

ATTACHMENT A  
TO THE 11/12 SEPTEMBER 2008 STAFF REPORT  
CEASE AND DESIST ORDER FOR THE CITY OF DIXON

**PUBLIC COMMENTS ON THE DRAFT CEASE AND DESIST ORDER**

The draft Cease and Desist Order (CDO) was transmitted for public review on 4 February 2008, while the tentative CDO was issued for public comment on 11 February 2008. Comments were received from the City of Dixon (Discharger) and Michael Ceremello (Dixon resident). The comments were received within the specified comment period. In addition, the City submitted a letter dated 15 April 2008 correcting some of its original comments. Copies of the comment letters are provided as Attachments C and D to this staff report.

**City of Dixon Comments**

Staff accommodated a number of the City's requests for changes or clarifications to the findings and the *"It is Hereby Ordered Section"* of the tentative CDO. The changes that were made are not discussed in this document. However, significant comments and/or areas which were not changed are discussed below.

**Proposed Changes to Schedule and Compliance Date**

In general, the City expressed concern that the schedule in the tentative CDO was too short to achieve compliance and requested that the final effluent limitations take effect in 2014. Staff has accommodated that request. In its comments, the City proposed the following changes to the interim measures and final compliance date:

**Comment:** *The City proposes that the tentative CDO require submittal of a Workplan for Monitoring Well Network Modifications by 29 August 2008.*

**Response:** Staff believe sufficient background groundwater quality data are available. If the City wishes to install additional groundwater monitoring wells, it may do so; however, staff do not propose to impose a requirement for additional wells. However, Task 3 of the proposed CDO would require submittal of a workplan prior to commencement of any water quality study or investigation intended to support a report of waste discharge and/or a revised effluent or groundwater limitation.

**Comment:** *The City proposes that the tentative CDO require submittal of a completed Salinity Source Study prepared in compliance with Health and Safety Code section 116786 by 30 September 2008.*

**Response:** Staff concur that preparation and submittal of a Salinity Source Study, as described in Health and Safety Code (HSC) section 116786(c) is appropriate.

**Comment:** *The City proposes that the tentative CDO require submittal of an adopted sewer use ordinance prohibiting the installation of residential water softening or conditioning appliances that discharge salinity to the community sewer system by 28 November 2008.*

**Response:** The tentative CDO has been revised to include this requirement.

**Comment:** *The City proposes that the tentative CDO require submittal of a facilities and financing plan for improvements to the wastewater treatment facility.*

**Response:** The City is responsible for this work and will need to complete a financing plan, if necessary.

**Comment:** *The City proposes that the tentative CDO require submittal of a Residential Salinity Source Control Plan describing measures the City will undertake to address salinity discharged into the community sewer system from existing residential water softening or conditioning appliances by 30 April 2009.*

**Response:** The tentative CDO has been revised to include this requirement.

**Comment:** *The City proposes that the tentative CDO require submittal of a Report of Waste Discharge (RWD) by 31 August 2010.*

**Response:** The revised tentative CDO requires submittal of a RWD by 31 January 2013, if necessary. The due date has been extended to allow the City time to determine if the source control measures are sufficient to meet the final effluent limitations.

**Comment:** *The City proposes that the tentative CDO commit the Regional Water Board to hold a hearing on the proposed RWD and revised WDRs by 30 September 2010.*

**Response:** While Regional Water Board staff will make every effort to review the RWD and prepare updated WDRs in a timely manner, the Regional Water Board cannot commit to a particular hearing date. In addition, the CDO has been revised to require submittal of a RWD only if the City or Regional Water Board staff find that the salinity source reduction efforts are insufficient to meet the final effluent limitations.

**Comment:** *The City proposes that the tentative CDO require submittal of a Salinity Source Control Effectiveness Report by 31 December 2010.*

**Response:** The tentative CDO has been revised to require this report by 31 January 2012. The due date has been extended to allow the City time to determine if the source control measures are sufficient to meet the final effluent limitations.

**Comment:** *The City proposes that the tentative CDO require submittal of a certified Environmental Impact Report, or other environmental document, for any necessary improvements to the WWTF by 29 April 2011.*

**Response:** The City is responsible for any CEQA documentation necessary for its project and will need to complete it in a timely manner, if necessary.

