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April 28, 2014

Via U.S. and Electronic Mail

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Central Valley Region 5
Water Quality Control Board
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**Re: Comments on the Tentative Waste Discharge Requirements for
Colusa Industrial Properties, Inc. WDR Order No. R5-2014**

Dear Ms. Adam and Ms. Olsen:

We write on behalf of **Colusa County Citizens for Responsible Industry** to provide comments on the Tentative Waste Discharge Requirements (“WDR”) Order (“Tentative Order”) prepared by the Central Valley Regional Water Quality Control Board (“Regional Board”) for Colusa Industrial Properties, Inc.’s Colusa Industrial Park Wastewater Treatment Facility (“WWTF”) in the Colusa Industrial Park (collectively referred to as “CIP”) in Colusa County.¹ The Tentative Order authorizes new construction and proposes new requirements to accommodate new Industrial Process Water (“IPW”) flows from a proposed new biomass power plant, known as the Colusa Bio – Energy Project and Solar Power Facility proposed by Colusa Bio Energy, LLC (“Applicant”). The biomass power plant is proposed on 25 acres² in Colusa County (“County”), approximately 1.75 miles south of the City of

¹ Waste Discharge Requirement Order No. R5-2014-__, available at http://www.swrcb.ca.gov/centralvalley/board_decisions/tentative_orders/colusa_industrial/cip_wdr.pdf [hereinafter cited as WDR R5-2014__].

² The Biomass and Solar Project is proposed on portions of Assessor’s Parcel Number (“APN”) 017-030-099 and APN 017-030-100. See North Star Engineering, Draft Initial Study and Proposed 2904-034cv

Colusa city limits and 0.85 miles west of State Route 20/45, southwest of the CIP (“Biomass Power Plant”).

The Biomass Power Plant requires the construction of a water tank, a 10,000 square foot turbine/generator building, cooling towers, exhaust stacks, ash silos and an electric substation.³ The power facility will employ the use of a boiler, which will burn biomass fuel and produce approximately 340,000 pounds of steam per hour to generate energy.⁴ The Biomass Power Plant will require up to 423,000 gallons of water per day (“gpd”) to produce 30 megawatts of power, which will generate a wastewater stream of 3,000 gpd.⁵ The wastewater will be primarily from cooling tower blow-down.⁶ Construction of a wastewater pipeline is necessary to convey this discharge to the WWTF.⁷ The WWTF is located within the CIP and is located approximately 0.25 miles northeast of Biomass Power Plant. However, neither the WDR, nor the Biomass Power Plant Mitigated Negative Declaration (“MND”) describe and analyze the impacts from construction and operation of the pipeline required to connect the two facilities.⁸ The applicant is seeking modification of the CIP WDR Order so that the Biomass Power Plant may discharge effluent to the WWTF.⁹ The proposed construction and operation of the WWTF in the CIP and the Biomass Power Plant are collectively referred to as “the Project”.

Based upon our review of the Tentative Order, supporting documentation, and past environmental documents for the CIP, we conclude that the Tentative Order fails to comply with the California Environmental Quality Act’s¹⁰ (“CEQA”) requirements. The Tentative Order states that the additional discharge generated by the proposed Biomass Power Plant to the CIP, and the new construction required to do so, is exempt from environmental review as an “existing facility” under the “Class 1” exemption in CEQA.¹¹ As described in these comments, the proposed Biomass Power Plant is not an existing structure, its discharge would necessitate new construction and modification of the current water treatment system at the

Mitigated Negative Declaration for the Colusa Bio Energy Project Conditional Use Permit #10-11-1 and Solar Power Facility, p. 1 (Dec. 2013) [hereinafter MND]. **Attachment A.**

³ *Id.*, pp. 11 – 12.

⁴ *Id.*, p. 12.

⁵ *Id.*.

⁶ *Id.*, p. 15.

⁷ *Id.*, p. 13.

⁸ MND, p. 15.

⁹ *Id.*, p. 3.

¹⁰ Pub. Resources Code §§ 21000 et seq.

¹¹ See CEQA Guidelines, § 15301.

April 28, 2014

Page 3

CIP, and its discharge and the modifications to the WWTF are new and will have a significant adverse impact on the environment. Therefore, the WDR is not categorically exempt under the existing facilities exception, and the Regional Board must conduct environmental review, pursuant to CEQA.

The Regional Board failed to proceed in the manner required by CEQA by improperly basing its exemption determination on proposed mitigation measures set forth in the pending and unapproved MND prepared for the Biomass Power Plant. However, the pending MND did not analyze the environmental impacts of the discharge, new construction and modifications. By relying on the mitigation measures in the pending and unapproved MND, the Regional Board has failed to consider and elicit public input on the Project's potentially significant environmental impacts associated with the new processes, procedures, construction and significantly expanded uses permitted by the WDR.

The Regional Board may not approve a new WDR for the CIP until it prepares an Environmental Impact Report ("EIR") that adequately analyzes the potentially significant direct, indirect and cumulative impacts associated with the WDR, and identifies and incorporates all feasible mitigation measures to minimize the impacts associated with the new processes and facilities permitted by the proposed WDR.

