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**FILED**  
San Francisco County Superior Court  
JUL 19 2002  
GORDON BASKALI, Clerk  
By: *[Signature]*  
Candy Clark

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO

COMMUNITIES FOR A BETTER ENVIRONMENT and SAN FRANCISCO BAYKEEPER,  
Petitioners,  
v.  
STATE WATER RESOURCES CONTROL BOARD and CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION,  
Respondents.  

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ULTRAMAR, INC.,  
Real Party in Interest.

No. 319575  
~~PROPOSED~~ <sup>v.</sup> STATEMENT OF DECISION  
Hearing Date: February 28, 2002  
Time: 9:30 a.m.  
Department: 301  
Action Filed: March 13, 2001

1 I. INTRODUCTION

2 On March 13, 2000, Petitioners Communities For A Better Environment and San  
3 Francisco BayKeeper timely filed a petition for writ of mandate seeking an order from this Court  
4 vacating an amendment of a National Pollutant Discharge Elimination System ("NPDES")  
5 permit issued by the Regional Water Quality Control Board, San Francisco Bay Region  
6 ("Regional Board") (Order No. 00-056), as well as an Order by the State Water Resources  
7 Control Board ("State Board") upholding that amendment (Order No. WQ 2001-06), for  
8 discharges of dioxins and other pollutants from Ultramar Inc.'s refinery near Avon, California.  
9 The Petition alleges that Order No. 00-056, as upheld by Order No. WQ 2001-06: (1) fails to  
10 include the "water quality-based effluent limit" for dioxins required by Section 1311(b)(1)(C) of  
11 the Federal Water Pollution Control Act (the "Clean Water Act" or "Act"), 33 U.S.C. § 1251 *et*  
12 *seq.*, and 40 C.F.R. § 122.44(d); (2) violates the Act's antidegradation requirement, 33 U.S.C.  
13 § 1342(o), and; (3) violates the Act's limitations on the application of schedules of compliance.  
14 The Court agrees with the first of those claims, and does not reach the other two arguments.

15 The Petition for Writ of Mandamus is hereby GRANTED. Real Party Ultramar's  
16 permit fails to include a numeric water quality-based effluent limitation as mandated by the  
17 Clean Water Act. By eliminating a water quality-based effluent limitation for dioxins as  
18 required by 33 U.S.C. § 1311(b)(1)(C) and 40 C.F.R. § 122.44(d) to be included in the permit for  
19 the Avon refinery, the orders of the Regional and State Boards are in violation of the law.  
20 Accordingly, pursuant to Code of Civil Procedure § 1094.5(f), the State Board's Order No. WQ  
21 2001-06 and the Regional Board's Order No. 00-056 are hereby remanded for further  
22 proceedings consistent with the Court's ruling.

23 II. STANDARD OF REVIEW

24 This Court must remand Orders 00-056 and WQ 2001-06 to the Regional and  
25 State Boards if it finds that the agencies prejudicially abused their discretion. Code Civ. Pro. §  
26 1094.5(b). A prejudicial abuse of discretion is established if the respondent has not proceeded in  
27 the manner required by law, the order or decision is not supported by the findings, or the findings  
28 are not supported by the weight of the evidence. *Id.*

1 III. LEGAL BACKGROUND

2 The permit amendment challenged by this action was issued under the Clean  
3 Water Act (the "Act"). 33 U.S.C. § 1251 *et seq.* The Clean Water Act established a phased  
4 approach to the establishment of effluent limitations in NPDES permits. 33 U.S.C. § 1311. A  
5 technology forcing statute, the Act imposes increasingly stringent effluent limitations on  
6 dischargers over time. 33 U.S.C. § 1311(b). Currently, technology-based effluent limitations  
7 must at least reflect the level of pollution reduction achievable by using the best available  
8 technology. 33 U.S.C. § 1311(b). However, in many cases water quality standards may still not  
9 be achieved even when dischargers use the best available technology. In those instances, permits  
10 must be more stringent than technology-based limits in order to meet standards. Pursuant to  
11 Section 1311(b)(1)(C), the Act requires "any more stringent effluent limitation, including those  
12 necessary to meet water quality standards. . ." 33 U.S.C. § 1311(b)(1)(C). *See EPA v.*  
13 *California*, 426 U.S. at 205 n. 12. NPDES permits must contain more stringent limitations, or  
14 water quality based effluent limitations ("WQBELs"), when the state permitting agency  
15 determines that pollutants "are or may be discharged at a level which will cause, have the  
16 reasonable potential to cause, or contribute to an excursion above any State water quality  
17 standard." 40 C.F.R. § 122.44(d)(1)(i) (emphasis added). Under these circumstances, the federal  
18 regulations require permits to establish effluent limits using a calculated numeric water quality  
19 criterion that the permitting authority demonstrates will attain and maintain applicable narrative  
20 water quality criteria and will fully protect the designated use. 40 C.F.R. § 122.44(d)(1)(vi)(A).

