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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF SACRAMENTO

9 ENVIRONMENTAL LAW FOUNDATION )  
10 and CALIFORNIA SPORTFISHING )  
PROTECTION ALLIANCE, California non- )  
11 profit organizations, )

12 Petitioners, )

13 v. )

14 CALIFORNIA REGIONAL WATER )  
QUALITY CONTROL BOARD, CENTRAL )  
15 VALLEY REGION, a California State )  
Agency, )

16 Respondent. )

17 CITY OF TRACY, a municipality, )

18 Real Party in Interest. )

**VERIFIED PETITION FOR WRIT OF  
MANDATE**

BASED UPON THE PORTER COLOGNE  
WATER QUALITY CONTROL ACT (Cal.  
Water §§ 13000 et seq.)



1 Tracy Permit with its flawed and incomplete implementation of the state and federal anti-  
2 degradation policies will degrade water quality throughout the Central Valley, thereby harming  
3 ELF. ELF's address is 1736 Franklin Street, Oakland, California 94612.

4 6. Petitioner CSPA is a non-profit public benefit conservation and research  
5 organization established in 1983 for the purpose of conserving, restoring, and enhancing the  
6 state's water quality and fishery resources and their aquatic ecosystems and associated riparian  
7 habitats. CSPA has approximately 2,000 members who live, recreate and work in and around  
8 waters of the State of California, including waterways throughout the Sierra Nevada, Central  
9 Valley and the Sacramento-San Joaquin River Delta Estuary. CSPA has actively promoted the  
10 protection of water quality and fisheries throughout California before state and federal agencies,  
11 the State Legislature and Congress and regularly participates in administrative and judicial  
12 proceedings on behalf of its members to protect, enhance, and restore California's water quality  
13 and fisheries. This action is brought on CSPA's behalf and on behalf of its members. CSPA's  
14 address is 3536 Rainier Avenue, Stockton, California, 95204.

15 7. Respondent California Regional Water Quality Control Board, Central Valley  
16 Region ("Regional Board") is a California agency created under the laws and regulations of the  
17 State of California and is qualified to do and is engaged in the regulation of water quality within  
18 the Central Valley Region.

19 8. Real Party in Interest City of Tracy is a municipal entity which discharges  
20 pollutants to Old River pursuant Regional Board Order No. R5-2007-0036.

21 9. Petitioners are informed and believe and thereon allege that the Regional Board  
22 controls the operation, policies, and activities of the water pollution permitting process.

23 10. Petitioners have exhausted administrative remedies and have no plain, speedy, or  
24 adequate remedy in the ordinary course of law; the only relief that can be obtained by Petitioners  
25 is through the granting of this writ of mandate.

### 26 **III. JURISDICTION AND VENUE**

27 11. This Court has jurisdiction over Respondent because it is a California agency  
28 permitting discharges into water bodies in the Central Valley, with its headquarters in Rancho

1 Cordova, California. Venue is proper in this Court because Respondent’s place of business is in  
2 Sacramento County, and therefore the Respondent is situated in Sacramento County. (CCP  
3 § 394, subd. (a).)

4 12. Under California Law, a party which has participated in the regulatory process  
5 may subsequently challenge the final agency action in court. (Water Code § 13330, subds. (a)-  
6 (b).)

7 13. ELF and CSPA are parties which actively participated in the review of the Tracy  
8 Permit, the permit at issue in this action.

9 14. On May 19, 2009 the State Board adopted Order number WQ 2009-0003 (“State  
10 Board Order”) dismissing ELF’s June 1, 2007 petition to review the Tracy Permit and denying  
11 review of CSPA’s petition with respect to Anti-Degradation. (State Board Order, p.1, fns. 1-2.)  
12 This petition for writ of mandate is timely filed within 30 days of the State Board Order.

