



## 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](mailto:deltakeep@aol.com), W: [www.calsport.org](http://www.calsport.org)

16 January 2009

Ms. Pamela C. Creedon, Executive Officer  
Mr. Loren J. Harlow, Assistant Executive Officer  
Mr. Ken Landau, Assistant Executive Officer  
Ms. Jo Anne Kipps, Senior WRCE  
Ms. Jill Walsh, SEA  
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: Conditional Early Settlement Offer R5-2008-0629 Relating to Violations of Waste Discharge Requirements Order 94-295, California Dairies, Inc., Tipton Milk Processing Facility, Tulare County

Dear Mesdames Creedon, Kipps, Walsh and Messrs. Harlow and Landau:

The California Sportfishing Protection Alliance (CSPA) has reviewed the proposed Conditional Early Settlement Offer R5-2008-0629 (Settlement Offer) and submits the following comments.

CSPA believes the exemption of California Dairies' Tipton Milk Processing Facility from 499 cited violations of WDR Order 94-209 is illegal and without merit. Accordingly, CSPA requests a public hearing in the matter.

### Early Settlement Offer

On 9 December 2008 the Central Valley Regional Water Quality Control Board (Regional Board) issued a *Conditional Early Settlement Offer* (Settlement Offer, Attachment 1) R5-2008-0629 relating to Violations of Waste Discharge Requirements Order 94-295, California Dairies, Inc., Tipton Milk Processing Facility (Tipton Milk). The settlement Offer was posted on the Regional Board's web site on 12 January 2009 for a required 30-day public comment period. The Settlement Offer assesses violations of Waste Discharge Requirements (WDRs) Order 94-295 (NPDES No. CA0082805). Penalties were assessed for the period from 1 January 2000 through 30 July 2008. The assessed violations were included in the Settlement Offer as Exhibit A. A mandatory minimum penalty of \$846,000 is proposed in accordance with California Water Code (CWC) Section 13385. Subdivisions (h) and (i) of CWC section 13385 require the assessment of an MMP of \$3,000 for specified serious and chronic effluent limitation violations.

All of the assessed violations occurred under WDR Order No. 94-295. The WDRs were renewed and adopted by the Regional Board on 31 July 2008 as Order No. R5-2008-0114 (NPDES No. CA0082805).

### Data Base Reported Violations

The California Integrated Water Quality System (CIWQS) is a computer system used by the State and Regional Water Quality Control Boards to track information about places of environmental interest manage permits and other orders, track inspections, and manage violations and enforcement activities. CIWQS also makes data available to the public through reports. A copy of the CIWQS public report for Tipton Milk (attachment 2) shows that there were 499 Effluent Limitation violations that are listed as “exempted” and not reported or discussed in the Settlement Offer:

- 218 exceedances of the electrical conductivity (EC) Effluent Limitation that were not counted as violations but were defined as not applicable “N/A due to revised method for compliance determination”.
- 30 exceedances of the electrical conductivity (EC) Effluent Limitation that were not counted as violations but were exempted as “Only one violation per week subject to MMPs”.
- 22 exceedances of the electrical conductivity (EC) Effluent Limitation that were not counted as violations but were exempted as both “N/A due to revised method for compliance determination” and “Only one violation per week subject to MMPs”.
- 207 exceedances of the permitted Effluent Limitation for flow that were not counted as violations but were defined as “limitation for flow, not pollutant, therefore considered not subject to MMP”.

### Permit Requirements

WDR Order No. 94-295 contains the following Effluent Limitations for flow and EC:

#### B. Effluent Limitations:

4. The discharge at Discharge Point 001 or Discharge Point 002 shall not exceed 2.5 mgd. The treated process wastewater discharge to the storage ponds shall not exceed 0.12 mgd, and non-process wastewater discharge to the storage ponds shall not exceed 0.33 mgd.
5. Mineralization, as measured by electrical conductivity (EC), shall not exceed the average EC of the source water plus 500  $\mu$ mhos/cm, or a maximum of 1000  $\mu$ mhos/cm, whichever is less.

The accompanying Monitoring and Reporting Program requires the following for flow and EC:

<u>Constituents</u>	<u>Units</u>	<u>Sampling Type of Sample</u>	<u>Frequency</u>
Flow	mgd	Metered	Continuous
EC @ 25 °C	μ mhos/cm	8-hr. Composite	Weekly

**WDR Order No. R5-2008-0114** was revised on 31 July 2008 to include the following EC Effluent Limitation and Compliance Determination:

d. Electrical Conductivity. Effluent annual average EC shall not exceed the annual flow-weighted average of EC in the source water plus 500 μmhos/cm, or a total of 1,000 μmhos/cm, whichever is more stringent. (For compliance determination, see Section VII.C.)

