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10 February 2009

Mr. Ken Landau, Assistant Executive Officer
Ms. Diana Messina, Sr. WRCE
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: Resolution to Amend Waste Discharge Requirements and Cease and Desist Order for the City of Auburn Wastewater Treatment Plant, Placer County

Dear Mr. Landau and Ms. Messina:

The California Sportfishing Protection Alliance (CSPA) has reviewed the proposed Amendment (Permit) of Waste Discharge Requirements (Order No. R5-2005-0030, NPDES Permit No. CA0077950) and Cease and Desist Order (No. R5-2008-0010) for the City of Auburn Wastewater Treatment Plant and submits the following comments.

CSPA requests status as a designated party for this proceeding. CSPA is a 501(c)(3) public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality and fishery resources and their aquatic ecosystems and associated riparian habitats. CSPA has actively promoted the protection of water quality and fisheries throughout California before state and federal agencies, the State Legislature and Congress and regularly participates in administrative and judicial proceedings on behalf of its members to protect, enhance, and restore California's degraded water quality and fisheries. CSPA members reside, boat, fish and recreate in and along waterways throughout the Central Valley, including Placer County.

1. The proposed Resolution inappropriately indicates that the Regional Board has adopted a Policy or amended the Basin Plan revising the interpretation and implementation of Narrative Water Quality Objectives. The standard of general application or the amendment, supplement, or revision of any rule is a regulation as defined in Government Code section 11342.600 and could be considered an Underground Regulation. The *Causes for Modification* under 40 CFR 122.62 for reopening and modification of the permit has not been justified.

Proposed Resolution Finding No. 3 states that: "WDR Order No. R5-2005-0030 contains final effluent limitations for several constituents, including aluminum, copper, lead, nickel, silver, and zinc. Since the adoption of Order No. R5-2005-0030, the Regional Water Board has updated its interpretation of narrative surface water objective in the Water Quality Control Plan for the

Sacramento River and San Joaquin River Basins (Basin Plan). Therefore, the Discharger has requested that Order No. R5-2005-0030 be modified to reflect the updated Regional Water Board interpretation of the Basin Plan narrative objective, specifically in regards to implementation of criteria for aluminum and hardness-based metals (i.e., copper, lead, zinc, nickel, and silver), in order to avoid costly and unnecessary mandatory minimum penalties (MMPs)." (Emphasis added)

Most of the listed constituents listed are regulated under the California Toxics Rule (CTR) and application of narrative objective is not an issue. However, the Basin Plan, *Implementation, Policy for Application of Water Quality Objectives,* is however unchanged and reads as follows:

> "This Basin Plan contains numerical water quality objectives for various constituents and parameters in Chapter III. Where numerical water quality objectives are listed, these are the limits necessary for the reasonable protection of beneficial uses of the water. In many instances, the Regional Water Board has not been able to adopt numerical water quality objectives for constituents or parameters, and instead has adopted narrative water quality objectives (e.g., for bacteria, chemical constituents, taste and odor, and toxicity). Where compliance with these narrative objectives is required (i.e., where the objectives are applicable to protect specified beneficial uses), the Regional Water Board will, on a case-by-case basis, adopt numerical limitations in orders which will implement the narrative objectives. To evaluate compliance with the narrative water quality objectives, the Regional Water Board considers, on a case-by-case basis, direct evidence of beneficial use impacts, all material and relevant information submitted by the discharger and other interested parties, and relevant numerical criteria and guidelines developed and/or published by other agencies and organizations (e.g., State Water Board, California Department of Health Services, California Office of Environmental Health Hazard Assessment, California Department of Toxic Substances Control, University of California Cooperative Extension, California Department of Fish and Game, USEPA, U.S. Food and Drug Administration, National Academy of Sciences, U.S. Fish and Wildlife Service, Food and Agricultural Organization of the United Nations). In considering such criteria, the Board evaluates whether the specific numerical criteria, which are available through these sources and through other information supplied to the Board, are relevant and appropriate to the situation at hand and, therefore, should be used in determining compliance with the narrative objective. For example, compliance with the narrative objective for taste and odor may be evaluated by comparing concentrations of pollutants in water with numerical taste and odor thresholds that have been published by other agencies. This technique provides relevant numerical limits for constituents and parameters which lack numerical water quality objectives. To assist dischargers and other interested parties, the Regional Water Board staff has compiled many of these numerical water quality criteria from other appropriate agencies and organizations in the Central Valley Regional Water Board's staff report, *A Compilation of Water Quality Goals*. This staff report is updated regularly to reflect changes in these numerical criteria."