#### 13 **IV. STANDARD OF REVIEW**

14 15. Petitioners bring this writ of administrative mandamus pursuant to CCP section  
15 1094.5, seeking review of the Regional Board’s approval of the Tracy Permit to discharge  
16 municipal and industrial wastewater into the Old River. Petitioners’ authority to challenge the  
17 Regional Board’s decision in this Court is provided under Water Code § 13330. Actions arising  
18 under section 13330 of the Water Code are governed by CCP section 1094.5. (Water Code  
19 § 13330, subd. (d).)

20 16. California Code of Civil Procedure §1094.5 provides that “the inquiry in such a  
21 case shall extend to the questions whether the respondent has proceeded without, or in excess of,  
22 jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of  
23 discretion. Abuse of discretion is established if the respondent has not proceeded in the manner  
24 required by law, the order or decision is not supported by the findings, or the findings are not  
25 supported by the evidence.” This establishes abuse of discretion as the appropriate standard of  
26 review.

#### 27 **V. FACTUAL BACKGROUND**

1           17.     This action concerns the contamination of the Old River as a direct result of  
2 Respondent's legally inadequate protections against pollution from wastewater discharge. On  
3 May 4, 2007, in adopting Order number R5-2007-0036, the Regional Board granted to the City  
4 of Tracy a National Pollution Discharge Elimination System ("NPDES") permit and Waste  
5 Discharge Requirements ("WDR's") for the City of Tracy Wastewater Treatment Plant ("Tracy  
6 WTP"). This permit forms the basis for the petition at bar.

7           18.     The City of Tracy owns and operates the Tracy WTP, which was constructed in  
8 1930, and treats wastewater from the City's wastewater collection system, as well as industrial  
9 wastewater, the bulk of which is food-processing wastewater from local cheese manufacturer  
10 Leprino Food Company. The City is in the process of nearly doubling the capacity of the Plant  
11 from nine million gallons per day to 16 million gallons per day.

12           19.     The Tracy WTP discharges into the Old River, which is part of the Sacramento-  
13 San Joaquin River Delta. The Old River's recognized beneficial uses include water contact  
14 recreation, warm freshwater aquatic habitat, cold freshwater aquatic habitat, fish migration and  
15 spawning habitat, and wildlife habitat. Sacramento-San Joaquin River Delta waterways are  
16 habitat and migration corridors for a number species protected under federal and state  
17 endangered species acts, including Chinook salmon, Central Valley steelhead, and Delta smelt.

18           20.     Receiving waters in the vicinity of the Tracy WTP's outfall are degraded for  
19 certain pollutants. Section 303(d) of the Clean Water Act requires states to establish water  
20 quality standards for waterways, and then to identify those streams failing to meet the standards.  
21 The Regional Board and State Board have identified Old River as impaired by low levels of  
22 dissolved oxygen. The Tracy Permit allows a 78% increase in mass loading of nitrate and a 77%  
23 increase in mass loading of phosphorous. (Tracy Permit, p. F-9.) Nitrogen and phosphorous are  
24 the primary contributors to eutrophication and increased mass loading of these constituents will  
25 further decrease oxygen levels in the Old River.

26           21.     The Tracy Permit will increase pollution in the already-impaired Old River. The  
27 permit allows the mass loading of many pollutants to increase 70-114%. (*See* Order No. R5-  
28 2007-0036, p. F-9.) However, the state anti-degradation policy and federal anti-degradation

1 requirements (collectively “anti-degradation requirements”) mandate that existing water quality  
2 be maintained and protected. (40 C.F.R. § 131.12(a)(2), as implemented by State Resolution 68-  
3 16.)

4 **State Resolution 68-16 and 40 CFR §131.12**

5 22. The Anti-Degradation Policy provides that, “Any activity which produces or may  
6 produce a waste or increased volume or concentration of waste and which discharges or proposes  
7 to discharge to existing high quality waters will be required to meet waste discharge  
8 requirements which will result in the best practicable treatment or control of the discharge  
9 necessary to assure that (a) pollution or nuisance will not occur and (b) the highest water quality  
10 consistent with maximum benefit to the people of the State will be maintained.”

