

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION**

**RESPONSE TO WRITTEN COMMENTS**

ON THE REISSUANCE OF WASTE DISCHARGE REQUIREMENTS FOR:

East Bay Municipal Utility District, Special District No. 1  
Wet Weather Facilities  
Alameda and Contra Costa Counties  
NPDES Permit No. CA0038440

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- I. San Francisco Baykeeper & Our Children's Earth – December 3, 2008**
  - II. Citizens for Environmental Justice – December 5, 2008**
  - III. San Francisco Baykeeper & Our Children's Earth – December 15, 2008**
  - IV. East Bay Collection System Agencies – December 19, 2008**
  - V. East Bay Municipal Utility District, Special District No. 1 – December 22, 2008**
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*Note: The format of this staff response begins with a brief introduction of the party's comments, followed with staff's response. Interested persons should refer to the original letters to ascertain the full substance and context of each comment.*

- I. San Francisco Baykeeper (Baykeeper) & Our Children's Earth (OCE) – December 3, 2008**

*Baykeeper and OCE Comment 1*

*Baykeeper and OCE point out that since it is clear that the Wet Weather Facilities (WWFs) cannot meet secondary treatment-based effluent limits, it is appropriate for the Draft Permit to ban discharges from the WWFs.*

Response 1

Comment noted.

*Baykeeper and OCE Comment 2*

*Baykeeper and OCE disagree with the Water Board's proposal to omit further regulatory requirements in the Draft Permit beyond the Discharge Prohibition and requirement to report any discharges in violation of this prohibition. Specifically, Baykeeper and OCE believe that the Draft Permit should include effluent limitations and reporting requirements. Baykeeper and OCE point out that the Water Board's NPDES Permit for the EBMUD Satellites prohibit the discharge of sewage to waters, yet also contain effluent limitations on any discharges and reporting requirements (e.g., Order No. R2-2004-0012 for the City of Oakland). Baykeeper and OCE indicate that the Water Board should not be inconsistent and issue an NPDES Permit to the EBMUD WWFs without including such conditions. This is because such limitations appropriately reflect that even when pollutant discharges are prohibited, they can still occur.*

### Response 2

Because the Cease & Desist Order (CDO) accompanying the Draft Permit includes effluent limitations and reporting requirements, it is not necessary to also include such conditions in the NDPEs Permit. Furthermore, this is consistent with previous Water Board actions, including Order No. R2-2004-0012, that prohibits discharge. Baykeeper and OCE incorrectly indicate that Order No. R2-2004-0012 includes effluent limitations and monitoring requirements beyond those required by the Draft Permit.

### Comment 3

*Baykeeper and OCE point out that U.S. EPA regulations require that NPDES Permits, even no discharge permits, include appropriate monitoring and reporting requirements and effluent limitations. Specifically, Baykeeper and OCE indicate that Clean Water Act Section 301 mandates technology-based and water quality standard-based effluent limitations for point source discharges. To comply with Section 301 of the Clean Water Act, Baykeeper and OCE indicate that the Draft Permit should include secondary treatment-based effluent limitations for total suspended solids and biochemical oxygen demand and appropriate water quality based effluent limitations for toxic pollutants known to be in the discharges. Baykeeper and OCE acknowledge that it will not be possible for EBMUD to meet such limits and indicate that the CDO include more lenient effluent limitations that EBMUD could meet, such as the level of TSS and BOD that EBMUD has been able to meet during the last several years.*

### Response 3

The State Water Board's Order No. WQ 2007-0004 specifies that the permit require secondary treatment or cessation of discharge. Because the Draft Permit prohibits discharge, it is inappropriate to also include technology and water quality based effluent limits.

Under Section 13301 of the California Water Code, if a discharger cannot comply with conditions in a Permit, the Water Board may issue a CDO that includes a series of actions that will result in permit compliance. It would follow that, if the Draft Permit includes a prohibition against discharge and effluent limits based on secondary treatment standards, EBMUD would need to implement a dual sequence of actions that are not consistent with one another. In other words, to eliminate discharges from the Wet Weather Facilities, EBMUD would need to better control sources of wet weather flows and/or provide more storage of such flows; whereas, to meet secondary treatment standards, EBMUD would need to implement a series of treatment plant upgrades.

In our view, the most effective solution for complying with State Water Board Order No. WQ 2007-0004 is to require EBMUD to eliminate discharges from its Wet Weather Facilities. Therefore, the actions required by the CDO are to ensure discharges from the wet weather facilities are eliminated as soon as practical. We do not believe it is appropriate to also include effluent limits based on secondary treatment because this would necessitate that, under the Draft CDO, EBMUD also implement a series of actions to comply with such standards.