The Basin Plan has not been revised as the proposed Amendment language would appear to indicate. As can be seen in the underlined text; the Basin Plan requires that permits be evaluated on a case-by-case basis. The citation that "…the Regional Water Board has updated its interpretation of narrative surface water objective" indicates that the Regional Board has implemented a uniform procedure for implementing the Narrative Water Quality Objective and is not making a case-by-case determination. The establishment of a uniform procedure by staff, based on the Regional Board's adoption of individual NPDES permits, is contrary to the requirements of the Basin Plan and raises questions regarding underground regulations. State agencies, with few exceptions, are required to adopt regulations following the procedures established in the Administrative Procedures Act (APA). A regulation is defined in Government

Code section 11342.600: "Regulation means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." It does not violate the APA to enforce or administer a statute on a case-by-case basis so long as no rule or standard of general application is used that should have been adopted pursuant to the APA. Here, the Regional Board has established a very clear rule to utilize a standard procedure for development of Effluent Limitations for metals. If a state agency issues, enforces, or attempts to enforce a rule without following the APA, the rule is called an "underground regulation." State agencies are prohibited from enforcing underground regulations.

As is stated above, most of the listed constituents listed are regulated under the California Toxics Rule (CTR) and application of narrative objective is not an issue. Therefore, if the citation of a "new interpretation" of the Basin Plan narrative objective is an attempt to legitimize reopening the permit fort modification in accordance with 40 CFR 122.62; it falls significantly short. The *Causes for Modification* under 40 CFR 122.62 for reopening and modification of the permit has not been justified.

2. The proposed Resolution fails to include a revision to the permit implementing the requirements of the Basin Plan, *Implementation, Policy for Application of Water Quality Objectives.*

Proposed Resolution Finding No. 3 states that: "WDR Order No. R5-2005-0030 contains final effluent limitations for several constituents, including aluminum, copper, lead, nickel, silver, and zinc. The cited metals have a potential for exhibiting additive toxic effects. The Basin Plan, *Implementation, Policy for Application of Water Quality Objectives* requires that: "Where multiple toxic pollutants exist together in water, the potential for toxicologic interactions exists. On a case by case basis, the Regional Water Board will evaluate available receiving water and effluent data to determine whether there is a reasonable potential for interactive toxicity. Pollutants which are carcinogens or which manifest their toxic effects on the same organ systems or through similar mechanisms will generally be considered to have potentially additive toxicity." (Emphasis added) The proposed Resolution fails to modify the NPDES permit to comply with the Basin Plan.

3. The proposed Permit establishes Effluent Limitations for copper, lead, nickel, silver, and zinc 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). 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 proposed Permit goes into great detail citing the Federal Regulation requiring the receiving water hardness be used to establish Effluent Limitations. The result of using a higher effluent or downstream hardness value is that metals are toxic at higher concentrations, discharges have less reasonable potential to exceed water quality standards and the resulting Permits have fewer Effluent Limitations. The comparative Effluent Limitation values presented to defend the unsupported statements regarding which is more protective. Once again the public is subject to a bureaucrat "knowing better" and simply choosing to ignore very clear regulatory requirements. 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 Regional Board states that: "The CTR does not define whether the term "ambient," as applied in the regulations, necessarily requires the consideration of upstream as opposed to downstream hardness conditions." The citation from the May 2000 Federal Register above shows that this statement is incorrect. However, one only need look at the definition of ambient which is "surrounding" the Regional Board use of the downstream mixed water is "in the middle of". There is no reasonable means of using the Regional Board's definition of ambient. Even if one were able to somehow accept the Regional Board's definition of "ambient" to defend using the downstream hardness, they then turn around and use the undiluted effluent hardness; as can be seen for copper in the proposed Resolution. Even the Regional Board has not argued that the use of the effluent hardness of complies with the CTR requirement to use the ambient instream hardness.