**Comment:** *The City proposes that the tentative CDO require submission of a copy of an awarded contract for construction of improvements to the WWTF by 28 April 2012.*

**Response:** The city is responsible for compliance with the final effluent limitations by 1 January 2014 and needs to perform any necessary work required to ensure compliance.

**Comment:** *The City proposes that the tentative CDO require submission of a copy of the City Council's acceptance of completion of the WWTF improvements construction contract by 30 April 2014.*

**Response:** The city is responsible for compliance with the final effluent limitations by 1 January 2014 and needs to perform any necessary work required to ensure compliance.

### Interim and Final Effluent Limitations

**Comment:** *The City objects to the proposed effluent limitations and asserts that compliance will almost certainly require construction of improvements to the WWTF.*

**Response:** While source control should result in substantial decreases in salt concentrations, physical improvements to the WWTF may be required. The revised schedule allows more time to conduct source control and assess its effectiveness. In addition, effluent limitations are now only proposed for sodium and chloride, as control of these two elements should result in water quality improvements for other salt-based constituents.

**Comment:** *The City commented that it has no reliable means of complying with the interim effluent limitations.*

**Response:** The proposed CDO has been revised to include interim limitations based on past performance.

### Compliance

**Comment:** *The City commented that all possible compliance measures are either unacceptable to the Regional Water Board or will take longer than allowed by the tentative Cease and Desist Order and will have significant economic and environmental impacts.*

**Response:** The tentative CDO has been revised to provide additional time to achieve compliance. In addition, the City's data shows that salinity source reduction measures may be the only measure need to comply with the final effluent limitations.

### Sufficiency of Existing Groundwater Monitoring Network

**Comment:** *The City commented that "[i]t is the opinion of the City and its consultants that the existing groundwater monitoring network is insufficient at this time to determine degradation or compliance with any disposal strategy."*

**Response:** The tentative CDO imposes effluent limitations rather than groundwater limitations on the discharge. Compliance, therefore, will be assessed by pond monitoring, rather than groundwater monitoring. Please see Attachment B for a more detailed response to this comment.

### Legal Issues

**Comment:** *Significant Effect Exception Applies. The City commented that adoption of the tentative CDO would not be categorically exempt from the California Environmental Quality Act (CEQA) and that, therefore, impacts must be considered.*

**Response:** Issuance of the Cease and Desist Order to the City of Dixon is categorically exempt from the requirements of the California Environmental Quality Act (Pub. Resources Code § 21000 *et seq.*) under a categorical exemption for Enforcement Actions by Regulatory Agencies (Cal. Code Regs., tit 14, § 15321). This regulation provides, in part, that the following are exempt from the CEQA process: "actions by regulatory agencies to enforce or revoke a ... permit ... adopted, or prescribed by the regulatory agency..." The action here

undertaken by a regulatory agency is the issuance of a Cease and Desist Order (Tentative Order) to enforce the terms of WDR No. 94-187.

The commenter contends that an exception to the exemption, codified at California Code of Regulations, title 14, section 15300.2(c), prohibits the Regional Water Board from using the aforementioned categorical exemption. This exception to the categorical exemption is applicable if two conditions are met: (1) the project raises the “reasonable possibility” that a “significant effect on the environment” may occur, and (2) this possibility is due to “unusual circumstances.” Therefore, under section 15300.2(c), there is a two-pronged inquiry into whether this exception to the categorical exemption is applicable.

In enacting the categorical exemptions, the Secretary of Resources has made the determination that specific classes of activities are categorically exempt from CEQA because “they do not have a significant effect on the environment.” (Cal. Code Regs., tit 14, § 15300.) In making this determination, a set of environmental factors that would be typical of the particular class of activity are analyzed to determine whether, as a class, these activities would potentially have a significant effect upon the environment. Section 15300.2(c) is in place to ensure that projects that might fit in a categorical exemption class, but are beset with “unusual circumstances,” do not escape environmental review. The logic behind this provision is “*presumably ... to enable agencies to determine which specific activities – within a class of activities that does not normally threaten the environment – should be given further environmental evaluation and hence be excepted from the exemption.*” (Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster, 52 Cal.App.4<sup>th</sup> 1165, 1206.)