I. STATEMENT OF INTEREST

Colusa County Citizens for Responsible Industry is a coalition comprised of individuals, including William Douthat and Ian Trotti, and groups, including California Unions for Reliable Energy ("CURE") and its members and their families. Colusa County Citizens for Responsible Industry was formed to advocate for responsible and sustainable industrial and utility development that protects public health and safety and the environment where the coalition members and their families live, work and recreate.

The individual members of Colusa County Citizens for Responsible Industry work, live and recreate in and around Colusa County and the surrounding region. They have a personal interest in protecting the Project site and surrounding areas where development and operations related to the Project may lead to unnecessary, adverse impacts to public health and safety and the area's plants, wildlife, air, food and water resources. These individuals appreciate and enjoy the environment in and around the Project area.

CURE is a coalition of labor unions whose members encourage sustainable development of California's energy and natural resources. Environmental degradation destroys cultural and wildlife areas, consumes limited fresh water resources, causes air and water pollution, and imposes other stresses on the environmental carrying capacity of the State. This in turn jeopardizes future development by causing construction moratoriums and otherwise reducing future employment opportunities for CURE's members. In contrast, well designed projects reduce environmental impacts of electricity generation, and improve long-term economic prospects. Additionally, union members live, recreate and work in the communities and regions that suffer the impacts of projects that are detrimental to human health and the environment. CURE, therefore, has a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment. Finally, CURE members are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. The CEQA process allows for a balanced consideration of a project's socioeconomic and environmental impacts, and it is in this spirit that we offer these comments.

Based on these concerns, Colusa County Citizens for Responsible Industry has a strong interest in ensuring projects comply with CEQA, as well as applicable federal, state, and local laws and regulations. While the coalition recognizes the benefits of renewable energy, it is also cognizant of the health and safety and environmental risks associated with industrial and utility development, such as that involved with this Project.

II. THE CATEGORICAL EXEMPTION FROM ENVIRONMENTAL REVIEW FOR EXISTING FACILITIES IN CEQA DOES NOT APPLY TO THE TENTATIVE ORDER

A. Categorical Exemptions Must Be Narrowly Construed to Afford the Fullest Protection of the Environment

CEQA provides that certain categories of projects have been determined not to have a significant effect on the environment and are, therefore, exempt from the provisions of CEQA. The Secretary of the Resources Agency designated 32 classes of projects that are categorically exempt from the provisions of CEQA.¹² The Class

¹² Pub. Resources Code § 21084(a).
2904-034cv

1 category provides an exemption from environmental review for “existing facilities”.¹³ Class 1 exempts from review:

the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency’s determination.¹⁴

In interpreting what constitutes an existing facility, CEQA specifically states that “[t]he key consideration is whether the project involves negligible or no expansion of an existing use.”¹⁵ Furthermore, Courts interpreting CEQA have time and again reiterated that categorical exemptions must be construed narrowly, to ensure the greatest environmental protection within the reasonable scope of their plain language.¹⁶

B. The WWTF Is Not an Existing Facility

The WWTF which will receive discharges from the proposed Biomass Power Plant is not an existing facility. In *Committee for a Progressive Gilroy v. State Water Resources Control Board*,¹⁷ the Court determined that a permit being reissued for the discharge from a Publicly Owned Treatment Works (“POTW”) was exempt from environmental review because an EIR had already analyzed the environmental impacts associated with the permitted discharge. Accordingly, additional review was superfluous and unnecessary. The POTW at issue in that case existed, for purposes of the Class 1 exemption, because a permit was being issued to a facility the operation of which was undergoing no or a negligible expansion beyond that already analyzed in an EIR. Indeed, the volume of effluent and processes employed had not changed.

¹³ See CEQA Guidelines, § 15301.

¹⁴ See *id.*

¹⁵ *Id.*

¹⁶ *County of Amador v. El Dorado County Water Agency*, (1999) 76 Cal.App.4th 931, 966; Guidelines, § 15003, subd. (f); see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390.

¹⁷ *Committee for a Progressive Gilroy v. State Water Resources Control Board*, (1987) 192 Cal.App.3d 847.

Here, no agency has conducted environmental review of the WWTF. Instead, in 1992, the County certified an EIR that addressed discharges from food processing operations from the CIP facilities.¹⁸ Accordingly, the Regional Board issued WDRs only for discharges from food processing operations and allowed those discharges to be directly applied to Land Application Areas (“LAAs”).¹⁹ Subsequently, Colusa Industrial Properties proposed additional discharges from other food processors and the Regional Board exempted the WDR for those similar food processing operations from CEQA review.