The proposed Permit failure to include Effluent Limitations for metals 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.

The proposed Resolution states that: "Recent studies indicate that using the lowest recorded receiving water hardness for establishing water quality criteria is not always protective of the receiving water under various mixing conditions (e.g., when the effluent hardness is less than the receiving water hardness)." However this is not the case here, the lowest recorded instream hardness was 11 mg/l as was used to develop the existing NPDES permit whereas the effluent hardness was 38 mg/l. Effluent Limitations for hardness dependant metals will be more restrictive based on a hardness of 11 mg/l than based on 38 mg/l.

The most typical wastewater discharge situation is where the receiving water hardness is lower than the effluent hardness. Metals are more toxic in lower hardness water. Therefore in this case it must follow those metals would be more toxic in the receiving water than in the effluent. For example, if the receiving water hardness is 25 mg/l and the effluent hardness is 50 mg/l a corresponding chronic discharge limitation for copper based on the different hardness's would be 2.9 ug/l and 5.2 ug/l, respectively. Obviously, the limitation based on the ambient receiving water hardness is more restrictive. For this case however the Regional Board's argues that the higher effluent hardness or the downstream hardness is protective of all beneficial uses. Since the limitation based on the upstream ambient hardness is more restrictive; the Regional Board's argument can only be made if in-stream mixing is considered. Mixing zones may be granted in accordance with extensive requirements contained in the SIP and the Basin Plan to establish Effluent Limitations. Mixing zones cannot be considered in conducting a reasonable potential analysis to determine whether a constituent will exceed a water quality standard or objective. The Regional Board's approach in using the effluent or downstream hardness to conduct a reasonable potential analysis and consequently establish effluent limitations can only be utilized if mixing is considered; otherwise the ambient (upstream) hardness results in significantly more restrictive limitations. A mixing zone allowance has not been discussed with regard to this issue and therefore does not comply with the SIP. Verification of the Regional Boards use of "mixing" in implementing their procedure can be found in text of Finding No. 4 (under various mixing conditions, under all possible mixing conditions, from high dilution to no dilution). The issue is that the Regional Board fails to comply with the regulatory requirement to use the ambient instream hardness for limiting hardness dependant metals under the CTR. Use of the effluent or the effluent receiving water mix simply does not meet the definition of the actual ambient hardness of the receiving stream.

The proposed Resolution must be amended to use the lowest recorded ambient receiving water hardness of 11 mg/l to develop Effluent Limitations for hardness dependent metals.

4. The proposed Permit fails to utilize valid, reliable, and representative effluent data in conducting a reasonable potential and limits derivation calculations 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 utilized only three years of data in assessing reasonable potential and has failed to use valid, reliable and representative data in developing limitations, contrary to the cited Federal Regulation. The Effluent Limitation for nickel was deleted when representative data including the hardness of 11 mg/l was not used (the data set was unreasonably limited to three years) to determine whether a reasonable potential to exceed water quality standards existed.

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 proposed 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."

5. The proposed Permit contains an inadequate antidegradation analysis that does not comply with the requirements of Section 101(a) of the Clean Water Act, Federal Regulations 40 CFR § 131.12, the State Board's Antidegradation Policy (Resolution 68-16) and California Water Code (CWC) Sections 13146 and 13247.

The antidegradation analysis in the proposed Resolution amends an NPDES permit and is therefore subject to the same requirements with regard to the Antidegradation Policy. 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, and Region IX Guidance, p. 1). Actions that trigger use of the antidegradation policy include issuance, re-issuance, and modification of an NPDES permit. Although the proposed Resolution significantly relaxes and even removes Effluent Limitations, the brief discussion of antidegradation requirements in the Findings consists only of skeletal, unsupported, undocumented conclusory statements totally lacking in factual analysis. The proposed resolution will significantly relax the NPDES permit for this facility by the following:

- The Effluent Limitations for copper, lead, silver and zinc were based on a hardness of 38 mg/l resulting in a significantly less restrictive limitation than the limitation based on a hardness of 11 mg/l which was used in WDR Order No. R5-2005-0030.

