

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

RESPONSE TO WRITTEN COMMENTS

ON THE REISSUANCE OF WASTE DISCHARGE REQUIREMENTS FOR THE EAST BAY COLLECTION SYSTEM SATELLITES:

Item 6, City of Albany, NPDES Permit No. CA0038474
Item 7, City of Alameda, NPDES Permit No. CA0038471
Item 8, City of Berkeley, NPDES Permit No. CA0038466
Item 9, City of Emeryville, NPDES Permit No. CA0038792
Item 10, City of Piedmont, NPDES Permit No. CA0038504
Item 11 City of Oakland, NPDES Permit No. CA0038512
Item 12, Stege Sanitary District, NPDES Permit No. CA0038482
Item 13, City of Oakland, Amendment of Cease and Desist Order No. 93-134
Alameda and Contra Costa Counties

The following parties submitted comments on one or more of the above items. Since, the comments apply to issues related to all the items, they are presented here as one consolidated set of responses to comments that apply to every item listed above.

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- I. City of Alameda – October 15, 2009**
II. San Francisco Baykeeper & Our Children’s Earth – October 18, 2009
III. East Bay Municipal Utility District, Special District No. 1 – October 19, 2009
IV. East Bay Collection System Satellites – October 23, 2009

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. City of Alameda – October 15, 2009

City of Alameda Comment 1

The City of Alameda (City) is concerned about the strict Prohibition III.D., that prohibits it from causing or contributing to discharges from East Bay Municipal Utility District’s (EBMUD) Wet Weather Facilities. The City believes this prohibition is too subjective and vague.

Response 1

This prohibition is clear and necessary to comply with the federal Clean Water Act and prevent the discharge of untreated sewage into the Bay. We have nonetheless revised the Fact Sheet as described in Response 4, below, so that there is no subjectivity or vagueness as to the compliance status of each satellite with the prohibition. State Water Board Order WQ 2007-0004 (Remand Order) effectively required EBMUD to comply with secondary treatment at or eliminate discharges from its Wet Weather Facilities. To comply with the Remand Order, the Regional Water Board adopted Order No. R2-2009-

0004 on January 14, 2009. Order No. R2-2009-0004 prohibits EBMUD from discharging from its Wet Weather Facilities.

Because the City operates and maintains a wastewater collection system that contributes to wet weather discharges from EBMUD's Wet Weather Facilities, it is necessary for the Water Board to impose a prohibition upon the City that is similar to the one it imposed on EBMUD.

City of Alameda Comment 2

The City requests that Water Board take into account discharges caused by severe natural conditions and other factors. Specifically, it requests that the Water Board include language from the previous permit that described what sort of factors the Water Board would consider in preparing an enforcement action.

Response 2

We are denying this request. This is because the language from the previous permit is not consistent with 40 CFR Part 122.41 (n). To address this inconsistency, the Tentative Order includes a direct reference to the Code of Federal Regulations (Special Provision B.1 of the Tentative Order). This is a more appropriate approach for providing the City with the opportunity to establish an affirmative defense in enforcement considerations if it can document that an upset has occurred.

City of Alameda Comment 3

The City indicates that it is unreasonable to require a zero tolerance prohibition at Prohibition III.D until there is a better understanding of the financial burden and impacts on each jurisdiction that such a prohibition will impose. The City indicates that these impacts may be better understood once EBMUD completes flow monitoring and identifies methods to address inflow and infiltration, as required under its Stipulated Order for preliminary relief.

Response 3

We have not made revisions in response to this comment. As described in Response 1, the prohibition is necessary to ensure compliance with the Clean Water Act. The Act does not provide the Water Board flexibility in deviating from established standards for financial reasons. And while we agree that the flow monitoring to be conducted by EBMUD will be an important factor in determining the most cost-effective way to comply with this prohibition and over what time period compliance can be reasonably attained, this does not change the fact that the Clean Water Act requires that wastewater discharges from EBMUD meet established standards now. The flows from the City's collection system cause and contribute to EBMUD's violations of those standards, so the prohibition is necessary now.

City of Alameda Comment 4

The City indicates that prior to establishing Prohibition III.D, the Water Board needs to define a detailed methodology to determine when a specific satellite agency contributes to wet weather facility discharges. Further, the City points out that if there is no reliable

method of determining when a specific agency is responsible, it is not reasonable to hold all satellite agencies responsible for wet weather discharges. Finally, the City indicates that if it is liable for future improvements, the permit should clearly define who is responsible and for what work.

Response 4

We disagree but have revised the Fact Sheet to clarify certain issues. The prohibition is necessary to comply with the Clean Water Act. It is not necessary to quantifiably establish when a satellite is violating the prohibition because, based on current information, all satellites would be violating. Flow monitoring conducted by EBMUD in 2005-2006 indicates that each satellite is causing or contributing to discharges from its Wet Weather Facilities.

