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SOUTH BAYSIDE SYSTEM AUTHORITY

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of: South Bayside System Authority Petition for Review of Action and Failure to Act by the California Regional Water Quality Control Board, San Francisco Bay Region, in Adopting Order No. R2-2007-0006 and Waste Discharge Requirements for the South Bayside System Authority	PETITION FOR REVIEW AND PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION (Wat. C. §§ 13320, 13321)

The South Bayside System Authority ("SBSA") hereby petitions the State Water Resources Control Board ("SWRCB"), as follows:

I. INTRODUCTION

This Petition is submitted pursuant to section 13320 of the Water Code to review Order No. R2-2007-0006 of the California Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB"), reissuing National Pollutant Discharge Elimination System ("NPDES") Permit No. CA0038369 ("NPDES Permit" or "Permit") for the SBSA. A copy of Order No. R2-2007-0006 is filed with this Petition as Exhibit "A," incorporated herein by reference. A copy of the Petition has been sent to the RWQCB. The issues and the grounds for the Petition follow. At such time as the full administrative record is

available and such other relevant material has been submitted, SBSA will file a Supplemental Memorandum of Points and Authorities in support of the Petition.[1]

II. FACTUAL BACKGROUND

A. SBSA's Facilities

The SBSA is a joint exercise of powers authority established as an entity separate and apart from its member agencies, the Cities of Belmont, San Carlos and Redwood City and the West Bay Sanitary District (Gov. C. §6500 et seq.). SBSA owns and operates the South Bayside System Authority Wastewater Treatment Plant ("WWTP") located at 1400 Radio Road in Redwood City, California, and associated pumping and conveyance facilities. The WWTP provides advanced secondary wastewater treatment for domestic, commercial and industrial wastewater from a service area with an overall population of approximately 217,000. The following jurisdictions and associated populations contribute to influent flows to the WWTP: West Bay Sanitary District (population 55,000), the Cities of Belmont (25,123), San Carlos (22,718), Redwood City (75,402), Town of Woodside (5,352), and portions of unincorporated San Mateo County (28,637).

SBSA's conveyance system consists of four pump stations, which receive wastewater from the wastewater collection systems of its member agencies, and approximately eight miles of force main that convey wastewater to the WWTP. The Joint Powers Agreement establishing the SBSA apportions flow limits among the member agencies, thus limiting inflow to the four pump stations. Wastewater passes from the pump stations through the force main to primary sedimentation basins. Wastewater treatment consists of primary sedimentation using clarifiers, biological treatment using fixed film reactors and activated sludge, secondary sedimentation, effluent filtration using dual- or mono-media filters, disinfection using sodium hypochlorite, and dechlorination using sodium bisulfite. Biosolids are treated by gravity thickening, anaerobic digestion

[1] SBSA reserves the right to file a Supplemental Memorandum of Points and Authorities in light of the fact that, in the absence of a complete administrative record, compliance with the requirement to provide citations to documents or other portions of the record is impossible (23 C.C.R. §2050(a)(7)).

and are dewatered by high-speed centrifuge or air dried using drying beds. Final biosolids cake and air-dried biosolids are disposed of via landfilling or used as an alternative daily cover.

Treated wastewater is discharged through a submerged diffuser approximately 2.3 miles southeast of the center span of the San Mateo-Hayward Bridge into the Lower San Francisco Bay. The diffuser is 6,700 feet offshore in the main shipping channel at a depth of 45 feet below the water surface at mean lower low tide.

In 2005, SBSA treated an average of 18.5 millions of gallons per day ("mgd") with an average dry weather flow of 16.8 mgd and a peak wet weather flow rate of 71 mgd. The dry weather design flow for the WWTP and related facilities is 29 mgd. Since 2000, SBSA has produced up to 0.25 mgd of tertiary treated, "unrestricted use" effluent for recycle/reuse by an SBSA landscape impoundment and by the City of Redwood City for its landscape irrigation. Construction of a 4.3 million gallon storage tank and recycled water chlorine contact tank is underway to expand the production capacity to meet a recycled water demand estimated at up to 2.5 mgd by midyear 2007. The new facilities are designed to meet changes in recycled water demand over the foreseeable future.