- The effluent Limitation for nickel was deleted.

- The aquatic life based Effluent Limitation for aluminum was deleted.

- Mass based Effluent Limitations were deleted for priority pollutants.

The proposed Resolution states the following: "The effluent hardness has ranged from 38 mg/L to 100 mg/L, based on 36 samples taken between August 2005 and July 2008. The variability in effluent hardness can be contributed to, in part, the fact that until recently, the Discharger manually added lime on an as-need basis to improve the performance of the denitrification system, which results in higher effluent hardness. While no formal correlation between the performance of the denitrification system and effluent hardness has been identified, the Discharger has observed that the denitrification system does not perform well when the effluent hardness is less than 50 mg/L, and that the denitrification system works optimally when the effluent hardness is greater than 75 mg/L. In October 2008, the Discharger installed a dedicated lime storage and feed system to ensure adequate denitrification. In order to assure adequate denitrification, but also to prevent additional solids in the treatment system, the Discharger intends to operate the lime storage and feed system to achieve an effluent hardness of 75 mg/L. Based on the recent upgrades to the treatment system, the Discharger has requested that criteria be calculated using an effluent hardness of 75 mg/L. However, because monitoring data is not available that indicates that the Discharger can reliably maintain the effluent hardness at or above 75 mg/L, for copper, nickel, and zinc water quality criteria were calculated using the lowest observed effluent hardness of 38 mg/L as CaCO3." The proposal is rejected based on poor monitoring data. The use of effluent hardness for the development of Effluent Limitations for metals has raised the fear that degrading chemicals would be used to raise the hardness, in order to get relaxed metals discharge limitations, rather than provide proper treatment. Although the proposal has been rejected due to poor sampling the addition of additional chemicals has occurred. The response does not discuss that adding chemicals to increase the effluent hardness will increase the hardness of downstream waters degrading the receiving water.

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.

Section 101(a) of the Clean Water Act (CWA), the basis for the antidegradation policy, states that the objective of the Act is to "restore and maintain the chemical, biological and physical integrity of the nation's waters." Section 303(d)(4) of the CWA carries this further, referring explicitly to the need for states to satisfy the antidegradation regulations at 40 CFR § 131.12

before taking action to lower water quality. These regulations (40 CFR § 131.12(a)) describe the federal antidegradation policy and dictate that states must adopt both a policy at least as stringent as the federal policy as well as implementing procedures.

California's antidegradation policy is composed of both the federal antidegradation policy and the State Board's Resolution 68-16 (State Water Resources Control Board, Water Quality Order 86-17, p. 20 (1986) ("Order 86-17); Memorandum from Chief Counsel William Attwater, SWRCB to Regional Board Executive Officers, "federal Antidegradation Policy," pp. 2, 18 (Oct. 7, 1987) ("State Antidegradation Guidance")). 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 (Water Quality Order 86-17, pp. 17-18).

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.

The federal antidegradation regulations delineate three tiers of protection for waterbodies. Tier 1, described in 40 CFR § 131.12(a)(1), is the floor for protection of all waters of the United States (48 Fed. Reg. 51400, 51403 (8 Nov. 1983); Region IX Guidance, pp. 1-2; APU 90-004, pp. 11-12). It states that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Uses are "existing" if they were actually attained in the water body on or after November 28, 1975, or if the water quality is suitable to allow the use to occur, regardless of whether the use was actually designated (40 CFR § 131.3(e)). Tier 1 protections apply even to those waters already impacted by pollution and identified as impaired. In other words, already impaired waters cannot be further impaired.