We revised the Fact Sheet to include, at the end of Section IV.4, the following:

“At this time, the Discharger is in violation of this prohibition because excessive I&I into its collection system causes or contributes to discharges from EBMUD’s WWFs. Prohibition III.D provides a narrative prohibition because information is not currently available to sufficiently specify an appropriate numeric flow limit or other more detailed set of standards necessary to eliminate the Discharger’s contribution to discharges from EBMUD’s WWFs. Implementation of the Stipulated Order and the development of a final remedy in the Federal Action are expected to provide the technical information necessary for the Discharger to achieve compliance with Prohibition III.D. The Regional Water Board intends to modify the Discharger’s NPDES permit in the future so that compliance can be measured by a specific numeric criterion or other more detailed set of standards rather than the current narrative criterion.”

City of Alameda Comment 5

The City points out that it has no authority over how EBMUD chooses to manage its wet weather facility, and that it is not appropriate for the permit to hold the City liable for EBMUD’s decisions.

Response 5

We disagree; however we have revised the Tentative Order to remove any obligation on the City and the other satellites to report on discharges from the Wet Weather Facilities. While the City has no control over how EBMUD manages its Wet Weather Facilities, it is equally true that EBMUD has no control over how the City or the other satellites operate and maintain their respective collection systems. Because discharges from EBMUD’s Wet Weather Facilities are in violation of the Clean Water Act, it is necessary that each entity that is causing or contributing to these discharges be held to the same prohibition.

However, since EBMUD is the entity responsible for day-to-day operation the Wet Weather Facilities, reporting responsibilities for any discharges from those facilities

appropriately falls on EBMUD alone. Thus, we have revised Provision IV.B.2 as indicated below. Additions are shown in underline; deletions are shown in strikethrough.

“2. Proper Sewer System Management Plan and Reporting, and Consistency with Statewide Requirements. The Discharger shall properly operate and maintain its collection system, which includes but is not limited to controlling inflow and infiltration, (Attachment D, Standard Provisions – Permit Compliance, subsection I.D), report any noncompliance with the exception noted below,

Following reporting requirements in the General WDRs for Wastewater Collection Agencies will satisfy NPDES reporting requirements for discharges of untreated or partially treated wastewater from the Discharger’s collection system. Furthermore, Regional Water Board staff issued notification and certification requirements in its letter on May 1, 2008. While not a part of this NPDES permit, the requirements in the May 1, 2008, letter continues to be in effect, and is included in Attachment G for reference.

Exception to noncompliance reporting. This Order does not require that the Discharger report noncompliance with Prohibition III.D. EBMUD’s NPDES Permit CA0038440 requires EBMUD to report such discharges from its Wet Weather Facilities so reporting by the Discharger is not necessary."

City of Alameda Comment 6

The City indicates that the wording in Prohibition III.D. is limiting and that the Water Board should consider a tentative prohibition pending the results of EBMUD’s flow monitoring study. Additionally, the City indicates that the permit should recognize that remedial actions enacted over the next few years will not yield immediate results, and that, if known, the permit should explicitly indicate the time period over which the satellites are not expected to feasibly “not cause or contribute” to wet weather discharges.

Response 6

We have not made the change requested. Because discharges from EBMUD’s Wet Weather Facilities do not comply with the Clean Water Act, it is not possible to include a tentative prohibition. To address the City’s concern about the time period over which the satellites are not expected to cause and contribute to discharges from the Wet Weather Facilities, we revised the Fact Sheet (see Response 4).

City of Alameda Comment 7

The City indicates that a clear cost-sharing schedule should be determined to define who is to contribute to what work. It points out that EBMUD should bear a prorate share of the costs of improvements and that this should go beyond the two year flow monitoring study, and \$2 million private lateral incentive program.

Response 7

We have not made the change requested because the requested requirement on EBMUD is inappropriate for a permit that covers the City and not EBMUD. As mentioned in an earlier response, we are not proposing an implementation schedule for the City and the other satellites to meet because additional information (e.g., flow monitoring, asset management template for managing collection systems, private lateral incentive programs) that will be gathered under the Stipulated Order is necessary to set forth a reasonable schedule under which compliance must be attained. The requirements for EBMUD to monitor flow for two years and contribute \$2 million per year to a private lateral incentive program are under the Stipulated Order, but the Stipulated Order is only considered a partial remedy for addressing discharges from EBMUD's Wet Weather Facilities. In other words, the appropriate contributions from each satellite and EBMUD necessary to eliminate discharges from the Wet Weather Facilities will need to be determined once the studies under the Stipulated Order have been completed.

City of Alameda Comment 8

The City requests that the Water Board rewrite the Reopener section to identify distinct reasons and outlined parameters before the Board chooses to modify or reopen the Order, such as discharger negligence.

Response 8

We have removed the reopener clause under Section IV.B.3 because it is duplicative. Please note that the Federal Standard Provisions under II.A Standard Provision – Permit Action (General) allows the Water Board to modify, revoke and reissue, or terminate the City's Order for cause (40 CFR Part 122.41(f)).

II. San Francisco Baykeeper (Baykeeper) & Our Children's Earth (OCE) – October 18, 2009

Baykeeper and OCE Comment 1

While Baykeeper and OCE agree that the Draft Permits should at least prohibit SSOs to waters of the United States, the Draft Permits should further expressly prohibit: (a) all SSOs to waters of the State and (b) all SSOs from the Permittees' sewage collection systems.