B. RWQCB Proceedings.

On or about November 16, 2006, SBSA received the RWQCB's tentative order ("TO") for the reissuance of SBSA's NPDES Permit. The TO included certain provisions to which SBSA objected, or with respect to which SBSA sought clarification and revision. By letter dated December 18, 2006, SBSA submitted its comments regarding the TO to the RWQCB, as a result of which all but one of SBSA's objections were resolved by the time of the hearing on the reissuance of the Permit by the RWQCB on January 23, 2007. That remaining objection pertains to the dioxin-TEQ (Toxic Equivalency) concentration-based and mass-based numeric effluent limitations that are contained in the Permit under Order No. R2-2007-0006. SBSA repeatedly raised its objection to the dioxin limitation and requested deletion thereof when

proposed by RWQCB staff prior to issuance of the TO, in SBSA's written comments to the TO and in testimony at the RWQCB hearing on January 23, 2007, upon conclusion of which Order No. R2-2007-0006 was adopted.

In 2001, SBSA petitioned the SWRCB for review of RWQCB Order No. 01-012, embodying the then reissuance of SBSA's Permit No. CA0038369 (SBSA Petition, dated February 22, 2001). Order No. 01-012 includes numeric dioxin-TEQ mass-based effluent limits as does the Permit under Order No. R2-2007-0006. The 2001 Petition states the numerous grounds supporting the invalidity of those limits and they are equally applicable to the current Order, as discussed below. Hearing on that (2001) petition was held in abeyance in the hope that the RWQCB would revisit its purported rationale for including the limitation and correct its error prior to the renewal of SBSA's NPDES Permit in 2006-2007. However, Order No. R2-2007-0006 includes the same dioxin-TEQ mass-based effluent limit and adds a dioxin-TEQ concentration-based effluent limit and a truncated compliance schedule that is infeasible and impossible of achievement (Permit, ¶ VI.C.2.d, pp. 18-19). Accordingly, SBSA seeks relief by way of deleting all requirements pertaining to the numeric dioxin-TEQ limitations contained in the Permit and all references therein to those limitations for the reasons hereinafter set forth.

III. NAME AND ADDRESS OF PETITIONER

A. Petitioner:

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B. Petitioner's Attorney (Please address or copy all communications regarding the petition to Petitioner's Attorney.)

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IV. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW.

Petitioner seeks review of Order No. R2-2007-0006 reissuing NPDES Permit No. CA0038369 ("Permit"). The specific Permit requirements which the State Board is requested to review include the following: (A) the effluent limits for dioxin-TEQ, contained in Effluent Limitations IV.2 (Permit, pp. 11-12); (B) the interim effluent limit for dioxin-TEQ contained in Effluent Limitation IV.C. (Permit, p. 15); (C) the dioxin-TEQ Compliance Schedule contained in Special Provisions VI.C.2.d. (Permit, pp. 18-19); (D) dioxin-TEQ monitoring provisions contained in Attachment E Section I. (Permit, pp. E-2 – E-3), (E) Table E-1 (Permit, p. E-3), (F) Table E-4 (Permit, pp. E-4 – E-5); (G) Section X .B (Permit. p. E-11); and (H) the Fact Sheet provisions pertaining to dioxin-TEQ (Permit, Attachment F, passim).

The State Board is also requested to review the RWQCB's actions in adopting the SBSA Permit for compliance with the California Water Code, the California Administrative Procedures Act ("APA"), the California Environmental Quality Act ("CEQA") and the CEQA Guidelines, the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California ("SIP"), the San Francisco Bay Basin Plan, the federal Clean Water Act, and associated federal Environmental Protection Agency ("EPA") regulations.

IV. THE DATE ON WHICH THE REGIONAL BOARD ACTED.

The Regional Board adopted Order No. R2-2007-0006 reissuing NPDES Permit No. CA0038369 on January 23, 2007.

V. STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER.

For the reasons more fully discussed in the Statement of Points and Authorities (Section VIII, below), the dioxin-TEQ concentration-based and mass-based numeric effluent limitations that are contained in Order No. R2-2007-0006 are invalid. Moreover, they cannot be achieved by the SBSA, as conceded by the RWQCB (Permit, pp. F-35, F-44 – F-45; see, also p. F-49). Furthermore, the primary source of dioxins (and furans) in the Bay Area is air emissions from combustion sources, again, a fact conceded by the RWQCB (Permit pp. F- 35-36; accord, testimony by RWQCB members and staff at the hearing on January 23, 2007). Therefore, they should be stricken from the Permit.

In 2001, SBSA petitioned the SWRCB for review of RWQCB Order No. 01-012, embodying the then reissuance of SBSA's Permit No. CA0038369 (SBSA Petition, dated February 22, 2001). Order No. 01-012 includes numeric dioxin-TEQ mass-based effluent limits as does Order No. R2-2007-0006. The prior Petition states the numerous grounds supporting the invalidity of those limits and they are equally applicable to the Permit as discussed in the Points and Authorities, below, and are incorporated herein by reference. In sum, the Permit provisions regarding dioxin-TEQ are factually unsupported and are invalid as a matter of law. Their inclusion in the Permit constitutes an abuse of discretion by the RWQCB and they should be deleted from the Permit in their entirety.

VI. THE MANNER IN WHICH PETITIONER IS AGGRIEVED.

By establishing an effluent limitation under the Permit that is not within the practicable or reasonable capability of compliance by the SBSA, the SBSA, a fortiori, will be subjected to exposure to prosecution for violation of the limitation with the

resultant imposition of civil and criminal penalties in substantial and virtually incalculable amounts. Alternatively, and as admitted by the RWQCB, "...dioxins and furans concentrations [in the receiving waters] cannot be further reduced without significant upgrades to the [SBSA's treatment plant]." (Permit, p. F-36). Thus, as so conceded, the RWQCB proposes an alternative uneconomic and infeasible "solution" for compliance that would result in incalculable and unreasonable costs without corresponding benefits.

VII. THE SPECIFIC ACTION BY THE STATE BOARD WHICH PETITIONER REQUESTS.

SBSA respectfully requests deletion of all requirements in the Permit for compliance with the dioxin-TEQ limitation. As noted in IV., above, references to dioxin-TEQ include: (A) the effluent limits for dioxin-TEQ, contained in Effluent Limitations IV.2 (Permit, pp. 11-12); (B) the interim effluent limit for dioxin-TEQ contained in Effluent Limitation IV.C. (Permit, p. 15); (C) the dioxin-TEQ Compliance Schedule contained in Special Provisions VI.C.2.d. (Permit, pp. 18-19); (D) dioxin-TEQ monitoring provisions contained in Attachment E Section I. (Permit, pp. E-2 – E-3), (E) Table E-1 (Permit, p. E-3), (F) Table E-4 (Permit, pp. E-4 – E-5); (G) Section X .B (Permit. p. E-11); and (H) the Fact Sheet provisions pertaining to dioxin-TEQ (Permit, Attachment F, passim). SBSA requests deletion of all of those provisions.

VIII. STATEMENT OF POINTS AND AUTHORITIES.

A. There Is No Empirical Support for Including Dioxin-TEQ In the Permit.

The Permit contains dioxin-TEQ effluent limits (concentration and mass-based limits) on the ground that the discharge has a reasonable potential to cause or contribute to an exceedance of the Basin Plan narrative objective for bio-accumulative substances. In purporting to obtain compliance with the narrative objective, RWQCB staff has used a dioxin-TEQ of 0.014 pg/L. However, there is no empirical basis for doing so because: (i) there is no applicable water quality objective for dioxin-TEQ (also

called TCDD equivalents); (ii) the only reasonably applicable water quality objective for dioxin compounds is the California Toxics Rule (CTR) objective for 2,3,7,8-TCDD; (iii) 2,3,7,8-TCDD has never been detected in SBSA's effluent; and (iv) the dioxin compounds that have been detected in the SBSA's effluent are significantly less toxic than 2,3,7,8-TCDD.

