

Bay Area Clean Water Agencies

Leading the Way to Protect Our Bay

A Joint Powers Public Agency

P.O. Box 24055, MS 702

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February 20, 2007

VIA EMAIL (commentletters@waterboards.ca.gov)

Ms. Tam Doduc, Chair, and Members
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Attention: Ms. Song Her, Clerk to the Board

RE: Comments on the Draft Order for Own Motion Review of East Bay Municipal Utility District's Wet Weather Permit (Order No. R2-2005-0047 [NPDES No. CA0038440]) and Time Schedule Order (Order No. R2-2005-0048), San Francisco Bay Region, SWRCB/OCC File A-1771

Dear Ms. Doduc and Members of the State Water Resources Control Board:

The Bay Area Clean Water Agencies (BACWA) appreciate the opportunity to comment on the draft order addressing the East Bay Municipal Utilities District (EBMUD) wet weather facilities, as well as make comments on policy issues raised in that same draft order. BACWA members own and operate publicly-owned treatment works (POTWs) that discharge to San Francisco Bay and its tributaries. Collectively, BACWA's members serve over 6 million people in the nine-county Bay Area, treating all domestic, commercial and a significant amount of industrial wastewater. BACWA was formed to develop a region-wide understanding of the watershed protection and enhancement needs through reliance on sound technical, scientific, environmental and economic information and to ensure that this understanding leads to long-term stewardship of the San Francisco Bay Estuary. BACWA member agencies are public agencies, governed by elected officials and managed by professionals who are dedicated to protecting our water environment and the public health.

BACWA hopes that the following comments will result in a **withdrawal** of the draft order.

The proposed Order has significant implications not only for EBMUD, but also for all clean water agencies in the San Francisco Bay region and the State of California. In the interest of administrative economy, BACWA's comments focus on the aspects of the Order addressing the interpretation of the 1994 National CSO Control Policy and the *Montgomery* decision, the provisions of the San Francisco Bay Basin Plan, the permit term, and the implications of the remand order for San Francisco Bay clean water agencies

Further, in order to avoid repetition, but to preserve these arguments, BACWA supports and incorporates by reference the comments made by EBMUD, the California Association of Sanitation Agencies (CASA), the Central Valley Clean Water Agencies (CVCWA), the National Association of Clean Water Agencies (NACWA), and the San Francisco Public Utilities Commission (SFPUC) in their respective comment letters.

I. Lack of Need for the Proposed Draft Order

First, BACWA would like to comment on the issuance of this draft order on the State Water Resources Control Board's own motion. BACWA fails to understand why such an order was necessary when an engaged stakeholder process was used in the creation and adoption of the EBMUD permit at issue. No one person or party appealed this permit, and U.S. EPA did not veto this permit. Given those facts, a presumption of legality should control. Notwithstanding that presumption, the draft order spends more than 30 pages tearing apart what would otherwise be presumed to be a legal permit. BACWA respectfully urges the State Water Resources Control Board (SWRCB) to credit the validity of a stakeholder driven process that resulted in a NPDES permit and a Time Schedule Order to undertake more investigations.

The SWRCB was well aware of the wet weather approach contained in the San Francisco Basin Plan. The San Francisco Bay Regional Water Quality Control Board (Regional Board) included in the 1975 Basin Plan a very specific plan to address wet weather overflows. *See* 1975 Basin Plan at pages 5-27 thru 5-35; *see also* current Basin Plan at Section 4.9.¹ The State Board reviewed and approved the 1975 Basin Plan on April 17, 1975 and specifically stated in their approving Resolution² that

"10. The San Francisco Bay Basin Plan contains a conceptual approach for the control of wet weather overflows directed toward and optimum economic solution for the protection of beneficial uses which we find represents a reasonable and appropriate step toward implementation of the prohibition of bypass of untreated waste contained in the Ocean Plan and the Bays and Estuary Policy."

The challenge to the Basin Plan's wet weather approach and EBMUD's wet weather facilities is prejudicial as it comes so late in the process. If the SWRCB was concerned that the Basin Plan provisions or EBMUD's wet weather facilities implemented under those provisions would not be lawful, the most appropriate time to raise these objections would have been before EBMUD embarked on the design and planning of its facilities, and well before EBMUD spent over \$300 million in reliance upon the approval of the regulatory agencies that these facilities were lawful. EBMUD's wet weather facilities represented an innovative approach to dealing with peak wet weather flow issues and these facilities have been in full operation, protecting the beneficial uses of the San Francisco Bay, for over a decade. BACWA does not understand why the SWRCB

¹ The Basin Plan at Section 4.9.2 includes a conceptual approach to controlling wet weather overflows, which recommends a "combination of designated alternative levels of maintenance (i.e., combination of treatment levels and beneficial use protection categories)." *See* Table 4-6 set forth below.

² SWRCB Resolution No. 75-28.

now tardily raises this laundry list of issues in this manner. BACWA believes that the Regional Board and EBMUD reasonably and responsibly implemented measures to address wet weather overflows consistent with legally adopted NPDES permits and the Water Quality Control Plan to protect the public health and the beneficial uses of the San Francisco Bay for the past roughly 30 years. Under the permit and Time Schedule Order (TSO) adopted by the Regional Board through a stakeholder process in September of 2005, EBMUD has committed to consider even more alternative approaches to addressing wet weather events. The SWRCB should allow the analysis and implementation of those alternatives to come to fruition instead of challenging the permit as is being done in the draft order.