11 23. The State Board has interpreted the state anti-degradation policy to incorporate  
12 the requirements of the federal anti-degradation requirement set out in 40 C.F.R. § 131.12.

13 24. The federal anti-degradation requirements mandate that water quality necessary to  
14 protect existing beneficial uses in a water body be maintained. (40 C.F.R. § 131.12(a)(1).)

15 25. In addition, the federal anti-degradation requirements mandate that, where water  
16 quality exceeds levels necessary to support propagation of fish, shellfish, and wildlife and  
17 recreation in and on the water, that quality shall be maintained and protected unless: (1) the State  
18 finds that allowing lower water quality is necessary to accommodate important economic or  
19 social development in the area in which the waters are located; (2) the State assures that water  
20 quality shall be adequate to protect existing uses fully; and (3) the State assures that the highest  
21 statutory and regulatory requirements for all new and existing point sources and all cost-effective  
22 and reasonable best management practices for nonpoint source control shall be achieved. (*Id.*  
23 § 131.12(a)(3).)

24 26. The federal Clean Water Act defines “water quality standards” as “provisions of  
25 State or Federal law which consist of a designated use or uses for the waters of the United States  
26 and water quality criteria for such waters based upon such uses.” (40 C.F.R. § 131.3, subd. (i).)  
27 Water quality standards also must consist of an anti-degradation policy and implementation  
28 procedure. (*Id.* §§ 131.6, subd. (d) and 131.12.)

1           27.     The anti-degradation requirements are a component of enforceable water quality  
2 standards, or “state policy for water quality control,” as the standards are called in California,  
3 and are required for permits issued pursuant to both the State Water Plan and the Water Quality  
4 Control Plan for the Sacramento and San Joaquin River Basins (“Basin Plan”), including the  
5 permit at issue. Those regulations establish three levels of water quality protection.

6           28.     The first level—Tier 1—requires that water quality necessary to protect existing  
7 beneficial uses in a water body be maintained. (40 C.F.R. § 131.12(a)(1).)

8           29.     The second level—Tier 2, for waters whose quality exceeds that necessary to  
9 support the beneficial uses for the water—requires that water quality only be degraded if, among  
10 other things, the Regional Board first finds that lower water quality is necessary to accommodate  
11 important economic or social development in the area in which the water body is located. (Id. §  
12 131.12(a)(2).)

13           30.     The third level - Tier 3, for high quality waters that are outstanding national  
14 resource waters, such as a water of a national or state park, wildlife refuges and/or a water of  
15 exceptional recreational or ecological significance, that water quality must be maintained and  
16 protected. (Id. § 131.12(a)(3).)

17           31.     Designation of the level of water quality protection afforded to a water body and  
18 the analysis on how to maintain the appropriate level of water quality is based on the quality of  
19 the water body, not the permitted activity. (40 C.F.R §131.12.)

20           32.     The Old River is considered a water quality impaired river (also known as a  
21 “Water Quality Listed Segment”) for certain constituents meriting Tier 1 protection for those  
22 constituents in the river that do not meet water quality standards, and Tier 2 protection for those  
23 constituents in the river that meet or exceed water quality standards.

24           33.     The Tracy Permit “allows for an increase in the volume and mass of some  
25 pollutants to be discharged to Old River.” (Tracy Permit, p. F-8.) In addition, “discharge from  
26 the facility may currently cause or contribute to exceedances of applicable water quality  
27 objectives for certain constituents.” (Id.) Such an increase is impermissible under the anti-  
28 degradation requirements due to the fact that the Old River is a water quality impaired river.

1 Under the Tier 1 requirements, no further water quality degradation can be allowed unless  
2 authorized by a TMDL, regardless of the level of control. (40 C.F.R. § 131.12(a)(1); *see* Region  
3 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12  
4 (June 3, 1987), p.2 (“EPA Guidance”), 10; *see also* Chief Counsel to the State Water Resources  
5 Control Board, William Attwater, mem. to Regional Board Executive Officers, Oct. 7, 1987, p.  
6 11.) The Regional Board prejudicially abused its discretion by permitting increased pollutants to  
7 be discharged into the Old River.