Although it is arguable that enforcement of WDR No. 94-187 through the Tentative Order might have a remote possibility of affecting the environment (the first prong of the section 15300.2(c) test), issuance of the Tentative Order fits neatly within the exempt class of Enforcement Actions by Regulatory Agencies, codified in the California Code of Regulations at title 14, section 15321. The Tentative Order enforces the terms of a permit that was adopted by the Regional Water Board in 1994. The Secretary of Resources has delineated this class of activities as exempt from CEQA review, and has reached the conclusion that this type of activity does not have a significant effect on the environment. Therefore, unless this activity presents “unusual circumstances,” the categorical exemption is applicable.

The second prong of the “unusual circumstances” test requires that the possibility that the activity will cause a significant effect on the environment be due to “unusual circumstances.” The case that the commenter cites, Azusa Land Reclamation Company, 52 Cal.App.4<sup>th</sup> 1165, not only delineates this test, but it also contains a good example of what constitutes “unusual circumstances.” There, the owner of an 80-acre unlined municipal solid waste landfill attempted to circumvent the CEQA process by claiming an “existing facility” exemption. (*id.* at 1192.) However, the landfill differed in many respects from typical landfills, especially in that its environmental surroundings made it “particularly ill-suited for disposal of waste.” (*id.* at 1178.) Among the “host of reasons” the court cited in finding that the unusual circumstances justified the application of section 15300.2(c) was that the landfill area was “ideal for recharging the basin,” in a “unique geologic setting,” on top of land that is “highly permeable

and will transmit water easily.” (*id.* at 1179.) In addition, there was active recharge occurring very close to the site, which helped supply water to a population of 1,000,000 people. (*id.* at 1176.) The combination of these unique factors led the court to conclude that the site was the “worst location for a landfill.” (*id.* at 1179.)

The Dixon facility does not exhibit any “unusual circumstances” that would necessitate application of the exception to the categorical exemptions. The difficulties experienced by the City of Dixon are fairly typical of those faced by wastewater treatment plants, and the site is not in an unusual geographic area. In addition, the commenter’s assertion that the only means of complying with the 1994 WDRs, enforced by the Tentative Order, is through the construction of an energy-intensive reverse osmosis facility is speculative in the extreme. Most wastewater treatment facilities do not have to resort to such measures, despite the fact that many share the same difficulties in coping with a moderately saline and very hard water supply, and domestic users who have worsened the problem through the installation of self-regenerating water softeners.

If the City chooses to construct a reverse-osmosis facility to deal with their salinity problem, that construction project would no doubt be subject to the type of environmental review that the commenter believes is necessary here. However, this course of action is far from inevitable. It is the belief of the Regional Water Board that such measures are not compelled by the current enforcement action.

**Comment:** *The Cumulative Impact Exception Applies*

**Response:** The commenter states that issuance of the Tentative Order may affect the environment as a result of the incremental impact of the project, when added to “other closely related past, present, and reasonably foreseeable probably (sic) future projects.” The comments go on to state that these “closely related projects” are the other 35+ wastewater treatment plants in the Central Valley Region that may face enforcement or permitting orders that could impose similar requirements on their effluent.

Projects where “the cumulative impact of successive projects of the same type, in the same place, over time, is significant” are not exempt from the CEQA process under California Code of Regulations, title 14, section 15300.2(b). This provision is designed to prohibit the division of large projects into smaller projects, which may not individually have a significant effect on the environment, but whose aggregate effect would. In performing an environmental analysis for a project, even at the initial stage, the agency must take into account the whole of the action that might affect the environment.

However, the instant action is not an attempt by the Regional Board to subdivide the overall regulation of the other 35+ wastewater treatment plants into smaller projects in order to escape environmental review. Each individual discharger is evaluated independently from the others, even those whose effluent or design is similar, because of the multitude of different factors that affect the operation of their facilities. What happens at the City of Dixon is not necessarily indicative of what may happen at other wastewater treatment plants, and does not set the regulatory course for all actions that will come after.

Even assuming arguendo that the projects are of the same type, 15300.2(b) is inapposite to the case at hand because the projects cannot reasonably be considered to be “in the same place.” The “same place” would have to encompass the entirety of the Central Valley, which stretches the definition beyond reason.