Comment 4

*To ensure that EBMUD achieves appropriate disinfection and dechlorination in future operations during EBMUD's inevitable discharges from the Wet Weather Facilities, Baykeeper and OCE indicate that the new NPDES Permit must include, at a minimum, effluent limitations on total coliform organisms and chlorine residual together with a requirement that EBMUD monitor and report the level of these pollutants in each of discharges from the Wet Weather Facilities. Baykeeper and OCE point out that this is necessary to comply with anti-backsliding provisions of the Clean Water Act.*

Response 4

Because the NPDES Permit prohibits discharge, it is inappropriate to include effluent limitations and related monitoring requirements in the permit. As the Draft CDO accompanying the Draft Permit includes effluent limitations and reporting requirements for chlorine residual and total coliform organisms, we believe this should address Baykeeper and OCE's concern. Moreover, the Draft Permit complies with anti-backsliding provisions of the Clean Water Act because it prohibits discharge.

Comment 5

*Baykeeper and OCE indicate that it is well documented that Wet Weather Facility discharges include various conventional and toxic pollutants, including total suspended solids, biochemical oxygen demand, total coliform organisms, chlorine residual, pH, copper, lead, mercury, nickel, silver, zinc, cyanide, chrysene, hexachlorobenzene, phlates, dioxins and furans, dichlorobromomethane, DDT, DDE, 4,4-DDE, dieldrin, endrin, and heptachlor epoxide. At a minimum, Baykeeper and OCE indicate that the NPDES Permit should require that EBMUD continue to sample the levels of these pollutants in its Wet Weather Facility discharges, so the public, the U.S. EPA, the Regional Water Board, and EBMUD are kept informed about the level of pollutants being discharged into San Francisco Bay.*

Response 5

To ensure proper operation of the Wet Weather Facilities, the Draft CDO requires that EBMUD monitor for flow, total coliform organisms, chlorine residual, pH, oil & grease, ammonia, biochemical oxygen demand, and total suspended solids at least monthly. Because the primary purpose of the Wet Weather Facilities is to provide settling of solids and removal of pathogens through disinfection, we believe that it is appropriate for monitoring efforts to focus on conventional parameters. We do not believe that collecting additional priority pollutant data will provide valuable information. This is because EBMUD has already documented that it cannot meet final water quality based effluent limits for a number of toxic pollutants since the Wet Weather Facilities were not designed to treat for these toxic pollutants, and levels of these priority pollutants in its discharge are unlikely to change. This is, in part, why the Draft Permit prohibits discharge from the Wet Weather Facilities.

Comment 6

*To address, in part, whether EBMUD should remediate sediments near WWFs to address legacy contamination, Baykeeper and OCE indicate that the NPDES Permit should*

*require appropriate receiving water monitoring. Specifically, Baykeeper and OCE indicate that the program should include (1) water column sampling for total and fecal coliform; (2) sampling for sediments near the outfalls for organic enrichment associated with sewage solids deposition and/or the accumulation of toxic metals, pesticides, dioxins and furans and other pollutants in the Bay's sediments that is perhaps being caused by discharges from the Wet Weather Facilities; (3) sampling for biota to determine whether the Wet Weather Facility discharges are causing changes to the abundance or health of indigenous aquatic life (specifically, Baykeeper and OCE indicate that the program should include monitoring for the presence of aquatic life by species and relative abundance and tissues of indigenous organisms for bioaccumulation of toxic pollutants known to be in the discharges); and (4) designation of sampling of appropriate reference locations for comparison purposes.*

#### Response 6

We have made changes in response to this comment. We understand that Baykeeper and OCE's comment on receiving water sampling for total coliform and fecal coliform relates to their concern that EBMUD could discharge pathogens at unsafe levels without warning the public. In our view, we do not believe receiving water monitoring is necessary because the Draft Permit prohibits discharge and the CDO requires effluent monitoring for total coliform. Since discharges from the Wet Weather Facilities are prohibited, we have revised the Draft Permit to require EBMUD to properly notify the Office of Emergency Services, the local health department, and Regional Water Board in accordance with recent requirements imposed on all Publicly Owned Treatment Works that violate bypass prohibitions. These requirements include many of the elements mentioned in Baykeeper and OCE's supplemental comments dated December 15, 2008, such as the date and time the discharge started, the estimated quantity of the discharge, the location of the threatened waterway, and the level of treatment. As EBMUD will be required to notify the appropriate agencies within two hours, it is unlikely that it will have information available to report on flow (the discharge may be ongoing) and discharge quality (it will take time to learn the sample results). In our view, the best solution is to have EBMUD provide an initial notification within two hours, and then augment this notification with information on discharge quality and volume once it is available.

