STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of the City of San Mateo for Review of Order No. 72-51 of the California Regional Water Quality Control Board, San Francisco Bay Region	Order No. 73-2

On September 8, 1972, the City of San Mateo (hereinafter "the City") petitioned the State Water Resources Control Board to review Order No. 72-51 of the California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter "the Regional Board"), adopted on August 10, 1972, ordering the City to cease and desist violating waste discharge requirements.

The petition requests the State Board to review and find inappropriate and improper the Regional Board's actions in adopting Order No. 72-51 on the basis that the Regional Board's findings that the City was in violation of coliform and settleable solids requirements were not in accordance with the evidence; that the degree of improvement in settleable solids required by the Regional Board's order is unreasonable when compared with the cost to the City of the increased treatment required for such improvement; and that the Regional Board's action was unreasonable because of its failure to recommend for a federal or state construction grant the City's project to construct secondary treatment facilities. In addition, the petition requests the State Board to find inappropriate and improper the procedures of the Regional Board in that the Regional Board, at its regular meeting on August 10, acted on the recommendation of a hearing panel without reviewing the record

of proceedings before the hearing panel; the Regional Board, at its regular meeting on August 10, refused to hear additional evidence; and the Regional Board acted in violation of the Brown Act, Government Code Sections 54950-54961, alleging, on information and belief, that the Board arrived at its decision prior to its public meeting at a secret meeting conducted on the morning of August 10.

The State Board having considered the petition and documentary evidence attached thereto, together with the record of proceedings before the Regional Board, finds as follows:

1. The City operates a primary wastewater treatment plant which presently discharges approximately 10 mgd of wastewater through an outfall into San Francisco Bay at a point approximately 500 feet north of the San Mateo bridge.

2. On October 22, 1970, the Regional Board adopted Resolution No. 70-79 setting waste discharge requirements including the following requirements for coliform and settleable solids:

"2. The discharge shall not:

d. Cause waters of the State to exceed the following limits of quality at any place within one foot of the water surface:

Coliform Organisms

240 MPN/100 ml, median of five consecutive samples, maximum.

10,000 MPN/100 ml, maximum, any single sample when verified by a repeat sample taken within 48 hours.

Whenever either of these bacterial values is exceeded in the receiving water for any reason they shall both be met instead in the waste at some point in the treatment process.

The discharger may demonstrate compliance in the waste stream as an optional alternative.

The Board will accept proof of effective effluent disinfection in terms of factors other than bacterial concentrations if the discharger documents a sound statistical correlation between such factors and bacterial analysis, and provided the conditions of sewage strength and treatment do not change from the demonstration period.

Analyses to be determined by the multiple tube fermentation method using at least two portions per decimal dilution."

"WASTE DISCHARGE REQUIREMENTS - WASTE STREAM

The waste discharged shall meet these quality limits at all times:

1. In any grab samples:

Settleable matter

The arithmetic average of any six or more samples collected on any day.	0.5 ml/l/hr maximum
Eighty percent of all individual samples collected during maximum daily flow over any 30-day period.	0.4 ml/l/hr maximum
Any sample.	1.0 ml/l/hr maximum"

3. On June 28 and July 11, 12 and 13, 1972, coliform in the waste discharge of the City exceeded, and caused the receiving waters to exceed, 240 MPN/100 ml, based on a median of five consecutive samples, in violation of requirements.

4. On June 28, 29 and 30 and July 11, 12 and 13, 1972, settleable matter in the waste discharges of the City exceeded 0.5 ml/l/hr, based on an arithmetic average of any six or more samples collected on any day, in violation of requirements.

5. During 30-day periods within the months of January, February, March, April, May, June and July, 1972, settleable matter in the waste discharge of the City exceeded 0.4 ml/l/hr, based on 80% of all individual samples collected, in violation of requirements.

With respect to the specific contentions raised by the petition the State Board further finds:

> Contention: The evidence was insufficient to support a finding that the City was in violation of coliform requirements based on a median of five samples: the proper sampling evidence establishes that the City is in full compliance with this requirement.

Findings:

Resolution No. 70-79 requires that the City's waste discharge shall not cause coliform organisms in the receiving water to exceed 240 MPN/100 ml based on a median of five consecutive samples. If this limit is exceeded in the receiving waters, the City may, under the terms of Resolution No. 70-79, demonstrate compliance with this requirement by showing that the limit is not exceeded in the waste at some point in the treatment process.