BACWA is extremely concerned that the SWRCB is now taking up a review of the San Francisco Bay Basin Plan's provisions and the EBMUD permit on its own motion. The SWRCB, through this action, is sending a very chilling message to all regulated public and private agencies in the State. Essentially, the SWRCB is undoing 30 years of proactive, legally directed water quality planning and improvements. In so doing, the SWRCB is sending a warning to the regulated community not to trust the regulatory agency actions and not to invest in or take actions to protect beneficial uses. The message includes a warning to not work through issues in a stakeholder process as that resolution may be overturned, and, most importantly, not to commit to continue review and analyze alternatives that may lead to improved approaches to environmental improvements.

For these reasons, BACWA respectfully requests the SWRCB members to **withdraw the draft order** and allow the numerous studies contained in the EBMUD permit and TSO to be completed and the results analyzed as intended in the NPDES Permit and TSO.

II. Revise the Analysis to Reflect an Accurate Interpretation of the *Montgomery* Decision and the National CSO Control Policy.

The draft order's analysis misconstrues the applicable case law and confuses the term "treatment works," a term of art with specific meaning under the Clean Water Act, with generic concepts of "treating" sewage. In essence, the draft order concludes that the wet weather facilities are "treatment works" subject to secondary treatment standards merely because they treat and store municipal sewage of a liquid nature and are owned by a municipality. *See* SWRCB's Draft Order at pg. 10. On these issues, BACWA refers the SWRCB to the letters prepared by EBMUD, the San Francisco Public Utilities Commission, and the National Association of Clean Water Agencies, which conclude that the opposite result was reached by the Court of Appeals in *Montgomery Environmental Coalition v. Costle*.³ As noted by the Court, the essence of the controversy was whether overflow points are part of the "treatment works" within the meaning of section 301(b)(1)(B) of the Clean Water Act.

The Court concluded that the broad and inclusive definition of "treatment works" in section 212 of the Act did not define the meaning of that term for the purposes of applying the technology-based standards of section 301, and that EPA's exclusion of sewage overflow points from that

³ 646 F.2d 568 (D.C. Cir. 1980).

definition was an appropriate interpretation of the Act.⁴ Based on this determination, the Court concluded that the proper technology-based standard for regulating combined sewer overflows is the same standard that applies to private industrial discharges, rather than the secondary treatment standard applicable to publicly owned treatment works.⁵ EPA clearly understood that “treatment” of combined sewer overflows would not transform such facilities into publicly owned treatment works subject to secondary treatment standards.

This misreading of the *Montgomery* decision would render meaningless the CSO Policy. Congress’ codification of the CSO Policy embodies the concepts set forth in the *Montgomery* decision and solidifies EPA’s determination of the means and methods for meeting the technological and water quality standards by express incorporation into the Clean Water Act. Under the draft order, almost any effort to control combined sewer discharges would mean the flow is no longer “uninhibited, untreated or unimpeded,” and thus would be subject to secondary treatment requirements. This result was neither intended by the *Montgomery* court nor required by Congress in the CSO Policy.

BACWA urges the SWRCB Board members to remove the current discussion on the applicability of *Montgomery* decision and the National CSO Control Policy from the draft order as this discussion conflicts with the interpretations and intent of applicable case and statutory law.

III. The San Francisco Bay Plan is Consistent with Clean Water Act in Correctly Accounting for Intermittent and Seasonal Discharges

SWRCB’s Position – Conclusion 5:

The San Francisco Bay Basin Plan provisions governing wet weather wastewater overflows from POTWs conflict with applicable Clean Water Act requirements and must be revised.

BACWA’s Response: The SWRCB draft order’s statements about the validity of the San Francisco Bay Regional Water Board’s Basin Plan provisions related to wet weather overflows are surprising in light of the fact that both the SWRCB and the U.S. EPA approved the Basin Plan’s wet weather provisions over thirty years ago. As stated previously, the State Board carefully reviewed and approved the Regional Board’s Basin Plan approach on April 17, 1975. In the 1982 Basin Plan, the wet weather overflow approach contained in the Basin Plan implementation chapter was further discussed and directly tied to the water quality objective chapter of the Basin Plan. In so doing, the Regional Board clearly defined the concept of seasonal uses and tied the protection of these uses to compliance with water quality objectives through the clear definition of maintenance levels. See Table 4-6 below, and the July 21, 1982 Basin Plan at pages 3-2 and 4-25 through 4-26.

⁴ *Id.* at pg. 591.

⁵ *Id.* at pg. 592.

In this time period since the approval of the Basin Plan in 1975, the only new regulation/policy or law adopted that impacts the wet weather provisions was the National CSO Control Policy, which was adopted by EPA in April 1994, and codified into law in 2000 as Section 402(q) of the Clean Water Act. The Federal CSO Control Policy was promptly incorporated into the Basin Plan by the Regional Board. The SWRCB and U.S. EPA approved the June 21, 1995 Basin Plan Amendments that incorporated the CSO Policy.

EBMUD and the Regional Board have correctly operated under the presumption that these Basin Plan provisions are valid and consistent with the Clean Water Act and the California Water Code to reasonably protect beneficial uses and the public health. There have been no new requirements, laws, or successful legal challenges which would warrant a change to the Basin Plan.

