undocumented conclusory statements totally lacking in factual analysis.

The waiver, Finding No. 30, acknowledges that groundwater quality will be degraded under the Order: "Because of the variability of soil and groundwater conditions throughout the Central Valley Region as cited in Finding No. 11, it is not possible to state with certainty that no discharge regulated under, and in compliance with, this Order will degrade groundwater quality. However, this Order includes the following specific requirements and conditions which constitute BPTC for the type of discharges regulated by this Order. These BPTC requirements will minimize degradation, prevent exceedance of any water quality objectives, and prevent impacts to beneficial uses."

Treatment processes for high BOD, nitrate, pH and total dissolved solids are readily available and can be considered best practicable treatment and control for wastewater discharges. The waiver does not require the wastestreams to be

treated; instead the waiver allows groundwater to be degraded by these discharges. It is not providing BPTC to allow groundwater degradation when treatment processes are readily available. The Regional Board does not discuss treatment alternatives in considering Antidegradation.

Groundwater is a precious resource in California. It is well documented in literature that large areas of California's groundwater resources are polluted with nitrate and salts. In many of these areas, the same areas where the wineries are located, groundwater is the only domestic and municipal supply. The Regional Board's "Antidegradation" analysis does not discuss the impacts of allowing degradation to areas reliant on groundwater for industrial, domestic and municipal supply. The Regional Board does not discuss the costs associated with degraded or polluted groundwater. The Regional Board does not discuss any costs except those possibly born by the discharger; a producer of a luxury product.

The analysis does not comply with the requirements of the State Board's Antidegradation Policy (Resolution 68-16) and California Water Code (CWC) Sections 13146 and 13247. 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. California's antidegradation policy is composed of the State Board's Resolution 68-16. 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. 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.

9. 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). 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/other sources, exceptions from otherwise applicable water quality objectives, etc. (State Antidegradation Guidance, pp. 7-10).

10. The State Board's APU 90-004 specifies guidance to the Regional Boards for implementing the state policy and guidance. The guidance establishes a two-tiered process for addressing these policies and sets forth two levels of analysis: a simple analysis and a complete analysis. A simple analysis may be employed where a Regional Board determines that: 1) a reduction in water quality will be spatially localized or limited with respect to the waterbody, e.g. confined to the mixing zone; 2) a reduction in water quality is temporally limited; 3) a proposed action will produce minor effects which will not result in a significant reduction of water quality; and 4) a proposed activity has been approved in a General Plan and has been adequately subjected to the environmental and economic analysis required in an EIR. A complete antidegradation analysis is required if discharges would result in: 1) a substantial increase in mass emissions of a constituent; or 2) significant mortality, growth impairment, or reproductive impairment of resident species. Regional Boards are advised to apply stricter scrutiny to non-threshold constituents, i.e., carcinogens and other constituents that are deemed to present a risk of source magnitude at all non-zero concentrations. If a Regional Board cannot find that the above determinations can be reached, a complete analysis is required.
11. 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, and; 7) an assessment of the significance of changes in ambient water quality. 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.
12. Any antidegradation analysis must comport with implementation requirements in State Board Water Quality Order 86-17 and State Antidegradation Guidance,

APU 90-004 and Region IX Guidance. There is no antidegradation analysis in the proposed waiver and no indication that any has been undertaken.

