STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2003-0009

In the Matter of the Petitions of

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES AND BILL ROBINSON

For Review of Waste Discharge Requirements
Order No. R4-2002-0142 [NPDES No. CA0053716]
and Time Schedule Order No. R4-2002-0143
for Whittier Narrows Water Reclamation Plant
Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

SWRCB/OCC FILES A-1509 AND 1509(a)

BY THE BOARD:

In August 2002, the Los Angeles Regional Water Quality Control Board (Regional Board) reissued waste discharge requirements Order No. R4-2002-0142 and Time Schedule Order (TSO) No. R4-2002-0143 to County Sanitation District No. 2 of Los Angeles County (District). The requirements, which serve as a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act,[1] regulate the discharge of tertiary-treated effluent from the District's Whittier Narrows Water Reclamation Plant (Whittier Narrows WRP) to the San Gabriel River and Rio Hondo. The State Water Resources Control Board (State Board or Board) received timely petitions from the District and an interested person, Bill Robinson, to review the orders.

This order addresses several issues raised by the District. It also discusses petitioner Robinson's procedural challenge to the Regional Board's action. Those issues that the Board does not address in this order are dismissed because, with one exception, the issues are

[1] 33 U.S.C. § 1251 et seq. Section 1342 establishes the NPDES permit program, under which the United States Environmental Protection Agency (U.S. EPA) or states with approved programs, such as California, regulate point source pollutant discharges to surface waters.

considered insubstantial.[2] This order does not address the District's challenge to numeric chronic toxicity effluent limits in its permit and TSO. The Board will consider this issue on its own motion at a later date. The order remands the permit and TSO to the Regional Board for appropriate action; the order otherwise denies the petitions.

I. BACKGROUND

The Whittier Narrows WRP is part of the District's Joint Outfall System, an integrated network of facilities, which includes seven treatment plants. The Whittier Narrows plant and five other upstream plants are connected to the Joint Water Pollution Control Plant located in Carson. The system allows for the diversion of influent flows into or around each upstream wastewater plant when necessary. The plant has a 15 million gallon per day (mgd) design capacity. Treatment at the facility includes primary sedimentation, activated sludge biological treatment, secondary sedimentation with coagulation, filtration, chlorination, and dechlorination. The activated sludge process is being modified to achieve nitrification and denitrification.

The Whittier Narrows WRP currently recycles nearly all of the treated effluent. Recycled water is used for irrigation and for groundwater recharge, and these activities are regulated under water reclamation requirements (WRR) contained in Order Nos. 97-702 and 91-100, respectively. Effluent that is not recycled is discharged to the San Gabriel River and to Rio Hondo, a tributary of the Los Angeles River. Rio Hondo is also hydraulically connected to the San Gabriel River watershed at the Whittier Narrows Reservoir, which impounds both Rio Hondo and the San Gabriel River. Below the reservoir, Rio Hondo continues to the Rio Hondo Spreading Grounds and then to the Los Angeles River, the Los Angeles River Estuary, and the Pacific Ocean. The San Gabriel River channel continues below the reservoir to the San Gabriel River Estuary and the Pacific Ocean.

Waters in Rio Hondo and the San Gabriel River are beneficially used for aquatic habitat and other uses.[3] In addition, reaches of the San Gabriel River and Rio Hondo are

[2] See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052(a)(1).

[3] See Water Quality Control Plan, Los Angeles Region, Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties (Basin Plan), Table 2-1 at 2-11 and 2-13.

designated for groundwater recharge (GWR), either as an existing or intermittent beneficial use.[4] Groundwater underlying the San Gabriel River is designated as an existing source of domestic and municipal water supply (MUN).[5] The two surface waters are also designated for water contact recreation (REC-1) as an existing use, except for Rio Hondo below the spreading ground.[6] In that stretch, REC-1 is designated as a potential use.