Four generations of EBMUD permits and at least four generations of San Francisco NPDES permits have been issued by the Water Board based on the wet weather concepts and requirements of the 1975 Basin Plan and the subsequent updates in 1982 and 1995. The US EPA has the authority and responsibility to review all of these NPDES permits and chose to accept them without action. No challenge was ever made to the Basin Plan or any of these permits by third parties, and U.S. EPA never vetoed any of these NPDES permits. Thus, the historical record supports the presumption that the Basin Plan and implementing NPDES permits are legally valid.

The San Francisco Bay Basin Plan represents a model for the nation on how to ensure that beneficial uses are reasonably protected at the same time that the Clean Water Act is being fully implemented. The San Francisco Regional Board took the effort and time to draft a reasonable approach for dealing with wet weather overflows at a time long before there was state or national attention on this issue. For that, the Regional Board should be lauded, instead of chastised.

BACWA is surprised that any question of the Basin Plan by the State Board would be put forth in this manner rather than through participation in a triennial review process and a request from SWRCB staff that this issue be examined through the normal process in which Basin Plans are reviewed, and potentially amended.

The draft EBMUD order contains mischaracterizations and misunderstandings of the intent and purpose of the wet weather provisions contained in the Basin Plan. To understand the meaning, one should review what exactly the Basin Plan says. BACWA has attached sections (4.9 Wet Weather Overflows; 4.9.2 Conceptual Approach) of the Basin Plan as Appendix A to these comments for quick reference by the SWRCB members.

The Basin Plan's wet weather implementation provisions focus on the undeniable fact that these discharges are intermittent in nature, occurring during period of heavy rainfall, which for the San Francisco Bay Region is generally seasonal (i.e., during winter). The Basin Plan continues with an overarching implementation plan for this potential seasonal and intermittent discharge by adopting a conceptual approach focused on location and protection of specific beneficial uses, which could be impacted by these infrequent and seasonal discharges. This implementation plan is consistent with both state and federal law. Water Code §13242 and 33 U.S.C. §1313(e).

Even more fundamentally, and consistent with the Basin Planning process, Regional Boards have the ability to set uses, categorize uses, and allow for seasonal variations in the attainment of uses. 40 C.F.R. §131.10. In that vein, the Basin Plan contains a table providing the following treatment requirements for overflows:

Table 4-6: Controlling Wet-weather Overflows

Levels of Water Quality Protection	Appropriate Level of Treatment
A. Complete protection for areas where the aquatic environment should be free of any identifiable risk from the discharge of untreated waste (i.e., shellfish beds for year-round harvesting).	Secondary treatment up to 20- year recurrence interval; above 20-year overflows allowed.
B. Areas that do not need complete year-round protection, such as shellfish beds for dry-weather harvesting, public beaches, and other water contact areas.	Secondary treatment for all flows up to two-year recurrence interval; primary treatment up to 20-year recurrence interval; above 20-year overflows allowed.
C. Areas where water quality or aquatic productivity may be limited due to the pollution effects of a dense human population or other urban activities that are largely uncontrollable. Such areas may include some shipyards and harbors.	Secondary treatment to half-year recurrence interval; primary treatment to five-year recurrence interval; above five-year overflows allowed.

This table represents a reasonable set of requirements related to the regulation of overflows.⁶ Secondary treatment is only required to meet certain design levels depending on the environment where the overflow discharge is directed. Where beneficial uses are more limited, the requirements are less stringent. Where beneficial uses are intact and represent sensitive uses, such as shellfish beds, the design requirements are more stringent.

The Basin Plan provisions recognize the difficulties associated with wet weather issues and the realities of differing levels of beneficial use attainability in different seasons. The concept of design storm return periods have been used to set design standards in the stormwater management and regulation. Other states (*e.g.*, Oregon) have also incorporated design storm concepts into other regulatory approaches and these too have been approved by the U.S. EPA. Above those design parameters, the discharge could be deemed to be an upset, bypass, or other unusual condition, thereby allowing secondary treatment requirements to not apply.⁷

⁶ The CWA required that one part of Basin Plans relate to recommendation of “such treatment works as will provide the most effective and economical means of collection, storage, treatment and elimination.” 33 U.S.C. §1252(b)(2)(B).

⁷ The definition of “effluent concentrations consistently achievable through proper operation and maintenance” under the secondary treatment regulations recognizes that secondary treatment requirements are not expected to be met 100% of the time. In fact, this definition applies “for a given pollutant parameter [to the] 95th percentile value for the 30-day average effluent quality achieved by a treatment works in a period of at least two years, **excluding values attributable to upsets, bypasses, operational errors, or other unusual conditions.**” 40 C.F.R. §133.102(f).

In summary, because neither state law nor the CWA strictly prohibit (and arguably authorize such a seasonal approach) the Water Board's Basin Plan wet weather approach, and because the SWRCB and U.S. EPA expressly approved of these Basin Plan provisions as well as numerous generations of NPDES permits implementing these provisions, Conclusion 5 of the State Board Order is not valid.

IV. Water Quality Based Effluent Limitations

The elements of the SWRCB draft order that pertain to effluent limits and monitoring do not properly consider (a) the unique nature and frequency of the wet weather discharges in question, (b) feasible treatment alternatives for these discharges, (c) the history of the development and implementation of the EBMUD wet weather control program, which has included significant involvement by USEPA and SWRCB, and (d) the resulting regulatory framework that has been created in the San Francisco Basin Plan, NPDES permits and in other written documentation. In failing to properly consider these factors, the SWRCB seeks to impose a hard-line and narrow interpretation of Clean Water Act requirements and NPDES permitting rules that is out of context with the unique case in point and inappropriate in its application. The SWRCB draft order seeks to impose a heavy handed approach that will impose onerous and unnecessary effluent limits and monitoring requirements that will likely only produce compliance problems for EBMUD and will not contribute to meaningful improvements in receiving water quality or beneficial uses attainment.