However, the Regional Board now proposes a Tentative Order for the “Colusa Industrial Properties Wastewater Treatment Facility,” a facility which does not exist as currently proposed.²⁰ The proposed Biomass Power Plant seeks to discharge effluent that requires treatment, and therefore, cannot be directly land applied, like the previous discharges from food processing. Because the CIP did not have a WWTF comprised of treatment ponds used for the dilution and monitoring of effluent discharge from a Biomass Power Plant, and the proposed WWTF has not undergone environmental review, the Class 1 exemption for existing facilities does not apply. Accordingly, the Regional Board must prepare an Initial Study and either a mitigated negative declaration or an EIR that identifies, analyzes and mitigates the new WWTF and its significant impacts.

C. The Colusa Industrial Park is Not a Facility

The area zoned as the Colusa Industrial Park is not a facility within the meaning of the “existing facilities” exemption under CEQA. CEQA requires the fullest protection of the environment, and therefore, a narrow interpretation of the categorical exemptions.²¹ Accordingly, the vague concept of a facility is not so broad as to encompass the industrial park. For instance, the Court in *Azusa Land Reclamation Co. v. Main San Gabriel Watermaster*, examined whether a landfill, which is excavated, fell within the definition of a facility, which is typically built. The Court explained:

¹⁸ Eco-Analysts, Final Supplemental Environmental Impact Report for the Colusa Industrial Park (May 1992) [*hereinafter* FEIR]. **Attachment B.**

¹⁹ *Id.*

²⁰ WDR R5-2014__, p. 1.

²¹ *County of Amador v. El Dorado County Water Agency*, (Dist. 1999) 76 Cal.App.4th 931, 966; Guidelines, § 15003, subd. (f); *see also Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390.

[A] term that does not have a clearly established meaning, such as the exemption for existing ‘facilities,’ should not be so broadly interpreted so to include a class of businesses that will not normally satisfy the statutory requirements for a categorical exemption, even if the premises on which such businesses are conducted might otherwise come within the vague concept of a “facility.”²²

The concept of a facility is vague. For example, a “facility” is normally defined as “something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end”; or “[s]omething that is built or installed to perform some particular function....”.²³

The Court held that a landfill does not come within the exemption for existing facilities, not only because of the difference in construction method employed, but also because “one of the significant features of a landfill is that its long term operation will change the characteristics of both the landfill and the land itself, because it will be filled up with alternating layers of solid waste and dirt.”²⁴

Similarly, here, the WDR regulates the discharges generated at the CIP, which is merely an area zoned for multiple uses and industries.²⁵ Like a landfill, which is filled with waste, an industrial park is an area of land that will be filled with a multitude of uses and industries that will have different effluent. The construction of each facility and addition of each new discharge to the WWTF will have characteristics that will impact and change the land. Indeed, the federal Environmental Protection Agency (“EPA”) has recognized that different effluents require different treatment technology. Accordingly, the EPA has codified different standards of treatment for different discharges in its effluent limitations guidelines (“ELGs”).²⁶ Different Standard Industrial Categories (“SICs”) have different ELGs which are implemented through individual permits in the National Pollution

²² *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, (1997) 52 Cal.App.4th 1165, 1192 – 93.

²³ *Id.* at 1193 quoting Black's Law Dict. (6th ed. 1990) p. 591.

²⁴ *Id.* at 1194.

²⁵ An industrial park is defined as “an area that is at a distance from the center of a city and that is designed (as by homogeneous architecture) esp. for a community of industries and businesses.” (Merriam Webster, <http://www.merriam-webster.com/dictionary/industrial%20park> (last visited April 15, 2014).)

²⁶ 33 U.S.C. § 1316; 40 C.F.R. § 400 et seq.

Discharge Elimination System (“NPDES”). Accordingly, the applicable ELG for the discharge source, which must be incorporated into a permit, is based on the type of technology needed to mitigate the impacts of the wastewater from the industrial discharge being regulated.²⁷ The WDR and Wastewater Discharge Requirement Technical Evaluation Prepared for the Addition of New Discharges both note that the future identities of the CIP’s tenants are unknown.²⁸ Accordingly, the SICs and corresponding required treatment technology is also unknown.

The existing facilities exemption was not intended to allow unhampered land application of a variety of different industrial effluents that have the potential to change the characteristics of the CIP, the WWTF retention ponds, and the land itself. Accordingly, the CIP is not a facility, and discharges into a new WWTF to process discharges from the CIP require environmental review.

D. The Biomass Plant is Not an Existing Facility; Therefore the WDR Covers More Than a Negligible Expansion of an Existing Use

The Biomass Power Plant, which is one of the bases for a newly proposed WDR, is still in the initial stages of the permit application process and is, therefore, by no means existing. Thus, the WDR falls outside the exception for existing facilities. CEQA’s categorical exemption for existing facilities is for the “operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures.”²⁹ In determining whether a facility is existing, “[t]he key consideration is whether the project involves negligible or no expansion of an existing use.”³⁰

There are three reasons that the WDR is not for an existing facility. First, the WDR proposes to cover waste discharges from a proposed Biomass Power Plant that does not exist. The Biomass Power Plant, which is one of the bases for a newly proposed WDR,³¹ is still in the initial stages of the permit application process.

²⁷ See 40 C.F.R. § 400 et seq.