Evidence introduced by the Regional Board staff to establish violations of the requirements included reports of sampling checks made by the Regional Board staff on June 27, 28, 29 and 30 and July 11, 12 and 13, 1972. On each of the seven days checked, according to the "Checking Program Report", five consecutive samples were taken of the effluent and five consecutive samples were taken of the receiving waters at a point in the center of the plume where it rose to the surface of the receiving waters. Samples thus obtained were tested for coliform by the Department of Public Health Sanitation laboratory.

The test results set forth on the "Checking Program Report" show violations of coliform requirements based on a median of five consecutive samples in the effluent and receiving waters on four of the seven days checked. The Board finds this sampling and testing procedure and the results thus obtained are sufficient to establish actual violations of this coliform requirement.

The City, on the other hand, relies on the absence of any coliform organisms in excess of 240 MPN/100 ml in the receiving waters as documented by its "Self-Monitoring Reports." Under the terms of Resolution No. 70-79, the City is required to perform items 1 - 7 of "Reporting Requirements" dated January 1, 1970. Under item 1 of "Reporting Requirements", the City is required to file technical reports on self-monitoring work performed according to detailed specifications of the Regional Board's Resolution No. 398, dated September 10, 1969. The self-monitoring program for the City, developed pursuant to Resolution No. 398, provides that the City shall sample receiving water at 14 defined stations and provides the following sampling schedule for coliform at each station:

> "Grab samples to be collected during the period one hour preceding to one hour following either high or low slack water on days coincident with effluent composite sampling, once monthly throughout the year." [Emphasis added.]

The gist of the City's contention seems to be that its self-monitoring data for coliform in the receiving waters, based on one sample per month at each of 14 separate stations, documenting over a period of seven months the absence of coliform violations in the receiving waters, is entitled to more weight than the Regional Board staff's "Checking Program Report" based on five separate samples per day at the same station documenting coliform violations in the receiving waters on only four of seven days checked.

With respect to this contention, the Board finds that a significant number of well-documented violations will support a cease and desist order even in the presence of a greater number of samples which show no violations of requirements.

The Board further finds that the weight the City attaches to its "Self-Monitoring Reports" is without support. The reason for basing the coliform requirement of 240 MPN/100 ml on the median of five consecutive samples is to obtain a statistically significant measure of coliform at one location and at one point in time. Comparing one sample at 14 separate stations at one point in time results in no significant measure of coliform at any one station. Similarly comparing a sample taken at any one station once on each of seven separate months results in no significant measure of coliform at the station at any given time. It is true that the frequency of the City's test complied with Resolution No. 398. And it makes little sense for a Regional Board to frame a requirement on the basis of a statistically significant measure and then accede to a monitoring program that does not conform to the requirement. But, it is the violation of requirements, not compliance with self-monitoring programs, on which adoption of this cease and desist order is based.

The Board also finds that the City's self-monitoring procedures do not necessarily measure the effect of the discharge on coliform in the receiving waters based even on one sample. The self-monitoring program for the City provides that grab samples

taken to measure coliform be "collected during the period one hour preceding to one hour following either high or low slack water." Of seven samples taken by the City, at the rate of one per month at station SM-1 located over the outfall diffuser, two of the samples were taken in excess of one and one-half hours before or after slack water, one was taken in excess of two hours before or after slack water and four were taken in excess of two and one-half hours before or after slack tide and within one-half hour of maximum flood tide according to the City's "Self-Monitoring Reports" and Tidal Current Tables, 1972, Pacific Coast of North America & Association. Because tidal currents carry the mass of a waste discharge away from the diffuser at SM-1, before the discharge reaches the surface, at an ever increasing rate as a maximum flood or ebb tide is approached, failure to take a sample at a point in time close to slack water will result in failure of the sample to reflect accurately the effect of the waste discharge on receiving water coliform. While other sampling stations, as defined by Resolution No. 398, are located at points around the outfall diffuser, it is impossible to determine with any degree of certainty whether a sample taken at one of these other stations catches the mass of the waste discharges as it is carried past by the tidal currents except by visual observations of the plume surfacing near the station where the sample is taken.