On the other hand, the San Francisco Bay Regional Board, the U.S. EPA and others involved in the development of the NPDES permit for the EBMUD wet weather facilities properly considered these case-specific and historical factors in crafting the permit requirements. Those requirements mandate and encourage continued progress by EBMUD and the communities that use the EBMUD system to address legal and technical issues associated with discharges from the wet weather facilities. The permit and time schedule order lay out a reasonable approach to move forward aggressively to address these issues.

The only improvement upon this approach that BACWA would recommend would be the adoption of wet weather standards statewide. Other states, such as Ohio, Maine and Massachusetts have developed water quality standards and water body use classifications, which consider wet weather events.⁸

⁸ Water quality criteria for a variety of parameters, including chemical contaminants, microbiological indicators of fecal contamination, and physical characteristics such as color and temperature are usually set and enforced to protect ambient waters during normal or very low flow conditions. Under very high flow or wet weather conditions, numerical standards for some contaminants may be exceeded in a discharge, but the designated beneficial uses may not be impaired due to dilution from the storm event. For example, during flood events, numeric turbidity standards may be exceeded, but the recreational uses may be foreclosed for safety and weather-related reasons, not because of water quality conditions. The waters then return to normal uses when flood flows recede and waters are calmer. Achievement of numerical standards during all high-flow events would be prohibitively expensive and are likely not necessary to protect actual uses during those time periods. EPA's 1994 CSO Policy specifically permits modification of state water quality standards and related uses when the standards cannot be achieved because of CSOs.

SWRCB's position –Conclusion 6:

The San Francisco Bay Water Board must revise the EBMUD permit to address whether discharges from the wet weather facilities have reasonable potential to cause or contribute to an exceedance of the Basin Plan coliform and toxicity water quality objectives and, if reasonable potential exists, to include water quality-based effluent limits for coliform and WET.

On page 18 of the SWRCB draft order, the basis for this comment is stated to be Clean Water Act Section 301(b)(1)(C) and USEPA regulations contained in 40 CFR 122.44(d)(1)(i). The actual language of the Clean Water Act [Section 301, Effluent limitations] states that “there shall be achieved...any more stringent limitation, including those necessary to meet water quality standards...or required to implement any applicable water quality standard established pursuant to this chapter.” The actual language contained in 40 CFR 122.44(d)(1)(i) states “...each NPDES permit shall include...requirements...necessary to achieve water quality standards. Limitations must control all pollutants...which are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any water quality standard.”

On page 19 of the draft order, the SWRCB states: “the San Francisco Bay Water Board argues that technology-based permit limits for ...bacteria...protect water quality, apparently obviating the need for additional water quality-based effluent limitations...” Also, the draft order states “The San Francisco Bay Water Board did not appropriately implement applicable BP objectives for total coliform, toxicity...” The draft order states that “The permit and Fact Sheet do not discuss the applicable Basin Plan objectives in Table 3-1 or effluent limitations in Table 4-2 for coliform.” Finally, the draft order states “...the permit does not contain findings concerning reasonable potential or limitations or other requirements governing whole effluent toxicity (WET).”

BACWA's Response: The EBMUD permit includes coliform limits which have required the installation and operation of disinfection facilities at the EBMUD wet weather facilities to meet the Basin Plan objectives. The point raised in the order requiring the performance of a reasonable potential analysis for coliforms is therefore moot, since that analysis is just a tool to decide if effluent limits are needed in the absence of technology standards which can achieve the standard.

The coliform limits in the existing EBMUD permit reflect the Best Professional judgment of the Regional Board to *implement applicable water quality standards* for coliforms in San Francisco Bay. The San Francisco Bay Water Board (and most other Regional Water Boards in California) has long used effluent limitations for coliform bacteria that require application of specific disinfection technology targets to protect beneficial uses.

The draft order would apparently seek to impose a different method for derivation of effluent limits for coliforms than has been historically used. No basis or authority is cited for such an imposition. Whereas the Clean Water Act requires that limitations be imposed to “implement” the standard, the specific methodology to be employed in setting these limits is not mandated by the Clean Water Act or USEPA regulations. The Regional Water Board has properly exercised its judgment in the establishment of effluent limits for coliforms in the existing EBMUD permit. The discharges from the wet weather facilities are characterized as minor discharges by the Regional Board (and EPA). The discharges are episodic, infrequent and occur during wet weather periods and in locations where body contact uses in the Bay are uncommon in wet weather. These factors were well understood and were considered by the Regional Board in development of the EBMUD wet weather permit.

The effluent limits in the EBMUD permit directly match the water quality objectives in Table 3-1 for protection of body contact recreation uses. Since no shellfish beds exist in the vicinity of the wet weather facilities, and since shellfish harvesting activity is not common during the extreme wet weather periods under which the wet weather facilities discharge to the Bay, the Regional Board’s use of Table 3-1 objectives provides appropriate protection of existing beneficial uses.

Footnotes in Basin Plan Table 4-2 allow for exceptions for coliform limits during wet weather and in cases where it is demonstrated that beneficial uses will not be compromised by such an exception. Therefore, the allegation in the SWRCB draft order that the existing permit limits are in conflict with Table 4-2 is erroneous.