8 34. Permitting agencies must perform a detailed socioeconomic and alternatives  
9 analyses of any potential degradation from the proposed action, and make a finding, supported  
10 by evidence, that any potential degradation in water quality is justified by important social or  
11 economic development in the area in which the waters are located. (Resolution 68-16; 40 C.F.R.  
12 § 131.12, subd. (a)(2).) The Regional Board did not perform a socioeconomic analysis or  
13 alternatives analysis for purposes of the Tracy Permit, in violation of the anti-degradation  
14 requirements; rather, the Regional Board relied on a cursory finding, without any supporting  
15 evidence, that “such degradation is consistent with the maximum benefit to the people of the  
16 state.” (Tracy Permit, p. F-8.)

17 35. In addition, the Regional Board prejudicially abused its discretion by improperly  
18 relying on a “significance” standard in performing its anti-degradation analysis. Though the  
19 State Board guidance on implementing the state anti-degradation policy may authorize such a  
20 policy (*see* APU 90-004, p.3), that guidance is flawed, given that requiring anti-degradation  
21 analysis only for discharges that result in “significant” degradation runs counter to both the state  
22 anti-degradation policy and the federal anti-degradation requirements. The Board relied on this  
23 concept of “significance” for its failure to perform detailed socioeconomic or alternatives  
24 analyses, in contradiction to both state and federal anti-degradation requirements. EPA has  
25 stated, in its guidance, that a “State must find that any action which would lower water quality is  
26 necessary to accommodate important economic and social development” whether or not water  
27 quality is significantly lowered. (EPA Guidance, p. 7.) By improperly injecting the concept of  
28



1 “significance” into its anti-degradation analysis, and by avoiding socioeconomic and alternatives  
2 analyses for “insignificant” degradation, the Board prejudicially abused its discretion.

3 36. Finally, the Board abused its discretion by relying on an improper baseline for  
4 purposes of its anti-degradation analysis. For purposes of compliance with the state anti-  
5 degradation policy, baseline water quality has been interpreted to mean “the best quality of the  
6 receiving water that has existed since 1968,... unless subsequent lowering was due to regulatory  
7 action consistent with State and federal antidegradation policies.” (APU 90-004.) However,  
8 Respondent used present water quality as the baseline against which degradation in the Old River  
9 was measured. (Order No. R5-2007-0036, p. F-9.) Use of current water quality as a baseline  
10 violates the state anti-degradation policy.

## 11 VI. PROCEDURAL BACKGROUND

12 37. The Regional Board adopted the City of Tracy Wastewater Treatment Plant Order  
13 Number R5-2007-0036 on May 4, 2007. The Order became effective on June 23, 2007. A true  
14 and correct copy of the Tracy Permit is attached hereto as Exhibit A.

15 38. Petitioners both submitted timely comments to the Regional Board on April 6,  
16 2007, explaining the legal deficiencies with implementing the anti-degradation policy in the  
17 Tracy Permit, which forms the basis for this Petition. ELF’s April 6, 2007 comments are  
18 attached hereto as Exhibit B. CSPA’s April 6, 2007 comments are attached hereto as Exhibit C.

19 39. When Petitioners’ concerns regarding the Tracy WTP were left unaddressed by  
20 the Regional Board in its approval of the order, Petitioners each filed timely petitions to the State  
21 Water Resources Control Board (“State Board”) for review, pursuant to Section 13320 of the  
22 Act. ELF’s petition, State Board File number A-1846(a), is attached hereto as Exhibit C.  
23 CSPA’s petition, State Board File number A-1846(b), is attached hereto as Exhibit D.