It is, therefore, the conclusion of this Board that the Regional Board's data for receiving water coliform, as set forth in its "Checking Program Report", based on a

significant median of five consecutive samples and based on samples taken in the center of the plume as it was visually observed surfacing, is entitled to more weight than the City's data as set forth in its "Self-Monitoring Reports."

Contention: The evidence was insufficient to support a finding that the City was in violation of settleable solids requirements.

Findings:

Resolution No. 70-79 requires that the City's waste discharge shall not cause settleable solids in the waste stream to exceed 0.5 ml/l/hr based on the arithmetic average of any six or more samples collected on any day; and, in addition, shall not cause settleable solids in the effluent to exceed 0.4 ml/l/hr based on 80% of all individual samples collected during maximum daily flow average for a 30-day period.

Evidence by the Regional Board staff to establish violation of the 0.5 ml/l/hr settleable solids requirements based on the arithmetic average of any six or more samples collected on any day included reports of sampling checks made by the Regional Board staff on June 27, 28, 29 and 30 and July 11, 12 and 13, 1972. On each of the seven days checked, according to the "Checking Program Report", six samples were taken in the final effluent. Samples thus obtained were tested by the Department of Public Health Sanitation laboratory. The test results set forth in the "Checking Program Report" show violations of the requirements on six of seven days checked. The Board finds this sampling and test procedure to be in strict conformance with the requirements and the

results thus obtained sufficient to establish violations of the requirements. If the Regional Board staff's testing procedures conform with requirements, any allegation that these procedures are "summary" has no merit. If the Regional Board's sampling point was in the final effluent, as indicated in the "Checking Program Report", it also conforms with requirements and Resolution No. 398. If a discharger is able to find a point in the final effluent where settleable solids measure less than requirements, such evidence is insufficient to rebut the Regional Board staff's evidence taken at another point in the final effluent showing that requirements are exceeded, without probative evidence that the staff's sampling point does not reflect accurately the quality of waste as discharged.

The evidence relied on by the Regional Board staff to establish violation of the 0.4 ml/l/hr settleable solids requirement based on 80% of all individual samples collected during a maximum daily flow over any 30-day period was the City's own "Self-Monitoring Reports" showing violations in each of the months between January and July 1972. The Board finds that there was sufficient evidence to support a finding that the City was in violation of the settleable solids requirements.

The City's evidence of compliance with settleable solids requirements in the latter part of August, after adjustments were made, presented with its petition is not relevant to the appropriateness of the cease and desist order; it is only relevant to compliance with the cease and desist order.

Contention: The Regional Board's action in adopting a cease and desist order for violation of requirements, after refusing to recommend, for purposes of obtaining construction grant funds, the City's project to construct upgraded treatment facilities which would eliminate violations of requirements was inappropriate and improper.

Findings:

The Regional Board, on April 22, 1972, recommended disapproval of the City's proposed secondary treatment facilities project for purposes of state and federal construction grant funds. The Regional Board recommended disapproval because the City's project would not have implemented subregional planning which calls for the consolidation of subregional wastewater treatment facilities.

To the extent full compliance with requirements can only be achieved through the construction of major facilities normally financed through state and federal construction grant funds, any delay occasioned by a regional board's refusal to recommend the project and/or the State Board's refusal to certify the project for grant funds can be taken into account in setting a time schedule for compliance in a cease and desist order adopted for violation of requirements.

However, in determining whether or not to adopt a cease and desist order, regional boards are obliged only to consider compliance or noncompliance with requirements. Refusal to recommend a project for construction grant funds is not relevant to this determination.

> Contention: The Regional Board's action in adopting a cease and desist order for violations of settleable solids requirements was inappropriate and improper because the substantial cost of additional treatment necessary to comply with these requirements on an interim basis will result in only questionable improvement and would be better allocated toward the construction of full secondary treatment facilities.

Findings:

In its cease and desist order, adopted on August 10, 1972, the Regional Board ordered the City to comply with settleable solids

requirements by November 11, 1972. To do so, the City would have to provide interim treatment facilities and could not wait until the construction of upgraded permanent facilities.