Regarding the need for an effluent limit for toxicity, the EBMUD permit contains receiving water limitations that stipulate that the discharges shall not cause toxic conditions. This permit limitation is commonly used and provides adequate protection of aquatic life uses and a direct connection to the narrative toxicity objectives in the Basin Plan. There is no requirement to go beyond this limitation to otherwise “implement” the toxicity objectives in the Basin Plan. In fact, the State Water Board has previously ruled that numeric effluent limits for chronic toxicity are not required, merely a trigger into additional analysis and reduction efforts. *See* SWRCB Order No. WQ 2003-0012 at pg. 9 (footnotes deleted)(holding that “[w]hile numeric effluent limitations are generally preferred, NPDES permits can legally contain ‘best management practices’ in lieu of numeric limitations where the permitting authority determines that numeric effluent limitations are not ‘feasible.’ In reviewing this petition and receiving comments from numerous interested persons on the propriety of including numeric effluent limitations for chronic toxicity in NPDES permits for publicly-owned treatment works that discharge to inland waters, we have determined that this issue should be considered in a regulatory setting, in order to allow for full public discussion and deliberation. We intend to modify the SIP to specifically address the issue.”); *see also id.* at pg. 17 (concluding that “[i]n the interim, these will be replaced by a narrative effluent limitation and other revisions necessary to ensure adequate limitations on chronic toxicity.”)

The assertions in the SWRCB order that the WWF discharges “can be expected to exhibit reasonable potential for WET” is without merit. No documented connection exists between reasonable potential for individual pollutants and WET. It is typical that plants routinely comply

with WET limits, yet may have difficulty complying with individual pollutant limits. The reverse is rarely observed. This is largely due to the conservatism employed in the calculation of the individual limits, which are driven by the avoidance of effects on the most sensitive forms of one or more sensitive species. For these reasons, it is BACWA's respectful conclusion that Conclusion 6 must be removed as incorrect.

SWRCB's Position – Conclusion 7:

The San Francisco Bay Water Board must revise the EBMUD permit to include appropriate effluent limitations and monitoring requirements for un-ionized ammonia.

The SWRCB states that the effluent from the wet weather facilities exhibits reasonable potential for ammonia because it is municipal wastewater. Further, the draft order indicates the belief of the SWRCB that it is inappropriate to only implement the ammonia water quality objective with receiving water limitations.

BACWA's Response: The permit contains a receiving water limitation, which states that the discharge shall not cause a violation of the Basin Plan objective for ammonia. This type of limitation is commonly used in NPDES permits throughout California and adequately implements the Basin Plan objective for un-ionized ammonia.

The assertion that reasonable potential exists for ammonia is made by SWRCB without any reference to data or performance of a reasonable potential analysis. Since ammonia is not governed by the SIP, an appropriate reasonable potential analysis would consider the fact that this is not sewage, rather a combination of sewage and I/I so therefore it is diluted in nature, the dilution of the wet weather discharges in the receiving water, appropriate averaging periods, and the attenuation of ammonia levels in the receiving water, in accordance with the U.S.EPA's Technical Support Document or the Basin Plan. The SWRCB's determination of the need for effluent limitations and monitoring in lieu of the receiving water limitation in the existing permit is without basis.

WQBELs are inappropriate because the ammonia standard was based on toxicity over time for continuous discharges. Since wet weather discharges are intermittent, a different wet weather standard should be developed. Forcing wet weather treatment facilities to attain a stringent numeric effluent limit for ammonia applicable to continuous discharges would require the installation of nitrification facilities. Conventional nitrification of the wet weather flows using biological treatment is infeasible given the intermittent and episodic nature of these flows. Source control to reduce ammonia is also infeasible, due to its innate presence as a component of domestic wastewater. If infeasible, a numeric effluent limitation is not required, and alternative requirements can be imposed. 40 C.F.R. §122.44(k)(3); *Communities for a Better Environment v. SWRCB*, 109 Cal.App.4th 1089, 1103-1105 (2003).

Given the infrequent and short-term nature of the wet weather discharges and the rapid decay of ammonia in the aquatic environment, coupled with the implied treatment requirements associated with strict effluent limitations on ammonia, it is unreasonable to impose ammonia effluent limits and ammonia monitoring requirements as described in the draft order. For these reasons,

BACWA respectfully urges that Conclusion 7 be removed or substantially revised to reflect these comments.

SWRCB's Position – Conclusion 8:

The San Francisco Bay Water Board must revise the EBMUD permit to include appropriate water quality-based effluent limitations for all pollutants with reasonable potential.

BACWA's Response: The pollutants in question are primarily trace organics that may be of concern as bioaccumulative pollutants. A number of these pollutants were infrequently detected at very low levels that exceeded California Toxics rule (CTR) criteria. Arguably, the permit could be amended to include performance-based effluent limits for the other pollutants that exhibit reasonable potential. However, as noted in the Fact Sheet, the detected data for these pollutants was inadequate to calculate or establish performance-based limits. On the other hand, the wet weather facilities will likely never be able to consistently meet all CTR criteria if imposed as end-of-pipe limits. Therefore, imposition of effluent limits for many of these pollutants should be avoided since the following have been demonstrated, or are being studied under the terms of the TSO: (a) the infeasibility of treatment, and (b) the minor impacts on the Bay associated with negligible annual mass loadings of these pollutants from the wet weather facilities.