21 IV. FACTUAL BACKGROUND

22 The United States Environmental Protection Agency ("EPA") has determined that  
23 Suisun Bay is impaired for dioxins, meaning that the level of dioxins in the Bay exceeds the  
24 narrative water quality standard established for toxic pollutants in the Basin Plan for the San  
25 Francisco Bay Region ("Basin Plan"). SBAR 13-004313; RBAR 9-202869; *Id.* at 202874;  
26 RBAR 1-200011-12 (Finding 41); SBAR 3-001135. The determination that Suisun Bay is  
27 impaired by dioxins was first made by the EPA in November 1998. SBAR 11-003919-3920.

28 ///

1 Hence, EPA has concluded that any discharge of dioxin into the already impaired  
2 Bay from the Avon Refinery, or any other facility identified as a source of dioxins to the Bay,  
3 has the reasonable potential to cause or contribute to an excursion of the narrative toxicity  
4 criterion. RBAR 1-200015 (Finding 57.a). See SBAR 7-002240 (EPA representative) ("The  
5 Bay is listed for ... dioxin. Therefore, the Bay has no more assimilative capacity. In other words  
6 the bay is incapable of absorbing or diluting these pollutants"); RBAR 1-200013 (Finding 49);  
7 SBAR 7-002350-2351.

8 The designation of Suisun Bay by the EPA as impaired for dioxins triggered the  
9 requirement that EPA or the State of California develop a Total Maximum Daily Load  
10 ("TMDL") for dioxins in that body of water. A TMDL represents the total amount of a  
11 particular substance that the water body can absorb while still meeting the designated uses for  
12 that water body. EPA has been in the process of developing the TMDL for dioxins since 1998,  
13 when the designation was made. Due to the complexity of the issue, however, EPA has not yet  
14 completed and issued the TMDL for dioxins for Suisun Bay.

15 On June 21, 2000, the Regional Board issued Order No. 00-056. RBAR 7-  
16 202361. This order placed an interim limit of 0.65 pg/L on the discharge of dioxins to Suisun  
17 Bay. RBAR 7-202366, ¶ 27. This limit is based upon the performance of the facility. The order  
18 also adopted a final limit based on the TMDL. Since the TMDL for Suisun Bay has not yet been  
19 developed, the Regional Board imposed a compliance plan that required the Refinery to comply  
20 with the TMDL by 2012. RBAR 7-202365, ¶¶ 18-19. In the event the EPA had not developed  
21 the TMDL by that date, the alternative final limit would be "no net loading." "No net loading" is  
22 a limit which would require the Refinery to either discharge no dioxins, or to offset any  
23 discharge with an equal reduction. *Id.*

#### 24 V. ANALYSIS

25 By issuing Order No. 00-056 without a WQBEL for dioxins, the Regional and  
26 State Boards failed to proceed in a manner required by law and/or abused their discretion,  
27 because the Refinery's permit no longer includes the requisite WQBEL. As described above, a  
28 NPDES permit must establish a WQBEL for a particular pollutant whenever the permitting

1 agency determines that the discharge of the pollutant has a reasonable potential to cause or  
2 contribute to a violation of water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. §  
3 122.44(d)(1)(i); See RBAR 1-200014 (2000 Permit, Finding 55).

4 The parties do not dispute that the Avon Refinery's NPDES permit must contain a  
5 WQBEL for dioxins.

6 The interim limit of 0.65 pg/L for five of the seventeen dioxin congeners is  
7 technology-based, rather than water-quality based, and is therefore not a WQBEL.