The Permittees' sewage collection systems all constitute Publicly Owned Treatment Works ("POTWs") as that term is defined by the Clean Water Act ("CWA") and accompanying U.S. EPA regulations. CWA § 212(2)(A), 33 U.S.C. § 1292(2)(A); 40 C.F.R. § 403.3. Specifically, a POTW includes all sewers, pipes and other conveyances that convey wastewater to a POTW's WWTP. EPA regulations require that POTWs subject to CWA regulation be properly operated and maintained. 40 C.F.R. § 122.41(e).

As sewage collection systems are part of the system/appurtenances used to collect and treat sewage to meet CWA requirements and as proper operation and maintenance of such systems would preclude SSOs, NPDES permits must prohibit SSOs. Furthermore, SSOs that do not directly reach waters, but overflow into public streets and other public places and back up into people's homes and businesses, pose nuisance public health threats that the State Board properly must regulate and seek to curtail. Notably, past NPDES permits issued by various California Regional Boards and permits issued by EPA have included such blanket prohibitions on SSOs. To protect the public health and welfare from the grave health risks and frequent potential property damage caused by SSOs to public streets, parks, residences and businesses, the Draft Permits must follow the example of past NPDES permits and include a blanket prohibition on all SSOs. The Regional Board may not condone the spilling of raw sewage into people's homes, places of business, public streets, and other areas accessible to the public.

In addition, the Draft Permits must include a separate and express prohibition on SSOs to waters of the State to comply with the Porter Cologne Act/California Water Code. The Draft Permits are not only NPDES permits, they are WDRs issued pursuant to the California Water Code. The California Water Code precludes the discharge of raw sewage to waters of the State, and the Draft Permits must reflect this. California Water Code § 13264. Prohibition A. in the NPDES Permits further represents impermissible backsliding from prior NPDES permits to the Permittees. See CWA §§ 402(o)(2) and 303(d)(4); 40 C.F.R. § 122.44(l). These prior NPDES permits to the Permittees contained the following, broader SSO prohibition:

The discharge of untreated or partially treated wastewater to any surface water stream, natural or man-made, or to any drainage system intended to convey storm water runoff to surface waters, is prohibited.

To comply with anti-backsliding requirements of the CWA and EPA regulations, the NPDES Permits must include SSO prohibitions at least as stringent as these prior permits.

In addition to not complying with applicable law, the SSO prohibition in the draft NPDES permits would preclude effective SSO enforcement. The SSO reporting information in the State Board's California Integrated Water Quality System Project (CIWQS) database posted on the State Board's website makes obvious that there is an endemic problem with accurate reporting of SSOs. Many spill reports from sewage system operators indicate large volume SSOs, with little to no of the spilled sewage recovered and yet the reports still indicate that none of the spills reached waters. It is extremely unlikely that large volume SSOs that are not recovered have not flowed into waters. The SSO prohibition as drafted gives sewage systems incentive to slant their reporting as not showing that spills reached waters of the United States, given the potential escape from liability if spills are not reported as reaching waters of the United States.

*An additional problem with the prohibition is the lack of clear definition in current case law of the term “waters of the United States.” The U.S. Supreme Court’s recent fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006) leaves highly uncertain what is a water of the United States. The State Board’s current Water Quality Enforcement Policy aptly observes that “fair, firm and consistent enforcement depends on a foundation of solid requirements in law, regulations, policies, and the adequacy of enforceable orders. . . . The extent to which enforceable orders include well-defined requirements . . . affects the consistency of compliance and enforcement” (emphasis added). Given the current uncertainty as to what constitutes a water of the United States under the governing case law, the Draft Permits are inconsistent with the State Board’s Enforcement Policy’s directive that enforceable orders should specify well-defined requirements. To be consistent with the Enforcement Policy, the Draft Permits must include a clear, unambiguous and thus enforceable prohibition on all sewage spills, not just those that reach “waters of the United States.”*

Notably, California Water Code sections 13260(a)(1) and 13263 provide the Regional Board with authority to regulate all SSOs, not just those that reach waters of the United States or waters of the State. Section 13260(a)(1) mandates that “Any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state” must file a report of waste discharge with the appropriate Regional Board (emphasis added). Any SSO has the potential to adversely affect quality of waters of the State. As the SSO reports in the CIWQS database show, many SSOs flow directly into State waters. Even when SSOs do not flow directly into waters, SSOs tend to leave sewage residue on streets or in storm drains that are eventually flushed into waters when it rains. Accordingly, sewage system operators must report all SSOs to the Regional Board to comply with California Water Code section 13260(a)(1). Section 13263, in turn, provides the Regional Board with broad authority to impose conditions regulating reported waste discharges, including conditions necessary to avoid public nuisance or indirect harm to waters.

Response 1

We have not made changes in response to the request. The Tentative Order would prohibit illicit discharges to waters of the United States, which is where the focus should appropriately remain at this time. To revise the prohibitions to include State waters as the commenter requested would in essence add discharge to groundwater to the mix and thus diffuse the focus of the current effort. Similarly, to expand the prohibitions to encompass all SSOs regardless of their destination would also diffuse the current effort. The prohibitions in the Tentative Order are sufficient to ensure that the satellites properly operate and maintain their collection systems and untreated wastewaters are not discharged to surface waters from their respective collection systems or cause or contribute to discharges from EBMUD’s Wet Weather Facilities.

