CALIFORNIA ASSOCIATION of SANITATION AGENCIES

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February 20, 2007

3/6/07 BdMtg Item 5
EBMUD
Deadline: 2/20/07 5pm

Via Electronic Mail & Hand-Delivery

Tam Doduc, Chair, and Members
State Water Resources Control Board
1001 I Street
Sacramento CA 95814

ATTN: Song Her, Clerk to the Board, commentletters@waterboards.ca.gov

SUBJECT: **DRAFT STATE WATER BOARD ORDER REGARDING EBMUD WET WEATHER PERMIT AND TIME SCHEDULE ORDER—SWRCB/OCC FILE NO. A-1771**

Dear Chair Doduc and Members of the Board:

The California Association of Sanitation Agencies (CASA) appreciates the opportunity to provide comments on the draft Order regarding the NPDES permit and time schedule order issued to the East Bay Municipal Utility District (EBMUD) for its wet weather facilities. The draft Order has significant implications not only for EBMUD, but also for all public wastewater agencies in the State. In the interest of administrative economy, CASA's comments focus on the aspects of the Order addressing compliance schedules, reasonable potential and calculation of effluent limitations. However, we incorporate by reference and endorse the comments filed separately by EBMUD, the Bay Area Clean Water Agencies (BACWA), the San Francisco Public Utilities Commission and the National Association of Clean Water Agencies (NACWA).

For the reasons detailed below, we urge the State Water Resources Control Board (State Water Board) to reject the draft Order in its entirety.

The State Water Board Should Address Compliance Schedules Through Development of a Policy Subject to Notice and Comment.

In October 2006, the State Water Board directed staff to prepare a Compliance Schedule Policy for consideration by the Board. At the time the Board gave this direction, Board Members indicated a desire to improve clarity and consistency across the regional boards with regard to availability of schedules of compliance, and indicated its intent to involve a variety of stakeholders in a dialogue on the appropriate duration, scope and elements of compliance schedules. Such a policy would be adopted pursuant to the Board's quasi-legislative authority, and would not be subject to the same constraints and strictures as on the

record adjudicatory proceedings. CASA does not concede that a statewide policy is needed, but if the State Water Board believes compliance schedules should be addressed, the proposed process discussed in October 2006 is the proper path for the development of such a policy.

Nearly one-third of the draft order is devoted to addressing compliance schedule issues, which, if adopted, would establish new state policy on a number of aspects of compliance schedule implementation. CASA submits that a quasi-adjudicatory proceeding on the Board's own motion is not the best mechanism for addressing issues of statewide importance involving various stakeholder perspectives, and implicating questions of policy as well as law. This is particularly the case where, as here, one of the four members of the Board is not able to participate in the decision and debate.

In light of the Board's intent to proceed with the compliance schedule policy on a relatively fast track, we are aware of no urgency to resolve the issues in the draft Order. The permit for EBMUD's wet weather facilities was adopted 18 months ago after significant involvement of environmental organizations, the State and U.S. EPA. Despite the significant spotlight under which the permit and TSO were adopted, no entity or individual requested that the Board review or overturn the Regional Water Board's action.[1]

If the State Water Board believes it is important to address compliance schedule issues, CASA urges the State Water Board to move forward with development of a policy involving full and fair discussion with the State Water Board, regional water boards and affected stakeholders and reject the draft Order.

The Compliance Schedules Included in the Permit Mandate Timely Achievement of Adequate and Proper Remedial Objectives, Notwithstanding the Lack of a Designated "Endpoint" for Compliance.

The draft order faults the Regional Water Board for including allegedly deficient compliance schedules in the permit. The compliance schedules are criticized for at least two reasons. First, the draft order claims that the compliance schedules fail to include a "final endpoint." (Draft Order, p. 24.) Second, the draft order claims that the schedules "do not include an enforceable sequence of actions or operations leading to compliance with the effluent limitations." (*Ibid.*)

The CWA defines the term "schedule of compliance" as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." (CWA § 502(17) [33

[1] We have difficulty understanding why EBMUD's reasonable request for an additional 90 days to provide comments on the draft order was denied, given the almost unprecedented nature of the potential impact of this order on the District's operations, ratepayers and exposure to liability.

U.S.C. § 1362 (17)].) The state's SIP further elaborates the requirements for a proper compliance schedule:

Based on an existing discharger's request and demonstration that it is infeasible for the discharger to achieve immediate compliance with a CTR criterion or with an effluent limitation based on a CTR criterion, the RWQCB may establish a compliance schedule in an NPDES permit. Compliance schedules shall not be allowed in permits for new dischargers.

