SAN FRANCISCO BAYKEEPER

June 20, 2011

Mayor Chuck Reed and Members of the San José City Council
c/o City Clerk
200 E. Santa Clara Street
San Jose, CA 95113
Submitted via electronic mail (cityclerk@sanjoseca.gov)

**RE: Agenda Item 7.2a: Resolution to adopt the MND and associated MM&R Plan prepared for the Dry-Fermentation Anaerobic Digester Facility, File No. SP09-057.**

Dear Mayor Reed and City Council Members:

Please accept these comments in advance of your June 21, 2011 review of the resolution to adopt a Mitigated Negative Declaration (MND) for the proposed Dry Fermentation Anaerobic Digestion Facility (Proposed Project). San Francisco Baykeeper respectfully submits these comments on behalf of our 2,300 members that live, work, and recreate in and around the San Francisco Bay. Baykeeper is a 501(c)(3) non-profit organization with the mission of protecting and enhancing the water quality of the San Francisco Bay for the benefit of its ecosystems and surrounding communities. With the goal of minimizing impacts to San Francisco Bay and adjacent wildlife habitat Baykeeper submits the following comments, which supplement earlier comments to the MND, as submitted May 9, 2011 and attached herein.

**MND FAILS TO ADEQUATELY RECOGNIZE EXISTING STORMWATER-BORNE DISCHARGES**

Hydrological and water quality impacts are assessed in Section 4.9 of the Revised Initial Study for the Proposed Project, which focuses largely on stormwater drainage and requirements pursuant to the San Francisco Bay Municipal Regional Stormwater NPDES Permit.[1] One of the factors contributing to the inadequacy of this Section and the MND, in general, includes the fact that stormwater quality impacts have not been assessed in relation to the fact the Proposed Project is located on Nine Par Landfill. This historic landfill was never properly contained, decommissioned or subject to routine water quality monitoring. Upon closure of the landfill the site was merely covered with non-engineered soil.

Since the Nine Par Landfill is not subject to routine groundwater and stormwater monitoring requirements we cannot reliably determine the magnitude and extent of ground and surface water contamination associated with the Proposed Project area. However, data from the nearby Zanker Rd Landfill indicates Nine Par Landfill likely discharges significant rates of stormwater-borne contaminants. Moreover, this data suggests that, on a cumulative basis, landfills in the Lower South Bay represent a significant impact to water quality of San Francisco Bay and other sensitive habitats.

[1] City of San José. June 2011. *Revised Initial Study Dry-Fermentation Anaerobic Digestion Facility Project File No. SP09-057*. Available at www.sanjoseca.gov

Table 1 presents data retrieved from the State Water Board's Storm Water Multiple Application and Report Tracking System (SMARTS) for the Zanker Rd Landfill in San Jose. This is self-reported data from 2006 to 2010 and Table 1 includes the number of samples collected in that time for a range of parameters, the average analytical result, the number of samples that were determined to exceed benchmark standards for stormwater discharges and the average value of those exceedances. Zanker Rd Landfill ranks among those facilities in the entire Bay Area with the highest number of benchmark exceedances. Moreover, this site consistently exceeds benchmark standards for aluminum, chemical oxygen demand (COD), copper, specific conductivity, iron, lead, magnesium, total suspended solids (TSS) and zinc.