Tier 2 waters are provided additional protections against unnecessary degradation in places where the levels of water quality are better than necessary to support existing uses. Tier 2 protections strictly prohibit degradation unless the state finds that a degrading activity is: 1) necessary to accommodate important economic or social development in the area, 2) water quality is adequate to protect and maintain existing beneficial uses and 3) the highest statutory and regulatory requirements and best management practices for pollution control are achieved (40 CFR § 131.12(a) (2)). Cost savings to a discharger alone, absent a demonstration by the project proponent as to how these savings are "necessary to accommodate important economic or social development in the area," are not adequate justification for allowing reductions in water quality (Water Quality Order 86-17, p. 22; State Antidegradation Guidance, p. 13). If the waterbody passes this test and the degradation is allowed, degradation must not impair existing uses of the waterbody (48 Fed. Reg. 51403). Virtually all waterbodies in California may be Tier 2 waters since the state, like most states, applies the antidegradation policy on a parameter-by-parameter basis, rather than on a waterbody basis (APU 90-004, p. 4). Consequently, a request to discharge a particular chemical to a river, whose level of that chemical was better than the state standards, would trigger a Tier 2 antidegradation review even if the river was already impaired by other chemicals.

Tier 3 of the federal antidegradation policy states "[w]here high quality waters constitute an outstanding national resource, such as waters of national and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water shall be maintained and protected (40 CFR § 131.12(a)(3)). These Outstanding National Resource Waters (ONRW) are designated either because of their high quality or because they are important for another reason (48 Fed. Reg. 51403; State Antidegradation Guidance, p. 15). No degradation of water quality is allowed in these waters other than short-term, temporary changes (Id.). Accordingly, no new or increased discharges are allowed in either ONRW or tributaries to ONRW that would result in lower water quality in the ONRW (EPA Handbook, p. 4-10; State Antidegradation Guidance, p. 15). Existing antidegradation policy already dictates that if a waterbody "should be" an ONRW, or "if it can be argued that the waterbody in question deserves the same treatment [as a formally designated ONRW]," then it must be treated as such, regardless of formal designation (State Antidegradation Guidance, pp. 15-16; APU 90-004, p. 4). Thus the Regional Board is required in each antidegradation analysis to consider whether the waterbody at issue should be treated as an ONRW. It should be reiterated that waters cannot be excluded from consideration as an ONRW simply because they are already "impaired" by some constituents. By definition, waters may be "outstanding" not only because of pristine quality, but also because of recreational significance, ecological significance or other reasons (40 CFR §131.12(a)(3)). Waters need not be "high quality" for every parameter to be an ONRW (APU 90-004, p. 4). For example, Lake Tahoe is on the 303(d) list due to sediments/siltation and nutrients, and Mono Lake is listed for salinity/TDC/chlorides but both are listed as ONRW.

The State Board's APU 90-004 specifies guidance to the Regional Boards for implementing the state and federal antidegradation policies 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.

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; 7) an assessment of the significance of changes in ambient water quality and 8) whether the waterbody was a ONRW. 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; while tertiary treatment may provide BPTC for pathogens, dissolved metals may simply pass through.

Any antidegradation analysis must comport with implementation requirements in State Board Water Quality Order 86-17, State Antidegradation Guidance, APU 90-004 and Region IX Guidance. The conclusory, unsupported, undocumented statements in the Permit are no substitute for a defensible antidegradation analysis.

6. The proposed Resolution will modify the NPDES permit to contain Effluent Limitations less stringent than the existing permit contrary to the Antibacksliding requirements of the Clean Water Act and Federal Regulations, 40 CFR 122.44 (l)(1).

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 antibacksliding 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. The proposed Resolution will not only relax limitations but will remove limitations as follows:

The Effluent Limitations for copper, lead, silver and zinc were based on a hardness of 38 mg/l resulting in a significantly less restrictive limitation than the limitation based on a hardness of 11 mg/l which was used in WDR Order No. R5-2005-0030.

- The effluent Limitation for nickel was deleted.
- The aquatic life based Effluent Limitation for aluminum was deleted.
- Mass based Effluent Limitations were deleted for priority pollutants.

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 antibacksliding rule are met. The antibacksliding 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 (l)(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 (l)(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.

7. The proposed Permit fails to contain an Effluent Limitation for nickel in violation of the California Toxics Rule, Federal Regulations (40 CFR 122.44), the California Water Code (CWC), Section 13377 and the State's Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP).