Furthermore, while the prohibitions would not specifically address discharges to waters of the State, this does not mean that such discharges are permitted. As pointed out by Baykeeper and OCE, such discharges would be in violation of California Water Code Section 13260, which requires that any person discharging waste, or proposing to

discharge waste, within any region that could affect the quality of the waters of the State file a report of waste discharge. Such discharges would be directly enforceable under California Water Code Section 13350.

On the issue of backsliding, the Tentative Order would not provide for a less stringent prohibition than the previous permit's Prohibition A when taken in the context of that permit's Sections B.1.a, and B.1.b. These sections specify circumstances when there is no violation of the prohibition. The circumstances include when the discharge does not enter a storm drain or surface water body, and when the discharge is fully cleaned up from a storm drain system. Therefore, the Tentative Order's prohibition is equally stringent compared to the previous permit's prohibition.

Finally, in regards to the Baykeeper and OCE's comment about condoning sanitary sewer overflows that do not reach surface waters, but overflow into public streets and other public places or back up into people's homes, the Tentative Order does not condone these discharges. Such discharges are prohibited by Discharge Prohibition III.B, which prohibits the discharge of untreated or partially treated wastewater that creates a nuisance as defined in California Water Code Section 13050(m).

Baykeeper and OCE Comment 2

Baykeeper and OCE support Discharge Prohibitions B, C, and D.

Response 2

Comment noted.

Baykeeper and OCE Comment 3

Baykeeper and OCE indicate that tentative permits improperly use the upset provision. Therefore, Baykeeper and OCE request that the Water Board delete this provision from the tentative permits. Baykeeper and OCE state that this confusing provision, literally read, makes no sense. It bars the Regional Board from taking an enforcement action against an SSO if a Permittee can prove that an "upset" has occurred, as the term is defined in Attachment D, Standard Provisions I.H. This latter provision, tracking EPA regulations, defines an "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations" (emphasis added). The Permits expressly omit any technology based effluent limitations, however. Thus, it is impossible for a Permittee to prove an SSO caused "unintentional and temporary noncompliance with technology based permit effluent limitations," making it simply nonsensical to include an upset defense predicated on proving such noncompliance. The upset provision in the Draft Permits appears to have been drafted due to inappropriate conflation of EPA's regulation governing bypass (40 C.F.R. § 122.41(m)) and upset (40 C.F.R. § 122.41(n)). The upset provision in the Draft Permits, though ambiguous (or even nonsensical), could be read as prohibiting Regional Board enforcement against any SSO if the Permittee proves an "upset." Only EPA's bypass regulation prohibits all EPA enforcement against discharges that constitute a bypass. Comparatively, EPA's upset regulation only precludes EPA enforcement against the technology-based effluent limitation violations involved in a given discharge; the

regulation authorizes enforcement against any discharge for causing an exceedance of water-quality based effluent limitations or other restrictions on discharge. Accordingly, the upset provision in the NPDES Permits should be deleted for its potential conflict with EPA regulations. Finally, including any sort of affirmative defense to Regional Board enforcement for SSOs conflicts with the State Board's Statewide General Waste Discharge Requirements for Sanitary Sewer Systems (Order No. 2006-0003-DWQ) ("the State Board SSO Permit"). The State Board SSO Permit omits any affirmative defense for SSOs, an outcome the State Board found mandatory under federal and state law and to provide adequate protection against the serious health, environmental, and property damage risks posed by SSOs. Both the State Board SSO Permit and the NPDES Permits will be in effect as WDRs for the discharges in question, thus leading to significant legal confusion given that the former precludes any affirmative defense while the NPDES Permits provide for one.

Response 3

We are not making changes in response to this comment since we do not view the upset provision as constraining our ability to take enforcement. The Fact Sheet of each Tentative Order contains the rationale for Prohibition III.A: "This prohibition is based on the federal Clean Water Act, which prohibits discharges of wastewater that does not meet secondary treatment standards as specified in 40 CFR Part 133. Additionally, the Basin Plan prohibits discharge of raw sewage or any waste failing to meet waste discharge requirements to any waters of the basin."

Because the prohibition is based on wastewater not meeting secondary treatment standards, we think it is reasonable for dischargers to have the opportunity to invoke an affirmative defense as allowed by federal regulation if they are unable to comply. Identical provisions also apply for other collection systems covered under any NPDES permit as part of those permits' federal standard provisions. Clarifying that the upset provision applies in these cases does not provide these dischargers any greater allowances not already allowed to all other dischargers.

Finally, we note that the burden of proof for establishing an affirmative defense is on the discharger, and the discharger would need to show that its discharge met all of the conditions under 40 CFR 122.41. In such cases, a discharger would need to show, at a minimum, that noncompliance was not caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation. As we would evaluate these same factors when considering enforcement, we do not view this language as being beneficial to dischargers except under extreme scenarios (e.g., natural disaster) where an upset defense would be appropriate.

Baykeeper and OCE Comment 4

Baykeeper and OCE indicate that the Water Board should improve the tentative permits' reporting provisions.