**Table 1. Annual Self-Reported Stormwater Monitoring Data Ranging from 2006 to 2010**

| Parameter (units) | Benchmark Value | Number of Samples Reported | Average Result | # of Samples Exceeding Benchmark Standard | Average Exceedance Result |
|---|---|---|---|---|---|
| pH <6.5 (SU) | <6.5 | 27 | 8.11 | 0 | N/A |
| pH >8.5 (SU) | >8.5 | 27 | 8.11 | 1 | 9.55 |
| Aluminum (mg/l) | 0.75 | 24 | 3.11 | 21 | 3.54 |
| Arsenic (mg/l) | 0.169 | 19 | 0.1 | 0 | N/A |
| Chemical Oxygen Demand (mg/l) | 100 | 20 | 269.25 | 19 | 282.11 |
| Total Chromium (µg/l) | 50 | 3 | 26 | 0 | N/A |
| Copper (mg/l) | 0.02 | 7 | 0.05 | 5 | 0.07 |
| Specific Conductivity (µmhos/cm) | 200 | 27 | 2,987.01 | 25 | 3,225.6 |
| Iron (mg/l) | 1 | 25 | 3.37 | 20 | 4.13 |
| Lead (mg/l) | 0.05 | 7 | 0.09 | 6 | 0.1 |
| Magnesium (mg/l) | 0.636 | 27 | 41,925.93 | 27 | 41,925.93 |
| Oil and Grease (mg/l) | 15 | 1 | 0 | 0 | |
| Selenium (mg/l) | 0.239 | 19 | 0.2 | 0 | |
| Silver (mg/l) | 0.032 | 11 | 0.04 | 1 | 0.2 |
| Total Organic Carbon (mg/l) | 100 | 25 | 56 | 3 | 126.67 |
| Total Suspended Solids (mg/l) | 100 | 27 | 319.96 | 23 | 366.52 |
| Zinc (mg/l) | 0.1 | 22 | 13.24 | 16 | 18.18 |

Based upon review of historic documents, Nine Par Landfill included the property now known as Zanker Rd Landfill until the early 1980s, when an EIR and full agency review took place for the site, resulting in the capping and monitoring of Zanker Rd Landfill. Therefore, it is reasonable to assume that both the Nine Par and Zanker Rd sites received similar waste, were constructed in a similar manner and generate leachate of comparable chemical characteristics. Since Par Nine Landfill was not capped consistent with

modern standards it would also be reasonable to assume that stormwater quality from the site is equal to or worse than that found from Zanker Rd Landfill. However, the Initial Study and MND for the Proposed Project do not characterize the existing discharges from the site or evaluate whether the Proposed Project has the potential to exacerbate such discharges.

Prior to approval of the Proposed Project, the site should be subject to a robust monitoring program to determine the extent and magnitude of stormwater and groundwater-borne contaminant migration from Nine Par Landfill. This program should be approved and receive oversight by the San Francisco Bay Regional Water Quality Control Board (RWQCB), which should determine whether mitigation measures are required to prevent contaminated stormwater discharges or lateral migration of leachate to sensitive receptors. Until such a monitoring program is carried out, water quality-related impacts associated with the Proposed Project cannot be properly assessed.

**MND FAILS TO ADEQUATELY ADDRESS POTENTIAL GROUNDWATER CONTAMINATION**

As discussed above, hydrological and water quality impacts are assessed in Section 4.9 of the Revised Initial Study for the Proposed Project. This Section does not adequately assess existing groundwater conditions on the site or whether the Proposed Project could disturb the underlying landfill and exacerbate existing groundwater contamination. Following the release of the Initial Study a site investigation for the landfill was made publicly available.[2] This report includes water quality data from landfill leachate and groundwater as well as soil from the landfill cap indicating the site is a source of a number of priority pollutants.

Groundwater samples from the northwest corner of the Proposed Project site were found to exceed environmental screening levels (ESL) for trichloroethene and cis-1,2-dichloroethene. Total petroleum hydrocarbons were also observed from two other groundwater wells and ESLs were exceeded in one or more samples for all CAM 17 metals except antimony, cadmium, molybdenum, selenium, and thallium. Moreover, soil samples from the landfill cap exceeded ESLs for arsenic and analysis of a refuse sample yielded exceedances for arsenic, chromium, copper and zinc.

In consideration of the fact that Nine Par Landfill is immediately adjacent to San Francisco Bay and a known source of priority pollutants the Initial Study should assess the Proposed Project's potential for exacerbating the risk to San Francisco Bay and other sensitive receptors as a result of groundwater and stormwater-borne contamination. Prior to approval of the Proposed Project further monitoring should be conducted and an assessment should determine whether the existing landowner, the City of San José, must implement an engineered solution to managing contamination from the site under appropriate oversight of the RWQCB.