²⁸ CH2MHill, Wastewater Discharge Requirement Technical Evaluation prepared for Colusa Industrial Properties, p. 1-1 (May 2013) [*hereinafter* Waste Discharge Report]. **Attachment C.**

²⁹ CEQA Guidelines, § 15301.

³⁰ *Id.*

³¹ The other basis for renewal is the added discharges of stormwater runoff from Premier Mushrooms, which may contain polyaromatic hydrocarbons, and heavy metals, the environmental impacts of which have also evaded review.

April 28, 2014

Page 9

Thus, the WDR covers a new facility that is by no means existing and clearly falls outside the exception for existing facilities.

Second, to date, the WDR for the CIP has permitted the land application of food processing operations.³² The current and past residents of the CIP include Hanover Foods, Inc., which ceased its operations in 2003,³³ but has recently reopened,³⁴ Sakata Seeds, Nunhems, USA, Inc., and Premiere Mushrooms.³⁵ Given the innocuous nature of the IPW from these food processors, and the lack of chemicals used in their industrial processes, the previous WDR for the CIP permitted the *direct* land application of IPW flows.³⁶ Accordingly, the WDR did not address treatment.

Third, for the first time, the WDR is being proposed for a WWTF. However, the WWTF is proposed, and the proposal incorporates proposed mitigation measures from the County's draft MND for the Biomass Power Plant. A WWTF that can accommodate the effluent from a Biomass Power Plant has not been approved and is not currently constructed. The effluent from a biomass facility is different from the effluent from current food processing in the CIP. For example, the Biomass Power Plant industrial process described in the power plant's Authority to Construct permit application explains that the process involves the addition of lime and ammonia. The addition of these compounds will change the nature of the effluent. Furthermore, the amount of discharge will increase because of the Biomass Power Plant's proposal to discharge between 1,800 and 3,000 gallons per day of effluent. However, no further discussion of the contents of the effluent are discussed in the WDR or in the Biomass Power Plant's MND.³⁷ Clearly, the treatment of waste discharge from a biomass facility and the construction of facilities required to do so is considerably different from the current effluent handling process at the CIP.³⁸ It is precisely the different nature of the biomass effluent and facilities required to process that effluent that has triggered the

³² Waste Discharge Report, p. 1-1.

³³ *Id.*

³⁴ Email from Ed Hulbert to Lani Andam, Re: Colusa Industrial Properties (Thursday, March 13, 2013 3:23 p.m.) **Attachment D.**

³⁵ Waste Discharge Technical Report, p. 1 -1.

³⁶ WDR R5-2014__, p. 3, ¶ 9 *emphasis added.*

³⁷ Application to the Colusa County Air Pollution Control District of an Authority to Construct for a Biomass Power Plant in Colusa, California, pp. 5 – 12 (March 2013). **Attachment E.**

³⁸ URS, Report of Waste Discharge – Lined Wastewater Evaporation Pond – San Joaquin Solar 1 & 2 Hybrid Power Plant Project, November 12, 1999. **Attachment F.**

expansion and modification of a WWTF. Therefore, a WDR for the WWTF is not a negligible expansion of an existing use.

E. The Proposed Permit for the CIP Would Authorize a New and Significantly Expanded Use and Discharge

The WDR allows for an expanded use of IPW, and modification of the WWTF. However, the Class 1 exemption is intended for regulatory devices that relate only to the operation of an existing system, rather than to permitting an expanded use of the system.³⁹ Where a permit is issued incident to a new or expanded use, the permit issuance does not qualify for a categorical exemption as an existing facility.⁴⁰ Indeed, the relevant consideration in determining whether a permit comes within the exemption for existing facilities is whether or not a permit would authorize a change in operations.⁴¹

Here, the Tentative Order expands the use of the existing CIP WWTF by 1) permitting a new use of the IPW flows for rice decomposition, 2) allowing for year round IPW land application, as opposed to application during only the dry months of the year, and 3) the addition of a discharge, which requires modification of the use of the WWTF treatment ponds and the construction of pipelines to convey the discharge to the treatment pond. Given the new uses proposed in the updated WDR, the permit is for an expanded and new use of the system.

1. *The proposal to convey process wastewater from a proposed biomass combustion plant to the industrial wastewater disposal system is not a negligible expansion of an existing use, but is a new use of the system.*

The water delivery and treatment system necessary to convey and treat the discharge is not already in place, and therefore, the WDR is not a regulatory device related to the operation of an existing facility. In *Turlock Irrigation District v. Zanker*, the irrigation district implemented new conservation rules to regulate a water delivery system that was already in place.⁴² Accordingly, the court held that

³⁹ *Turlock Irrigation District v. Zanker* (Dist. 2006) 140 Cal.App.4th 1047, 1065; *See also Santa Monica*, 101 Cal.App.4th at 793.

⁴⁰ *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1311-12; *Erven v. Board of Supervisors*, (1975) 53 Cal.App.3d 1004, 1014.

⁴¹ *Bloom v. McGurk*, 26 Cal.App.4th at 1311-12.