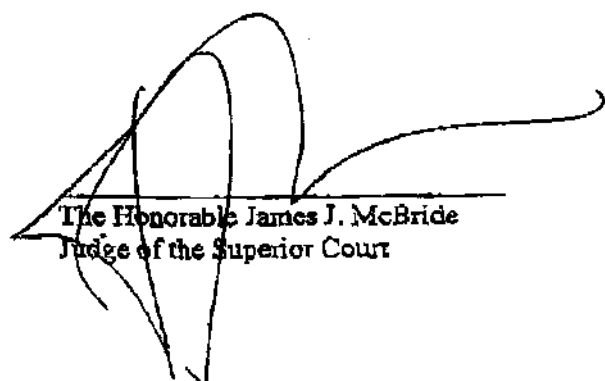
8 The final limits established in Order No. 00-056 do not constitute WQBELs  
9 because they are not numeric limits as required by 40 C.F.R. § 122.44(d)(1)(vi)(A). The primary  
10 final limit, the TMDL-based limit, is not a WQBEL within the meaning of Section  
11 122.44(d)(vi)(A) because no TMDL has yet been established by EPA or the State, and it  
12 therefore does not constitute a numeric limit. The alternate final limit, the limit of "no net  
13 loading," is not a WQBEL within the meaning of Section 122.44(d)(vi)(A) because the State has  
14 not yet developed a program that establishes a numeric limit.

15 Since Order No. 00-056 does not contain a numeric WQBEL, it was issued in  
16 violation of 40 C.F.R. § 122.44(d)(1)(vi)(A). The Regional Board therefore abused its discretion  
17 within the meaning of Code of Civil Procedure § 1094.5.

## 18 VI. CONCLUSION

19 For the foregoing reasons, the Petition for Writ of Mandate is GRANTED and the  
20 Regional Board's and State Board's orders issuing and upholding Order No. 00-056 and Order  
21 No. WQ 2001-06 are remanded for further proceedings in accordance with the requirements of  
22 the Clean Water Act and this ruling.

23  
24 Date: 7/15/02

  
25  
26 The Honorable James J. McBride  
27 Judge of the Superior Court  
28

1 Based On Order

2 Submitted by:

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28 Amended Order  
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NO. 695 P. 8  
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Deputy Clerk

SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
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COMMUNITIES FOR A BETTER  
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BAYKEEPER,

Petitioners,

v.

STATE WATER RESOURCES CONTROL  
BOARD and CALIFORNIA REGIONAL  
WATER QUALITY CONTROL BOARD,  
SAN FRANCISCO BAY REGION,

Respondents.

ULTRAMAR, INC.,

Real Party in Interest.

Case No. 319375

~~PROPOSED~~ JUDGMENT GRANTING  
PEREMPTORY WRIT OF MANDATE

Hearing Date: February 28, 2002  
Time: 9:30 a.m.  
Department: 301

Action filed: March 13, 2001

This cause came on regularly for trial on February 28, 2002, at 9:30 a.m., in Department 301 of the above-entitled court, the Honorable James J. McBride, Judge, sitting without a jury. Michael R. Lozeau, Earthjustice Legal Defense Fund appeared on behalf of Petitioners Communities For A Better Environment ("CBE") and San Francisco BayKeeper. Anne E. Simon appeared on behalf of Petitioner CBE. Deputy Attorney General Gavin G. McCabe appeared on behalf of the State Respondents State Water Resources Control Board ("State Board") and California Regional Water Quality Control Board, San Francisco Bay Region ("Regional Board"). Rick R. Rothman appeared on behalf of Real Party in Interest Ultramar, Inc. Melissa Thorne appeared on behalf of amicus curiae Bay Area Clean Water Agencies. The cause was argued and submitted for decision. Having considered the arguments of

1 counsel, the documents and administrative record on file in the action and having issued the Statement  
2 of Decision on this matter.

3 IT IS ORDERED, ADJUDGED, AND DECREED as follows:

4 A peremptory writ of mandate shall be issued and directed to Respondents State Water  
5 Resources Control Board and California Regional Water Quality Control Board, San Francisco Bay  
6 Region commanding Respondents, respectively, to set aside the State Board's Order No. WQ 2001-06  
7 and the Regional Board's Order No. 00-056.

8  
9 The writ shall remand Order No. WQ 2001-06 to the State Board and Order No. 00-056 to the  
10 Regional Board for further proceedings in their discretion that are consistent with this Judgment and the  
11 Statement of Decision.

12  
13 Petitioner shall recover costs from Respondents and Real Party In Interest Ultramar, Inc. in the  
14 amount of Pursuant to Cost Bill.

15 Dated: 7/15, 2002.

16  
17  
18 The Honorable Judge James J. McBride

19 Judgment entered on \_\_\_\_\_, 2002, in Vol. \_\_\_\_\_ of the Judgment Book, page

20  
21  
22 Clerk  
23 By \_\_\_\_\_  
Deputy

24 Submitted by:

25 Michael R. Lozeau

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