On sampling sediments near the Wet Weather Facilities' outfalls for pollutants associated with sewage, we agree with Baykeeper and OCE that EBMUD should develop a plan with a reference station to evaluate the impact of its past discharges. This is because, as documented in the Fact Sheet for the Draft Permit, EBMUD has been discharging wastewater that does not comply with secondary treatment standards for conventional pollutants or water quality based standards for toxic pollutants. Therefore, we have revised the Draft CDO to include a provision that requires EBMUD, consistent with the State Water Board's policy on Sediment Quality Objectives, to submit and implement a plan to evaluate the effect of past discharges from its Wet Weather Facilities on sediment quality.

On sampling for biota to determine whether the Wet Weather Facilities' discharges are causing changes to the abundance or health of indigenous aquatic life and

bioaccumulation of toxic pollutants, we do not believe it is possible to design such a study given the infrequent nature the Wet Weather Facilities' discharge and other influences (e.g., stormwater runoff, legacy pollution) that would affect the health of aquatic life.

#### Comment 7

*Baykeeper and OCE object to the lack of content in the provisions in the CDO for what EBMUD's Plan to eliminate wet weather discharges should contain. Specifically, Baykeeper and OCE indicate that the new CDO should direct EBMUD to install flow meters and perform modeling to determine the amount of peak flow contributed by each of the EBMUD satellites and the amount of flow reduction required by each satellite to eliminate use of the Wet Weather Facilities. Additionally, Baykeeper and OCE indicate that the CDO should require EBMUD, in concert with the satellites, evaluate the feasibility and effectiveness of limited peak flow storage to reduce effective peak flows. Further, Baykeeper and OCE point out that the CDO should mandate interim reductions in Wet Weather Facility discharges commensurate with feasible phased reductions (i.e., Baykeeper and OCE urge that the total volume of discharges from the Wet Weather Facilities be reduced to one-third of current levels in five years, with ten percent or more reductions in volume discharged in each subsequent year until the final goal of elimination of discharge is reached. Finally, Baykeeper and OCE indicate that the requirement to develop and implement a plan for phasing out the Wet Weather Facilities should be included in EBMUD's NPDES Permit, not merely placed in the CDO.*

#### Response 7

While we believe that EBMUD's plan for eliminating discharges from its Wet Weather Facilities at the earliest possible date will likely include many of the elements mentioned by Baykeeper and OCE, it is not necessary to include such specifics in the Draft CDO.

Additionally, it is inappropriate to include the requirement for EBMUD to develop and implement a plan for phasing out the Wet Weather Facilities in the Draft Permit when it is already included in the CDO. This is because, at this time, the Wet Weather Facilities do not result in secondary treatment of wastewater. Having a requirement in the Draft Permit that EBMUD develop and implement a plan for phasing out the Wet Weather Facilities is the equivalent of granting a compliance schedule. NPDES regulations at 40 CFR 122.47(a)(1) allow for compliance schedules provided they are not later than the applicable statutory deadline under the Clean Water Act. In this case, the Draft Permit cannot include a requirement for EBMUD to implement a plan for phasing out the Wet Weather Facilities because the statutory deadline for complying with technology-based effluent limits was March 31, 1989.

#### Comment 8

*Baykeeper and OCE indicate that the Water Board should either amend the CDO or issue a companion CDO to require EBMUD to study the level of I/I reduction needed to eliminate blending at the main treatment plant. Additionally, Baykeeper and OCE indicate that the Water Board should reissue the NPDES Permit for the main treatment*

*plant and include a schedule of compliance provision that requires EBMUD to eliminate blending by January 2010.*

Response 8

We plan to reissue the NPDES Permit for EBMUD's main treatment plant within the next year. At that time, we will address blending issues associated with that facility.

Comment 9

*Baykeeper and OCE indicate that the Water Board needs to reissue new NPDES Permits and CDOs to the satellites to require large-scale reductions in I/I.*

Response 9

The Water Board plans to reissue NPDES Permits for the satellites in 2009. During the reissuance process, the Water Board will be evaluating I/I rates from these systems.

**II. Citizens for Environmental Justice – December 5, 2008**

Comment 1

*On behalf of Citizens for Environmental Justice, Ken Berry indicates that the Water Board's proposed action to approve a CDO for the EBMUD Wet Weather Facilities violates the requirements of the California Environmental Quality Act. This is because the CDO cites Title 14 of the California Code of Regulations Section 15321 as the authority for not preparing an environmental analysis. Mr. Berry points out that 14 CCR Section 15300.2(e) prohibits any categorical exemption from being utilized to avoid preparing an environmental analysis for any site on any list compiled pursuant to Government Code (GC) §65962.5. GC §65962.5(c)(3) requires the listing of any site for which a CDO is issued pursuant to Water Code (WC) §13301 concerning the discharge of hazardous materials. "Hazardous materials" are defined in Health and Safety Code (HSC) §25501(o).*

Response 1

We disagree that the Cortese List (compiled pursuant to Government Code §65962.5) applies to the Wet Weather Facilities and the proposed CDO.