The CTR includes hardness-dependent standards for the protection of both freshwater and saltwater aquatic life for nickel. Freshwater aquatic habitat is a beneficial use of the receiving water. The standards for metals are presented in dissolved concentrations. U.S. EPA recommends conversion factors to translate dissolved concentrations to total concentrations. The acute and chronic conversion factors for nickel in freshwater are 0.998 and 0.997 respectively. Using the worst-case (lowest of receiving water and effluent) measured hardness of 11 mg/l, the

corresponding standards are 8.1 _g/*l* and 73 _g/*l* for the acute and chronic criteria, respectively. The maximum observed effluent nickel concentration was 11.4 ug/l, as reported in the existing permit.

In accordance with Federal Regulations, 40 CFR 122.44, the Regional Board is required to establish an effluent limitation if a pollutant is measures in the effluent which presents a reasonable potential to exceed a water quality standard of objective. In accordance with the SIP, Section 1.3, since the maximum effluent concentration exceeded the water quality standard, an effluent limitation is required. 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 measured concentrations of nickel at 11.0 µg/l clearly exceed the CTR water quality standard of 8.1 µg/l and in accordance with Federal and State Regulations and the SIP, effluent limitations are required. 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.

8. The proposed Permit fails to contain an Effluent Limitation for aluminum protective of the aquatic life beneficial uses of the receiving stream in accordance with Federal Regulations 40 CFR 122.44, US EPA's interpretation of the regulation, and California Water Code, Section 13377. The proposed permit contains an inadequate reasonable potential analysis for aluminum by using incorrect statistical multipliers as required by Federal regulations, 40 CFR § 122.44(d)(1)(ii). Effluent Limitations for aluminum is improperly regulated as an annual average contrary to Federal Regulations 40 CFR 122.45 (d)(2) and common sense.

Federal Regulations, 40 CFR 122.44 (d)(i), requires that; "Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." The Basin Plan contains a narrative water quality objective for toxicity that states in part that "[a]*ll waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life*" (narrative toxicity objective). Where numeric water quality objectives have not been established, 40 CFR §122.44(d) specifies that WQBELs may be established using USEPA criteria guidance under CWA section 304(a), proposed State criteria or a State policy interpreting narrative criteria supplemented with other relevant information, or an indicator parameter. U.S. EPA developed National Recommended Ambient Water Quality Criteria for

protection of freshwater aquatic life for aluminum to prevent toxicity to freshwater aquatic life. The recommended ambient criteria four-day average (chronic) and one-hour average (acute) criteria for aluminum are 87 mg/*l* and 750 mg/*l*, respectively.

The maximum observed effluent aluminum concentration was 720 _g/l. Freshwater Aquatic habitat is a beneficial use of the receiving stream.

US EPA's 87 ug/l chronic criterion was developed using low pH and hardness testing. California Central Valley waters, the Sacramento River, at the Valley floor, have been sampled to have hardnesses as low as 39 mg/l $CaCO_3$ by the USGS in February 1996 for the *National Water Quality Assessment Program.* Contributory streams, especially foothill streams, have also been sampled and shown to contain even lower hardness levels. US EPA recognized in their ambient criteria development document, (Ambient Water Quality Criteria for Aluminum, EPA 440/5-86-008) that the pH was in the range 6.5 to 6.6 and that the hardness was below 20 mg/l. Typical values for pH and hardness in the Central Valley alone warrant use of the chronic ambient criteria for aluminum. Despite the hardness and pH values used in the development of the criteria; U.S. EPA's conclusions in their *Ambient Criteria for the Protection of Freshwater Aquatic Life* recommends that application of the ambient criteria as necessary to be protective of the aquatic beneficial uses of receiving waters in lieu of site-specific criteria.