**Comment:** *The City commented that the interim and final effluent limits proposed for consideration in the tentative CDO were not derived in compliance with California Water Code (CWC) requirements, are invalid, and were not developed with consideration of factors described in CWC Section 13241.*

**Response:** A discussion of the derivation of the interim and final effluent limits is found in the Staff Report and Attachment B. Initially, it is worthwhile to repeat that these comments presume that the Tentative Order is implementing new effluent limitations for the City of Dixon. It is not. Instead, it is an enforcement mechanism that provides a means by which the City of Dixon can achieve compliance with the terms of the 1994 Order. These comments would have been more appropriately raised during the adoption of WDRs Order No. 94-187. Nonetheless, the Regional Water Board will respond to these comments to the best of its ability, in light of the misplaced context.

**Comment:** *The Basin Plan Does Not Contain an Applicable Water Quality Objective*

**Response:** The commenter states that effluent limitations in the Tentative Order, “are not tied to consideration of beneficial uses or nuisance.” This is not the case for the 1994 Order. The Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan) states that, “Unless otherwise directed by the Regional Water Board, all ground waters in the region are considered as suitable or potentially suitable, at a minimum, for municipal and domestic water supply (MUN), agricultural supply (AGR), industrial service supply (IND), and industrial process supply (PRO).” The Basin Plan further states that exceptions may be applied where, “there is contamination, either by natural processes or by human activity ... that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices...” WDR No. 94-187 took these provisions of the Basin Plan into account when it prohibited discharges to groundwater that interfered with beneficial uses, or where background water quality already interfered with beneficial uses, to background levels.

The Tentative Order clarifies these prohibitions by setting forth numerical effluent limits that will assure compliance with the prohibitions in WDR No. 94-187. In addition, the Tentative Order includes interim limits that must be met in place of the prohibitions because of the recognition that the current practices of the City of Dixon are not sufficient to meet the provisions of the WDR No. 94-187.

**Comment:** *For Discharges to Non-Federal Waters, the Regional Water Board Must Consider Water Code section 13241 Factors When Setting Effluent Limitations*

**Response:** The commenter states that, “... where there is no applicable water quality objective in the Basin Plan, the Regional Board is required to all of the factors (sic) in sections 13263 and 13241 before imposing the effluent limitations.” The commenter mischaracterizes the Tentative Order as containing new permit limitations; instead, it is an enforcement action pursuant to CWC section 13301 intended to require the City to comply with WDR No. 94-187.

CWC section 13301 does not require consideration of the factors in 13241 because the issuance of a cease and desist order does not establish water quality objectives.

The commenter also argues that the tentative CDO does not comply with CWC section 13263, which the commentator argues should be applicable to issuance of the Tentative Order. CWC section 13263 states that, “[t]he regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge...” The Tentative Order does not prescribe requirements – it instead provides a time schedule under which the City of Dixon can achieve compliance with discharge requirements prescribed in WDR No. 94-187.

**Comment:** *The Effluent Limitations Are Substantively Different from the Waste Discharge Requirements*

**Response:** The commenter states that, “*The Tentative Order incorrectly suggests that the new effluent limitations do not substantively change the effluent limitations in the 1994 Waste Discharge Requirements.*” However, the commenter does not reference any terms of the Tentative Order that are at odds with the 1994 Order. The commenter’s inference is incorrect, because the Tentative Order aims to implement the provisions of the 1994 Waste Discharge Requirements that prohibit degradation of groundwater to levels that would prohibit beneficial use(s) of the groundwater, or, in cases where groundwater quality already impairs beneficial uses, to degrade the water no worse than background water quality.

**Comment:** *The Tentative Order takes inconsistent and confusing positions as to whether the underlying groundwater qualifies as “high quality waters” subject to the Policy. There are no findings and there is no evidence demonstrating that the Regional Board conducted an analysis of the factors listed in the Policy to determine the appropriate level of effluent control.*

**Response:** As stated previously, the Tentative Order does not implement new effluent limitations for the Dixon wastewater plant; it enforces limits from WDR No. 94-187. The 1994 Order prohibits degradation of groundwater to levels that would impair beneficial use(s) of the groundwater, or, in cases where groundwater quality already impairs beneficial uses, to degrade the water no worse than background water quality.