First, the Cortese List laws specified in Government Code Section 65962.5(c)(3), which mandates, in relevant part, that the State Water Resources Control Board compile a list of "[a]ll Cease and Desist orders issued after January 1, 1986, pursuant to Section 13301 of the Water Code..., that concern the discharge of wastes that are hazardous materials," were not intended to apply to the discharge of domestic sewage from publicly owned wastewater treatment facilities, such as the EBMUD Wet Weather Facilities. Instead, the intent of the law was to provide notice to land use developers regarding the presence of hazardous materials that had been released on the property proposed for development.

This legislative intent is shown by where Section 65962.5 of the Government Code is placed in that Code: Title 7 (Planning and Land Use), Division 1 (Planning and Zoning), Chapter 4.5 (Review and Approval of Development Projects), and Article 6

(Development Permits for Classes of Projects). As is apparent from these code titles, all of these sections of the Government Code concern planning and land use development.

Further evidence of this legislative intent is also provided by subdivision (f) of Section 65962.5. Subdivision (f) states in relevant part:

Before a lead agency accepts as complete an application for any **development project** which will be used by any person, the applicant shall consult the lists ... and shall submit a signed statement to the local agency indicating whether the project and any alternatives are located on a site that is included on any of the lists compiled pursuant to this section [65962.5] and shall specify any list. If the site is included on a list, and the list is not specified on the statement, the lead agency shall notify the applicant .... The statement shall read as follows:

#### HAZARDOUS WASTE AND SUBSTANCES STATEMENT

The development project and any alternatives proposed in this application are contained on the lists compiled pursuant to Section 65962.5 of the Government Code. Accordingly, the project applicant is required to submit a signed statement that contains the following information... Specify any list pursuant to Section 65962.5 of the Government Code....

(Emphasis added)

Moreover, additional legislative intent is shown in section 65963.1(a) of the Government Code, the statutory section that immediately follows Section 65962.5. It states, in relevant part:

[T]his chapter applies to the making of a land use decision or the issuance of a permit for a hazardous waste facility project by a public agency..., including, but not limited to, all of the following actions:

- (a) The approval of land use permits and conditional use permits, the granting of variances, the subdivision of property, and the modification of existing property lines....

These statutory provisions make clear that the Cortese List law was part of a comprehensive scheme relating to planning and land use development, and that its purpose was to provide information to developers regarding the presence of hazardous materials on property being considered for development. Accordingly, the Cortese List

law was not intended to apply to waste discharges from wastewater treatment plants regulated by the State and Regional Water Boards.

Second, the definition of “hazardous material” cited in Health and Safety Code Section 25501(o) was also intended to have a special and limited meaning, as evidenced by its placement in that portion of the Health and Safety Code. The definition is contained in Chapter 6.95, which is titled “Hazardous Materials Release Response Plans and Inventory,” and Article 1 of that chapter, titled “Business and Area Plans.” The legislative intent of Chapter 6.95 is explicitly stated in Section 25500 of Article 1. Since the definition echoes the intent language used, it is instructive to quote the relevant parts of Section 25500:

The Legislature declares that, in order to protect the public health and safety and the environment, it is necessary to establish business and area plans relating to the handling and release or threatened release of hazardous materials. The establishment of minimum statewide standards for these plans is a statewide concern. Basic information on the location, type, quantity, and the health risks of hazardous materials handled, used, stored, or disposed of in the state, which could be accidentally released into the environment, is not now available to firefighters, health officials, planners, public safety officers, health care providers, regulatory agencies, and other interested persons. The information provided by business and area plans is necessary in order to prevent or mitigate the damage to the health and safety of persons and the environment from the release or threatened release of hazardous materials into the workplace and the environment....

As mentioned, the definition of “hazardous material” echoes the legislative intent expressed in Section 25500. Of particular importance for determining the meaning of this definition is the following language used in the definition:

‘Hazardous material’ means any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if **released** into the workplace or the environment....

(Health & Saf. Code, § 25501, subd. (o). Emphasis added.)