Although the SWRCB adopted a water quality objective for TCDD equivalents of 0.014 pg/L in its 1991 Enclosed Bays and Estuaries Plan, in 1994 the Sacramento County Superior Court determined that plan to be invalid because, prior to adopting the objectives, the SWRCB failed to consider economics and other factors required to be considered under Water Code Section 13241, failed to comply with CEQA, and failed to comply with the Administrative Procedures Act (APA). Following the Court's decision, the SWRCB rescinded the plan, including the dioxin-TEQ objective of 0.014 pg/L. Thus, the dioxin-TEQ objective that RWQCB used to establish effluent limits in the Permit is the same objective that has been invalidated and later rescinded.

The facts in Communities for a Better Environment, et al. v. State Water Resources Control Board, et al; Tesoro Refining and Marketing Company, Real Party in Interest (2003) 109 Cal. App. 4th 1089, 1101;1 Cal. Rptr. 3rd 76; ("Tesoro"), likewise militate against the limitation imposed by the RWQCB on the SBSA. There, the Court noted that the RWQCB rescinded the numeric WQBEL of 0.14 pg/L for dioxins and replaced it with an interim performance-based limitation with which the discharger could comply (id., at 109 Cal. App. 4th 1102). However, there, as here, the problems created by dioxins, "...[need] to be solved on a regional level by creation of a TMDL [Total Maximum Daily Load]." (id.; citing the SWRCB's record of the proceedings).

There is no legal or practical basis for the dioxin-TEQ limitation. Indeed, the RWQCB concedes the infeasibility of the limitation and offers no reasonable or foreseeable means for overcoming that deficiency (Permit, p. F-49). The proper regulatory approach is through the development of a TMDL (Tesoro, supra).

B. Inclusion of the Dioxin-TEQ Limit Violates Applicable Federal Law.

Inclusion of the dioxin-TEQ limit in the Permit is inconsistent with the plain reading of the Clean Water Act ("CWA"). The adoption of water quality-based effluent limitations, including concentration and mass limitations before the adoption of TMDLs was neither intended by Congress, nor mandated by the CWA. Congress intended water quality-based limits in permits to implement applicable water quality standards (CWA §§302, 304(l)). Congress stated that where water quality standards were not being implemented even after the imposition of technology-based effluent limits, TMDLs were to be established at a level necessary to implement or achieve the standards (CWA §303(d)(1)(C)). This statutory analysis makes clear that Congress intended water quality-based effluent limits to be based on the results of a TMDL process. This interpretation is also consistent with EPA guidance (see, Water Quality-based Approach to Pollution Control, Ch. 7, USEPA's "Water Quality Standards Handbook," 2nd Ed. [1993])[2].

In fact, numerous NPDES permits in the Bay Area have been adopted which defer the establishment of numeric effluent limits until the dioxin TMDL has been developed and approved. By including the dioxin-TEQ effluent limit based on the Basin Plan narrative objective for bioaccumulative substances, the RWQCB has acted in a manner that is inconsistent with EPA regulations (40 CFR 131.11(a)(2)). Specifically, prior to translating the narrative objective into a numeric effluent limit, the RWQCB failed to identify in the Basin Plan the method by which it intended to regulate point source discharges of toxic pollutants based on the narrative objective, either specific to dioxin-TEQs or more generally.

Discussion in the California Toxics Rule preamble (CTR; Federal Register/Vol. 65, No. 97) regarding dioxin-TEQ effluent limits provides no support for including such

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[2] The narrative objective states as follows: "Many pollutants can accumulate on particles, in sediment, or bioaccumulate in fish and other aquatic organisms. *Controllable* water quality factors shall not cause a detrimental increase in concentrations of toxic substances found in bottom sediments or aquatic life. Effects on aquatic organisms, wildlife, and human health will be considered." (Emphasis added; dioxin-TEQ as an NPDES permit condition is <u>not</u> controllable.)

limits in an NPDES permit without compliance with State of California or federal legal requirements for establishing such limitations. Statements in the preamble do not constitute binding policy or guidance, let-alone a regulation. The State Implementation Policy (SIP), not the CTR preamble, establishes policies for implementing priority pollutant standards promulgated under the CTR (SIP, Introduction, page 1).

