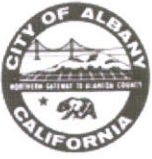
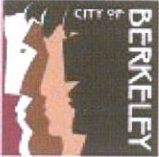




October 23, 2009



Bruce H. Wolfe
Executive Officer
California Regional Water Quality Control Board,
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612



**Re: Comments of Satellites on Tentative Order Nos. R2-2009-00XX
NPDES Nos. CA0038474, CA0038471, CA0038466, CA038792, CA0038512,
CA0038504, CA0038482**

Dear Mr. Wolfe:



This letter sets forth the comments of the Cities of Alameda, Albany, Berkeley, Emeryville, Oakland, Piedmont and Stege Sanitary District (the "Satellites") on their respective Tentative Order Nos. R2-2009-00XX, NPDES Nos. CA0038474, CA0038471, CA0038466, CA038792, CA0038512, CA0038504, CA0038482 ("Tentative Orders"). These comments are in addition to any individual comments by these agencies. The Satellites have worked closely with Regional Water Board staff to address numerous issues raised by the Tentative Orders, and Regional Water Board staff has been professional and cooperative. We highly commend staff's collaborative work with the Satellites to find productive and feasible solutions to water quality problems confronting our communities.



Background

As the Regional Water Board is aware, and as the Tentative Order Fact Sheets acknowledge, these permitting proceedings are the latest in a long history of regulatory actions directed toward East Bay sanitary sewer systems. Collection systems throughout the East Bay, the Satellites among them, were designed and constructed in the early twentieth century, and all lead to East Bay Municipal Utility District's ("EBMUD") publicly owned treatment works. The design of these collection systems was common at the time they were built, but it allowed significant inflow and infiltration ("I&I") that caused the systems to overflow in wet weather.

In 1976, the Regional Water Board issued NPDES permits to EBMUD and the Satellites. EBMUD's NPDES permit required it to eliminate discharges of untreated wet weather overflows from its interceptor system. In the 1980s, EBMUD and the Satellites cooperated to develop a comprehensive program to eliminate the untreated wet weather discharges. This effort produced the East Bay Infiltration/Inflow Correction Program, and specified Compliance Plans for each Satellite Agency.

In 1986, the Regional Water Board issued Cease and Desist Order No. 86-17. In that order, the Regional Water Board accepted the program developed by EBMUD and the Satellites, and directed the Satellites to implement their Compliance Plans. Some of the Satellites requested an extension of the Order No. 86-17 deadlines, and a revised Cease and Desist Order was issued in 1993.



In 2007, the State Water Board issued Order WQ 2007-0004, which essentially rejected the approach to wet weather compliance that the Regional Water Board, the United States Environmental Protection Agency ("USEPA"), EBMUD and the Satellites had agreed on for decades. 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. Shortly afterwards, the USEPA, and the 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 to, among other things, 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 systems.

The SO clearly implies that cooperative actions by the Satellites will be required to reduce wet weather flows in order to reach the ultimate objective of elimination or substantial reduction in the use of the Wet Weather Facilities. The Prohibitions set forth in the Tentative Orders are intended to require that each Satellite will be legally responsible for taking such actions as may be needed to address the SO's objective. Unfortunately, neither the Satellites as a group nor any of the individual entities can immediately meet the requirements of Prohibition III.D, regardless of any near term maintenance or operational activities they may undertake. The following comments are intended to address the impossibility of compliance with Prohibition III.D for the Satellites.

Comment on Anti-Backsliding

One of the Satellites' greatest concerns with the Tentative Orders is the possibility that Anti-Backsliding Rules under the Clean Water Act might be applied to planned future revisions to Discharge Prohibition III.D. Discharge Prohibition III.D provides:

The Discharger shall not cause or contribute to discharges from EBMUD's Wet Weather Facilities that occur during wet weather or that are associated with wet weather.

If interpreted strictly, the Satellites are concerned that *any* flow contributed into EBMUD's system when EBMUD discharges from the Wet Weather Facilities would be considered a violation of Discharge Prohibition III.D – even for Satellites that have fully implemented all I&I reduction programs ordered by the Regional Water Board. Such an interpretation of Prohibition III.D would unfairly place the Satellites in the position of potentially being strictly liable for a permit violation 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.

