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July 23, 2012

VIA U.S. MAIL & E-MAIL

Laurent Meillier
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

**RE: In re Guadalupe Rubbish Disposal Company, Inc.
Order R2-2012-0032**

Dear Mr. Meillier:

This letter responds to the comments from Mr. David T. Truslow dated June 18, 2012 in which he raises certain objections to the proposed settlement between Guadalupe Rubbish Disposal Company, Inc. (“GRDC”) and the San Francisco Bay Regional Water Quality Control Board. GRDC appreciates Mr. Truslow’s interest in this matter and his thoughtful comments on the proposed settlement of the above-referenced matter.

As an initial matter, and as you know, the proposed settlement is the result of a lengthy investigative and statutory enforcement process to assess liability for the condensate spill that occurred at a leased portion of GRDC’s facility on December 20, 2010. The settlement itself is also the result of further negotiation and development of additional information that helped assist all parties in reaching a proposed settlement that is fair and avoids the risks and costs of further litigation. As with most negotiated settlements, the final result is a compromise. If one party believes that the settlement is too low, the other will think it is too high. That truism applies here as well. GRDC believes that the proposed settlement is too high, and – presumably – Water Board staff may think it should have been higher. Such is compromise. While the parties were assisted by the State Board’s *Water Quality Enforcement Policy* (the “Enforcement Policy”), there was still room for disagreement as to how the policy should be interpreted and implemented.

While I do not intend to re-hash the settlement negotiations, there are several points worth noting. First, there were several factors that resulted in a significant reduction of the initial penalty amount, pursuant to the Enforcement Policy. Second, GRDC argued for additional reductions under the Enforcement Policy, which the Water Board did not agree to in the final calculation. If the parties had not settled, GRDC would have re-asserted these arguments, in addition to other legal and factual defenses.

With respect to the factors that reduced the total penalty amount, the most significant was the evidence GRDC presented as to the total spill volume. The initially proposed penalty was based on an

erroneously estimated spill volume of 86,220 gallons. During settlement discussions, GRDC presented evidence based on actual observations that the rate of the spill was much less than that used to calculate the initially proposed penalty. Indeed, based on this documentation, the Regional Water Board's Prosecution Team reduced the estimated spill volume to 31,200 gallons. Even with the reduced spill volume, GRDC still believes that the spill volume used to calculate the penalty is too high. Under California law, the volume of the discharge used to calculate the penalty should be based on the volume of the condensate spilled, not the volume of condensate-contaminated stormwater. GRDC estimated the volume of the condensate released to be less than 1,440 gallons. This disputed difference in the calculation of the "discharge" is obviously significant. If this matter were to go to a hearing, GRDC would argue that 1,440 gallons of condensate released should be the volume of discharged used to calculate the statutory penalty. If that were the case, the maximum volume-based penalty could not have been higher than \$10 per gallon under CWC Section 13385(c)(2) – or **\$4,440** (\$10 x (1,440 gallons – 1,000 gallons)). Obviously, GRDC's willingness to settle and waive its argument for this penalty amount was a very significant concession.

The Water Board also reduced the penalty amount under the Enforcement Policy based on evidence that (a) the potential harm to beneficial uses, and (b) the risk or threats of the condensate-impacted stormwater were not as significant as initially determined. Again, while GRDC agrees that a penalty amount should be reduced based on these factors, GRDC does not believe that the final reduction was enough. GRDC presented evidence that the potential harm to beneficial uses resulted not from any actual impacts, but rather because of delays in governmental decision-making and in obtaining sampling results during the Christmas holiday. GRDC also presented evidence showing that the condensate-impacted stormwater did not pose a threat to human health or the environment. The toxicity testing showed that discharged stormwater was not acutely toxic to rainbow trout. GRDC also presented a stream survey along MacAbee Creek by a third party expert documenting no observed injuries to wildlife, that mammal, bird and insect activity was observed along the channel, and that water quality was clear, but tinged brown. If this case were to go to hearing, GRDC would be able to present strong evidence supporting further reductions in the penalty amount. Nonetheless, GRDC elected to settle this matter in order to reach a final resolution without the need for an evidentiary hearing.

While GRDC would argue that there are other factors that should reduce the final penalty, I believe that our point is clear: if this case were to go to an evidentiary hearing, GRDC could advance strong arguments supporting a penalty amount several orders of magnitude below the negotiated penalty amount. While the Water Board would certainly dispute the strength of GRDC's position, both parties would have to agree that the other's arguments have potential merit and therefore a final negotiated settlement is the best resolution.