“**Release**” is defined in Section 25501(s) of the Health and Safety Code as:

[A]ny spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, **unless permitted or authorized by a regulatory agency.**



(Emphasis added)

There are two important points to make regarding this definition. First, the many terms used, such as spilling, leaking, etc., signify that the release was an action, either intentional or unintentional, that caused a material to enter into the environment. Second, and more importantly, the exception provided by the phrase, “unless permitted or authorized by a regulatory agency,” makes it clear that the various types of releases into the environment are the subject of the types of releases intended to be covered within the definition of “hazardous material.” Therefore, the types of releases that are contemplated within the definition of “hazardous material” are only those releases that are **not** permitted or authorized by a regulatory agency and that meet the other elements of the definition (i.e., present a significant hazard to human health and safety or to the environment).

In sum, the Cortese List laws were not intended to apply to discharges of domestic wastewater from regulated wastewater treatment plants such as the EBMUD Wet Weather Facilities. Moreover, the Draft CDO will not result in any physical change to the environment beyond that mandated by the permit it is intended to enforce. The permit is exempt from California Environmental Quality Act (CEQA) and the CDO enforces the permit. Therefore, consistent with California Water Code Section 15321, it is appropriate for the Regional Water Board to rely on the categorical exclusion from CEQA cited in Finding No. 9 of the Draft CDO.

Comment 2

*Mr. Berry further explains that there is a National Pollution Discharge Elimination System (NPDES) permit associated with this project. The California Appellate Court has determined that activities not required by the United States Clean Water Act (CWA), which is the authority for issuing NPDES permits, are not exempt from CEQA (Committee for a Progressive Gilroy v. State Water Resources Control Board (1987) 192 Cal.App.3d 847). The proposed CDO involves construction, which is not authorized by NPDES permits.*

Response 2

The EBMUD Wet Weather Facilities are regulated pursuant to an NPDES Permit, Board Order R2-2005-0047, NPDES Permit No. CA0038440. Section 13389 of the Water Code exempts the State and Regional Water Boards from being required to comply with CEQA prior to the adoption of any Waste Discharge Requirements (WDRs). Since the Regional Water Board was not required to comply with CEQA when the NPDES permit was adopted in 2005, and it will not be required to comply with CEQA if the Draft Permit is reissued in 2009, it follows that the Regional Water Board is also not required to comply with CEQA for adoption of the Draft CDO, which seek to enforce the CEQA-exempt NPDES permit.

This conclusion has been affirmed for more than 30 years now. In *Pacific Water Conditioning Association, Inc., v. City Council of the City of Riverside et al.* (1977) 73

Cal. App. 3d 546 [140 Cal. Rptr. 812] (*Pacific Water Conditioning Association*), the Fourth District Court of Appeal addressed the issue of whether the Regional Water Quality Control Board, Santa Ana Region (Santa Ana Regional Board), was required to prepare an Environmental Impact Report (EIR) pursuant to the CEQA prior to issuing a CDO to the City of Riverside to enforce previously issued WDRs. The Court dispensed with the preliminary question of whether the Santa Ana Regional Board was required to prepare an EIR or other CEQA environmental documentation for its initial issuance of the WDRs. It noted in pertinent part that Water Code Section 13389 explicitly exempts the State and Regional Water Boards from having to comply with Chapter 3 of CEQA, which commences with Section 21100 of the Public Resources Code and includes EIR preparation requirements. Thus, the Court concluded that the Santa Ana Regional Board properly prescribed WDRs without having to prepare an EIR pursuant to the statutory exemption provided by Water Code Section 13389.<sup>1</sup>

The Court then considered the issue of whether the statutory exemption in Water Code Section 13389 extended to issuance of the CDO. It held that it did. The Court first noted that a CDO is an enforcement technique that may be used by a regional board as a first step to seek to enforce previously promulgated WDRs. The Court then observed that the usual situation, which applied here, is that all environmental consequences flow from the original WDRs, and a subsequent CDO would have no environmental effects beyond those resulting from those original WDRs. Moreover, the Court commented that “[i]t would be nonsensical to permit promulgation of requirements without preparation of any EIR but to require preparation of an EIR as a prerequisite to issuance of an order which does no more than command compliance with the original order.”<sup>2</sup>

### **III. Baykeeper & OCE – December 15, 2008**

#### *Comment 1*

*Baykeeper and OCE indicate that the Regional Water Board should amend the Draft Permit and the CDO to include provisions requiring EBMUD to issue press releases, email public notices to a list of interested persons that EBMUD will develop and maintain, and place notices on their website immediately following any discharges from the Wet Weather Facilities. The Draft Permit and CDO should require EBMUD to include instructions to the public in both its press releases and the notices on its website*