⁴² *See Turlock Irrigation District*, 140 Cal.App.4th 1047.

the rules were a regulatory device which did not expand the use because the rules regulated access to and operation of a system which already existed.⁴³ Therefore, application of the Class 1 exemption was proper.⁴⁴

Unlike in *Turlock*, the proposal to convey process water from the proposed Biomass Power Plant to a WWTF in the CIP will result in a new use of the CIP's wastewater system. The Tentative Order sets forth a series of new and different uses for the system. The Tentative Order expands the timeframe during which IPW can be land applied. In the original WDR for the CIP, outflows of IPW were prohibited from November 1 through April 30.⁴⁵ Indeed, the IPW was used only for irrigation water during the dry weather months. The new regulations implemented by the Tentative Order will permit the application of IPW during the winter months for rice decomposition on the CIP land, a new use of the land and the IPW.⁴⁶ The land will be completely flooded by effluent from various sources for rice decomposition.⁴⁷ Therefore, IPW constituents will directly impact the land and the underlying ground water, which drains to the Colusa Water Basin.⁴⁸

Accordingly, the WDR is distinguishable from the circumstances presented in *Turlock*, where new rules made a minor change to the operation of an existing system without any expansion of the physical system. The Tentative Order will lead to a significant expansion in operation of the system and use of the IPW. Accordingly, the new purpose the WWTF and IPW will serve, rice decomposition, is not exempt from CEQA as a negligible expansion of an existing use. Environmental review of the Project is required.

2. *The proposed WDR authorizes a new discharge which requires the modification of new facilities.*

Operation of the biomass plant, and disposal of the IPW discharged from the biomass plant, requires the construction of new facilities, and therefore, does not fall under the Class 1 exemption for existing facilities.⁴⁹ The existing facilities

⁴³ *Id.* at 1065 .

⁴⁴ *Id.*

⁴⁵ WDR, Order No. 5-01-250, at p.8.

⁴⁶ WDR R5-2014__, p. 6, ¶ 20.

⁴⁷ *Id.*

⁴⁸ WDR R5-2014__, p. 11, ¶ 40.

⁴⁹ See *Bloom v. McGurk*, 26 Cal.App.4th 1307 (holding that a new regulatory permit with no expansion of the facility or its use came within the class 1 exemption).

exemption was intended for minor modifications, such as maintenance and improvements to an existing structure, rather than the expansion of a facility.⁵⁰ Where a permit is not necessarily a renewal, but rather, allows for the expansion or a change in the use of a facility, the existing facilities exemption does not apply, and environmental review is required.⁵¹

To accommodate the addition of biomass effluent and corresponding permit modification under review, CIP proposes that “lined pond 3,” which is currently used for emergency storage of IPW inflows, be used to regulate and manage IPW.⁵² Accordingly, the lined pond to which the discharge will be conveyed is being altered to implement a new process necessary to prepare the effluent for land application. In tandem with this new use of the system, Colusa Bio Energy LLC will construct 0.25 miles of pipeline to convey their effluent to “lined pond 3.”⁵³ Therefore, physical expansion, as well as an expansion and modification of the WWTF processes, will be made incident to the WDR. The existing facilities exemption is inapplicable to the proposed Biomass Power Plant, and should not be construed to insulate the WDR authorizing its discharge from environmental review.

3. *The physical modifications and expanded use necessary to convey and treat the biomass effluent at the WWTF are not minor.*

The addition of the biomass facility to the CIP will require the laying of piping and the expanded use of the WWTF, which is in no way a minor alteration of an existing use.⁵⁴ The Class 1 exemption is intended only for minor alterations to existing facilities.⁵⁵ “Although the Guidelines do not define a minor alteration, it has to be one that is so small that it does not cross the threshold level set by the Guidelines for an exception to the categorical exemptions. Thus, a ‘minor’ alteration cannot be an activity that creates a reasonable possibility of a significant

⁵⁰ See *City of Pasadena v. State of California*, (1993) 14 Cal.App.4th 810, 822 (holding that minor interior building modifications necessary to bring a building up to code were minor); see also *Erven v. Board of Supervisors*, (1975) 53 Cal.App.3d 1004, 1014 (“Should the Board decide in the future to widen existing public roads or to acquire private road easements, by condemnation or dedication, and improve them, such actions would not qualify for exemption and compliance with the CEQA would be required either by the preparation and consideration of an environmental impact report or by a negative declaration.”).

⁵¹ *Bloom v. McGurk*, 26 Cal.App.4th at 1312-13.

⁵² WDR R5-2014__, p. 5, ¶ 19.

⁵³ MND, p. 88.

⁵⁴ See CEQA Guidelines, § 15301 (“minor alteration of existing public or private structures.”).