Even if it were assumed that the CTR preamble impliedly authorized a dioxin-TEQ limit, that implication fails as a basis for a regulation. Specifically, prior to adopting such a provision, the federal Environmental Protection Agency (EPA) must comply with the requirements of federal law governing the adoption of regulations and with the requirements of the CWA and EPA regulations governing the adoption of water quality standards. It has not done so.

C. Inclusion of the Dioxin-TEQ Limit In the Permit Violates Applicable California Law.

Water Code Section 13000 requires that activities affecting water quality "shall be regulated to attain the highest water quality *which is reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Emphasis added). The section imposes an overriding requirement on the RWQCB to adopt effluent limits that are reasonable based on consideration of various public interest factors. It is not reasonable to adopt a dioxin-TEQ limit that could limit future economic growth and development and also require costly WWTP modifications out of proportion to benefits under the present circumstances where: (i) there is no adopted water quality objective for dioxin-TEQ and therefore no requirement to adopt a dioxin-TEQ limit and (ii) atmospheric sources are the primary source of dioxin compounds, while publicly owned treatment works ("POTWs"), in general, are acknowledged to be minor sources, as conceded by the RWQCB in its proceedings.

Moreover, at the hearing and in response to SBSA comments, the RWQCB asserted that it had followed Water Code Sections 13241 and 13242 in adopting the

narrative objective. There is no evidence in the record to support that assertion. However, inspection of the records of adoption of Basin Plans in Regions 4 and 5 shows that said Section 13241 and 13242 procedures were not followed in adopting objectives, including the narrative objectives. The implication of that deficiency argues against the RWQCB's assertion in these proceedings.

Prior to adopting a dioxin-TEQ effluent limit, the RWQCB must comply with Water Code sections 13241 and 13242, including taking into consideration economic effects of the requirement, the level of water quality that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area and the need for developing housing within the region, among other considerations. Here, the RWQCB has presumed to establish a *de facto* water quality objective for dioxin-TEQ without complying with Water Code sections 13241 and 13242, CEQA, or the Administrative Procedures Act. In failing to consider economics or the means to attain the objective, as required by Water Code sections 13241(d) and 13242, the staff has acted contrary to guidance issued by the SWRCB's Office of Chief Counsel, which states: "A Regional Water Board is under an affirmative duty to consider economics when adopting water quality objectives in water quality control plans or, in the absence of applicable objectives in a water quality control plan, when adopting objectives on a case-by-case basis in waste discharge requirements. To fulfill this duty, the Regional Water Board should assess the costs of the proposed adoption of a water quality objective." (Memorandum from William R. Attwater, Chief Counsel, SWRCB, to Regional Water Board Executive Officers and Regional Water Board Attorneys entitled: "Guidance on Consideration of Economics in the Adoption of Water Quality Objectives," January 4, 1994)

Use of a dioxin-TEQ objective that was ruled invalid by the Sacramento Superior Court and rescinded by the SWRCB to interpret compliance with the narrative objective for bio-accumulative substances is inconsistent with the express language of the San Francisco Bay Basin Plan and, therefore, is an improper application of the

narrative objective. Numerical objectives must be based on extensive technical information that relates concentrations of pollutants in water to adverse effects on beneficial uses (Basin Plan, Chapter 4, "Numeric Water Quality Objectives: Waste Load Allocations"). That information has not been obtained for a dioxin-TEQ limitation and reliance upon data and studies acquired to date is not supported by the necessary regulatory procedure and concomitant public review process. Succinctly put, purported reliance upon the Basin Plan for the numeric dioxin-TEQ is lacking and none can be established unless and until the requisite substantial technical information has been acquired and the legally required regulatory procedure followed.