To ensure accurate and complete SSO reporting, the Draft Permits should mandate that SSO reports include any information available as to the time the SSO commenced and the total volume of sewage spilled from the time that the SSO commenced. The Draft Permits should further make clear that the reports should clearly identify whether any sewage flowed into any water body or water conduit, including the ocean, tidal waters, natural streams, wetlands or marshes, artificial channels, drainage ditches or canals, or storm drains. The reports should name the water bodies whenever this information is available or give other information providing the location of the water bodies or conduits (such as address or geographic coordinates). The reports should include this information and report the volume of sewage that initially flowed into the water body or conduit even if the operator claims to have recovered some or all of the sewage spilled and returned the sewage to its collection system. The report should separately indicate the volume of sewage recovered from the total volume initially spilled.

Response 4

We are not making changes in response to this comment. This is because the dischargers are already required to report this information under the General WDRs for Wastewater Collection Agencies and the Regional Water Board's May 1, 2008, letter. These requirements are referenced in Provision B.2 of the Tentative Orders, which, in part, state:

“Following reporting requirements in the General Collection System WDR will satisfy NPDES reporting requirements for discharges of untreated or partially treated wastewater from the Discharger's wastewater collection system. Furthermore, Regional Water Board staff issued notification and certification requirements in its letter on May 1, 2008. While not a part of this NPDES permit, the requirements in the May 1, 2008, letter continue to be in effect, and the letter is included in Attachment G for reference.”

Baykeeper and OCE Comment 5

The new CDO revises Order No. 93-134 to delete any further requirement for Oakland to construct additional relief sewers. The new CDO provides instead that Oakland is to spend an amount on sewer line rehabilitation work that is equivalent to the amount Oakland would otherwise have spent on relief sewers to meet the requirements of Order No. 93-134. Baykeeper and OCE conceptually support Oakland shifting its efforts and expenditures away from relief sewers and onto sewer line rehabilitation work instead. Sewer line rehabilitation work, designed carefully and executed well, should reduce I/I into Oakland's sewer lines—reducing both wet-weather SSOs from the Oakland collection system and the volume of sewage conveyed from Oakland's collection system to EBMUD's system during storm events. This should help reduce discharges from the WWFs.

However, the CDO's arbitrary limit on Oakland's expenditures on sewer line rehabilitation to the amount Oakland would have otherwise spent on relief sewers is insufficient to bring Oakland into compliance with the CWA or California Water Code.

To ensure compliance, the CDO must require Oakland to devise a comprehensive, multi-year I/I reduction plan that reduces I/I to a level needed, in conjunction with reductions in peak flows from the other satellites, to avoid WWF discharges. The CDO must require Oakland to develop this I/I reduction plan based on the analysis of properly performed flow monitoring, flow modeling, CCTV inspection and smoke testing that identifies the sources of excessive I/I. The I/I reduction plan, to be effective, must further specify that Oakland adopt a systematic program for remedying problems with private laterals at the same time it repairs, replaces, or rehabilitates any of its sewer main lines. The detailed information presented at EBMUD's Blue Ribbon Panel meetings (many of which Regional Board staff attended) amply demonstrated that repair, replacement, or rehabilitation of sewer main lines is often not very effective at reducing I/I unless the private laterals that connect to these main lines are also repaired, replaced, or rehabilitated. The cost-effective time to fix private laterals is at the same time that sewer main lines are addressed

Response 5

We are not making changes in response to this comment. The purpose of amending the Cease & Desist Order for the City of Oakland is to ensure that actions taken under its compliance schedule are consistent with the prohibition in the tentative orders that prohibits any of the satellites from causing or contributing to discharges at EBMUD's Wet Weather Facilities during wet weather. We appreciate that Baykeeper and OCE agree with this conceptual shift in resources.

On remaining points, we acknowledge that this amendment to the Cease & Desist Order will not result in the City of Oakland or the other satellites complying with the prohibition against causing or contributing to discharges at EBMUD's Wet Weather Facilities during wet weather. At this time, we do not have adequate information to require a sequence of actions under a reasonable time period to bring these facilities into compliance with this prohibition. To address this information gap, EBMUD is required under a Stipulated Order, in part, to monitor flows from each of the satellite's wastewater collection systems over the next two years, develop a private lateral ordinance, implement an incentive program to encourage replacement of leaky private laterals, and develop an asset management template for managing collection systems. Additionally, U.S. EPA has indicated its plans to enforce the satellites' noncompliance with this prohibition by requiring each of the satellites to implement measures over the next few years to improve their respective systems until we have adequate information to propose a final remedy.

III. East Bay Municipal Utility District, Special District No. 1 – October 19, 2009

East Bay Municipal Utility District Comment 1

East Bay Municipal Utility District (EBMUD) supports the issuance of the Tentative Orders as complements to the "no discharge" permit the Water Board issued to EBMUD in January 2009 and the work EBMUD is compelled to perform under a Stipulated Order (issued by the Federal District Court in a case brought by the Regional and State Water Boards and U.S. EPA against EBMUD).