⁵⁵ *Azusa*, 52 Cal.App.4th at 1194; CEQA Guidelines, § 15301.

environmental effect.”⁵⁶ According to the MND for the Biomass Power Plant, the effluent “will be discharged to the CIP Wastewater Treatment Facility (WWTF) located approximately 0.25 miles north of the project site.”⁵⁷ The MND goes on to state, “[t]he bio-energy facility would also require the installation of a wastewater conveyance pipeline to the CIP WWTF.”⁵⁸ However, the CIP will only be able to serve the bio-energy facility without violating the existing WDRs through the modification of the procedures used by the CIP’s WWTF. Furthermore, modification of the WDR was necessary to accommodate a year round discharge, which permits a new use of the land – rice straw decomposition.⁵⁹ The new use of the CIP, combined with the new process that will be implemented to treat the wastewater of a distinct and different type of chemical discharge, and the construction of .25 miles of pipeline, cannot be construed to be a minor modification.

An expanded use of the WWTF system, the construction of new pipelines to serve the system, an expansion of the timeframe during which the system operates, and a new use of the system are not minor modifications. The WDR is not permitting a minor change to the operation of an existing system without any expansion of the physical system. The Tentative Order will lead to a significant expansion in operation of the system, along with the construction of new or expanded facilities to accommodate a new effluent from a Biomass Power Plant. Therefore, the Project is not a minor modification of an existing use exempt from CEQA.

⁵⁶ *Id.*

⁵⁷ MND, p. 88.

⁵⁸ *Id.*

⁵⁹ WDR R5-2014__, p. 21, ¶ 66.

III. EVEN IF THE NEW FACILITIES AND NEW USES COULD BE CHARACTERIZED AS INVOLVING NO EXPANSION OR A NEGLIGIBLE EXPANSION OF AN EXISTING FACILITY, THERE IS SUBSTANTIAL EVIDENCE THAT THE PROPOSED DISPOSAL OF WASTEWATER FROM THE PROPOSED BIOMASS PLANT THROUGH THE PROPOSED CONSTRUCTION AND OPERATION OF THE FACILITY ITSELF AND NEW PIPELINES WILL HAVE A SIGNIFICANT ENVIRONMENTAL IMPACT DUE TO UNUSUAL CIRCUMSTANCES, AND THEREFORE, THE CLASS 1 CATEGORICAL EXEMPTION DOES NOT APPLY

The CEQA Guidelines provide that “[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”⁶⁰ “A significant effect is a ‘substantial, or potentially substantial, adverse change....’ This means that an activity has a significant effect if it ‘has the potential to degrade the quality of the environment.’”⁶¹ Whether a project presents unusual circumstances, is determined by whether the project presents circumstances that differ from the types of projects typically covered by the claimed categorical exemption, and those differences create the possibility of an adverse impact on the environment.⁶²

A. WDR Coverage of a Biomass Facility within an Industrial Park used by Food Processing Operations Presents Unusual Circumstances

The Regional Board’s proposed WDR for land application of IPW from the Biomass Power Plant presents unusual circumstances. Whether a Project presents unusual circumstances is determined by whether “the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects.”⁶³ The unusual circumstances exception can be triggered by a showing that a project is distinguishable from the types of projects ordinarily exempt from review.⁶⁴

⁶⁰ CEQA Guidelines, § 15300.2.

⁶¹ *Azusa*, 52 Cal.App.4th at 1197 quoting Pub. Resources Code §§ 21068, 21083.

⁶² *Fairbank v. City of Mill Valley* (1999) 75 Cal. App. 4th 1243, 1260.

⁶³ *Azusa*, 52 Cal.App.4th at 1207 citing *Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413.

⁶⁴ *Fairbank v. City of Mill Valley*, 75 Cal. App. 4th at 1260.

Whether the circumstances exist, is a factual determination, whereas whether the circumstances related to the Project are unusual is a matter of law.⁶⁵

The WDR for the CIP presents an unusual circumstance in that WDRs are being issued for discharges of wastewater generated by various facilities in an industrial park as opposed to individual facilities. The WDR that would cover the Biomass Power Plant discharges is the same WDR which covers the entire CIP. The CIP may house a range of uses. Indeed, the future tenants of the CIP are still unknown, as is the contents of their discharges.⁶⁶ Accordingly, the CIP is required to present the Regional Board with a detailed analysis of the effluent from new dischargers applying for coverage under the permit.

Ordinarily, CEQA review of a renewed permit for an individual facility, which has not been significantly altered or changed may be appropriate, and therefore, properly exempt as the “operation . . . [or] permitting . . . of existing public or private structures.”⁶⁷ Indeed,

thousands of permits are renewed each year for the ongoing operation of regulated facilities, and [courts have] discern[ed] no legislative or regulatory directive to make each such renewal an occasion to examine past CEQA compliance at every facility... That result would contravene the applicable statutes of limitation and the ordinary meaning of the words used in the class 1 exemption.⁶⁸

However, new dischargers that are seeking coverage under a new or substantially revised permit, which authorizes discharges from new facilities with new uses, is subject to environmental review. The effluent from the new facilities seeking permit coverage may be different from the permitted discharges, and therefore, will require different treatment technology depending on the type of effluent. In other circumstances, when a discharger’s permit is up for renewal on a regular basis, the discharge may not have changed at all. Indeed, CEQA review was not intended to open each and every permit renewal to a new environmental review.⁶⁹

⁶⁵ See *Azusa*, 52 Cal.App.4th at 1207.