This Board finds the Regional Board's action in ordering compliance with settleable solids requirements necessitating interim treatment facilities both reasonable and appropriate. On the one hand the degree of violation of settleable solids requirements was significant. On the other hand plant performance data included in the record suggests that chemical addition to bring settleable solids into compliance with requirements would only be required during peak flow periods (4 to 6 hours/day). This would bring the cost of compliance to a level substantially below that estimated by the City. Moreover, data submitted by the City with its petition indicates that subsequent to the adoption of this order, the City has been able to meet settleable solids requirements through minor plant modifications.

> Contention: The Regional Board's action in adopting the cease and desist order was inappropriate and improper since it did not independently review the record of the hearing panel as required by Water Code Section 13302, there being no transcript of proceeding before the hearing panel then available.

Findings:

> Water Code Section 13302(b), in pertinent part, provides:
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> "The board, after making such independent review of the record and taking such additional evidence as may be necessary, may adopt, with or without revision, the proposed decision and order of the panel." [Emphasis added.]

The phrase "as may be necessary" applies to both the review of the record and the taking of additional evidence. The Regional Board,

therefore, was not required by Water Code Section 13302(b) to review and consider the transcript since the Regional Board did not, in its discretion, consider such review necessary. Moreover, when adopting a hearing panel's proposed findings and order without change, due process does not require the Regional Board to review the record of proceedings before the hearing panel [see Taylor v. Industrial Accident Commission, 38 C.A.2d 75, 82 (1940)].

Contention: The Regional Board's action in adopting the cease and desist order was inappropriate and improper since it refused to hear additional evidence at its hearing.

Findings:

The "hearing" provided for by Water Code Section 13302 takes place before the "hearing panel" not the full regional board. The "hearing panel" is the proper forum for presenting all evidence and making all arguments. Hearing panels were incorporated into the Porter-Cologne Act to streamline administrative procedures bearing on the adoption of cease and desist orders -- not to give the discharger yet another day in court to present its case.

As previously noted, the provision in Water Code Section 13302(b) that the full board may take such additional evidence as necessary leaves it to the Board's discretion whether to permit additional evidence to be presented. Refusal to permit additional evidence by the full regional board in the absence of a showing that the evidence was not reasonably available at the time the hearing panel was convened did not constitute an abuse of discretion.

Accordingly counsel for the City was properly advised at the meeting of the full regional Board that the only additional evidence that would be received was additional evidence not

reasonably available at the time the hearing panel was convened. Since no offer of proof was made of such additional evidence, the Regional Board's action was in this regard appropriate and proper.

> Contention: The action of the Regional Board in adopting the cease and desist order was inappropriate and improper in that the Regional Board's action was based on a decision made at a secret meeting held in violation of Government Code Sections 54950-54961.

Findings:

The City in its petition alleges on information and belief that the Regional Board met secretly without notice prior to and in a place separate from its noticed meeting on August 10, 1972 and then and there arrived at a decision with respect to the hearing panel's recommendation on the cease and desist order, which decision was simply announced at the public meeting. No statement of facts was included in the petition to support the allegation.

State agencies, including regional boards, are subject to certain open meeting requirements under the Bagley Act, Government Code Section 11120 et seq., essentially similar in substance to the Brown Act, Government Code Section 4950 et seq., applicable to local agencies and relied upon by the City in its petition.

Under both the Bagley Act and the Brown Act, however, actions taken are not thereafter rendered invalid even if taken in violation of the terms of either Act [see Old Town Development Corp. v. Urban Renewal Agency of City of Monterey, 249 C.A.2d 313 (1967)]. And since this Board, based on its independent review of the record, concurs in and finds the action of the Regional Board in all other respects appropriate and proper, the Board does not find petitioner's allegation, based only on "information and belief", to be a sufficient reason to refer this matter back to the Regional Board.

Now therefore, it is the conclusion of this Board that the action of the Regional Board in adopting Order No. 72-51 was appropriate and proper.

IT IS HEREBY ORDERED that the petition of the City of San Mateo for review of the action of the San Francisco Bay Regional Board in adopting Order No. 72-51 be, and it is, denied.

Adopted as the order of the State Water Resources Control Board at a meeting duly called and held at Sacramento, California.

Dated: February 1, 1973

W. W. Adams, Chairman

Ronald B. Robie, Vice Chairman

E. F. Dibble, Member

Roy E. Dodson, Member

ABSENT

Mrs. Carl H. (Jean) Auer, Member