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<sup>1</sup> The Court commented on the similarity of the exemption from CEQA for Waste Discharge Requirements promulgated under Water Code Section 13389 with the exemption from the National Environmental Policy Act (NEPA) for NPDES permits issued under the federal Clean Water Act. The Court noted that Chapter 5.5 of the Water Code, which contains Section 13389, was enacted to allow California to administer the federal NPDES permit program, and that the chapter was patterned after the Federal Clean Water Act (33 U.S.C. Section 1251 et seq.), which created the NPDES permit system. Clean Water Act Section 1371(c), the Court noted, excludes the issuance of NPDES permits from the requirements of the National Environmental Policy Act (NEPA) after which CEQA was patterned. Thus, the Court concluded that it was fairly apparent that the exemption from CEQA for the promulgation of Waste Discharge Requirements contained in Water Code Section 13389 was meant to parallel the exemption from NEPA for the issuance of NPDES permits contained in Clean Water Act Section 1371. (*Pacific Water Conditioning Association*, 73 Cal.App.3d 546, 556.)

<sup>2</sup> *Id.*

*how interested persons can be added to EBMUD's standard email listserve list of interested persons to receive EBMUD's notices directly. This is because the WWFs discharge to near-shore receiving Bay waters that are used for water contact recreation such as windsurfing and kiteboarding and additional recreation where incidental water contact routinely occurs, such as kayaking. Moreover, wind conditions are often favorable during or following large winter storms that make for optimum windsurfing and kiteboarding, meaning such recreationalists may well be in Bay waters following discharges from these WWFs without being aware of such discharges. Specifically, Baykeeper and OCE indicate that EBMUD's notices should specify which WWFs have discharged, the location of the WWF discharge points, the time the WWF discharges began, the volume discharged (once known), and whether EBMUD complied with bacteria and total residual chlorine limits during the discharges. Baykeeper and OCE point out that these measures are necessary to ensure that the public is aware of and can take appropriate precautions against exposure to the pollutants in the WWF discharges.*

#### Response 1

We agree with much of the above. Please see our response to Comment 6 of Baykeeper and OCE's December 3, 2008, letter.

#### Comment 2

*Baykeeper and OCE note that the Regional Water Board extended the public comment period on the Draft Permit and the CDO by one week. While Baykeeper and OCE welcome this extension, they urge the Regional Water Board not to further delay consideration and adoption of the Draft Permit and CDO. This is because they are important steps toward the resolution of the excessive and unlawful discharge of pollutants from the WWFs and an overdue response to the State Board's decision, In the Matter of Own Motion Review of EBMUD Wet Weather Permit (Order No. WQ 2007-0004) (May 1, 2007).*

#### Response 2

Comment noted.

### **IV. East Bay Collection System Agencies – December 19, 2008**

The East Bay Collection System Agencies - the Cities of Albany, Alameda, Berkeley, Emeryville, Oakland, and Piedmont, and Stege Sanitary District (hereafter Communities) collectively submitted the following comments on the Draft Permit and Draft CDO.

#### Comment 1

*The Communities request that they be allowed a meaningful amount of time for participation in the development of new regulatory and legal mandates for the EBMUD Wet Weather Facilities because these changes will result in significant impacts to their agencies. The Communities point out that they are committed to cooperating and working with EBMUD and the Regional Water Board to provide practical, cost-effective capital and asset management programs that address the issues regarding the EBMUD Wet Weather Facilities. However, the Communities are concerned that, until a week or*

*two ago, they were excluded from the process that will certainly require significant efforts and expense by the Communities. The Communities believe they are important partners in the solution of this issue and should be treated accordingly, and want to ensure that their interests and concerns are appropriately represented to the Regional Water Board.*

#### Response 1

We agree that the Communities are important partners in the solution of this issue, and we hope to work with the Communities on developing the most cost effective solutions for eliminating discharges at the EBMUD Wet Weather Facilities. We only recently briefed the Communities on this process because we need their feedback to help determine the most reasonable course of action for eliminating discharges from the EBMUD Wet Weather Facilities. The specifics on how to eliminate discharges will be sorted out over the next few years. The Draft Permit and Draft CDO are in response to State Water Board Order WQ 2007-0004, which effectively requires EBMUD to comply with secondary treatment or cease discharge from its Wet Weather Facilities. In our view, the most effective solution for complying with State Water Board's Order No. WQ 2007-0004 is to require EBMUD to eliminate discharges from its Wet Weather Facilities.

