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For Petitioner California Sportfishing Protection Alliance

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

**In the Matter of Waste Discharge Requirements For)
United States Department of the Air Force, Air Force) PETITION FOR REVIEW
Real Property Agency, Former McClelland Air Force)
Base Groundwater Extraction and Treatment)
System; California Regional Water Quality Control)
Board – Central Valley Region Order No. R5-2008-)
0161; NPDES No. CA0081850)**

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 Waste Discharge Requirements (NPDES No. CA0081850) for United States Department of the Air Force, Air Force Real Property Agency, Former McClelland Air Force Base

Groundwater Extraction and Treatment System, on 24 October 2008. *See* Order No. R5-2008-0161. 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. R5-2008-0161, Waste Discharge Requirements (NPDES No. CA0081850) for the United States Department of the Air Force, Air Force Real Property Agency, Former McClelland Air Force Base Groundwater Extraction and Treatment System. 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:

24 October 2008

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 7 September 2008. That 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:

A. The Permit fails to contain mass-based effluent limits for Carbon Tetrachloride, Chromium VI, Dichlorobromomethane, 1,1-Dichloroethane, 1,2-Dichloroethane, 1,1-Dichloroethylene, Tetrachloroethylene, Trichloroethylene, Vinyl Chloride and cis-1,2-Dichloroethylene as required by Federal Regulations 40 CFR 122.45(b).

The Permit Fact Sheet states that: “A technology based effluent limitation for flow is established in this Order to monitor performance of the groundwater treatment system from the standpoint of volumes being treated.” In other words, the system is designed to treat a maximum volume of pollutants. The treatment system described in the Permit consists of an air stripper, granular activated carbon, ion exchange and resin vessels all of

which are designed based on the mass of pollutants to be treated. Mass limitations are critically important to assure that the system is not overloaded and to determine a schedule for maintenance; such as for carbon regeneration prior to pollutant breakthrough. Section 5.7.1 of U.S. EPA's *Technical Support Document for Water Quality Based Toxics Control* (TSD, EPA/505/2-90-001) states with regard to mass-based Effluent Limits:

“Mass-based effluent limits are required by NPDES regulations at 40 CFR 122.45(f). The regulation requires that all pollutants limited in NPDES permits have limits, standards, or prohibitions expressed in terms of mass with three exceptions, including one for pollutants that cannot be expressed appropriately by mass. Examples of such pollutants are pH, temperature, radiation, and whole effluent toxicity. Mass limitations in terms of pounds per day or kilograms per day can be calculated for all chemical-specific toxics such as chlorine or chromium. Mass-based limits should be calculated using concentration limits at critical flows. For example, a permit limit of 10 mg/l of cadmium discharged at an average rate of 1 million gallons per day also would contain a limit of 38 kilograms/day of cadmium.

Mass based limits are particularly important for control of bioconcentratable pollutants. Concentration based limits will not adequately control discharges of these pollutants if the effluent concentrations are below detection levels. For these pollutants, controlling mass loadings to the receiving water is critical for preventing adverse environmental impacts.

However, mass-based effluent limits alone may not assure attainment of water quality standards in waters with low dilution. In these waters, the quantity of effluent discharged has a strong effect on the instream dilution and therefore upon the RWC. At the extreme case of a stream that is 100 percent effluent, it is the effluent concentration rather than the mass discharge that dictates the instream concentration. Therefore, EPA recommends that permit limits on both mass and concentration be specified for effluents discharging into waters with less than 100 fold dilution to ensure attainment of water quality standards.”

Federal Regulations, 40 CFR 122.45 (f), states the following with regard to mass limitations:

- “(1) all pollutants limited in permits shall have limitations, standards, or prohibitions expressed in terms of mass except:
 - (i) For pH, temperature, radiation or other pollutants which cannot be expressed by mass;
 - (ii) When applicable standards and limitations are expressed in terms of other units of measurement; or
 - (iii) If in establishing permit limitations on a case-by-case basis under 125.3, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation (for example, discharges of TSS from certain mining operations), and permit

conditions ensure that dilution will not be used as a substitute for treatment.

(2) Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.”

Mass limitations are feasible for the pollutants being regulated by the Permit. This is clearly evidenced by the fact that the existing Permit, Order No. R5-2003-0052-A01 contained mass limitations for most of the limited constituents. As stated in our opening paragraph; mass limits are also necessary to assure that the system operates and is maintained to prevent violations of discharge limitations.

In addition to the above citation, on June 26th 2006 U.S. EPA, Mr. Douglas Eberhardt, Chief of the CWA Standards and Permits Office, sent a letter to Dave Carlson at the Central Valley Regional Water Quality Control Board strongly recommending that NPDES permit effluent limitations be expressed in terms of mass as well as concentration.