II. CONTENTIONS AND FINDINGS

A. District Petition

1. Contention: The District contends that the Regional Board improperly included MUN-based effluent limits in its permit to protect the GWR use. The District objects for three reasons: (1) there are no federally-adopted criteria or water quality objectives for the GWR use; (2) the federal Clean Water Act does not apply to discharges to groundwater; and (3) the District's discharge is already regulated under separate WRRs to protect the GWR use.

Finding: The Regional Board was legally required to include any effluent limits in the District's permit that were necessary to protect the GWR use of surface waters. Because the surface waters recharged a groundwater aquifer currently used for drinking water, the Regional Board reasonably based the effluent limits on groundwater objectives intended to protect the MUN use. The District correctly points out that neither the federal National Toxics Rule (NTR)[7] nor the California Toxics Rule (CTR)[8] establishes criteria that are specifically for the GWR use.[9] Nor are there water quality objectives in the Regional Board's Basin Plan that

[4] *Ibid.* The Basin Plan defines GWR as "[u]ses of water for natural or artificial recharge of ground water for purposes of water quality, or halting of saltwater intrusion into freshwater aquifers." Basin Plan at 2-1.

[5] Basin Plan, fn.3, *supra*. The Basin Plan defines MUN as "[u]ses of water for community, military, or individual water supply systems including, but not limited to, drinking water supply." Basin Plan at 2-1.

[6] Basin Plan, fn.3, *supra*. The Basin Plan defines REC-1 as "[u]ses of water for recreational activities involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not limited to, swimming, wading, water-skiing, skin and scuba diving, surfing, white water activities, fishing, or use of natural hot springs." Basin Plan at 2-2.

[7] 40 C.F.R. § 131.36

[8] *Id.* § 131.38.

[9] The CTR criteria do, however, apply to all inland surface waters and enclosed bays and estuaries. Different criteria apply depending on whether or not the water has a MUN designation. *Id.* 131.38(d)(2).

are specific to this use.[10] The Basin Plan does, however, contain numeric water quality objectives for chemical constituents and radioactivity to protect groundwaters designated for MUN.[11] The numeric objectives are derived from primary maximum contaminant levels (MCLs) established by the Department of Health Services (Department) in Title 22 of the California Code of Regulations.[12] In general, the Department establishes MCLs to ensure the safety of public drinking water supplies at the point of use, i.e. at the tap.

The Regional Board was required to include any effluent limitations in the District's permit that were necessary to meet water quality standards.[13] Standards consist of beneficial use designations and criteria, or water quality objectives under state law, to protect the uses.[14] Hence, the Regional Board was required to include any effluent limits in the District's permit necessary to protect the GWR use. This use is premised on a hydrologic connection between surface waters and groundwater, and the groundwater in this case is used for MUN. Since there are no criteria or objectives specific to the GWR use, the Regional Board properly based effluent limitations for the GWR use on the groundwater MUN objectives. By doing so, the Regional Board ensured that the use of surface waters to recharge groundwater used as an existing drinking water source is protected. The fact that there are no criteria or objectives specific to the GWR use did not deprive the Regional Board of the ability to protect the use. The Clean Water Act contemplates enforcement of both beneficial uses as well as criteria in state water quality standards.[15]

Nor is the permit infirm because it inappropriately regulates a discharge to groundwater. The District correctly points out that NPDES permits regulate discharges to

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[10] Like the CTR, the Basin Plan does contain narrative and numeric objectives that apply to all inland surface waters and enclosed bays and estuaries. Basin Plan, fn. 3*supra*, pp. 3-3 through 3-17.

[11] *Id.* at 2-17.

[12] *Id*. at 3-18. The Basin Plan states:

> "Ground waters designated for use as [MUN] shall not contain concentrations of chemical constituents and radionuclides in excess of the limits specified in the following provisions of [Title 22] which are incorporated by reference into this plan: Table 64431-A of section 64431 (Inorganic chemicals), . . . , Table 64444-A of section 64444 (Organic Chemicals), and Table 4 of section 64443 (Radioactivity). This incorporation by reference is prospective including future changes to the incorporated provisions as the changes take effect."