The TSO addresses these issues both by requiring EBMUD to investigate a one-system permit model that analyzes the feasibility of meeting permit limits by combining the WWFs and the main treatment plant under a single permit.⁹ See Order No. R2-2005-0048 at pg. 11. This report is just a few months away from the required submittal date. In addition, the TSO requires a study of the costs and benefits of toxic pollutant reductions and offsets. *Id.* at pg. 12. These studies will address the feasibility of additional actions by EBMUD. These studies should not be ignored by the State Board.

If no other feasible options are available, then numeric WQBELs should not be prescribed. Pursuant to 40 C.F.R. §122.44(k)(3), where numeric water quality based effluent limitations are infeasible, alternative non-numeric effluent limitations can be used, such as source control, best management practices, or narrative limitations. See SWRCB Order No. WQ 2003-0012 at pg. 9. A California Court of Appeals has held as much, and this decision is **binding upon the SWRCB** as the defendant in that case. See *Communities for a Better Environment v. SWRCB*, 109 Cal.App.4th 1089, 1103-1105 (2003). Furthermore, "the definition of 'effluent limitation' in the CWA refers to 'any restriction,' does not specify that a limitation must be numeric, and provides that an effluent limitation may be a schedule of compliance." *Id.* at 1104 citing 33 U.S.C. §1362(11); see also *In the Matter of the Petition of Citizens for a Better Environment, et al.*, SWRCB Order No. WQ 91-03, 1991 WL 135460 at pg. 12 (1991).

⁹ Arguably this could be done for secondary treatment requirements, too. Similar to a blending concept, a consolidated approach might be feasible.

For these reasons, BACWA respectfully urges that Conclusion 8 must be amended to insert other options for “effluent limitations” that would comply with this conclusion.

SWRCB’s Position – Conclusion 9:

The San Francisco Bay Water Board must use the current, applicable Basin Plan in conducting the reasonable potential analysis.

The SWRCB, on page 22 of the draft order, notes that the effluent limitations in the existing permit for lead, nickel and zinc, which were calculated using the 1995 Basin Plan objectives, are more stringent than limitations based on the 2005 Basin Plan objectives for these metals.

BACWA’s Response: BACWA agrees that reasonable potential analysis should be based on the 2005 Basin Plan objectives. While the Fact Sheet states that this analysis was based on the 1995 Basin Plan objectives, the findings in the permit itself indicate that the 2005 objectives were used. Therefore, it appears that the permit already addresses the point raised in the SWRCB draft order. Also, as properly noted in the Fact Sheet, the compliance schedule for final effluent limits for these metals (in the next permit) should extend to 2015, since these limitations would be based on Basin Plan objectives (not the CTR), and the Basin Plan authorizes a 10-year time schedule.

Additional BACWA Proposal: Instead of chastising the Regional Board, the State Board should encourage creative thinking. The draft order at page 18 recognizes that “[t]he San Francisco Bay Water Board retains considerable flexibility to set wet weather water quality standards and a program of implementation for wet weather. The strategy can afford POTWs appropriate flexibility for meeting water quality standards as required by section 301(b)(1)(C) of the Clean Water Act during wet weather.” Perhaps the SWRCB should consider adoption of wet weather standards statewide instead of putting the onus to do so on individual regional boards whose staff is already overburdened with other regulatory programs. Other states, such as Ohio, Maine and Massachusetts have developed water quality standards and water body use classifications, which consider wet weather events.¹⁰

V. Monitoring Requirements

¹⁰ Water quality criteria for a variety of parameters, including chemical contaminants, microbiological indicators of fecal contamination, and physical characteristics such as color and temperature are usually set and enforced to protect ambient waters during normal or very low flow conditions. Under very high flow or wet weather conditions, numerical standards for some contaminants may be exceeded in a discharge, but the designated beneficial uses may not be impaired due to dilution from the storm event. For example, during flood events, numeric turbidity standards may be exceeded, but the recreational uses may be foreclosed for safety and weather-related reasons, not because of water quality conditions. The waters then return to normal uses when flood flows recede and waters are calmer. Achievement of numerical standards during all high-flow events would be prohibitively expensive and are likely not necessary to protect actual uses during those time periods. EPA’s 1994 CSO Policy specifically permits modification of state water quality standards and related uses when the standards cannot be achieved because of CSOs.

In general, mandates in the SWRCB draft order to revise monitoring requirements in the Self Monitoring Program (SMP) are unwarranted. Regional Water Boards typically spend considerable time on a permit-specific basis working with NPDES permittees to arrive at Self Monitoring Program requirements that strike a reasonable balance between the cost of monitoring and the value of the information obtained. Considerations in this effort include the effluent quality of the discharge, frequency of the discharge, area of impact of the discharge, observed ambient conditions, monitoring cost, monitoring logistics, and others. The resulting monitoring requirements reflect the combined professional judgment of Regional Water Board staff and the professional staff of the wastewater treatment entity. In practical terms, a remand order is no way to communicate with the Regional Board on issues at this level of detail. The mandates in the draft order on this topic are untimely and reflect undue micromanagement of a key function of the Regional Water Board.

SWRCB's position – Conclusion 21:

The self monitoring program must be revised to require monitoring for total coliform, BOD, and TSS for each discharge event.

On page 32 of the draft order, the SWRCB states that monitoring of each discharge is necessary to assess compliance with permit limits and to evaluate facility performance.