#### VII. COMPLIANCE DETERMINATION

Compliance with the effluent limitations contained in section IV of this Order will be determined as specified below:

c. Effluent Annual Average Electrical Conductivity (Section IVA.1.d. and IV.B.4.). Compliance with the limit will be determined monthly by comparing the annual rolling average of the weekly data submitted for effluent EC and the annual rolling average of the monthly flow-weighted data submitted for the source water EC.

The Monitoring and Reporting Program for R5-2008-0114 was revised to require a grab sample rather than an 8-hour composite. The sampling frequency remained at weekly.

#### Discussion

The Effluent Limitation for EC from WDR Order No. 94-295 states that: “Mineralization, as measured by electrical conductivity (EC), shall not exceed the average EC of the source water plus 500 μmhos/cm, or a maximum of 1000 μmhos/cm, whichever is less.”

The Settlement Offer states that: “Compliance with WDRs Order 94-295 Effluent Limitation B.5 was determined for the period from 1 January 2000 through 30 July 2008 (review period) in accordance with a method approved by the Central Valley Water Board. This method determines compliance with the EC effluent limitation by comparing the annual rolling average of the weekly data submitted for effluent EC and the annual rolling average of the monthly flow-weighted data submitted for the source water EC.” It is assumed that the phrase “approved by the Central Valley Water Board” refers to the Regional Boards adoption of Order R5-2008-0114.

The Effluent Limitation for EC in Order No. 94-295 is not a weekly or annual average. Since no time frame is associated with the 94-295 EC Effluent Limitation it is an instantaneous limit: the limit may not be exceeded at any time. An annual average contains high and low values; daily,

weekly and monthly levels could exceed a regulated value while maintaining compliance of an annual average basis. There is nothing in Order No. 94-295 that allows averaging in determining compliance with the Effluent Limitation for EC.

WDR Order No. 94-295 was adopted in 1994. WDR Order No. R5-2008-0114 was adopted in 2008. The 2008 Order replaces the 1994 Order but does not amend it; Order No. 94-295 was rescinded by the adoption of Order No. R5-2008-0114 which contains the following language: "IT IS HEREBY ORDERED, that Orders No. 94-295 and No. 92-057 are rescinded upon the effective date of this Order except for enforcement purposes, and, in order to meet the provisions contained in Division 7 of the CWC (commencing with Section 13000) and regulations adopted thereunder, and the provisions of the federal Clean Water Act (CWA) and regulations and guidelines adopted thereunder, the Discharger shall comply with the requirements in this Order." The Effluent Limitation and Compliance Determination procedure in Order No. R5-2008-0114 for EC constitutes a significant relaxation of the EC Effluent Limitation in Order No. 94-295. While the Antibacksliding regulations (40 CFR 122 (l) and 122.62 (a) (16) can be addressed in a permitting action, they cannot be retroactively applied to a previous permit. The "exemption" for "N/A due to revised method for compliance determination" is incorrect.

The monitoring frequency for EC in Order No. 94-295 is weekly, however there is no "weekly" association to the Effluent Limitation. Sampling frequency does not equate to the time frame associated with an Effluent Limitation. For example; it is common practice to limit metals as a daily maximum and monthly average in NPDES permits; however sampling is typically conducted no more than monthly and in many cases quarterly. The quarterly sampling requirement does not alter the time frame associated with the Effluent Limitation. The Effluent Limitation for EC in Order No. 94-295 is not a weekly limitation and can be exceeded more than once during a week. The Discharger chose to sample more frequently than was required by the Monitoring and Reporting Program. Each sampling event subjects the Discharge to potential violation of the Effluent Limitation. The "exemption" for "Only one violation per week subject to MMPs" is incorrect. Order No. 94-295 requires that: "The Discharger shall comply with all the items of the "Standard Provisions and Reporting Requirements for Waste Discharge Requirements (NPDES)," dated 1 March 1991, which are part of this Order. This attachment and its individual paragraphs are referred to as "Standard Provision(s)"." Standard Provisions require that the results of any sampling conducted more frequently than required by the Monitoring and Reporting Program must be submitted to the Regional Board.

WDR Order No. 94-295 contains an Effluent Limitation for flow. CWC Section 13385 (i) (1) requires a mandatory minimum penalty of \$3,000 be assessed for exceedance of a waste discharge requirement effluent limitation. The CWC does not specify that an Effluent Limitation must only be for a "pollutant". The "exemption" for "limitation for flow, not pollutant, therefore considered not subject to MMP" is incorrect.

All of the criteria used to exempt California Dairies, Inc. at the Tipton Milk Processing Facility from mandatory minimum penalties for the cited 499 violations of WDR Order No. 94-295 appears to be without merit.

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 style with a large, prominent initial "B".

Bill Jennings, Executive Director  
California Sportfishing Protection Alliance