[13] See 33 U.S.C. § 1311(b)(1)(C); Wat. Code § 13377.

[14] See 33 U.S.C. § 1313(c)(2)(A); Wat. Code § 13050(f), (h), and (j). Standards also include an antidegradation policy. See 33 U.S.C. § 1313(d)(4)(B).

[15] *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 714-719.

surface waters under the Clean Water Act.[16] The District's permit, in fact, regulates the discharge from the Whittier Narrow WRP to surface waters, not groundwater. In any event, in California an NPDES permit also serves as waste discharge requirements under state law.[17] As such, the permit can include appropriate provisions to implement both federal and state law.

The District argues that the Regional Board improperly regulated the GWR use in its permit because the Regional Board had already issued WRRs in 1991 to protect this use. Water reclamation requirements are issued under Chapter 7, Division 7 of the Water Code. They are intended to ensure that reclaimed water is safe from a public health perspective. They do not and cannot substitute for an NPDES permit, which is issued under Chapter 5.5, Division 7 of the Water Code. And, as stated above, the Regional Board was required to include in the permit any effluent limitations necessary to protect the GWR use.

Finally, the District faults the Regional Board for failing to grant the District credit for dilution or attenuation in the underlying groundwater. As a result, the Regional Board imposed effluent limits to protect the GWR use that were based on the MUN groundwater objectives applied at the end of the pipe.

Since groundwater recharge and use are long-term activities, the Regional Board could reasonably consider dilution and attenuation, taking into account long-term average river flows, aquifer capacities, recharge volumes, and soil adsorption, in developing effluent limits to protect the GWR use. The record indicates that the Regional Board did not do so because the District did not submit the necessary data and studies in a timely manner.

The District, in fact, attempted to introduce studies on dilution at the Regional Board hearing on its permit, the date on which the Regional Board intended to adopt the permit - in other words, at the absolute last minute. The District asserts that it "mentioned" the studies in a prior comment letter; however, the letter does not refer to any specific studies nor does it suggest any specific dilution or attenuation factors that the Regional Board could use in developing effluent limits.[18] Regional Board staff did not have the opportunity to consider the studies prior to the hearing on the District's permit; therefore, the Regional Board properly

[16] See 33 U.S.C. §§ 1311, 1342.

[17] See Wat. Code §§ 13263, 13374, 13377.

[18] See Regional Board Administrative Record at 10.1-255.

excluded the studies from the hearing record.[19] The Regional Board did, however, include a reopener clause in the District's permit to allow the District to provide data on dilution and attenuation, which could provide a basis for revising the contested effluent limits in the future.[20] The burden is on the District to promptly provide this data. The Board will direct the Regional Board to work with the District, once the data is provided, to determine whether dilution and attenuation are appropriate factors to consider in developing effluent limits to protect the GWR use.

2. Contention: The District further contends that the effluent limitations to protect the GWR use are based on a narrative groundwater objective that violates federal and state law and is otherwise inappropriate. The District also argues that the Regional Board violated Water Code section 13263(a) in establishing these limits. Finally, the District objects to specific limits on the ground that they are more stringent than Title 22 MCLs or are based on Title 22 secondary MCLs that are not incorporated into the Basin Plan.

Finding: The District's challenge to the underlying groundwater objective attacks the validity of the Regional Board Basin Plan. This challenge does not raise a petitionable issue.[21] It is, in any event, untimely since the objective has been in the Basin Plan since 1994. The Board also notes that the District's characterization of the objective as a "narrative objective" is incorrect. The Basin Plan incorporates by reference, as objectives, tables of numerical values. The resulting objectives are, thus, numeric.

The District's challenge to the limits on the ground that the Regional Board failed to comply with Water Code section 13263(a) also appears to be untimely. It does not appear from our review of the record that the District raised this objection in its written or oral comments to the Regional Board. Even assuming that the issue had been raised, the challenge must be rejected. Section 13263(a) requires a Regional Water Quality Control Board (regional board) to consider the provisions of Water Code section 13241, among other factors, when adopting waste discharge requirements. Section 13241 requires that the regional boards consider six factors in establishing water quality objectives, including, for example, economic

[19] The District requests that the State Board include the studies in the Board's record for this petition. The Board denies this request because the Board is remanding the District's permit to the Regional Board for further action, and it is preferable that the Regional Board consider this information in the first instance.