EBMUD indicates that the Tentative Orders formalize the long-standing relationship between EBMUD and the Satellites in protecting San Francisco Bay against negative wet-weather impacts. EBMUD points out that the Tentative Orders correctly view wet weather flows in the Satellites' collection systems as internal waste streams within the overall East Bay Sanitary Sewer System. Further, EBMUD indicates that requirements imposed by the Tentative Order (not to cause or contribute to wet-weather discharges from the Wet Weather Facilities) are authorized under both Federal and State law (40 CFR 122.41(e) and 122.45(h); Water Code Section 13263).

Response 1

Comment noted.

IV. East Bay Collection System Satellites – October 23, 2009

East Bay Collection System Satellites Comment 1

The Satellites' are concerned that Anti-backsliding rules under the Clean Water Act might be applied to planned future revisions of Discharge Prohibition III.D, which prohibits the Satellites from causing or contributing to discharges from EBMUD's Wet Weather Facilities during wet weather.

The Satellites are concerned that any flow contribution to EBMUD's system could be considered a violation even if a particular satellite has already fully implemented inflow and infiltration (I&I) reduction programs. This would unfairly place the Satellites in the position of being strictly liable for a permit violation that they have no ability to prevent. The Satellites cannot control EBMUD's operation of the Wet Weather Facilities, and individual Satellites cannot control the amount of flow contributed by other Satellites.

While the Satellites do not believe that Anti-backsliding rules apply to Discharge Prohibition III.D, they are concerned that another party could take a different position. To ensure that Anti-backsliding rules are not improperly applied to Discharge Prohibition III.D, the Satellites formally request that the Tentative Order be revised as follows:

- “B. Cease and Desist Orders, EBMUD 2009 NPDES Permit, and Stipulated Order for Preliminary Relief.** *In 1986, the Regional Water Board issued a Cease and Desist Order (“CDO”) No. 86-17 (reissued in 1993 as CDO No. 93-014) to the Discharger and each of the Satellite Agencies requiring them to cease and desist discharging from their wastewater collection systems. In response, EBMUD and the Satellites developed a comprehensive Infiltration/Inflow Correction Program (“I/ICP”) which contains schedules, called Compliance Plans, for each Satellite to complete various sewer rehabilitation projects specified in the I/ICP.*

The Compliance Plans were incorporated into CDO No. 93-014 for each Satellite as a compliance schedule.

* * * *

In 2009, the Regional Water Board adopted Order No. R2-2009-0004 reissuing the EBMUD permit and prohibiting any discharge from EBMUD's three wet weather facilities ("WWFs"); located at 2755 Point Isabel Street, Richmond; 225 Fifth Avenue, Oakland; and 5597 Oakport Street, Oakland. Shortly afterwards, the USEPA, and Regional and State Water Boards filed a Federal Action (lawsuit) against EBMUD for discharges in violation of this prohibition and entered into a Stipulated Order ("SO") based on EBMUD's immediate inability to comply. The SO requires EBMUD, among other things, to conduct flow monitoring on satellite collection systems, adopt a regional private sewer lateral ordinance, implement an incentive program to encourage replacement of leaky private laterals, and develop an asset management template for managing collection system.

EBMUD had a number of studies conducted to provide the basis for developing many of the technical provisions of the SO. One conclusion of these studies was that, while significant progress had been made in reducing inflow and infiltration ("I/I") through the I/ICP and subsequent sewer pipe rehabilitation, it is unlikely that these projects will be sufficient to reduce satellite flows to the extent that discharges from the WWFs are eliminated or significantly reduced. The cooperation of each Satellite Agency in the development and implementation of the programs specified above, along with making improvements to their own collection systems, is critical to achieving the flow reductions within each system that is necessary to eliminate or significantly reduce the discharge from the WWFs.

- P. *Anti-Backsliding Requirements.*** *Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations at title 40, Code of Federal Regulations section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. Because this Order prohibits all discharges from the sewer collection system, there are no effluent limitations in this Order, and this Order is as stringent as the previous permit. The*

Regional Water Board intends to refine the narrative Prohibition III.D with a numeric flow limit or other more detailed set of standards that achieves the same result as the Prohibition when information necessary to develop the limit becomes available. Accordingly, such future refinement of the effluent limitation is an equivalent effluent limitation and will not be considered to be less stringent than the existing Prohibition III.D.”

Add paragraph to Fact Sheet page F-12 Section IV.4.

“Prohibition III.D provides a narrative prohibition because information is not currently available to sufficiently specify an appropriate numeric flow limit or other more detailed set of standards necessary to eliminate Discharger’s contribution to discharges from EBMUD’s WWFs. Implementation of the SO and the development of a final remedy in the Federal Action is expected to provide the technical information necessary to ensure compliance with Prohibition III.D. The Regional Water Board intends to modify the Discharger’s NPDES permit so that compliance can be measured by a specific numeric criterion or other more detailed set of standards rather than the current narrative criterion.”

The Satellites go on to indicate that they would prefer more specific language than that described above be substituted in Section P. The preferred language states:

“The Regional Water Board intends to refine the narrative Prohibition III.D to require specific actions, collection system performance or wastewater flows when information necessary to develop those specific permit conditions becomes available.”