A schedule of compliance shall include a ***series of required actions*** to be undertaken for the purpose of achieving a CTR criterion and/or effluent limitations based on a CTR criterion. These actions shall demonstrate ***reasonable progress toward the attainment of a CTR criterion*** and/or effluent limitations. The compliance schedule shall include a schedule for completion that reflects a realistic assessment of the shortest practicable time required to perform ***each task***. (SIP, § 2.1; emphasis added.)

Nowhere in the CWA definition is there any requirement of a designated "endpoint" as part of a compliance schedule. Nor does the SIP require that compliance schedules include an ultimate endpoint in addition to the task-specific schedule for completion of actions. Similarly, federal regulations specify criteria for governing *interim* compliance dates, but are silent as to an ultimate endpoint for compliance. (40 C.F.R. §122.47(a)(3).) No "endpoint" requirement diminishes the Regional Board's authority to approve a compliance schedule that, in the Regional Board's opinion, is necessary to allow the permittee a "reasonable opportunity to attain compliance" with newly revised discharge requirements. (See 40 C.F.R. § 122.47(a)(2).)

Compliance schedules must, by statutory definition, include "enforceable actions or operations leading to compliance." (CWA § 502(17) [33 U.S.C. § 1362].) As acknowledged on page 26 of the draft order, the compliance schedules in the permit and accompanying Time Schedule Order (TSO) include a series of studies identifying and evaluating a number of regulatory and engineering remedies to address the noncompliant status of EBMUD's wet weather facilities. (See California Regional Water Quality Control Board, San Francisco Bay Region, Time Schedule Order No. R2-2005-0048, Section A, pp. 10-17.) Completion of these studies, and other provisions of the TSO, is integrated as an enforceable term in the permit itself. (California Water Quality Control Board, San Francisco Bay Region, Order No. R2-2005-005-0047, Section E, subdiv. 1, pp. 24-25.)

Despite the inclusion of specific, enforceable actions in the permit issued by the Regional Water Board, the State Water Board's draft Order characterizes these studies as a "paper effort" at compliance and states that the Board does not "believe that these provisions meet the regulatory requirement of a schedule of enforceable remedial measures leading to compliance with water quality standards." (Draft Order, p. 26.) It would be unjustifiably harsh to summarily dismiss in this manner EBMUD's resource intensive investigation of compliance

alternatives, in light of the significant recent change in the way U.S. EPA appears to be interpreting its regulatory authority over wet weather facilities. U.S. EPA's decision in 2004 that wet weather treatment facilities must meet secondary treatment requirements seems to contradict a nearly 18 year-old regulatory opinion—an opinion upon which EBMUD had relied when it built the three WWFs subject to the permit. (See the "History and Background" discussion in California Water Quality Control Board, San Francisco Bay Region, Order No. R2-2005-005-0047, pp. 5-7.) EBMUD's extensive study of all regulatory alternatives is both understandable and justifiable given the magnitude of the agency's investment in the facilities to date, and given the potential impact of the recent regulatory change on the viability of continued operation of the facilities. Taken in historical and regulatory perspective, the specific actions called for in the permit's compliance schedule represent a reasonable and prudent course of action. Therefore, the Regional Board was justified in including the terms of the compliance schedule in the permit.

Nothing in the Basin Plan, Law or Regulation Restricts the Availability of Compliance Schedules to "Less Stringent" Objectives.

The draft Order (conclusions #13 and #15) states that the San Francisco Bay Water Quality Control Plan (hereinafter Basin Plan) authorizes compliance schedules in NPDES permits only if the effluent limitations subject to the compliance schedule implement objectives more stringent than objectives previously in effect. The draft Order provides no citations or supporting documentation for these conclusions, however, simply stating in conclusory fashion that "[c]ompliance schedules are not appropriate where, as in this case, revised objectives are adopted that are less stringent than objectives that were in effect for 20 years." (Draft Order, p. 28.) This contention is not supported by the Basin Plan, federal law or U.S. EPA's previous interpretations.

The San Francisco Bay Basin Plan states that "[a]s new objectives or standards are adopted, permits will be revised accordingly." (San Francisco Bay Basin Plan 4-14.) The State Water Board has found that this "language can reasonably be construed to authorize compliance schedules for new interpretations of existing standards." (SWRCB WQO 2001-06, p. 54.) Neither the Basin Plan language nor the State Board's interpretation thereof has limited the application of compliance schedules to new or revised objectives that are *more stringent* then those in effect at the time that the compliance schedule provisions were adopted. The relevant inquiry is whether or not the permittee can immediately comply with the new limitations imposed under the new or revised objective.