[20] Order No. R4-2002-0142, Requirements and Provisions V.I

[21] See Wat. Code § 13320(a).

considerations. Here, the Regional Board based the effluent limitations on numerical objectives, which the Regional Board is presumed to have legally adopted in compliance with Water Code section 13241.[22] Further, the effluent limits were retained from the District's prior permit. According to the Regional Board, over the last decade, the District has consistently complied with the limits; thus, economic considerations were not obviously in issue. As discussed above, the Regional Board did not have site-specific dilution or attenuation data on which to modify the limits.

Additionally, the District contends that the Title 22-based effluent limits are inappropriate because they are expressed as monthly averages rather than as 12-month rolling averages, which are generally allowed under Title 22. The Basin Plan, however, incorporated only selected tables from Title 22. It did not incorporate Title 22's sections on monitoring, reporting, and other provisions. When the Regional Board evaluates dilution and attenuation, the Regional Board should consider appropriate long-term averaging periods.

Although the Board will not review the validity of the underlying groundwater objectives, the Board agrees with the District that several effluent limitations prescribed to protect the GWR use must be reconsidered. The Board has identified several problems with the limits. First, the limits for seven constituents are higher, and in some cases orders of magnitude higher, than limits based on applicable CTR criteria.[23] The Regional Board, in fact, found that the District's discharge of these pollutants, which include chromium VI, silver, lead, selenium, zinc, endrin, and toxaphene, did not have the "reasonable potential" to cause or contribute to a

[22] See *Western States Petroleum Ass'n v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1007, 122 Cal.Rptr.2d 117.

[23] The table below shows that the limits are 2 to 15,000 times CTR-based limits:

Basis	**Chrome VI (UG/I)**	**Lead (ug/I)**	**Selenium (ug/I)**	**Silver (ug/I)**	**Zinc (ug/I)**	**Endrin (ug/I)**	**Toxaphene (ug/I)**
MCL limit	50*[A]	50*[D]	10*[C]	50*[E]	5000*[B]	2	3
CTR limit	11	10	5	20	260	0.036	0.0002

*[A] The primary MCL is for chromium, not chromium VI.
*[B] This limit is based on a secondary MCL for zinc.
*[C] The primary MCL is 50 ug/L for selenium.
*[D] There is no primary or secondary MCL for lead.
*[E] There is no primary MCL; the secondary MCL is 100 ug/L for silver.

violation of the applicable CTR criteria[24]. The Regional Board generally cited the Clean Water Act proscription against backsliding to support the limits.[25] Under the antibacksliding rule, a permitting authority cannot, under certain circumstances, reissue a permit with less stringent effluent limits than those in a prior permit.

The Regional Board cannot authorize the District to discharge pollutants at levels that would exceed limits based on applicable CTR criteria.[26] The Regional Board must include in the District's permit any effluent limits necessary to implement the most stringent applicable water quality standards. For this reason, the Board's Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2000) (Toxics Policy) instructs the regional boards to use the most stringent applicable criterion or objective when determining whether a pollutant must be limited in a permit.[27]

This does not mean, however, that the permit must necessarily include CTR-based limits for the seven pollutants. The Regional Board did not find "reasonable potential" for any of the seven. While the Clean Water Act antibacksliding rule generally proscribes including effluent limits in a permit that are less stringent than those in a former permit, the rule has several exceptions. The Regional Board recognized this but concluded that none of the exceptions applied.[28] The Clean Water Act contains two sets of exceptions from the antibacksliding rule for water quality-based effluent limitations, one found in section 303(d)(4) and the other in section 402(o)(2).[29] It is not clear that the Regional Board considered the

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[24] The term "reasonable potential" is based on 40 C.F.R. § 122.44(d)(1)(i), which requires that permit issuers include effluent limitations for all pollutants that "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." If a pollutant does not require a limit under this test, the pollutant is said not to have "reasonable potential."