Response 1

We agree with the Satellites contention that anti-backsliding would not be violated should we refine the narrative Prohibition III.D to a numeric one or other detailed standard that achieves the same result as the existing prohibition. Therefore, we have included the requested changes by the satellites in the Revised Tentative Orders (with minor editorial changes and one change to the new paragraph under Section IV.4 of the Fact Sheet noted below); however, we did not include the preferred language for Section P. This is because this language discounts the likelihood that the satellites will be regulated through flow limits, which we believe is the most likely scenario.

Revision to Section IV.4 of the Fact Sheet: “...to provide the technical information necessary for the Discharger to ensure achieve compliance with Prohibition III.D...”

East Bay Collection System Satellites Comment 2

The Satellites indicate that 40 CFR 122.41(e) does not provide authority for the Water Board to impose Discharge Prohibition III.D.

The Satellites indicate that Section 122.41, subdivision (e), does not authorize the Regional Water Board to impose Discharge Prohibition III.D because Discharge Prohibition III.D is not an operation and maintenance requirement. Instead, Discharge Prohibition III.D is a narrative wet weather flow limit. The broad “cause or contribute” language in the discharge prohibition potentially makes a Satellite liable for violations of Discharge Prohibition III.D if it contributes wet weather flows to EBMUD’s interceptor system on a day in which EBMUD discharges from its Wet Weather Facilities regardless of whether the Satellite has properly maintained and operated its collection system to eliminate I&I. The Tentative Orders even acknowledge that Discharge Prohibition III.D. is designed to control peak wet weather flows. Section II.P of the Tentative Orders provides that “[t]he Regional Water Board intends to refine the narrative Prohibition III.D with a numeric flow limit that achieves the same result as the Prohibition when information necessary to develop the limit becomes available.” Similarly, Section IV.B.2 of the permit states, “[i]mplementation of the General Collection System WDR requirements for proper operation and maintenance and mitigation of spills will satisfy the corresponding federal NPDES requirements specified in this Order provided the Discharger reduces peak wet weather flows so that it does not cause or contribute to discharges at EBMUD’s Wet Weather Facilities.” (emphasis added.) Accordingly, because Prohibition III.D is a wet weather flow limit rather than an operation and maintenance requirement, it is not authorized by section 122.41, subdivision (e).

Moreover, if the purpose of Discharge Prohibition III.D was merely to ensure that the Satellites properly maintain and operate their collection systems to reduce I&I, Discharge Prohibition III.D would be superfluous because Section IV.B.2 of the Tentative Orders requires a Satellite to “properly operate and maintain its collection system, which includes but is not limited to controlling inflow and infiltration.” Similarly, the standard permit conditions set forth in Section I.D of Attachment D require the Satellites to properly operate and maintain their facilities in accordance with 40 C.F.R § 122.41(e).

Response 2

We disagree. Prohibition III.D is necessary to clarify and highlight that the standard for proper operation and maintenance has become more stringent in that it is now necessary to control inflow and infiltration to eliminate discharges from EBMUD’s Wet Weather Facilities. For this reason, reliance on the general operation and maintenance provision alone is not adequate. During wet weather, satellites contribute excessive flows to EBMUD’s interceptor, which, in turn, causes and contributes to wet weather discharges that are in violation of the Clean Water Act.

East Bay Collection System Satellites Comment 3

The Satellites indicate that Discharge Prohibition III.D violates substantive due process because it is a vague and overbroad narrative provision. The Satellites have no means of knowing how to control the operation of their collection systems during wet weather to comply with Discharge Prohibition III.D. Moreover, the Tentative Orders do not contain any standards for determining compliance with Discharge Prohibition III.D. Furthermore, Discharge Prohibition III.D potentially makes the Satellites strictly liable

for the actions of third parties over which they have no control, such as EBMUD's operation of the Wet Weather Facilities and the amount of flow contributed by other Satellites.

Response 3

See Response 1 to the City of Alameda.

East Bay Collection System Satellites Comment 4

The Satellites indicate that the Tentative Orders are invalid because they do not demonstrate that the Regional Water Board considered the factors in Water Code section 13241. When issuing waste discharge requirements to a permittee under the Clean Water Act that impose requirements more stringent than those imposed by the Clean Water Act, the Regional Water Board must consider all of the factors set forth in Water Code section 13241, including economic considerations. (Wat. Code § 13263, subd. (a); City of Burbank v. State Water Resources Control Board (2005) 25 Cal.4th 613, 627.)

The Tentative Orders impose requirements more stringent than those imposed by the Clean Water Act. The Tentative Orders prohibit discharges to EBMUD's interceptor that cause or contribute to discharges from EBMUD's Wet Weather Facilities, require the control of I&I and require the preparation of a Sewer System Management Plan while the Clean Water Act does not. The addition of these more stringent requirements to the Tentative Orders requires the Regional Water Board to comply with Water Code section 13241.

Response 4

We disagree. The Clean Water Act prohibits discharges of wastewater that do not meet secondary treatment standards as specified in 40 CFR Part 133. The requirements in the Tentative Order are to ensure that the satellites properly operate and maintain their wastewater collection systems to reduce inflow and infiltration, and by doing so not cause or contribute to violations of Clean Water Act-mandated requirements. These requirements are not more stringent than the Clean Water Act.