The federal Clean Water Act explicitly allows for schedules of compliance for new or revised water quality standards. (CWA §1313(e)(3)(F).) Such schedules of compliance are not limited to new or revised water quality standards that are more stringent than those previously in effect. In *Communities for a Better Environment v. State Water Resources Control Board* (2005) 132 Cal.App.4th 1313, the California Court of Appeal upheld a trial court decision that found compliance schedules are authorized when the State adopts a new or revised

interpretation of an existing water quality standard--without caveats as to the relative stringency of the new and existing objectives.

U.S. EPA considers compliance schedules to be part of the implementation of State's water quality standards, and therefore U.S. EPA reviews and approves compliance schedule provisions as part of the continuing planning process. (*In re Star-Kist Caribe, Inc.*, 3 Environmental Administrative Decisions (EAD) (1990) 172, 1990 EPA App. LEXIS 45, *22, fn. 16; see also 33 U.S.C. §1313(e)(3)(F) (requiring adequate implementation, including schedules of compliance for revised or new water quality standards, under subsection (c) of this section.) U.S. EPA reviewed and approved the compliance schedule provisions in the San Francisco Bay Basin Plan. EPA has also reviewed compliance schedule language contained in other Basin Plans in California that do not limit compliance schedules to new or revised objectives that are more stringent. For example, language contained in North Coast Water Quality Control Plan, which was approved by U.S. EPA, allows for compliance schedules for effluent limitations or receiving water limitations that "implement new, revised or newly interpreted water quality objectives, criteria or prohibitions." (Letter to Tom Howard, Acting Executive Director from Alexis Strauss, Director, Water Division, U.S. EPA Region IX, Nov. 29, 2006.) The authorizing language does not limit the application of compliance schedules to new or revised water quality objectives that are more stringent. Similarly, the language contained in the Los Angeles Water Quality Control Plan, approved by U.S. EPA in February of 2004, states that compliance schedules are authorized for standards that are adopted, revised or newly interpreted after the effective date of the amendment." (Los Angeles Water Quality Control Plan, Chapter 3.) The Sacramento San Joaquin River Water Quality Control Plan includes a compliance schedule authorization provision for water quality objectives or criteria adopted after September 25, 1995—again, without regard to the stringency of the objectives. [2]

U.S. EPA recently articulated its position regarding compliance schedule authorizing provisions in its November 2006 communication to the State Water Board.[3] U.S. EPA confirms that the State may authorize compliance schedules for a permittee to comply with an effluent limitation that implements a new or revised water quality standard. (Attachment to Letter, Discussion of Selected Issues, p. 4.) U.S. EPA does refer to stringency with regard to the compliance schedule provisions contained in the California Toxics Rule (CTR) (40 CFR §131.38(e)) limiting compliance schedules to situations where implementation of the water

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[2] A review of existing Basin Plan compliance schedule provisions reveals that the only reference to "more stringent" objectives is contained in the Los Angeles Basin Plan's definition of "newly interpreted water quality standard." In that instance, a "newly interpreted water quality standard" means "a narrative water quality objective that when interpreted by the Regional Board during NPDES permit development (using appropriate scientific information and consistent with state and federal law) to determine the numeric effluent limits necessary to implement the narrative objective, results in a numeric effluent limitation more stringent than the prior NPDES permit issued to the discharger." Clearly, the need for "more stringency" here is related to the calculation of the effluent limitation and not the actual water quality objective. Thus, this language does not support the conclusions in the draft Order.

[3] Letter to Tom Howard, Acting Executive Director, State Water Resources Control Board from Alexis Srauss, Director, Water Division, U.S. Environmental Protection Agency, Region IX, November 29, 2006.

quality criteria contained in the CTR results in *water quality based effluent limitations that are new or more restrictive* then previous effluent limitations. The authorizing compliance schedule language in the CTR is triggered by the water quality based effluent limitation and not the underlying criteria. In any case, the objectives in question are Basin Plan objectives and are therefore subject to the compliance schedule provisions contained in the Basin Plan, and not the CTR.

The draft Order concludes that the Regional Board erred in conducting a reasonable potential analysis based on the 1986 Basin Plan objectives instead of the 2005 objectives. Even if this is the case, however, the Regional Water Board has the discretion to authorize compliance schedules for effluent limitations derived from the 2005 Basin Plan objectives.

Basin Plan Compliance Schedules are Available for Effluent Limitations Derived from Basin Plan Objectives Without Regard to Their Similarity to CTR Criteria.