[25] See 33 U.S.C. § 1342(o). Fact Sheet for Order No. R4-2002-0142 (Fact Sheet), Table R for Discharge #004 and for Discharges #001, 002, and 003.

[26] See, e.g., 33 U.S.C. § 1342; Wat. Code § 13377.

[27] Toxics Policy, Sec. 1.3, *Step 1*.

[28] See Fact Sheet, fn. 25, *supra*, VII. I, pp. 19-21 and VIII.a, pp. 23-24; Order No. R4-2002-0142, Finding 38.

[29] 33 U.S.C. §§ 1342(o)(2) and 1313(d)(4). These two provisions constitute independent exceptions to the backsliding prohibition. U.S. EPA Technical Support Document for Water Quality-based Toxics Control (March 1991) (TSD) at 113.

exception in section 303(d)(4) for waters that attain water quality standards. Antibacksliding is permitted for these waters as long as federal antidegradation requirements are met.[30]

The Regional Board found that the District's permit complied with antidegradation requirements, and the Regional Board listed only two of the seven pollutants, lead and zinc, as impairing pollutants.[31] Impairing pollutants are pollutants that are present in the receiving water in concentrations exceeding the applicable water quality standards. Consequently, it appears that the antidegradation exception is available for the remaining five pollutants.[32] The exception may also apply for lead and zinc because the Regional Board's reasonable potential analysis indicates that background receiving water concentrations for these constituents are less than the most stringent applicable criteria.[33] On remand, therefore, the Regional Board must reexamine the propriety of the effluent limits in light of this antibacksliding exception. This Board also holds today in Order WQO 2003-XXXX that the antibacksliding exception for new information[34] applies where new monitoring data indicate that the discharge of a pollutant does not have reasonable potential to cause or contribute to a water quality standards violation.

Second, the effluent limits for two pollutants, 2,4-D and nickel, are higher than their Title 22-based objectives.[35] The nickel limit is also higher than a CTR-based limit.[36] The Regional Board apparently did not analyze reasonable potential for 2,4-D but rather included an effluent limit for this pollutant based on antibacksliding. The Regional Board did not find reasonable potential for nickel but included a limit for this pollutant, as well, based on antibacksliding. Nickel is not considered an impairing pollutant; consequently, the preceding

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[30] The federal antidegradation policy is described in 40 C.F.R. § 131.12. It establishes three tiers of water quality protection.

[31] Order No. R4-2002-0142, Findings 25 and 48.

[32] Lead is considered an impairing pollutant for reaches of the Rio Hondo and San Gabriel rivers. Zinc is considered an impairing pollutant for a Rio Hondo reach. Order No. R4-2002-0142, Finding 25.

[33] Fact Sheet, fn. 25, *supra*, Table R.

[34] See 33 U.S.C. § 1342(o)(2)(B)(i).

[35] The MCL for 2,4,-D is 70 ug/L; the permit limit is 100 ug/L. The MCL for nickel is 100 ug/L; the permit limit is 200 ug/L, expressed as total recoverable. See Cal. Code Regs., tit. 22, § 64431, Table 64431-A, § 64444, Table 64444-A; Order No. R4-2002-0142, Discharge Requirements I.A.2.(b).

[36] The CTR chronic freshwater criterion for nickel is 52 ug/L, expressed as dissolved. The Regional Board used a value of 115 ug/L for the CTR chronic criterion. This value is for total recoverable nickel and is likely adjusted for hardness. See Fact Sheet, fn. 25, *supra*, VIII.b., p. 24.

discussion regarding the antidegradation and new information exceptions to antibacksliding applies to the nickel limit. The Regional Board did not list 2,4-D as an impairing pollutant either. On remand, the Regional Board must analyze reasonable potential for this pollutant.[37] If there is no reasonable potential, then the pollutant should be treated like the other nonimpairing pollutants, discussed above, for which there is no reasonable potential.