With respect to Mr. Truslow's specific comments, I have addressed each below.

Comment 1. Santa Clara County Reimbursement

In his June 18, 2012 letter, Mr. Truslow argues that Santa Clara County should be reimbursed for direct and opportunity expenses incurred as a result of the closure of a small portion of Almaden Quicksilver County Park. However, as you know, the Water Board does not have the authority to order the reimbursement to Santa Clara County for any expenses it incurred as a result of the discharge. GRDC does note, however, that the partial closure of the park (an estimated 15% of the park was closed)

was considered in determining the score under the factor “Harm or Potential Harm to Beneficial Uses” and thus was calculated into the total liability.

Comment 2. Unknown GEH-GRDC Settlement Offset

In his comments, Mr. Truslow speculates that GRDC is profiting or received an economic benefit as the result the spill because of a confidential settlement. As you know, the spill occurred at a landfill gas-to-energy facility owned and operated by Guadalupe Energy Holdings LLC, a subsidiary of Fortistar LLC (“GEH”); this facility is located on GRDC’s property. There is no factor in the Water Board’s statutes or regulations or in the Enforcement Policy that would justify a different settlement result based on how GRDC and GEH resolved this issue between themselves.

Comment 3. History of Violations

Mr. Truslow argues that GRDC should be penalized at a higher rate because of its prior violations. GRDC again disagrees. The Water Board cites two prior violations that occurred 17 and 12 years ago. Indeed, the first violation occurred in 1995 – roughly four years before Waste Management acquired GRDC and began operating the landfill. While there was one spill in 2000, GRDC does not agree that one spill indicates any significant history of violations that warrant increasing the penalty amount – and certainly no basis for using a multiplier higher than the 1.1 value the Water Board did use.

Comment 4. Incentivizing Unlawful Behavior

GRDC strongly disagrees with Mr. Truslow’s assertion that the proposed penalty amount incentivizes unlawful behavior. GRDC and its employees take environmental protection and regulatory compliance extremely seriously. This incident was very unfortunate and GRDC’s employees worked extremely hard to respond to and cleanup the spill. It was especially difficult because it occurred during the Christmas holidays. Indeed, some GRDC staff had to work on Christmas Eve and into Christmas Night. The amount of the penalty is very high and extremely significant to GRDC. GRDC strongly disagrees with the suggestion that a penalty of \$167,285 is a trivial amount. It is not. Indeed, it is higher than many other settlements with the Water Board. *E.g., In re C&H Sugar Company, Inc.*, Order No. R2-2010-00XX (\$57,310 for a discharge of 243,000 gallons); *In re East Bay MUD*, Order No. R2-2011-0005 (\$72,000 penalty for a discharge of 27,600 gallons); see also *In re East Bay Regional Park District*, Order No. R2-2009-0016 (ACL assessing \$44,900 in penalties for a 22,260 gallon spill). When calculated based on the number of gallons of condensate spilled, it equates to over \$100 per gallon – an order of magnitude higher than the statutory maximum of \$10 per gallon. Even using the higher diluted volume, the per gallon penalty amount exceeds \$5.00 per gallon – a per gallon amount significantly higher than most comparable Water Board settlements. It is simply not credible to suggest that a penalty exceeding \$167,000 creates an incentive for any unlawful behavior.

Comment 5. Toxicology Analysis

Mr. Truslow disputes GRDC’s toxicology analysis; however, he also concedes that the analysis was performed by a third party consistent with EPA methods. As such, Mr. Truslow has not presented any legitimate basis upon which to question the validity or results of the toxicity study. Moreover, GRDC is not aware that the Water Board or any other party has any contrary evidence demonstrating acute toxicity of the stormwater that was discharged.

July 23, 2012

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While GRDC appreciates Mr. Truslow's interest in this matter, Mr. Truslow has not provided any new information to the Water Board that would affect the agreed-upon settlement. In addition, although GRDC continues to believe that the proposed settlement amount is too high as demonstrated above, GRDC supports the Water Board's final approval of the settlement in order to resolve this matter without the costs, risks, and resources needed to proceed to a full evidentiary hearing. Accordingly, GRDC supports the Water Board's final approval of the proposed settlement.

Please let me know if you have any questions about the above or if you need any additional information. We look forward to working with you to finalize the settlement.

Sincerely,



Andrew M. Kenefick

cc: Ann Carroll *via e-mail only*