24 40. On May 19, 2009, the State Board dismissed ELF’s petition outright, and  
25 dismissed CSPA’s with respect to claims arising under the state anti-degradation policy. (State  
26 Board Order, p.1, fns. 1-2.) The State Board dismissed both ELF’s petition and the portion of  
27 CSPA’s petition arising under the state anti-degradation policy without review of the petitions’  
28 merits. Thus, the State Board denied review of ELF’s petition and of CSPA’s with respect to the

1 state anti-degradation policy. A true and correct copy of the State Board Order is attached as  
2 Exhibit E.

3 41. Any party aggrieved by an order of a regional board for which the state board  
4 denies review may obtain review of the order of the regional board by filing a petition for writ of  
5 mandate not later than 30 days from the date on which the state board denies review. (Water  
6 Code § 13330, subd. (b).)

7 42. The Tracy Permit, Order R5-2007-0036, was a decision or order of a regional  
8 board as the term is used in section 13330(b) of the Water Code. The State Board's dismissal of  
9 this issue allows for review of the regional board's failure to comply with the anti-degradation  
10 policy. (*Id.*)

11 43. Petitioners are "aggrieved parties" as the term is used in section 13330 of the  
12 Water Code. Petitioners actively participated in the issuance of the Regional Board's Tracy  
13 WTP, including the timely submission of comments to the Regional Board and oral testimony  
14 before the Regional Board at public hearings.

15 44. This writ of mandate is timely filed within 30 days of the State Board's denial of  
16 Petitioners' petition for review.

17 45. By failing to comply with the state anti-degradation policy, Respondent has  
18 committed an abuse of discretion in issuing the Tracy Permit.

19 46. By the relief set forth in CCP §1094.5, Petitioners request the Tracy Permit be set  
20 aside by the court and re-issued in accordance with the correct practices set forth below.

21 **VII. FIRST CAUSE OF ACTION**

22 (Violations of State Anti-Degradation Resolution 68-16 and 40 C.F.R. § 131.12.)

23 47. Petitioners incorporate by reference the allegations in the paragraphs set forth  
24 above.

25 48. The Tracy Permit, Order No. R5-2007-0036, was approved by the California  
26 Regional Water Quality Control Board, Central Valley Region on May 4, 2007, consisting of the  
27 NPDES and Waste Discharge Requirements for the City of Tracy Wastewater Treatment Plant.  
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1           49.     The Tracy Permit was approved pursuant to the Section 402 of the federal Clean  
2 Water Act (“CWA”), 33 U.S.C. § 1342, and the state Water Code.

3           50.     Both the Clean Water Act and Porter-Cologne require permits to implement water  
4 quality standards, or “state policies for water quality control,” as water quality standards are  
5 called in California, that protect beneficial uses of a given water. (Water Code § 13263; 40  
6 C.F.R. § 122.44.)

7           51.     The federal anti-degradation requirements, 40 C.F.R. § 131.12, as implemented  
8 by State Resolution No. 68-16, constitute a state policy for water quality control, and are  
9 included in both the State Water Plan and the Basin Plan for the Sacramento and San Joaquin  
10 Rivers. The state anti-degradation policy is an enforceable water quality standard in the State of  
11 California.

12           52.     When a proposed order contains a potential increase in pollutant loadings for a  
13 given water body, then application of the anti-degradation requirements is mandated, pursuant to  
14 the Regional Board’s obligations under the state anti-degradation policy State Resolution No. 68-  
15 16, 40 C.F.R. § 131.12, and Porter-Cologne, Water Code § 13263.

16           53.     The Tracy Permit authorizes increases in the amounts or “mass loadings” of  
17 numerous pollutants that were to be discharged to the Old River. (Tracy Permit, p. F-9.)

18           54.     The Regional Board prejudicially abused its discretion when it adopted the Tracy  
19 Permit, as the Tracy Permit does not comply with the anti-degradation requirements.

20           55.     In allowing increases in mass loadings of pollutants, the Regional Board  
21 prejudicially abused its discretion by failing to proceed in the manner required by law, as such  
22 increases are impermissible under the anti-degradation requirements.