The Regional Board and their proposed Permit cites US EPA's *Ambient Criteria for the Protection of Freshwater Aquatic Life for Aluminum* (criteria) as not being representative or necessary because the chronic criteria were based on a low hardness and low pH. The Regional Board cites one section of the criteria development document but ignores the final recommendation to use the recommended criteria absent a site-specific objective for aluminum. The Regional Board then defaults to the US EPA recommended acute criteria of 750 ug/l. The Regional Board's citation of the criteria development document is incomplete its review, for example the *criteria* development document (EPA 440/5-86-008) also cites that:

- 169 ug/l of aluminum caused a 24% reduction in the growth of young brook trout.
- 174 ug/l of aluminum killed 58% of the exposed striped bass.
- Bioaccumulation factors ranged from 50 to 231 for young brook trout exposed to aluminum for 15 days.
- Aluminum at 169 ug/l caused a 24% reduction in the weight of young brook trout.

US EPA recommends that understanding the *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* is necessary in order to understand the text, tables and calculations of a criteria document. The Regional Board's assessment of the use of low hardness and low pH clearly shows they did not heed EPA's advice in reviewing the criteria development procedures for water quality criteria or the final recommendations. The Regional Board occasionally cites individual aluminum toxicity testing at Yuba City; again individual testing is not a valid replacement for developing fully protective criteria. A prime example of a state utilizing good water quality standards development techniques for developing a site specific standard for aluminum is the state of Indiana where a final chronic criterion of 174 ug/l was established in 1997. In 2003, Canada adopted pH dependant freshwater aquatic life criteria for aluminum that ranges from 84 ug/l to 252 ug/l.

Ignoring the final recommendation of the criteria misses the protective intermediate measures to protect against mortality and reductions to growth and reproduction. The Regional Board's single use of the acute criteria for aluminum is not protective of the beneficial uses of the receiving stream.

Based on information included in analytical laboratory reports submitted by the Discharger, aluminum in the discharge has a reasonable potential to cause or contribute to an in-stream excursion above a level necessary to protect aquatic life, and, therefore to violate the Basin Plan's narrative toxicity objective.

Federal Regulations, 40 CFR 122.44 (d)(i), requires that; "Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 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 California Water Code (CWC), Section 13377 states in part that: "…the state board or the regional boards shall…issue waste discharge requirements… which apply and ensure compliance with …water quality control plans, or for the protection of beneficial uses…" Section 122.44(d) of 40 CFR requires that permits include water quality-based effluent limitations (WQBELs) to attain and maintain applicable numeric and narrative water quality criteria to protect the beneficial uses of the receiving water. A water quality standard for Failure to include an effluent limitation for aluminum in the proposed permit violates 40 CFR 122.44 and CWC 13377.

Federal regulations, 40 CFR § 122.44(d)(1)(ii), state "when determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, **the variability of the pollutant or pollutant parameter in the effluent**, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water." Emphasis added. The reasonable potential analysis fails to consider the statistical variability of data and laboratory analyses as explicitly required by the federal regulations. The proposed Permit states that: "The Regional Water Board conducted the RPA in accordance with Section 1.3 of the SIP. Although the SIP applies directly to the control of CTR priority pollutants, the State Water Board has held that the Regional Water Board may use the SIP as guidance for water quality-based toxics control. The SIP states in the introduction "*The goal of this Policy is to establish a standardized approach for permitting discharges of toxic pollutants to non-ocean surface waters in a manner that promotes statewide consistency."* Therefore, in this Order the RPA procedures from the SIP were used to evaluate reasonable potential for both CTR and non-CTR constituents." The procedures for computing variability are detailed in Chapter 3, pages 52-55, of USEPA's *Technical Support*

Document For Water Quality-based Toxics Control. The Regional Water Board conducted the RPA in accordance with Section 1.3 of the SIP. The proposed Permit states that: "Although the SIP applies directly to the control of CTR priority pollutants, the State Water Board has held that the Regional Water Board may use the SIP as guidance for water quality-based toxics control" but fails to discuss compliance with 40 CFR § 122.44(d)(1)(ii). The State and Regional Boards do not have the authority to override and ignore federal regulation. A statistical analysis results in a projected maximum effluent concentration (MEC) based on laboratory variability and the resulting MEC is greater than was obtained from the actual sampling data. The result of using statistical variability is that a greater number of constituents will have a reasonable potential to exceed water quality standards and therefore a permit will have a greater number of effluent limitations. The intentional act of ignoring the Federal regulation has a clear intent of limiting the number of regulated constituents in an NPDES permit. The fact that the SIP illegally ignores this fundamental requirement does not exempt the Regional Board from its obligation to consider statistical variability in compliance with federal regulations. The failure to utilize statistical variability results in significantly fewer Effluent Limitations that are necessary to protect the beneficial uses of receiving waters. The reasonable potential analysis for aluminum is flawed and must be recalculated.