BACWA's Response: There is no federal or State requirement that this change to require more intensive sampling be added to the self monitoring program (SMP) for either compliance or performance evaluation purposes. The San Francisco Bay Water Board has reviewed this issue and, based on best professional judgment, has decided on appropriate compliance monitoring frequencies for total coliform, BOD and TSS. In order for the SWRCB to overrule this judgment, there must be clear rationale based on federal or State requirements. If the SWRCB merely disagrees with the Regional Water Board's judgment on this issue, it should be taken up in the Basin Planning or triennial review process, and not as a remand action on an individual permit.

SWRCB's Position – Conclusion 22:

The self monitoring program must be revised to include appropriate monitoring requirements for dissolved oxygen and sulfide.

BACWA's Response: No rationale or overriding need is stated for this requirement in the draft order. Dissolved oxygen violations are not an observed problem in San Francisco Bay. Sulfides are not present under aerobic conditions. The San Francisco Bay Water Board has used its best professional judgment and knowledge of Bay conditions to determine the need for dissolved oxygen or sulfide monitoring in the shallow tidal areas near the wet weather facility discharge points, balancing the cost and difficulty of monitoring against the value of the information obtained. See also BACWA's response for Conclusion 21.

SWRCB's Position – Conclusion 23:

The self monitoring program must be revised to require influent monitoring of BOD and TSS.

The SWRCB states that influent monitoring is required to assess facility performance and because secondary treatment is the applicable standard for the wet weather facilities.

BACWA's Response: No federal or State requirement or other rationale is stated to support the need to assess wet weather facility performance in the draft order. Influent monitoring is sometimes required in NPDES permits to support source control or pretreatment programs. In this case, EBMUD would address this need at its main wastewater treatment facility. Regarding the reference to secondary treatment, see arguments against the imposition of federal secondary requirements on the wet weather facilities.

SWRCB's Position – Conclusion 24:

The self monitoring program must be revised to ensure that representative total and fecal coliform samples are taken.

BACWA's Response: The permit calls for monthly samples of total coliforms. The federal regulations at 40 C.F.R. §122.48 state that permits shall specify monitoring sufficient to yield data that are representative of the monitored activity. The San Francisco Bay Water Board has determined that monthly monitoring of total coliforms is an adequate frequency based on knowledge of the effluent quality of the wet weather facilities, and other factors. SWRCB has no clear authority or mandate to impose this requirement.

SWRCB's Position – Conclusion 25:

Provision E.8 and footnote 6 to Table 1 of the SMP must be revised to ensure that changes to the SMP are consistent with applicable EPA regulations on permit modifications.

BACWA's Response: This appears to be a minor change that would not warrant remand. Case law and regulations set the requirements for permit modifications whether or not it is expressly stated in the permit.

SWRCB's Position – Conclusion 26:

Provision E.9 of the permit must be revised to delete language stating that if the standard provisions differ from the permit provisions, the permit provisions prevail. Provision E.9 must ensure that the discharger complies with the minimum federally-required standard conditions..

BACWA's Response: It is unclear whether the permit must be amended as stated in this Conclusion. The standard provisions can be incorporated by reference and not included at all in the permit. Further, the permit can amend the standard provisions so long as the minimum required elements are maintained that fit the type of treatment facility at issue. If the standard

provisions are included, then the upset and bypass provisions will be express and can be applied to any situation where the specified design storm is exceeded.

VI. Shortened Permit Terms Are Not Unlawful.

SWRCB position – Conclusion 10: *The San Francisco Bay Water Board abused its discretion in shortening the permit term in order to avoid putting final limits for CTR constituents in the permit.*

BACWA's Response: BACWA would like to comment on the draft order's discussion on page 27,¹¹ and conclusions on page 34 in paragraph 10 of shortened permit terms. Nothing is illegal about issuance of a permit less than five years in length. In fact, the Clean Water Act specifically mandates that States are to issue permits "for fixed terms not exceeding five years." 33 U.S.C. §1342(b)(1)(B)(emphasis added). Similarly, federal regulations state that "NPDES permits shall be effective for a fixed term not to exceed 5 years." 40 C.F.R. §122.46(a). In addition, the federal regulations contemplate that the permitting authority "may issue any permit for duration *less than the full allowable term* under this section." 40 C.F.R. §122.46(c)(italics added). States with delegated NPDES permit programs are required to follow these federal requirements. 40 C.F.R. §123.25(a)(17). Nothing in federal or state law prevents a permit term from being for four years, one year, or one day. The Regional Board did not abuse its discretion by shortening the permit term in the EBMUD permit. For these reasons, the discussion of this matter on page 27 and Conclusion 10 should be deleted from the draft order.

VII. The Tone of the Draft Order Should Be Reviewed and Revised.

Before completing comments on the proposed order BACWA is compelled express concern that the SWRCB has used such inflammatory and insulting language when referring to that actions of a sister agency, namely the Region 2 Water Board. We have questioned why these issues were raised in this format rather than a more open and usual approach through Basin Plan reviews, policy development and general discussion that we can only presume regularly take place between SWRCB staff, including the Regional Board Executive Officers and the SWRCB's Executive Director and Deputy. We continue to be surprised at the lengthy list of issues that was derived and raised in the draft remand order. What is even more troublesome for BACWA members is the disrespect shown for the hard work and professional approach that the Regional Water Board, including the Board Members, and the staff that developed this permit and the Basin Plan on which it is based.

BACWA members do not always concur with either the Regional Board or with the SWRCB.