23           56.     The Regional Board prejudicially abused it discretion when it inserted an  
24 improper “significance” standard into its anti-degradation decision, in conflict with the mandate  
25 of the anti-degradation requirements.

26           57.     The Regional Board prejudicially abused it discretion by failing to proceed in the  
27 manner required by law due to its failure to perform detailed socioeconomic and alternatives  
28 analyses, and due to its reliance on the improper concept of “significance” as a justification for

1 its failure to perform socioeconomic and alternatives analyses, in violation of the anti-  
2 degradation requirements.

3 58. Use of current water quality as a baseline violates the anti-degradation  
4 requirements, which require that the baseline for determining degradation be the best water  
5 quality since 1968. (See APU 90-004, p. 4.) In using present water quality as a baseline, the  
6 Regional Board prejudicially abused its discretion.

7 **VIII. PRAYER FOR RELIEF**

8 59. WHEREFORE, Petitioners pray for judgment as follows:

9 60. That there be issued against respondent Regional Board a writ of mandate setting  
10 aside the Tracy Permit, Order No. R5-2007-0036, with directions to reissue the permit in  
11 conformance with the requirements set forth in State Resolution 68-16 and 40 C.F.R. § 131.12,  
12 and with directions that, until such time as the Tracy Permit is reissued, the real party in interest  
13 must comply with any requirements of Regional Board Order No. 96-104 that are more strict  
14 than those of Order No. R5-2007-0036.

15 61. Award Petitioners their costs and expenses, including reasonable attorney fees  
16 according to law.

17 62. For such other and further relief as the court deems appropriate.

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Respectfully submitted,

DATED: June 18, 2009

ENVIRONMENTAL LAW FOUNDATION  
James R. Wheaton  
Erin C. Ganahl

By: \_\_\_\_\_  
Erin C. Ganahl  
Attorneys for Petitioner  
ENVIRONMENTAL LAW FOUNDATION

LOZEAU DRURY, LLP

By: \_\_\_\_\_  
Michael Lozeau  
Attorney for Petitioner  
CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE

EXHIBIT LIST

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A. Waste Discharge Requirements Order No. R5-2007-0036.

B. Comments to Regional Board from Enviromental Law Foundation regarding Order R5-2007-0036, dated April 6, 2007.

C. Comments to Regional Board from California Sportfishing Protection Alliance regarding Order R5-2007-0036, dated April 6, 2007.

D. Petition of Environmental Law Foundation to State Water Resources Control Board, requesting review of Order R5-2007-0036, dated June 1, 2007.

E. Petition of California Sportfishing Protection Alliance to State Water Resources Control Board, requesting review of Order R5-2007-0036, dated May 27, 2007.

E. State Board Order Number WQ 2009-0003, dated May 19, 2009.

F. Copy of letter sent to Attorney General Edmund G. Brown Jr., accompanied by a copy of the above petition, pursuant to CCP § 388, dated June 17, 2009.

G. Request to Pamela Creedon, Executive Director, to prepare the administrative record for this petition.

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**VERIFICATION**

*Environmental Law Foundation and California Sportfishing Protection Alliance v. Central Valley Regional Water Quality Control Board*, Sacramento County Superior Court, Case No. [Unassigned]

I am an attorney at law duly admitted and licensed to practice before all courts of this State. I have my professional office at 1736 Franklin St., 9th Floor, Oakland, CA 94612.

I am the attorney of record for Environmental Law Foundation (“ELF”), Petitioners in this action. My California State Bar number is 248472.

Petitioner Environmental Law Foundation is a 501(c)(3) non-profit corporation residing in Oakland, California.

I have read the foregoing Verified Petition for Writ of Mandate and know the contents thereof; the factual allegations therein are true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on the 17 day of June, 2009 at Oakland, California.

\_\_\_\_\_  
Erin C. Ganahl, *on behalf of*  
ENVIRONMENTAL LAW FOUNDATION