The impossibility of compliance with Discharge Prohibition III.D as written is all the more troubling because third parties or the government might argue that the future refinement of this prohibition, which is planned by all stakeholders, would be constrained by Clean Water Act Anti-Backsliding provisions. The Satellites do not agree that Anti-Backsliding rules apply to Discharge Prohibition III.D, but the risk of another party taking a contrary position cannot be controlled.

The Satellites are, therefore, highly appreciative that Regional Water Board staff has agreed to make modifications to the Tentative Orders to preclude improper application of Anti-Backsliding rules to future refinement of Discharge Prohibition III.D. These modifications include changes to finding II.P and a new

section of the Fact Sheet, page F-12 Section IV.4. Accordingly, the Satellites hereby formally request that the revisions contained in the following paragraphs be included in the final Order 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, to 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.

It is the understanding of the Satellites that the language set forth above, with the exception of the track changes, is acceptable to Regional Water Board staff. The language added by the track changes is intended to make the noted paragraph consistent with the proposed language to be added to the Fact Sheet in Section IV.4. The issue raised by the track changes is intended to provide the Regional Water Board with the discretion to use the appropriate means available to modify Prohibition III.D once the information from the current set of studies is available, rather than limit future permit conditions to solely numeric flow limits.

Although the track changes language set forth above may be minimally acceptable to preserve the Regional Water Board's regulatory options until after the current EBMUD and Satellite studies have been completed, the Satellites would prefer that even more specific language be substituted in Section P above to state:

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

Other Specific Comments

As noted above, the Satellites are pleased with the cooperative efforts of both Regional Water Board staff and members of the USEPA in attempting to work with the Satellites to address this complicated issue. Unfortunately, in light of the recent presentation of Notice to Sue letters to Satellites and the potential for Satellites to be included in the pending litigation between the USEPA, the State and Regional Water Boards, EBMUD and certain NGO groups, the Satellites seek to set forth several legal assertions as objections to the Tentative Orders in order to preserve the potential to raise these legal issues as may be required in the future.

1. 40 C.F.R. § 122.41(e) does not Provide Authority for the Imposition of Discharge Prohibition III.D

The Regional Water Board improperly relied on Section 122.41, subdivision (e), of Title 40 of the Federal Code of Regulations for the imposition of Discharge Prohibition III.D. Section IV of the Permit Fact Sheet states that Discharge Prohibition III.D is based on the operations and maintenance requirements in Section 122.41, subdivision (e), of Title 40 of the Federal Code of Regulations and “is necessary to ensure that the Discharger properly operates and maintains its facilities to reduce I&I.” Section 122.41, subdivision (e), provides in relevant part, “[t]he permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the permit.”

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).

2. Discharge Prohibition III.D Violates Substantive Due Process

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.

3. The Regional Water Board Failed to Consider Factors in Water Code section 13241

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.

4. The Tentative Orders Impermissibly Specify the Manner of Compliance in Violation of Water Code Section 13360

Water Code Section 13360 prohibits the Regional Water Board from specifying the manner in which a permittee achieves compliance with waste discharge requirements and explicitly authorizes a permittee to comply in any lawful manner. Section IV.B.2 of the Tentative WDR violates Section 13360 by specifying that the Satellites must achieve compliance with Discharge Prohibition III.D by controlling I&I. The Tentative WDR must therefore be revised to permit the Satellites to comply with the discharge prohibitions in any lawful manner, including by constructing additional capacity in their collection systems.

5. Issuance of Tentative Orders is not Exempt from CEQA

The exemption from the California Environmental Quality Act ("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.

6. The Satellites' Collection Systems Do Not Require NPDES Permits

Because the Satellites 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.)

7. State Water Board Order No. WQ 2007-004 Was Erroneously Decided

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. R2-2009-005 ("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.

8. Res Judicata / Estoppel

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.

Conclusion

The Satellites support Regional Water Board staff's proposed modifications to the Tentative Order, and looks forward to continuing their work in partnership with the Regional Water Board to protect water quality.

Very truly yours,



Doug Humphrey

On behalf of the seven East Bay Collection System Satellites

c: Hugh Barroll, Environmental Protection Agency
Lori Jonas, United States Department of Justice
Lila Tang, Regional Water Board
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