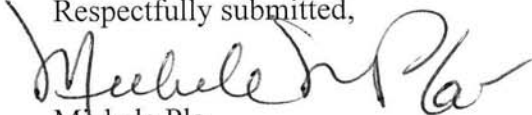
¹¹ The draft order at page 27 states: "The record reflects, however, that the San Francisco Bay Water Board intentionally shortened the permit term in order to avoid putting final effluent limitations in the permit. In our view, this approach was an abuse of discretion." Footnote 132 attached to this draft order language cites to an email from the Regional Board to EPA stating that "permits issued over the last three years were generally given a term of 4 years and 11 months to make the compliance schedule, which normally is five years for CTR criteria, exceed the permit life." Nothing is unlawful or sinister about this action either. Federal regulations have specifically contemplated that final compliance dates may not occur during the term of a permit. *See e.g.*, 40 C.F.R. §131.38(e)(7). Furthermore, EPA reviewed and did not object to or veto this 2005 permit on this grounds.

However, we respect their positions and the seriousness which they apply to their work. Perhaps the SWRCB disagrees with some of the policy choices made by the Regional Board, but such reasonable differences clearly do not amount to an abuse of discretion, and BACWA hopes that the SWRCB would carefully consider such assertions before including them in a public document, even in draft form.

BACWA respectfully requests that the SWRCB give close attention to the comments made herein on its proposed draft order. Representatives of BACWA will be available at the hearing scheduled for March 6, 2007, to provide additional information and answer any questions the Board members might have on BACWA's comments set forth herein.

In closing, BACWA finds no urgency is needed in relation to the adoption of this draft order. EBMUD's wet weather facilities have been in use for years, and the draft order provides no evidence that the discharges from these facilities is actually causing harm or detrimentally affecting beneficial uses.¹² For these reasons, BACWA requests that the State Board **withdraw** this order and address the issues contained therein as statewide policy issues in which time is provided to consider and weight policy approaches and the environmental impacts, instead of in an remand order on the EBMUD facilities.

Respectfully submitted,



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John Roddy, City Attorney, City and County of San Francisco

¹² Orders not supported by the findings, or findings not supported by the evidence, constitute an abuse of discretion. *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 515; *California Edison v. SWRCB*, 116 Cal. App.3d 751, 761 (4th Dt. 1981); see also *In the Matter of the Petition of City and County of San Francisco, et al.*, State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995).

Appendix A

San Francisco Bay Basin Plan Sections:

“4.9 WET WEATHER OVERFLOWS

During periods of heavy rainfall, large pulses of water enter sewerage systems. When these pulses exceed the collection, treatment, or disposal capacity of a sewerage system, overflows occur. This is especially problematic for sewer systems that combine both sanitary sewage and stormwater (Combined Sewer Systems or CSS), such as the City and County of San Francisco’s system (discussed under the municipal discharger section). All other municipalities in the region operate two distinct sewer systems. Wet weather is also problematic for separate systems because more water infiltrates the pipes leading to treatment plants. This problem is commonly referred to as inflow/infiltration (I/I). In either case, pulses of water during wet weather may cause untreated or partially treated wastewater to be discharged directly to surface water bodies.

Wet weather overflows of wastewater affect three types of beneficial uses: water contact recreation, non-contact water recreation, and shellfish harvesting. The water quality characteristics that can adversely affect these beneficial uses are pathogens, oxygen-demanding pollutants, suspended and settleable solids, nutrients, toxics, and floatable matter.

Additionally, the following is the Water Board’s recommended approach to control the seasonal degradation of water quality that results from all wet weather overflows of wastewater, including POTWs with either combined and separate sewer systems, (emphasis added) and industrial wastewater facilities. The overflow from San Francisco’s combined sewer system is addressed by the CSO Control Policy described above.

4.9.2 CONCEPTUAL APPROACH

The recommended approach to controlling wet weather overflows of wastewater that contains particular characteristics of concern to beneficial uses is a combination of designated alternative levels of maintenance (i.e., combination of treatment levels and beneficial use protection categories) and guidance for the design of overflow discharge structures. The Water Board is not endorsing any specific control measures, but is presenting a conceptual framework that allows for the evaluation of costs and benefits. This framework can be used as guidance in adopting specific control measures. As with all of its programs, the Water Board will implement this conceptual approach consistent with the national goal of “...water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.”¹³

Maintenance and associated treatment and overflow requirements are detailed in Table 4-8 [sic – Table 4-6]. The following requirements should be met for all overflows:

- (a) Outfalls achieve an initial dilution of 10:1;
- (b) Overflows receive treatment to remove large visible floatable material and to protect the outfall system; and

¹³ This quotation recites a Clean Water Act interim goal. See CWA §101(a)(2); 33 U.S.C. §1251(a)(2).

- (c) Overflow locations be removed from dead-end sloughs and channels, and from close proximity to beaches and marinas.

Exceptions to (a) and (c) will be considered where an inordinate burden would be placed on the discharger relative to beneficial uses protected, and when an equivalent level of environmental protection can be achieved by alternative means, such as an alternative discharge site, a higher level of treatment, and/or improved treatment reliability.

The conceptual approach described above will be used by the Water Board in evaluating wet weather discharge conditions where polluted stormwater or process wastewater bypasses any treatment unit or units that are used in the normal treatment of the waste stream. Evaluation of such discharges must include identification of:

- Actual capacities of the collection system, each treatment unit, and the disposal system;
- Flow return period probabilities for the specific facility location;
- Cost of providing complete storage or treatment capacity and disposal capacity for flow return periods of 1, 5, and 20 years;
- Quality of the polluted stormwater and process wastewater for flow return periods of 1, 5, and 20, years; and
- Beneficial uses that may be affected by such discharges.”