**MND FAILS TO ADEQUATELY RECOGNIZE WATER QUALITY-BASED IMPACTS TO BIOLOGICAL RESOURCES**

As discussed above, recent data indicates the site is a known source of priority pollutants, yet has not been engineered to contain such contaminants. Nor is the site subject to routine monitoring or

[2] Golder Associates Inc. May 2011. *Nine Par Landfill Site Investigation*. Prepared on behalf of Zero Waste Energy Development Company San Jose, California. Available at www.sanjoseca.gov

appropriate oversight by the RWQCB. Potential impacts to biological resources associated with the dispersal of contaminated soils and water were not addressed in the Initial study for the Proposed Project. Since the site is located adjacent to a federal wildlife reserve hosting several federal- and state-protected species a thorough assessment should determine whether the Proposed Project site currently poses a risk to protected species and whether the Proposed Project could exacerbate this risk. In either event, the site should be properly engineered to contain known contamination and minimize the risk to sensitive receptors.

**MND FAILS TO ADEQUATELY RECOGNIZE POTENTIAL IMPACTS ASSOCIATED WITH SEA LEVEL RISE**

Flood risk is considered in Section 4.9 of the Revised Initial Study for the Proposed Project, yet this section fails to recognize the potential impacts of sea level rise with regards to flood risk. According to the Revised Initial Study, Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps indicate the project site is located within Zone AE, with a flood elevation of 12 feet above mean sea level.[3] This suggests the site is already susceptible to significant flood risk that is likely to be exacerbated by small to moderate levels of sea level rise. This risk should be properly assessed and managed if the Proposed Project is to be considered sustainable over the projected lifetime of the project.

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Thank you for considering Baykeeper's comments. We urge you at this time not to adopt the MND and associated MM&R Plan prepared for the Dry-Fermentation Anaerobic Digester Facility until outstanding issues, including those presented here, can be addressed. If you have any questions, please feel free to contact me at (415) 856-0444, extension 108.

Sincerely,

Ian Wren
Staff Scientist
San Francisco Baykeeper

Attachment: Baykeeper comments on the Mitigated Negative Declaration for the Proposed Dry Fermentation Anaerobic Digestion Facility, Project No. SP09-057, May 9, 2011.

[3] Federal Emergency Management Agency. 2009. *Flood Insurance Rate Map. 006085C0062H & 06085C0055H*.

SAN FRANCISCO BAYKEEPER®

May 9, 2011

Ms. Jodie Clark
City of San José
Department of Planning, Building, and Code Enforcement
200 East Santa Clara Street
San José, CA 95113-1905
jodie.clark@sanjoseca.gov
*Submitted via electronic mail*

**RE: Comments on the Mitigated Negative Declaration for the Proposed Dry Fermentation Anaerobic Digestion Facility, Project No. SP09-057**

Dear Ms. Clark:

Thank you for the opportunity to comment on the Mitigated Negative Declaration ("MND") for the proposed Dry Fermentation Anaerobic Digestion Facility ("Project"). San Francisco Baykeeper ("Baykeeper") submits these comments on behalf of our 2,300 members that live, work, and recreate in and around the San Francisco Bay. Baykeeper is a 501(c)(3) non-profit organization with the mission of protecting and enhancing the water quality of the San Francisco Bay for the benefit of its ecosystems and surrounding communities. With the goal of minimizing impacts to the San Francisco Bay, Baykeeper submits the following comments.

## 1. The MND Unlawfully Segments Review of the Digestion Facility Project from the Water Pollution Control Plant Master Plan.

Before adopting a MND, the California Environmental Quality Act ("CEQA") requires a lead agency to review the environmental impacts of the *whole* project in an initial study. An agency may decide to "tier" review of a large-scale project that involves several small-scale projects in certain situations, but such tiering is unlawful if ignores the future environmental impacts of the project at issue. According to the CEQA Guidelines, "[t]iering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." Cal. Code Regs. tit. 14, § 15152(b). The California courts have made it abundantly clear that this practice, which is commonly known as "piecemealing," does not satisfy CEQA: "The requirements of CEQA cannot be avoided by piecemeal review which results from chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences." Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 Cal. 4th 459, 503; Rio Vista Farm Bureau Center v. County of Solano (1992) 5 Cal. App. 4th 351, 370.