13. The Central Valley Water Board acted as lead agency for this project under the California Environmental Quality Act (CEQA; Public Resources Code Section 21000 et seq.), and determined that the adoption of Resolution No. 82-036 would not cause a significant environmental impact and therefore, in accordance with CEQA, approved a Negative Declaration dated 23 December 1981. Since 1981 the regulation and knowledge of wastewater disposal has undergone significant change. In 1981 there was little groundwater monitoring at waste disposal sites. In 1981 priority pollutant knowledge was minimal, significant standards had not been developed and sampling was scarce. Since 1981 the Central Valley Regional Board has documented groundwater degradation issues at food processing facilities and at wineries. As the above comments address; the proposed discharges to land pose a threat to groundwater quality with low pH, high nitrate, salts (EC, TDS, chloride) and organic loadings. A twenty eight year old negative declaration did not address the potential impacts to groundwater quality and degradation of each of the designated beneficial uses. It is likely that an environmental impact report is required to assess the potential impacts related to the proposed waiver.
14. The required characterization to obtain coverage under the proposed waiver is wholly inadequate. The Findings indicate that pH levels can be low, yet sampling for pH is not required. Nitrate levels can be discharged at levels greatly exceeding water quality standards, yet sampling of the liquid wastestream is not required. BOD sampling is not required to assess the organic loading. Ongoing sampling is not required to assure that the original characterization was accurate or to assess the potential impacts to groundwater quality. Any characterization and assessment of the sites and potential to degrade groundwater quality should be made and certified by a registered professional engineer or geologist.

In conclusion the waiver threatens to cause violation of several sections of the Basin Plan and degrade groundwater quality contrary to CWC 13269. The waiver should not have been adopted without revision to eliminate the threat to groundwater quality. The Regional Board should issue individual Waste Discharge Requirements as the cited winery and food processing discharges do not constitute a low threat to water quality.

5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED.

CSPA is a non-profit, environmental organization that has a direct interest in reducing pollution to the waters of the Central Valley. CSPA's members benefit directly from the waters in the form of recreational hiking, photography, fishing, swimming, hunting, bird watching, boating, consumption of drinking water and scientific investigation. Additionally, these waters are an important resource for recreational and commercial fisheries. Central Valley waterways also provide significant wildlife values important to the mission and purpose of the Petitioners. This wildlife value includes critical nesting and feeding grounds for resident water birds, essential habitat for endangered species and other plants and animals, nursery areas for fish and shellfish and their aquatic food organisms, and numerous city and county parks and open space areas. CSPA's members reside in communities whose economic prosperity depends, in part, upon the quality of water. CSPA has actively promoted the protection of fisheries and water quality 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 declining aquatic resources. CSPA member's health, interests and pocketbooks are directly harmed by the failure of the Regional Board to develop an effective and legally defensible program addressing discharges to waters of the state and nation.

6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS.

Petitioners seek an Order by the State Board to:

- A. Vacate Order No. R5-2009-0097 and remand to the Regional Board with instructions prepare and circulate a new tentative order that comports with regulatory requirement.
- B. Alternatively; prepare, circulate and issue a new order that is protective of identified beneficial uses and comports with regulatory requirements.

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION.

CSPA's arguments and points of authority are adequately detailed in the above comments and our 28 August 2009 comment letter. Should the State Board have additional questions regarding the issues raised in this petition, CSPA will provide additional briefing on any such questions. The petitioners believe that an evidentiary hearing before the State Board will not be necessary to resolve the issues raised in this petition. However, CSPA welcomes the opportunity to present oral argument and respond to any questions the State Board may have regarding this petition.

8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGERS, IF NOT

THE PETITIONER.

A true and correct copy of this petition, without attachment, was sent electronically and by First Class Mail to Ms. Pamela Creedon, Executive Officer, Regional Water Quality Control Board, Central Valley Region, 11020 Sun Center Drive #200, Rancho Cordova, CA 95670-6114.

9. A STATEMENT THAT THE ISSUES RAISED IN THE PETITION WERE PRESENTED TO THE REGIONAL BOARD BEFORE THE REGIONAL BOARD ACTED, OR AN EXPLANATION OF WHY THE PETITIONER COULD NOT RAISE THOSE OBJECTIONS BEFORE THE REGIONAL BOARD.

CSPA presented the issues addressed in this petition to the Regional Board in a 28 August 2009 comment letter that was accepted into the record.

If you have any questions regarding this petition, please contact Bill Jennings at (209) 464-5067 or Michael Jackson at (530) 283-1007.

Dated: 4 November 2009

Respectfully submitted,



Bill Jennings, Executive Director
California Sportfishing Protection Alliance

Attachment No. 1: Order No. R5-2009-0097