East Bay Collection System Satellites Comment 5

The Satellites indicate that the Tentative Orders are not exempt from California Environmental Quality Act (CEQA). To support this position, the Satellites indicate that the exemption from CEQA set forth in Water Code section 13389 only applies to the extent that the specific provisions in the Tentative Orders are required by the Clean Water Act. (See Wat. Code § 13372, subd. (a). Therefore, because the Tentative Orders impose several requirements that are not required by the Clean Water Act, such as the prohibition on discharges to EBMUD's interceptor that cause or contribute to discharges from EBMUD's Wet Weather Facilities, the requirement to control I&I and the requirement to prepare a Sewer System Management Plan, the issuance of the Tentative Orders is not exempt from CEQA under Water Code section 13389.

Response 5

We disagree. The most stringent requirements in the Tentative Orders are necessary to ensure that the satellites do not cause or contribute to discharges from EBMUD's Wet Weather Facilities that are in violation of the Clean Water Act. In other words, we

believe that the requirements imposed on the satellites are necessary to comply with the Clean Water Act, and therefore, are exempt from CEQA.

East Bay Collection System Satellites Comment 6

The Satellites indicate that because they do not discharge pollutants to a water of the United States from a point source, they should not be subject to NPDES permits. In adopting Order No. 2006-003, Statewide General Waste Discharge Requirements for Sanitary Sewer Systems, the State Water Board considered comments from stakeholders suggesting that NPDES permits should be required for all collection systems leading to an NPDES-permitted publicly owned treatment works. This approach was rejected, and the State Water Board noted that “this interpretation is not widely accepted and US EPA has no official guidance to this [effect].” (Fact Sheet for Order No. 2006-003, p. 4.)

Response 6

We disagree. The satellites, with the exception of the City of Emeryville, have been subject to NPDES Permits since 1976 because of the high number of sewer overflows in their respective communities, many of which discharge to waters of the United States. The satellites’ wastewater collection systems fall within the definition of a publicly owned treatment works, and any discharges from such systems must be regulated under an NPDES permit. As such, it is appropriate to regulate the satellites under NPDES permits.

In regards to Order No. 2006-0003-DWQ, the State Water Board recognized the need for this sort of flexibility as it recognized that some regional water boards issued NPDES permits to wastewater collection system operators and left intact the regional water boards’ ability to adopt more stringent permits than the Statewide General Waste Discharge Requirements, which only set forth bare minimum requirements.

East Bay Collection System Satellites Comment 7

The Satellites understand that the Regional Water Board must comply with the State Water Board’s Order No. WQ-2007-004. Nevertheless, the Satellites believe Order No. WQ 2007-004 was wrongly decided, and in order to preserve their rights, they assert arguments on that basis.

The Tentative Orders are invalid because they are based on Order No. WQ 2007-04, which was erroneously decided by the State Water Board. The 2007 Order concluded that the permit and time schedule order issued to EBMUD by the Regional Water Board in September 2005, which permitted EBMUD to use its Wet Weather Facilities, were invalid because they failed to implement secondary treatment requirements and to ensure compliance with applicable water quality standards. As discussed in EBMUD’s Petition for Review of Waste Discharge Requirements Order No. R2-2009-0004 and Cease and Desist Order No. R2-2009-0005 (“EBMUD Petition”), the State Board’s conclusions in the 2007 Order were erroneous because secondary treatment standards do not apply to facilities that discharge intermittently during wet weather. In addition, the Wet Weather Facilities are not subject to secondary treatment standards because they do not fall within the definition of a “publicly owned treatment works.” Furthermore, the permit

and time schedule order are consistent with the regulatory strategy in the Basin Plan, which was approved by the State Board.

The Satellites agree with and incorporate by reference the arguments made in EBMUD's Petition regarding the validity of the 2007 Order. Accordingly, to the extent that the State Water Board erroneously determined that the Wet Weather Facilities are subject to secondary treatment standards, the basis for Discharge Prohibition III.D. is invalid.

Response 7

Comment noted.

East Bay Collection System Satellites Comment 8

As the Regional Water Board is aware, the Wet Weather Facilities and the Satellites' improvements under the East Bay Infiltration/Inflow Correction Program were constructed at the direction of, and with the consent of, both the Regional Water Board and EPA. These projects were undertaken to comply with injunctive provisions of Regional Water Board orders issued to resolve the agency's claims under the Clean Water Act and Porter-Cologne regarding wet weather discharges from the East Bay sanitary sewer systems. These administrative orders are final, and the Regional Water Board is barred by the doctrine of res judicata from seeking further relief on the basis of the same claims. In addition, because the Satellites relied on representations from the Regional Water Board and EPA demanding construction of the Wet Weather Facilities and the Satellites' improvements, and the Regional Water Board and EPA knew of this reliance, the Regional Water Board is now estopped from requiring further and different actions from the Satellites.

Response 8

We disagree. The previous Regional Water Board administrative orders referenced in the comment were primarily established to address untreated sanitary sewer overflows from the satellites' collection systems and EBMUD's interceptor system. As detailed in the Fact Sheet, it is necessary now to also address discharges of partially treated wastewater in violation of the Clean Water Act from EBMUD's Wet Weather Facilities. We are therefore not barred from seeking further relief.