The draft Order contends that the Regional Water Board may not include compliance schedules that extend beyond May 18, 2010 for effluent limitations that are based on Basin Plan objectives identical to CTR criteria. (Draft Order, Conclusion #14.) This conclusion is erroneous. The fact that the Basin Plan objectives for certain constituents are identical to the CTR criteria for those constituents does not magically transform them into federally promulgated criteria subject to the CTR sunset date.

When U.S. EPA promulgated the CTR, waters subject to objectives contained in the San Francisco Bay Basin Plan Tables III-2A and III2-B were expressly excluded from the CTR criteria. (40 CFR 131.38, fn. b.) In 2004, the San Francisco Bay Regional Water Quality Control Board amended the San Francisco Bay Basin Plan to change water quality objectives for arsenic, cadmium, chromium, copper (freshwater only), lead, nickel, silver, and zinc to be consistent with the CTR.[4] In adopting the new objectives, the Regional Board followed the State's Basin Plan amendment process by considering factors set forth in Water Code section 13241, conducting a public hearing, and preparing an environmental checklist in accordance with the Secretary of Resources' certification of the Basin Planning process as exempt from the California Environmental Quality Act. (Resolution No. R2-2004-0003, San Francisco Bay Regional Water Quality Control Board, Jan. 21, 2004.) In addition, the Regional Board submitted the Basin Plan amendment to the State Water Resources Control Board, the Office of Administrative Law and U.S. EPA for review and approval. The revised objectives became effective on January 5, 2005 after approved by U.S. EPA.

Criteria contained in the CTR were adopted by U.S. EPA through the federal regulatory process and were subject to the federal Administrative Procedures Act. The CTR criteria did not undergo the same process that is required of water quality standards adopted by California.

[4] Had U.S. EPA desired the 1986 Basin Plan objectives to be replaced with the CTR criteria, U.S. EPA could have undertaken a revision of the federal regulations to apply the CTR to the Bay. U.S. EPA did not do so.

The water quality standards adopted in the 2005 Basin Plan Amendment were subject to the State's process for adopting water quality objectives and were not adopted pursuant to the federal Administrative Procedures Act. Thus, the standards in the 2005 Basin Plan are state adopted standards and therefore are subject to the compliance schedule provisions contained in the Basin Plan. It is irrelevant that the numeric criteria are the same for both, as it is the standards adoption process that characterizes the nature of the standard.[5] Thus, the Regional Board has the discretion to adopt compliance schedules for these newly revised standards that are consistent with the Basin Plan's compliance schedule provisions (i.e., up to 10 years). It is not for the State Board to limit the Regional Board's discretion, particularly where the State Board has previously reviewed and approved of both the compliance schedule provisions and the water quality objectives that are in the San Francisco Bay Basin Plan.

The Regional Water Board did not Abuse its Discretion in Establishing the Term of the Permit as Four and One Half years.

The State Water Board's draft Order concludes that "[t]he 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." (Draft Order, at p. 27.) The language of the conclusion suggests that the term for permits issued by the Regional Water Boards is presumptively five years, and that the Regional Water Board unjustifiably deviated from a legal mandate by imposing a permit term of less than five years.

The conclusion that the four and a half year term in the EBMUD permit is improperly foreshortened misconstrues the nature of the Regional Water Boards' discretionary authority with regards to the adoption of NPDES permits. The Clean Water Act mandates that state-issued permits be for "fixed terms *not exceeding* five years." (CWA § 402(b)(1)(B) [33 U.S.C. § 1342], emphasis added; State Water Resources Control Board, Review of Orders Nos. 82-24 and 82-54 of the California Regional Water Quality Control Board, Central Coast Region, March 19, 1983, Order No. WQ 83-1, 1983 Cal. ENV LEXIS 32 [upholding a four-year term on a NPDES permit issued to Pacific Gas & Electric].) There is nothing that limits the Regional Board's discretion to adopt a permit term that is shorter then the statutorily mandated provision that requires permit terms to *not exceed* five years. The primary purpose of the statutory provision is to ensure that states provide for "regular, periodic review of permits to ensure that they are up-to-date and contain appropriate conditions." (Nov. 29, 2006 correspondence, attachment p. 7.) In issuing the wet weather facility permit to EBMUD for a four and one half year term, the Regional Board complied with the explicit provisions of section 402(b)(1)(B) and the Congressional intent of allowing for periodic review by both the state and the permit holder. In fact, the "shortened" permit term will allow the Regional Water

[5] Indeed, certain of the CTR criteria are identical to the numeric objectives promulgated in the invalidated Inland Surface Waters Plan. This similarity is hardly surprising, as the various objectives and criteria are all derived from U.S. EPA 304(a) advisory criteria.