⁶⁶ WDR R5-2014__, p. 3, ¶ 11.

⁶⁷ CEQA Guidelines, § 15301.

⁶⁸ *Bloom v. McGurk*, 26 Cal.App.4th at 1315.

⁶⁹ *Bloom v. McGurk*, 26 Cal.App.4th at 1315.

However, the Tentative Order is distinguishable. The WDR covers a zoning designation for an area that may house a variety of industrial discharges, which require different treatment technologies to mitigate the impacts each of those discharges may have on the environment. The biomass facility is a new use of the property, which will generate effluent that requires a new treatment process. The effluent is different from that produced by the current users of the CIP WWTF. Accordingly, the Regional Board's reissuance of the CIP's WDR permit presents unusual circumstances.

B. The WDRs Will Result In Significant Environmental Impacts Due to Unusual Circumstances

The approval of the Tentative Order presents unique circumstances that will result in a significant impact on the environment. A distinguishing project feature combined with substantial evidence of an adverse environmental impact is sufficient to remove the project from the categorically exempt class.⁷⁰

To date, the WDR for the CIP has only authorized the discharges of food processing operations, which have not used chemicals in their operations.⁷¹ However, the BFB that will be constructed and used at the Biomass Power Plant for the generation of energy will add ammonia and lime to water during the energy production process.⁷² No treatment is prescribed for these chemicals, nor are the environmental impacts that lime and ammonia may have on agriculture and the environment discussed, analyzed or mitigated. Furthermore, the biomass effluent will contain elevated levels of TDS.⁷³ Elevated levels of TDS in land applied IPW flows is known to hamper crop productivity, and may lead to soil degradation⁷⁴

In sum, the WDR may result in a significant environmental impact due to unusual circumstances and, therefore, is not exempt from environmental review, pursuant to CEQA.

⁷⁰ *Fairbank v. City of Mill Valley*, 75 Cal. App. 4th at 1260.

⁷¹ WDR Order No. 99-093, p. 1, ¶ 4. **Attachment G.**

⁷² Application to the Colusa County Air Pollution Control District of an Authority to Construct for a Biomass Power Plant in Colusa, California, pp. 5 – 12 (March 2013).

⁷³ MND, pp. 21. 68 – 73.

⁷⁴ Stephen A. Grattan, *Irrigation Water Salinity and Crop Production*, Agriculture and natural Resources Catalog, U.C. Davis, Publication No. 8066 (2002). **Attachment H.**

IV. THE CVRWQCB HAS IMPERMISSIBLY BASED ITS EXEMPTION DETERMINATION ON MITIGATION MEASURES FOR THE BIOMASS AND SOLAR ENERGY PROJECT WHICH HAVE NOT BEEN EVALUATED NOR APPROVED

The first step in the CEQA process is determining whether or not the proposed project is encompassed by either a statutory or categorical exemption.⁷⁵ If the proposed project is not exempt, the lead agency is required to prepare an Initial Study.⁷⁶ If the Initial Study results in a determination that the Project will have a significant impact on the environment, an environmental review document be prepared to identify measures that will mitigate project impacts below a level of significance.⁷⁷ It is only in this last step that measures are identified to mitigate the environmental impacts associated with the project.

Here, the Regional Board improperly incorporates the mitigation measures set forth in the proposed and unapproved MND for the Biomass and Solar Energy Project and claims that the WDR is exempt.⁷⁸ However, “proposed mitigation measures cannot be used to support a categorical exemption; they must be considered under the standards that apply to a mitigated negative declaration.”⁷⁹ Indeed, an exemption from environmental review cannot be based on another final environmental review document,⁸⁰ and certainly not on one that is still unapproved.

The Wastewater Discharge Requirement Technical Evaluation Prepared for the Addition of New Discharges states, “[p]reliminary data suggest that the GeenPlant [sic] biomass plant IPW may be suitable for CIP land application; but may not comply with current permit limits for TDS.”⁸¹ Because high concentrations of TDS may degrade groundwater and limit crop productivity, the MND for the Biomass Power Plant proposes a TDS mass balance approach to dilute its effluent.⁸²

⁷⁵ See *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 792 summarizing the three tiered approach to environmental review procedures mandated by CEQA.

⁷⁶ CEQA Guidelines, § 15063.

⁷⁷ Pub. Resources Code, §§ 21080, 21151.

⁷⁸ See MND, pp. 68 – 73.

⁷⁹ *Azusa*, 52 Cal.App.4th at 1199; see also *Salmon Prot. & Watershed Network v. Cnty of Marin*, (2004) 125 Cal.App.4th 1098, 1107.

⁸⁰ *Azusa*, 52 Cal.App.4th at 1200 – 01.

⁸¹ Letter from Bret Isbell, Water Resources Engineer to Ed Hulbert, p. 2 (October 2, 2013)

Attachment I.