The Basin Plan (Implementation, IV-15.00) states, in its Controllable Factors Policy, that “[c]ontrollable water quality factors are not allowed to cause further degradation of water quality in instances where other factors have already resulted in water quality objectives being exceeded. Controllable water quality factors are those actions, conditions, or circumstances resulting from human activities that may influence the quality of the waters of the State, that are subject to the authority of the State Water Board or Regional Water Board, and that may be reasonably controlled.”

The Basin Plan (Implementation, IV-17.00) states, in its Policy for Application of Water Quality Objectives, that “[i]n cases where the natural background concentration of a particular constituent exceeds an applicable water quality objective, the natural background concentration will be considered to comply with the objective.”

“High quality waters” must be analyzed on a constituent-by-constituent basis. The final effluent limits in the Tentative Order are based on the maximum concentration allowable that will protect beneficial uses with respect to those constituents. The constituent concentrations that the discharger must achieve in its effluent are either derived from background levels (when background levels are more contaminated than beneficial uses would permit), or are derived from the beneficial uses specified for the groundwater. The maximum concentrations were chosen as final limits to allow the discharger the opportunity to attain compliance with WDR No. 94-187.

**Comment:** *The current draft recycled water policy indicates that expensive wastewater treatment facility improvements are not necessary to achieve best practicable treatment technology. The Tentative Order, however, incorrectly assumes the contrary.*

**Response:** The recycled water policy is still in its draft form, and as such, cannot be relied upon as a directive from the State Water Board. It is the City of Dixon, not the Regional Water Board, that decided that the only means to comply with WDR No. 94-187 is through expensive wastewater plant upgrades. The Tentative Order would provide a time schedule under which the City can meet the requirements of WDR No. 94-187 through plant upgrades and source control, which is consistent with methods used by other facilities with similar issues.

#### Additional Comments

**Comment:** *The City disagrees with the methods used to determine background groundwater quality and corresponding effluent limitations.*

**Response:** As described in Attachment B, Regional Water Board staff contend that background groundwater quality and corresponding effluent limitations were determined in an appropriate fashion. For a more detailed response, please see Attachment B.

**Comment:** *The City stated that it did not submit the required Report of Waste Discharge, as described in Finding 12.g, pursuant to a request made by Regional Water Board staff at a 30 November 2007 meeting.*

**Response:** Regional Water Board staff has not directed the City to violate Regional Water Board-adopted orders. In addition, Regional Water Board staff has no authority to override Board-adopted orders.

**Comment:** *With respect to Finding 17, the City commented that contrary to Regional Water Board staff’s assertions, it has demonstrated significant progress with regard to violations over the last ten years. The comment included a list of completed evaluations and proposed activities.*

**Response:** Comment noted. No changes are necessary.

**Comment:** The City commented that it had informed Regional Water Board staff during the 30 November 2007 meeting referenced in Finding 19 that compliance with the protective groundwater limitations imposed by the 2005 CDO would be problematic for any facility, due to the high quality irrigation water applied upgradient of the site.

**Response:** Comment noted. No changes are necessary.

**Comment:** *The City commented that the limitations referenced in Finding 23 were calculated in accordance with the 2005 CDO. The City also stated it had proposed that if the CDO groundwater limitations were applied as an interim effluent limitation, the legal impediments to enacting new brine discharging water softener controls could be addressed.*

**Response:** Comment noted. No changes are necessary.

**Comment:** *With respect to Finding 25, The City commented that its effluent does not currently meet the proposed interim effluent limitations. The City also stated that it believes it is unlikely that compliance could be achieved unless documented outside influences are accounted for in the compliance wells.*

**Response:** The proposed CDO has been revised to include interim performance-based limitations based on past performance. The tentative CDO imposes effluent limitations rather than groundwater limitations on the discharge. Compliance, therefore, will be assessed by pond monitoring, rather than groundwater monitoring.