The Board reaches the same conclusion for the permit limits for iron and MBAs (foaming agents).[38] As with 2,4-D, the Regional Board did not analyze whether these pollutants had "reasonable potential" but rather cited antibacksliding concerns as the basis for the limits. Neither pollutant is an impairing pollutant. The permit and fact sheet do not adequately explain the need for these limits. On remand, the Regional Board must determine whether there is reasonable potential for these pollutants and, if not, reconsider the need for limits based on the antidegradation or new information exceptions to antibacksliding.

Finally, the District objects to the selenium, silver, and silvex (2,4,5-TP) limits on the ground that they are more stringent than the Title 22 MCLs. The Board has already addressed the selenium and silver limits. The District's permit includes a monthly average silvex limit of 10 ug/L; the primary MCL is 50 ug/L. The Regional Board did not analyze reasonable potential for this pollutant and cited antibacksliding as the basis for the limit. On remand, the Regional Board must also reconsider this limit for the reasons previously discussed.

3. Contention: The District contends that the final limitation for nitrite as nitrogen (nitrite-N) of 1 milligram per liter (mg/L) in its permit[39] and interim limit of 6 mg/L in the TSO[40] are inappropriate and unlawful. The District argues that the Regional Board failed to explain the basis for either limit in either the permit fact sheet, permit, or TSO.

Finding: The permit fact sheet clearly explains the basis for the final nitrite-N limit.[41] It is based on a numeric objective of l mg/L applicable to all inland surface waters and enclosed bays and estuaries in the Los Angeles region.[42] Neither the fact sheet, permit, nor TSO,

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[37] Data on effluent concentrations of 2,4-D are not included in the permit Fact Sheet.

[38] The Board notes that the limits are based on Title 22 secondary MCLs, which are not incorporated into the Basin Plan as groundwater objectives.

[39] Order No. R4-2002-0142, Effluent Limitations, I.A.2(a).

[40] TSO, Order No. 1.

[41] Fact Sheet, fn.25, *supra*, section IX, p. 32.

[42] Basin Plan, fn.3, *supra*, p. 3-11.

however, explains the derivation of the interim nitrite-N limit. Evidence in the Regional Board record indicates that staff used U.S. EPA guidance[43] to calculate a monthly average limit of 5.76 mg/L at the 99% confidence level. On remand, therefore, the Regional Board must include an appropriate finding in the TSO that explains how the interim limit was calculated.

4. Contention: The District additionally objects to numeric chronic toxicity effluent limitations in its permit and TSO. The District contends that the limits are inconsistent with the Basin Plan's narrative toxicity objective. The District also contends that they are inappropriately based on U.S. EPA guidance.

Finding: The District's permit includes final effluent limits for chronic toxicity that are a daily maximum and monthly median of 1.0 Toxic Units Chronic (TUc) in a critical life stage test.[44] The Regional Board found reasonable potential for chronic toxicity based on effluent data and the fact that a San Gabriel River reach does not attain water quality standards for toxicity.[45] The Regional Board also found that the District could not consistently comply with the limits and, for this reason, included an interim chronic toxicity limit of 3 TUc as a daily maximum in the TSO.

The District objects to the fact that the chronic toxicity limits are expressed numerically. The District raised the same challenge to chronic toxicity limits included in permits and TSOs issued to the District for its Long Beach and Los Coyotes Water Reclamation Plants.[46] In Order WQO 2003-XXXX, which the Board has adopted today, the State Board decided to review these permits and TSOs on its own motion. In particular, the Board desires more time to carefully consider this important issue. For this reason, the Board will not decide whether the chronic toxicity limits in the Whittier Narrows permit and TSO are appropriate at this time. Rather, the Board will review these limits on its own motion when it considers the same issue for the Long Beach and Los Coyotes permits and TSOs.

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[43] TSD, fn. 30, *supra*, App. E.

[44] Order R4-2002-0142, Effluent Limitation A.12.