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Board to review and potentially alter the provisions and conditions contained in this permit earlier then the normally prescribed permit term.

No statute or regulation establishes that the permit term must be five years. Consequently, the Regional Board did not abuse its discretion in electing to set a shorter permit term.

<u>The Receiving Water Limitation for Un-ionized Ammonia is Protective of Beneficial Uses.</u>

The draft Order concludes that the Regional Water Board must revise the EBMUD permit to include appropriate effluent limitations and monitoring requirements for un-ionized ammonia. According to the draft Order, the effluent from the wet weather facilities exhibits reasonable potential for ammonia not because of any calculations done by way of a formal reasonable potential analysis, but merely 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.

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 receiving water limitation is commonly used in NPDES permits throughout California. As the State Water Board has previously concluded, the Clean Water Act gives regulatory agencies "considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges." (*In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley Audubon Society* (Order No. WQ 91-03) at p. 12).) Effluent limitations are only one means of achieving water quality standards and are not the only permissible limitation on a discharger. (*Trustees For Alaska v. E.P.A.* (9th Cir. 1984) 749 F.2d 549, 557; *See also Natural Resources Defense Council v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1380, fn. 21.) Water quality based effluent limitations are to be applied when *necessary* to meet water quality standards. (*Communities for a Better Environment v. State Water Resources Control Board, supra,* 132 Cal. App. 4th at p. 1321.) Other means of ensuring compliance with water quality standards include prohibitions, best management practices, and receiving water limitations.

The conclusion in the draft Order that effluent limitations and monitoring must replace the receiving water limitation in the existing permit also lacks a technical basis. The draft Order provides no reference to data in the record or performance of a reasonable potential analysis. An appropriate reasonable potential analysis conducted in accordance with the U.S.EPA's Technical Support Document or the Basin Plan would consider the nature of the discharge. The influent to the wet weather facilities is dilute, the intermittent and short term wet weather discharges are diluted in the receiving water, and ammonia levels in the receiving water rapidly attenuate particularly during wet weather events.

The infrequent and short-term nature of the wet weather discharges and the rapid decay of ammonia in the aquatic environment, coupled with the treatment requirements associated with strict effluent limitations on ammonia, make it unreasonable to impose ammonia effluent limits and ammonia monitoring requirements as described in the draft order. For these reasons, CASA and CVCWA respectfully urge that Conclusion 7 be deleted from the draft Order.

Conclusion

As a final matter, CASA is compelled to comment on the very unusual procedural posture of this matter. We respect and acknowledge the State Water Board's authority—and perhaps, in some cases, its responsibility—to step in and review Regional Water Board actions that, in its view, do not comport with law or policy. But we question the State Water Board's use of this authority in this case.[6]

The challenges faced by the Regional Water Board in permitting these unique wet weather facilities in the wake of a change in position by U.S. EPA after some 20 years cannot be dismissed lightly. The EBMUD wet weather permit was subject to extensive review and input by environmental stakeholders, U.S. EPA and other interested persons. U.S. EPA did not object to the permit. No petitions for review were filed with this Board. We believe this is because all involved understood some fundamental realities about the EBMUD facilities. The solution—whatever it was deemed to be—could not be implemented within the permit term. The ultimate resolution of the East Bay wet weather issues will be a long term one and will require answers to many technical questions that require data gathering, study, and creative, new approaches to a very daunting and atypical situation. Conclusory legal pronouncements such as those set forth in the draft Order do little to resolve these very real and complex challenges.

The timing of the State Water Board's proposed action also raises serious policy concerns. The Board's regulations require interested persons aggrieved by regional board actions to act quickly—within 30 days—to submit their appeals to the State Water Board. This short statute of limitations (like those in other environmental statutes such as the California Environmental Quality Act) is grounded in very important policy and practical considerations. Permittees should not be in the position of expending significant resources toward compliance only to have the State Water Board step in many months later and overturn the entire permit without warning despite no evidence of imminent and substantial harm to the environment.

[6] It is unclear what action was taken by the Board to review the EBMUD permit. Water Code section 13320 permits the State Water Board to review a Regional Water Board action "on its own motion." But we were unable to find any reference in any of the State Water Board's minutes that such an "own motion" was ever brought or passed by a majority vote of the Board.

For the reasons articulated in this letter, as well as those submitted on behalf of EBMUD, BACWA, San Francisco and NACWA, we request that the State Water Board reject the draft Order and allow implementation of the permit and TSO to continue. Thank you for your consideration of our comments.

Sincerely,

Roberta L. Larson

RLL/jlp