Federal Regulation 40 CFR 122.45 (d)(2) requires that permit for POTWs establish Effluent Limitations as average weekly and average monthly unless impracticable. The proposed resolution would amend the permit to establish the Effluent Limitations for aluminum as an annual average contrary to the cited Federal Regulation. Establishing the Effluent Limitations for aluminum in accordance with the Federal Regulation is not impracticable; to the contrary the Central Valley Regional Board has a long history of having done so. Proof of impracticability is properly a steep slope and the Regional Board has not presented any evidence that properly and legally limiting aluminum is impracticable.

9. The proposed Resolution proposed to remove mass-based effluent limits from the NPDES permit for priority pollutants contrary to Federal Regulations 40 CFR 122.45(b).

The proposed Resolution in discussing the removal of mass based Effluent Limitations incorrectly states that: "Additionally, these parameters are not oxygen demanding, bioaccumulative, or associated with a 303(d) listing. Therefore, this resolution will amend Order No. R5-2005-0030 to remove mass-based limitations for aluminum, copper, lead, silver, and zinc." According to the Draft RCRA Waste Minimization PBT Chemical List [Federal Register: November 9, 1998 (Volume 63, Number 216)] copper, lead, nickel and zinc are listed as persistent, bioaccumulative and toxic.

Federal Regulation, 40 CFR 122.45 (b) requires that in the case of POTWs, permit Effluent Limitations, standards, or prohibitions shall be based on design flow. Concentration is not a basis for design flow. Mass limitations are concentration multiplied by the design flow and therefore meet the regulatory requirement.

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:
> For pH, temperature, radiation or other pollutants which cannot be expressed by mass;
> When applicable standards and limitations are expressed in terms of other units of measurement; or
> 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."

Federal Regulations, 40 CFR 122.45 (B)(1), states the following: "In the case of POTWs, permit effluent limitations, standards, or prohibitions shall be calculated based on design flow."

Traditional wastewater treatment plant design utilizes average dry weather flow rates for organic, individual constituent, loading rates and peak wet weather flow rates for hydraulic design of pipes, weir overflow rates, and pumps.

Increased wet weather flow rates are typically caused by inflow and infiltration (I/I) into the sewer collection system that dilutes constituent loading rates and does not add to the mass of wastewater constituents.

For POTWs priority pollutants, such as metals, have traditionally been reduced by the reduction of solids from the wastestream, incidental to treatment for organic material. Following adoption of the CTR, compliance with priority pollutants is of critical importance and systems will need to begin utilizing loading rates of individual constituents in the WWTP design process. It is highly likely that the principal design parameters for individual priority pollutant removal will be based on mass, making mass based Effluent Limitations critically important to compliance. The inclusion of mass limitations will be of increasing importance to achieving compliance with requirements for individual pollutants.

As systems begin to design to comply with priority pollutants, the design systems for POTWs will be more sensitive to similar restrictions as industrial dischargers currently face where production rates (mass loadings) are critical components of treatment system design and compliance. Currently, Industrial Pretreatment Program local limits are frequently based on mass. Failure to include mass limitations would allow industries to discharge mass loads of individual pollutants during periods of wet weather when a dilute concentration was otherwise observed, upsetting treatment processes, causing effluent limitation processes, sludge disposal issues, or problems in the collection system.

The removal of mass limitations from the NPDES permit constitutes backsliding in accordance with 40 CFR 122.44(l) and 122.62(a)(16)

In addition to the above citations, 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.

Thank you for considering these comments. If you have questions or require clarification, please don't hesitate to contact us.

Sincerely,

Bill Jennings, Executive Director
California Sportfishing Protection Alliance