[45] Fact Sheet, fn.25, *supra*, IX. A.3, pp. 34-35.

[46] See State Board/Office of Chief Counsel Files A-1496 and A-1496(a).

B. Robinson Petition

Contention: Petitioner Robinson contends that he was denied due process in the permit proceeding because the Regional Board refused to accept his proffered written materials at the August 29, 2002 hearing on the District's permit.

Finding: The Regional Board did not violate petitioner Robinson's right to a fair and impartial proceeding. The record indicates that the Regional Board provided ample public notice and opportunity to comment on the District's proposed permit and TSO. The last public notice was issued on July 22, 2002, and it established an August 12, 2002, deadline for submission of comments. In accordance with the Regional Board's procedures, petitioner Robinson was not allowed to submit voluminous written materials on the hearing day, August 29, 2002. In addition, his comment letter dated August 19, 2002, was excluded. The Regional Board's actions were consistent with State Board regulations, which authorize the regional boards to require written submittals in advance of a hearing in order to discourage surprise testimony.[47] The Regional Board's actions were appropriate in order to prevent prejudice to the discharger and to the Regional Board, both of whom had not had the opportunity to review the written materials offered at the August 29 hearing.

Although the Regional Board excluded petitioner's written submittals, the petitioner was allowed to provide oral testimony at the hearing. He was given additional time to present his arguments. Further, the Regional Board has represented that staff will consider petitioner's comments at a later date, when the Regional Board acts on the District's San Jose Creek Wastewater Reclamation Plant permit and water recycling requirements.

III. CONCLUSIONS

For the reasons explained above, the State Board concludes:

1. The Regional Board was legally required to include effluent limits in the District's permit that were necessary to protect the GWR use of surface waters.

2. The Regional Board had the legal authority to base effluent limits in the District's permit for the GWR use on the numeric MCL-based groundwater objectives.

[47] Cal. Code Regs., tit. 23, § 648.4.

3. It is appropriate for the Regional Board to consider the propriety of factoring in dilution and attenuation, where site-specific data are available, in developing effluent limits to protect the GWR use.

4. The Regional Board must reconsider the need for effluent limits for chromium VI, silver, lead, selenium, zinc, endrin, toxaphene, and nickel in light of the antibacksliding exceptions for attainment waters contained in Clean Water Act section 303(d)(4) and for new information in section 402(o)(2)(B)(i).

5. The Regional Board must assess reasonable potential for iron, MBAs, 2,4-D and silvex and, if there is no reasonable potential, reconsider the need for limits under the antibacksliding exceptions for attainment waters or new information.

6. The final effluent limitation for nitrite-N is appropriate and proper.

7. The Regional Board must include an appropriate finding in the TSO that explains how the interim nitrite-N limit was calculated.

8. The Regional Board did not violate petitioner Robinson's procedural due process rights by excluding his August 19, 2002 written comments and written submittals at the August 29, 2002 hearing.

IV. ORDER

IT IS HEREBY ORDERED that Order No. R4-2002-0142 is remanded to the Regional Board for reconsideration of the final effluent limitations for chromium-VI, silver, lead, selenium, zinc, endrin, toxaphene, 2,4-D, nickel, iron, MBAs, and silvex.

IT IS FURTHER ORDERED that TSO No. R4-2002-0143 is remanded to the Regional Board for inclusion of an appropriate finding explaining the calculation of the nitrite-N interim limit.

IT IS FURTHER ORDERED that, once the District provides appropriate data on dilution or attenuation, the Regional Board shall work with the District to determine whether the permit should be reopened to reconsider effluent limits to protect the GWR use.

IT IS FURTHER ORDERED that the State Board shall review on its own motion the numeric chronic toxicity effluent limitations in the permit and TSO.

IT IS FURTHER ORDERED that in all other respects the petitions for review are denied.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 16, 2003.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton
Nancy H. Sutley

NO: None.

ABSENT: None.

ABSTAIN: None.

Debbie Irvin
Clerk to the Board