**Comment:** *With respect to Finding 26, the City commented that its planning efforts to date have been necessary to achieve eventual compliance.*

**Response:** Comment noted. No changes are required.

### **Michael Ceremello Comments**

**Comment:** *Mr. Ceremello questioned the conclusions reached in several of the Background findings of the tentative CDO and asserted that test wells (TW) 1, 2, and 3 were not representative of either upgradient or downgradient water quality. Mr. Ceremello further commented that electrical conductivity has declined from 3,000  $\mu\text{mhos/cm}$  to 1,300  $\mu\text{mhos/cm}$ .*

**Response:** Please see Attachment B for a discussion of groundwater conditions at the City of Dixon's wastewater treatment facility.

**Comment:** *Mr. Ceremello commented that California law precludes the City of Dixon from eliminating residential self-regenerating water softeners as a source of pollution. He also advised that Regional Water Board staff be aware that the City's wastewater committee has been addressing legislators to advise them of this. Mr. Ceremello questioned why higher interim salinity limitations were not set to take into account water softener legislation.*

**Response:** Effluent and receiving water (in this case, groundwater) limitations are generally set to protect water quality from degradation and pollution and to prevent adverse impacts to beneficial uses (e.g., drinking water supply, agricultural irrigation supply, industrial process supply) of the receiving water. Interim limits are generally based on either performance of the existing treatment system or anticipated improvements to existing water quality based on source control or other relatively short-term means of improving the discharge quality.

**Comment:** *Mr. Ceremello questioned how the Regional Water Board or staff justify the tentative CDO given that residents of Dixon have previously overturned a sewer rate increase adopted to provide funding for the City's work toward compliance.*

**Response:** It is the responsibility of the Regional Water Board to issue waste discharge requirements and enforcement actions that ensure protection of water quality from degradation and pollution and that prevent adverse impacts to the beneficial uses of the receiving water.

The fact that the residents of Dixon overturned a previous sewer rate increase does not mean that the Regional Water Board should abandon its obligation to protect water quality.

**Comment:** *Mr. Ceremello questioned the need to prevent migration of waste constituents from the City's unlined ponds before proof of migration of heavy metals or other toxic constituents and proposed that accumulated deposits of sludge might be acting as an impermeable barrier.*

**Response:** Please see Attachment B for a discussion of groundwater conditions at the City of Dixon's wastewater treatment facility. The concerns addressed by the tentative CDO involve salinity because of its degradation/pollution of groundwater and potential impacts on beneficial uses.

**Comment:** *Mr. Ceremello questioned the Regional Water Board's delay in developing numeric limitations and objected to the language in Finding 17 of the tentative CDO regarding the Executive Officer's concern over the City's lack of progress in the last ten years.*

**Response:** The Regional Water Board has issued three Cease and Desist Orders to the City of Dixon; this would be the fourth. The City has not complied with its previous Cease and Desist Orders and it is expected to fully comply with this one.

**Comment:** *Mr. Ceremello objected to Finding 26 of the tentative CDO.*

**Response:** Regional Water Board staff believe that Finding 26 contains an accurate description of the status of compliance with CDO No. R5-2005-0078.

**Comment:** *Mr. Ceremello questioned the omission of a discussion of the wastewater committee's plans for expanded capacity in Finding 27.*

**Response:** The City of Dixon is the entity regulated by the Waste Discharge Requirements and subject to this enforcement order. It may take the wastewater committee's plans into account as it complies with the requirements of the CDO.

**Comment:** *Mr. Ceremello suggested a delay of at least a year to develop timelines for compliance and objects to a "hurry up" approach.*

**Response:** The tentative CDO has been revised to extend the timeline for the City to achieve compliance.

**Comment:** *Mr. Ceremello objected to the language in Task 5 of the tentative CDO advising the City that if it wishes to have higher water quality limitations, it must submit a site-specific groundwater analysis with the report of waste discharge, and questioned it given his assertion that Regional Water Board staff are not inclined to consider the results of trace element and salinity studies.*

**Response:** The City of Dixon has requested that the CDO include an "off-ramp" to allow it the opportunity to submit additional hydrogeologic data that may support revised final effluent limitations. The proposed CDO does not require that the City collect this information, but if it intends to, then the City must submit workplans for review and approval by Regional Water Board staff. In addition, the City may ask that the Regional Water Board reevaluate the final effluent limits listed in the proposed CDO. However, the City must still take all the required salinity source control measures and show

progress toward meeting the final effluent limitations, whether or not it elects to collect additional hydrogeologic data.