B. The Permit contains Effluent Limitations less stringent than the existing permit (Order R5-2003-0052-A01) contrary to the Antidegradation requirements of the Clean Water Act and Federal Regulations, 40 CFR 122.44 (l)(1), specifically mass limitations for Chromium VI, Dichlorobromomethane, 1,1-Dichloroethane, 1,2-Dichloroethane, 1,1-Dichloroethylene, Tetrachloroethylene, Trichloroethylene and Vinyl Chloride have been eliminated.

Under the Clean Water Act (CWA), point source dischargers are required to obtain federal discharge (NPDES) permits and to comply with water quality based effluent limits (WQBELs) in NPDES permits sufficient to make progress toward the achievement of water quality standards or goals. The antidegradation and antidegradation rules clearly spell out the interest of Congress in achieving the CWA’s goal of continued progress toward eliminating all pollutant discharges. Congress clearly chose an overriding environmental interest in clean water through discharge reduction, imposition of technological controls, and adoption of a rule against relaxation of limitations once they are established.

Upon permit reissuance, modification, or renewal, a discharger may seek a relaxation of permit limitations. However, according to the CWA, relaxation of a WQBEL is permissible only if the requirements of the antidegradation rule are met. The antidegradation regulations prohibit EPA from reissuing NPDES permits containing interim effluent limitations, standards or conditions less stringent than the final limits contained in the previous permit, with limited exceptions. These regulations also prohibit, with some exceptions, the reissuance of permits originally based on best professional judgment (BPJ) to incorporate the effluent guidelines promulgated under CWA §304(b), which would result in limits less stringent than those in the previous BPJ-

based permit. Congress statutorily ratified the general prohibition against backsliding by enacting §§402(o) and 303(d)(4) under the 1987 Amendments to the CWA. The amendments preserve present pollution control levels achieved by dischargers by prohibiting the adoption of less stringent effluent limitations than those already contained in their discharge permits, except in certain narrowly defined circumstances.

When attempting to backslide from WQBELs under either the antidegradation rule or an exception to the antibacksliding rule, relaxed permit limits must not result in a violation of applicable water quality standards. The general prohibition against backsliding found in §402(o)(1) of the Act contains several exceptions. Specifically, under §402(o)(2), a permit may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant *if*: (A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation; (B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or (ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section; (C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy [(e.g., Acts of God)]; (D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or (E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit, and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Even if a discharger can meet either the requirements of the antidegradation rule under §303(d)(4) or one of the statutory exceptions listed in §402(o)(2), there are still limitations as to how far a permit may be allowed to backslide. Section 402(o)(3) acts as a floor to restrict the extent to which BPJ and water quality-based permit limitations may be relaxed under the antibacksliding rule. Under this subsection, even if EPA allows a permit to backslide from its previous permit requirements, EPA may never allow the reissued permit to contain effluent limitations which are less stringent than the current effluent limitation guidelines for that pollutant, or which would cause the receiving waters to violate the applicable state water quality standard adopted under the authority of §303.49.

Federal regulations 40 CFR 122.44 (l)(1) have been adopted to implement the antibacksliding requirements of the CWA:

- (l) Reissued permits. (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or

conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under Sec. 122.62.)

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions--A permit with respect to which paragraph (1)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if:

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or (2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) Limitations. In no event may a permit with respect to which paragraph (1)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

C. The Permit contains an Effluent Limitation for acute toxicity that allows mortality to aquatic life that exceeds the Basin Plan water quality objective and does not comply with Federal regulations, at 40 CFR 122.44 (d)(1)(i) or the Clean Water Act.

Under the federal Clean Water Act (CWA), states are required to classify surface waters by *uses* – the beneficial purposes provided by the waterbody. For example, a waterbody may be designated as a drinking water source, or for supporting the growth and propagation of aquatic life, or for allowing contact recreation, or as a water source for industrial activities, or all of the above. States must then adopt *criteria* – numeric and narrative limits on pollution, sufficient to protect the uses assigned to the waterbody. Federal regulations, at 40 CFR 122.44 (d)(1)(i), adopted to require implementation of the CWA, 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. 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. This section of the Basin Plan further states, in part that, compliance with this objective will be determined by analysis of indicator organisms (toxicity tests).

The Permit requires that the Discharger conduct acute toxicity tests and states that compliance with the toxicity objective will be determined by analysis of indicator organisms. However, the Tentative Permit contains a discharge limitation that allows 30% mortality (70% survival) of fish species in any given toxicity test. Surely, mortality is a detrimental physiological response to aquatic life.