The RWQCB was not constrained by the SIP to include a dioxin-TEQ limit in the Permit. The SIP requires water quality-based effluent limitations only where it is determined that the discharge may cause, has a reasonable potential to cause, or contributes to, an excursion above any applicable priority pollutant criterion or objective (SIP, Section 1.3). There is no applicable specific priority pollutant criterion or objective for dioxin-TEQ in the CTR or Basin Plan and therefore no requirement under the SIP to adopt effluent limitations for dioxin-TEQ. In short, the RWQCB cannot rely, either expressly or by implication, on the SIP for establishing a dioxin-TEQ limit because there was no underlying compliance with the requirements of the CWA, EPA regulations, the Water Code and CEQA in purporting to adopt the limit.

The RWCB relied almost exclusively on the Basin Plan as authority for including the dioxin-TEQ limitation (Permit, pp. F-34 – F-35; similar testimony of the RWQCB's staff will appear in the transcript of the hearing on January 23, 2007, preparation of which has been requested). The Basin Plan provides, in pertinent part:

> "When uncontrollable water quality factors result in the degradation of water quality beyond the levels or limits established herein as water quality objectives, the Regional Board will conduct a *case-by-case analysis of the benefits and costs* of preventing further degradation. In cases where this analysis indicates that beneficial uses will be adversely impacted by allowing further degradation, then the Regional Board will not allow *controllable water quality factors* to cause any further degradation of water quality. Controllable water quality factors are those actions, conditions, or circumstances resulting

from human activities that may influence the quality of the waters of the state and *that may be reasonably controlled*." (Basin Plan, Ch.3, *WATER QUALITY OBJECTIVES*; emphasis added).

...

"Many pollutants can accumulate on particles, in sediment, or bioaccumulate in fish and other aquatic organisms. *Controllable* water quality factors shall not cause a detrimental increase in concentrations of toxic substances found in bottom sediments or aquatic life. Effects on aquatic organisms, wildlife and human health will be considered." (Basin Plan, Ch.3, §3.3.2, *Bioaccumulation*; emphasis added)

Here, the RWQCB has not conducted the requisite case-by-case analysis. Nor has it demonstrated that dioxin-TEQ is a controllable water quality factor. Quite to the contrary, the RWQCB admits that it is, essentially, uncontrollable by a POTW, such as the SBSA (Permit, p. F-49). Finally, the RWQCB concedes that dioxin-TEQ is a factor that is not subject to reasonable control (id.).

D. Conclusion.

The inclusion of a numeric dioxin-TEQ limit in the Permit is not supported by the extensive technical studies and empirical data required under the SIP, nor has establishment of that limit undergone the requisite regulatory procedure under federal and State law, including providing opportunity for essential public input. Also, aside from procedural defects, it does not comply with statutory substantive requirements including, without limitation, consideration of the factors specified in Water Code Sections 13241 and 13242 for the adoption and implementation of water quality objectives. Finally, it violates the criteria of the Basin Plan for translating a narrative factor to a numeric limitation. Inclusion of the limit is without proper factual or legal basis and is arbitrary and capricious. For the foregoing reasons, it should be deleted from the Permit.[3]

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[3] The SBSA is informed and believes that Central Marin Sanitary District, Central Contra Costa Sanitary District and the Bay Area Clean Water Agencies will file, or have filed, petitions with the SWRCB that raise the same or similar issues that are included herein. SBSA hereby incorporates by reference all pertinent provisions, including without limitation, the Statements of Points and Authorities, contained in

IX. STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD.

A copy of this petition was mailed to the San Francisco Bay Regional Water Quality Control Board on February 21, 2007.

X. STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD.

The substantive issues and objections of the SBSA raised herein were raised before the RWQCB, as the administrative record will demonstrate.

Dated: February 21, 2007

Respectfully submitted,

By: _____
David E. Schnicker
Attorney for Petitioner, SBSA

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those petitions to the extent that they are consistent with, and support, the position of SBSA as stated herein.