⁸² See MND, p. 72.

To this end, the MND proposes the use of lined pond 3, which “has been available for emergency IPW storage,” even though “no IPW has been diverted into Pond 3 to date.” In fact, the MND states that the CIP proposes to use Pond 3 to regulate and monitor IPW flows before IPW is conveyed to the land application system.”⁸³ Prior to this proposal the, “IPW [was] directly land applied during the seed washing season, typically from August through October each year.”⁸⁴

The Regional Board improperly proposes to base its exemption determination on proposed mitigation measures for a Project that will have a significant impact on water quality in the Colusa Basin. CEQA prohibits this approach.⁸⁵ The Regional Board is required to prepare an environmental review document which identifies, analyzes and mitigates the adverse impacts that will result from construction of an expanded WWTF system, new processes to dilute the biomass effluent, and issues arising from the distinctly different effluent that will be discharged from a steam generating power facility, as opposed to seed washing operations.⁸⁶

V. THERE ARE NO OTHER EXEMPTIONS THAT ARE APPLICABLE TO THE TENTATIVE ORDER

The WDR is not statutorily exempt from CEQA review. According to the Water Code, “[n]either the state board nor the regional boards shall be required to comply with the provisions of Chapter 3 of Division 13 of the Public Resources prior to the adoption of any waste discharge requirement, except requirements for new sources as defined in the Federal Water Pollution Control Act [“FWPCA”].”⁸⁷ This statutory exemption from preparation of an EIR is only applicable to those WDR orders that are issued pursuant to the federal authority in the FWPCA.⁸⁸ The FWPCA applies only to the discharge of a pollutant from a point source to the waters of the United States.⁸⁹ The California Water Code requires the regulatory permitting of discharges made to both surface waters and land, which may impact

⁸³ Waste Discharge Report, p. 2-5.

⁸⁴*Id.*, at 2-1.

⁸⁵ *Salmon Prot. & Watershed Network*, 125 Cal.App.4th at 1107.

⁸⁶ Waste Discharge Technical Report, p. 1-1. (Since 2003 only seed washing operations by Nunhems and Sakata Seeds have been discharging effluent.).

⁸⁷ Cal. Water Code § 13389.

⁸⁸ *Committee for a Progressive Gilroy v. State Water Resources Control Board*, (1987) 192 Cal.App.3d 847.

⁸⁹ 33 U.S.C. § 1251 et seq.

surface or ground water quality.⁹⁰ “[W]hen the orders are required by the Federal Water Pollution Control Act, the boards are explicitly relieved of the duty ‘to comply with the provisions [of CEQA].’”⁹¹ However, Water Code section 13372 of the Water Code places a limitation on the statutory exemption from CEQA review set forth in section 13889.⁹² According to Water Code section 13372, “[t]he provisions of this chapter apply only to actions required under the Federal Water Pollution Control Act and acts amendatory thereto.”⁹³

The WDR under review is for the land application of IPW, and therefore, is being issued under the exclusive authority of the Porter-Cologne Act.⁹⁴ Because the WDR for the CIP is issued under the exclusive authority of the Porter-Cologne Act, “[b]y the terms of the statutes read as a whole, the exemption under Water Code section 13389 simply does not apply in this case.”⁹⁵ Accordingly, no statutory exemptions apply to the WDR. Therefore, the CVRWQCB must prepare an EIR that identifies, analyzes and mitigates the impacts associated with land application of a new source of IPW, which may have a significant impact on the environment.

VI. CONCLUSION

The Regional Board may not approve a new WDR for the Project until it prepares an EIR that adequately analyzes the Project’s potentially significant direct, indirect and cumulative impacts, and identifies and incorporates all feasible mitigation measures to minimize the impacts associated with the new processes and facilities permitted by the updated WDR. By complying with State law, the Regional Board and the public can ensure that the Project’s significant environmental impacts are mitigated to a less than significant level.

⁹⁰ See Cal. Water Code, § 13263, which provides that requirements be prescribed related to the conditions in the disposal area, or receiving waters where the discharge is proposed.

⁹¹ *Committee for a Progressive Gilroy*, 192 Cal.App.3d at 860 quoting Cal. Water Code, § 13389.

⁹² See *id.* at 862.

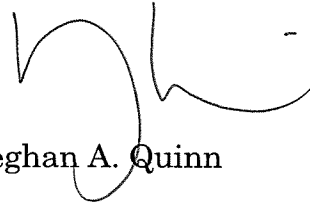
⁹³ Cal. Water Code, § 13372; *Committee for a Progressive Gilroy*, 192 Cal.App.3d at 862.

⁹⁴ See WDR No. 05-01-250.

⁹⁵ *Committee for a Progressive Gilroy*, 192 Cal.App.3d at 862.

April 28, 2014
Page 20

Sincerely,

A handwritten signature in black ink, appearing to read 'MQ', with a large loop under the 'Q' and a horizontal stroke extending to the right.

Meghan A. Quinn

MAQ:clv

Attachments