For an ephemeral or low flow stream, allowing 30% mortality in acute toxicity tests allows that same level of mortality in the receiving stream, in violation of federal regulations and contributes to exceedance of the Basin Plan's narrative water quality objective for toxicity. In receiving streams where dilution may be available the primary mixing area is commonly referred to as the zone of initial dilution, or ZID. Within the ZID acute aquatic life criteria are exceeded. To satisfy the CWA prohibition against the discharge of toxic pollutants in toxic amounts, regulators assume that if the ZID is small, significant numbers of aquatic organisms will not be present in the ZID long enough to encounter acutely toxic conditions. The allowance of 30% mortality will result in acute toxicity within the ZID. Before the discharge can be allowed a complete mixing zone analysis is required in accordance with the Basin Plan and the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (SIP) to show that discharge limitations prevent toxicity; such an analysis has not been completed. 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 SIP and the Regional Board is required to the Policy.

US EPA's *Technical Support Document for Water Quality-based Toxics Control* states, on page 104, that:

“When setting a whole effluent toxicity limit to protect against acute effects, some permitting authorities use an end-of-pipe approach. Typically these limits are established as an LC50>100% effluent at the end of the pipe. These limits are routinely set without any consideration as to the fate of the effluent and the concentrations of toxicant(s) after the discharge enters the receiving water. Limits derived in this way are not water quality based limits and suffer from significant deficiencies since the toxicity of a pollutant depends mostly upon concentration, duration of exposure, and repetitiveness of the exposure. This is especially true in effluent dominated waters. For example, an effluent that has an LC50=100% contains enough toxicity to be lethal up to 50% of the test organisms. If the effluent is discharged to a low flow receiving waterbody that provides no more than a three fold dilution at the critical flow, significant mortality can occur in the receiving water. Furthermore, such a limit could not assure protection against chronic effects in the receiving waterbody. Chronic effects could occur if the dilution in the receiving water multiplied by the acute to chronic ratio is greater than 100 percent. Therefore, in effluent dominated situations, limits set using this approach may be severely underprotective. In contrast, whole effluent toxicity limits set using this approach in very high receiving water flow conditions may be overly restrictive.”

Following US EPA's rationale the limitations of allowing 70% survival (30% mortality) in acute toxicity tests, as is the case in the cited LC50, will result in the allowance of toxic discharges to ephemeral streams, which is representative of the receiving waters at Davis. While the State and Regional Board's method of prescribing an effluent limitation of 70% percent survival may be protective in waterbodies with significant dilution; such a limitation should be subject to a complete mixing zone analysis. For an ephemeral receiving stream a mixing zone analysis would not be applicable under worst case dry stream conditions. The Order should be revised to require the Regional Board to prohibit acute toxicity (100% survival as compared to the laboratory control) in accordance with Federal regulations, at 40 CFR 122.44 (d)(1)(i).

With regard to WET testing variability; US EPA's *Technical Support Document for Water Quality-based Toxics Control* states, on page 11, that:

“In summary, whole effluent toxicity testing can represent practical tests that estimate potential receiving water impacts. Permit limits that are developed correctly from whole effluent toxicity tests should protect biota if the discharged effluent meets the limits. It is important not confuse permit limit variability with toxicity test variability” (emphasis added)

The Permit must be revised to prohibit acute toxicity, require 100% survival in toxicity tests, in accordance with Federal regulations, at 40 CFR 122.44 (d)(1)(i), the CWA, the SIP, the CWC and the Basin Plan.

D. The Permit does not contain Effluent Limitations for 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).

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 argument that domestic sewage contains toxic substances and presents a reasonable potential to cause toxicity if not properly treated and discharged. 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 Permit contains Effluent Limitation B, 1, e, which states that: “There shall be no chronic toxicity in the effluent discharge”. However, “chronic toxicity” is not defined. If the definition of chronic toxicity is that; in chronic bioassay tests there shall be no mortality and growth and reproduction shall not be statistically different than the laboratory control; the limitation is acceptable. A numeric or well defined effluent limitation for chronic toxicity must be included in the Order.

Permit is quite simply wrong; by failing to include a numeric or well defined effluent limitation prohibiting chronic toxicity the Permit does not "...implement the SIP". The Regional Board has commented time and again that no chronic toxicity effluent limitations are being included in NPDES permit until the State Board adopts a numeric limitation. The Regional Board explanation does not excuse the Permit's failure to comply with Federal Regulations, the SIP, the Basin Plan and the CWC. The Regional Board's Basin Plan, as cited above, already states that: "...waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses..." Accordingly, the Permit must be revised to prohibit chronic toxicity (mortality and adverse sublethal impacts to aquatic life, (sublethal toxic impacts are clearly defined in EPA's toxicity guidance manuals)) in accordance with Federal regulations, at 40 CFR 122.44 (d)(1)(i) and the Basin Plan and the SIP.

E. The 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). Page F-18 of the Permit states that the effluent hardness was used to calculate the reasonable potential for exceeding water quality standards for metals (chromium, copper, cadmium, nickel and zinc).