In this case, the City of San José will unlawfully piecemeal the Project if it adopts the MND for the new Digestion Facility before it prepares the Programmatic Environmental Impact Report ("Environmental Impact Report") for the Water Pollution Control Plant and its buffer lands. As stated in the Project's Initial Study, the Project will be located on only 41 acres of a 96-acre

parcel of land. Initial Study, Page 5. The City of San José has designated the remainder of this parcel as a likely expansion area for the San José/Santa Clara Water Pollution Control Plant. *Id.* Considering the massive size of the Plant, which operates on a 2,600-acre site, the Project will have significant environmental impacts that are reasonably foreseeable when evaluated in conjunction with the Plant's future expansion and redevelopment. Even if the Project would result in relatively small environmental impacts by itself, the Project's impacts will be magnified by the future development of the Plant as seen in its Master Plan. Therefore, these future impacts must be considered by the City of San José *before* it adopts a MND for the Project.

The Project will result in several significant environmental impacts that are not addressed in its Initial Study. For example, the unused portion of the project site currently hosts a tidal marsh area that will be impacted by the future development of the Water Pollution Control Plant. This area also contains sites that may be contaminated with pollutants, such as the former Nine Par Landfill and an inactive recycled water filling station. The future development of these sites could release pollutants into to the San Francisco Bay, thereby impacting its water quality. Since the City of San José is well aware of the Plant's future development, it would be feasible for the City to analyze the cumulative impacts of the Project in its Initial Study.

**2. <u>The City of San José Must Prepare an EIR Because the Project Will Have Significant Environmental Impacts.</u>**

A lead agency must prepare an EIR instead of a Negative Declaration ("ND") if a "fair argument" can be made on the basis of "substantial evidence" in the record that the project may have a significant adverse environmental impact. Cal. Code Regs. tit. 14, § 15064(a)(1); Laurel Heights Improvement Association v. U.C. Regents (1993) 47 Cal.4th 376. A ND is authorized only when the lead agency determines that no substantial evidence exists to support a fair argument of significant effects. Cal. Code Regs. tit. 14, § 15063. Here, the Initial Study identifies several environmental impacts that are more than significant, mandating the City of San José to prepare an EIR that fully evaluates the Project's environmental impacts.

For example, relying on the Initial Study, the draft MND identifies several impacts that the Project will have on water quality and aquatic ecosystems. First, the MND concludes that the proposed Project will increase impervious surfaces on the project site, which could introduce pollutants into stormwater from the project area. Draft MND, Page 8. The Project may also cause a significant increase in the amount of contaminants in stormwater runoff during construction. *Id.* at 9. Even more, Project-related construction and grading activities could contaminate the adjacent aquatic and wetland habitats, such as the San Francisco Bay National Wildlife Refuge. *Id.* at 2. All of these impacts are significant and must be analyzed in an EIR.

**3. <u>The Notice of Intent to Adopt a MND is Inadequate Because it States that the City of San José Plans to Adopt the MND on the Same Day that it Receives Comments.</u>**

According to the City of San José's Notice of Intent, "the purpose of [the] notice is to inform the public of the Director's intent to adopt a Mitigated Negative Declaration for the proposed project on May 9, 2011," which is also the deadline for submitting comments on the proposed Project. If the City adopts the MND on the same day that it receives comments on the MND, the City will not have an adequate opportunity to consider and respond to comments. Instead, the City should

only adopt the MND after it provides itself with an adequate amount of time to consider and respond to all comments submitted by the public.

Thank you for considering Baykeeper's comments. If you have any questions, please feel free to contact me at (415) 856-0444, extension 109.

Sincerely,

Abigail D. Blodgett
Legal Fellow
San Francisco Baykeeper