#### Comment 2

*The Communities request that adoption of the tentative permit and CDO be postponed until 30 days following the date upon which the proposed Stipulated Order between U.S. EPA and EBMUD regarding the Wet Weather Facilities is finalized and released to the Communities. In addition, a new comment period during this time should be allowed to adequately address the real impacts to the agencies.*

*The Communities indicate that, while the current tentative permit and CDO formalize an all-out prohibition on discharges from the wet weather facilities, it has only recently become clear to them that the proposed Stipulated Order, rather than the documents currently up for public comment, contain the detailed requirements associated with the prohibition on wet weather facilities indicated in the tentative permit. Further, these policy and legal actions, while not naming the Communities directly, obviously will have an enormous and profound effect on the Communities. For example, EBMUD has estimated that the necessary capital outlay for the approach suggested in the draft regulatory documents is \$600 million. The Communities believe that only with specific knowledge of the details, which are not yet available, can they effectively comment on an out-right prohibition on discharges from the EBMUD wet weather facilities.*

#### Response 2

We are not granting this request. State Water Board Order WQ 2007-0004 (Remand Order) effectively requires that EBMUD comply with secondary treatment or eliminate discharges from its Wet Weather Facilities. The purpose of the Draft Permit is to comply with the Remand Order. While the proposed Stipulated Order will provide details on studies and programs that EBMUD will need to implement to eliminate discharges from the Wet Weather Facilities, it is a separate process for which there will be ample opportunity for public review and comment. In our view, secondary treatment is not a reasonable alternative for the Wet Weather Facilities. This is because the discharges are

intermittent in nature and not conducive to biological treatment. The costs of implementing alternative secondary treatment technologies are well above any sort of infrastructure renewal program that would help to eliminate discharges from the Wet Weather Facilities, and providing secondary treatment would not include the added benefit of replacing old and leaky pipes.

Comment 3

*The convoluted legal reasons for issuing the tentative permit and CDO before the proposed Stipulated Order are not justified and have resulted in the exclusion of meaningful participation by the Communities in a program that has significant and costly impacts on them.*

Response 3

The Draft Permit and Draft CDO are necessary to comply with State Water Board Order WQ 2007-0004 (Remand Order). These documents, in themselves, do not require any actions by the Communities. Any sort of new requirements for the Communities will need to be included in their respective NPDES Permits. As we plan to reissue these permits in the near future, we expect the Communities to actively participate in this process.

The Draft Permit and CDO must be adopted prior to the proposed Stipulated Order because they set forth the requirements with which EBMUD must comply. The Stipulated Order will be the regulatory agencies' vehicle to ensure that EBMUD comply with the Draft Permit and CDO.

Comment 4

*The Communities object to a prohibition on EBMUD Wet Weather Facilities. To substantiate this position, the Communities provide the following history: EBMUD's wet weather facilities were built in the early to mid-1990's based on years of studies and discussions among all applicable regulatory agencies, EBMUD, and the Communities. In particular, over the 12-year period from 1975 to 1987, \$18 million was spent on at least 12 planning reports leading up to the design and construction of the wet weather facilities. These reports also included analysis of, and recommendations for, infiltration/inflow (I/I) reduction programs by the Communities.*

*To date, EBMUD has spent \$325 million on the wet weather program, and the Communities have together spent more than \$335 million on rehabilitating sewers and constructing relief sewers, to reduce infiltration/inflow. The wet weather facilities currently serve mostly as wet weather storage tanks but also discharge primary-treated wastewater a few times a year, during large or extended storm events. The facilities are operating as designed and serve a valuable function for protecting public health and the environment.*

*The U.S. EPA, the State Water Board, and the San Francisco Bay Regional Water Board were actively involved in the development of these wet weather facilities, including program approval, from inception through design and construction, and only recently decided that these programs are insufficient.*

*The U.S. EPA has stated that, as federal regulations have become more strict, more work must be done to address wet weather flows. But the reality is that federal laws and regulations have not changed substantively in recent years, only their interpretation by some. The proposal by regulatory agencies to prohibit the infrequent discharges from the wet weather facilities is inappropriate.*

#### Response 4

As pointed out in Response 1, State Water Board Order WQ 2007-0004 (Remand Order) effectively requires EBMUD to comply with secondary treatment standards or cease discharge from its Wet Weather Facilities. This is because the federal Clean Water Act requires, with the exception of combined sewer overflows, that any point source discharge of sewage effluent to waters of the United States must comply with technology-based, secondary treatment standards, at a minimum, and any more stringent requirements necessary to meet applicable water quality-based standards and other requirements. Because the EBMUD Wet Weather Facilities are considered Publicly Owned Treatment Works, these facilities must cease discharge or be upgraded to comply with the federal Clean Water Act.