The hardness of the receiving water was 38 mg/l and the hardness of the effluent was 120 mg/l. The lower hardness results in higher toxicity rates and therefore an effluent limitation is more likely to be required for the discharge. 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 states that the effluent hardness and the downstream hardness were used to calculate Effluent Limitations for metals. The definition of *ambient* is "in the surrounding area", "encompassing on all sides". It has been the Region 5, Sacramento, NPDES Section, in referring to Basin Plan objectives for temperature, to define *ambient* as meaning upstream. It is reasonable to assume, after considering the definition of ambient, that EPA is referring to the hardness of the receiving stream before it is potentially impacted by an effluent discharge. It is also reasonable to make this assumption based on past interpretations and since EPA, in permit writers' guidance and other reference documents, generally assumes receiving streams have dilution, which would ultimately "encompass" the discharge. Ambient conditions are in-stream conditions unimpacted by the discharge.

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 Permit failure to include Effluent Limitations for copper, cadmium, silver and zinc 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.

F. The Permit fails to utilize valid, reliable, and representative effluent data in conducting a reasonable potential and limits derivation calculations for copper contrary to US EPA’s interpretation of Federal Regulations, 40 CFR 122.44(d), and should not be adopted in accordance with 40 CFR 122.4 (a), (d) and (g) and CWC Section 13377.

Federal Regulations, 40 CFR 122.44(d), requires that limits must be included in permits where pollutants will cause, have reasonable potential to cause, or contribute to an exceedance of the State’s water quality standards. US EPA has interpreted 40 CFR 122.44(d) in *Central Tenets of the National Pollutant Discharge Elimination System (NPDES) Permitting Program* (Factsheets and Outreach Materials, 08/16/2002) that; although States will likely have unique implementation policies there are certain tenets that may not be waived by State procedures. These tenets include that “where valid, reliable, and representative effluent data or instream background data are available they MUST be used in applicable reasonable potential and limits derivation calculations. Data may not be arbitrarily discarded or ignored.” The Regional Board has failed to valid, reliable and representative data in developing limitations, contrary to the cited Federal Regulation.

Federal Regulation, 40 CFR 122.4 (a), (d) and (g) require that no permit may be issued when the conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA, when imposition of conditions cannot ensure compliance with applicable water quality requirements and for any discharge inconsistent with a plan or plan amendment approved under Section 208(b) of the CWA. In accordance with 40 CFR 122.4 (a), (d) and (g) the Permit may not be adopted for failing to include protective limitations based on valid, reliable and representative data.

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.”

The lowest hardness of the receiving water was recorded as 38 mg/l which translates to a 4-day average (CCC) for copper of 4.0 ug/l and a 1-hour average (CMC) of 5.7 ug/l as derived directly from the California Toxics Rule (CTR). The highest recorded receiving water copper concentration was 12 ug/l. The highest recorded copper concentration of the effluent was 2.1 ug/l; however this was for dissolved not total copper. The total copper concentration would be higher than the dissolved fraction. It is also necessary to consider the statistical variability of the effluent sampling as required by Federal regulations, 40 CFR § 122.44(d)(1)(ii). With only two effluent samples (n = 2) and utilizing the statistical procedures from US EPA’s *Technical Support Document for Water Quality based Toxics Control* (TSD), Table 3-1; with a coefficient of variation of 0.6 (since there are less than 10 samples), the RP multiplying factor is 7.4 and the projected maximum effluent concentration for copper will be 15.54 ug/l. There is a reasonable potential for copper to exceed the CTR criteria and an Effluent Limitation is required.

The permit concludes that the data set is inadequate and that it is uncertain whether a reasonable potential exists for copper to exceed water quality standard. Federal Regulations, 40 CFR 122.44(d), requires that limits must be included in permits where pollutants will cause, have reasonable potential to cause, or contribute to an exceedance of the State’s water quality standards. US EPA has interpreted 40 CFR 122.44(d) in *Central Tenets of the National Pollutant Discharge Elimination System (NPDES) Permitting Program* (Factsheets and Outreach Materials, 08/16/2002) that although States will likely have unique implementation policies there are certain tenets that may not be waived by State procedures. These tenets include that “where the preponderance of evidence clearly indicates the potential to cause or contribute to an exceedance of State water quality standards (even though the data may be sparse or absent) a limit MUST be included in the permit.”

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. R5-2008-0161 (NPDES No. CA0081850) and remand to the Regional Board with instructions prepare and circulate a new tentative order that comports with regulatory requirements.
 - 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 7 September 2008 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.

A true and correct copy of this petition, without attachment, was sent to the Discharger in care of: Mr. Steve Mayer, P.E., AFRPA Western Regional Execution Center, 2411 Olson Street, McClelland, CA 95652.

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 7 September 2008 detailed 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: 23 November 2008

Respectfully submitted,



Bill Jennings, Executive Director
California Sportfishing Protection Alliance

Attachment No. 1: Order No. R5-2008-0161