#### Comment 5

*The Communities request that the milestone in the CDO for compliance with the permit be 30 years, not 10 years. The Communities point out that EBMUD has estimated that the cost to the Communities under a wet weather facilities prohibition scheme is \$600 million, and the tentative CDO indicates that this program must be implemented in 10 years. The Communities suspect that this cost is too low because it does not sufficiently take into consideration the additional complexities due to construction in urban environments. An additional significant concern is the effectiveness and success of flow reduction efforts at a huge cost; flow reduction of 70% is needed if the wet weather facilities prohibition is enacted, unprecedented for a system that serves over 600,000 customers. There is great uncertainty about actual flow reduction that can be realized from the combination of programs, construction, and activities that the Communities will undertake, and ten years is not realistic. The Communities believe that a pilot program in subbasins may be needed initially to determine what the best plan may be in order to achieve realistic and cost-effective flow reduction, and this will take some time. In any event, it will take several decades for the Communities to implement full I/I reduction at cost-effective rates, even in the event that it is feasible to achieve the reductions contemplated for eliminating the EBMUD Wet Weather Facility discharges.*

#### Response 5

The Water Board recognizes that it is unlikely that EBMUD will be able to eliminate discharges from its Wet Weather Facilities within ten years. For this reason, the Draft CDO indicates that if, after ten years, EBMUD continues to discharge from its Wet Weather Facilities, it must provide a plan and time schedule for achieving compliance. The Water Board chose a compliance deadline of 10 years, in part, because by then we expect that EBMUD and the Communities will have a much better understanding of their systems and will have been able to conduct pilot tests to evaluate the full potential of I/I reduction. If compliance is not achieved within 10 years, EBMUD, working with the

Communities, should be able to provide a detailed schedule of the work it must complete to eliminate discharges from the Wet Weather Facilities.

Comment 6

*If the regulatory agencies insist on placing the wet weather facilities out of service at some point in the future, the Communities request that the maximum annual cost for each East Bay Collection System Community be identified with Communities' input ahead of a draft regulatory mandate. The Communities indicate that there is a limit to the costs that a local collection system agency can bear, especially in this economic climate, irrespective of the miniscule public health and water quality benefits that would occur from prohibiting the EBMUD wet weather facilities. EBMUD studies have estimated that the incremental asset management costs are in excess of \$25 million per year for the Communities, a daunting sum, especially in these economic times. The Communities are on schedule to complete their agreed-upon projects for reduction of I/I and have made a commitment to continue cost-effective asset management efforts even after current deadlines are met. Somehow, annual cost needs to be factored into the solution and not ignored.*

Response 6

See Response 2. To comply with State Water Board Order WQ 2007-0004, the Water Board has two alternatives: (1) require EBMUD to comply with secondary treatment or (2) require EBMUD to cease discharge. The Water Board and U.S. EPA evaluated these alternatives and determined that the most reasonable course of action is to require EBMUD to cease discharge.

Comment 7

*The tentative permit should include enforcement discretion language indicated in the State Water Board's sanitary sewer overflow (SSO) waste discharge requirements (WDR). The EBMUD Wet Weather Facilities are effectively being characterized by regulatory agencies as major SSOs due to the proposed prohibition on discharges from these facilities. In addition, the Regional Water Board is not currently addressing the specific enforcement discretion mandated by the State Water Board for SSOs in the SSO WDRs. As a result, the Communities request that the enforcement language from the SSO WDRs be reproduced in its entirety in the tentative permit for the wet weather facilities to more effectively ensure that this common sense approach to judging the appropriateness of local government behavior be seriously considered during enforcement actions.*

Response 7

We do not think it is appropriate to include the enforcement language from the SSO WDRs in the EBMUD NPDES Permit. This is because the enforcement language from the SSO WDRs relates to untreated wastewater that is randomly discharged to the environment. In this case, discharges from the Wet Weather Facilities will be partially treated and at a controlled outfall. Therefore, the Water Board does not consider discharges from the Wet Weather Facilities to be sanitary sewer overflows. We would classify such discharges as unauthorized discharges (i.e., partially treated wastewater that

does not meet permit conditions). To evaluate whether we should take an enforcement action for such a discharge, we would consider whether EBMUD has met the conditions in its CDO (e.g., effluent limitations for total coliform organisms and chlorine residual).

**V. East Bay Municipal Utility District, Special District No. 1 – December 22, 2008**

Comment 1

*EBMUD indicates that it is prepared to support the Draft Permit and Draft CDO as it understands these documents are the Water Board's first step in a process aimed at eliminating discharges from the Wet Weather Facilities.*

Response 1

Comment noted.

Comment 2

*To preserve its rights, EBMUD indicates that the basis for the discharge prohibition, the State Water Board's Order WQ 2007-0004, is legally defective for reasons documented in a number of documents that it incorporates by reference. That said, EBMUD indicates that it expects this issue will become obsolete as the process moves forward, and it points out that no response from the Water Board is necessary on this issue at this time.*

Response 2

Comment noted.