

ENVIRONMENTAL ADVOCATES

ATTORNEYS AT LAW

5135 ANZA STREET
SAN FRANCISCO, CALIFORNIA 94121
(415) 533-3376
FAX: (415) 358-5695
E-mail: csproul@enviroadvocates.com

October 18, 2009

California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Comments on draft NPDES PERMITS and WASTE DISCHARGE REQUIREMENTS for the following dischargers: City of Oakland, NPDES Permit No. CA0038512, Order No. R2-2009-xxxx; City of Alameda, NPDES Permit No. CA0038474, Order No. R2-2009-xxxx; City of Albany, NPDES Permit No. CA0038471, Order No. R2-2009-xxxx; City of Berkeley, NPDES Permit No. CA0038466, Order No. R2-2009-xxxx; City of Emeryville, NPDES Permit No. CA0038792, Order No. R2-2009-xxxx; City of Piedmont, NPDES Permit No. CA0038504, Order No. R2-2009-xxxx; and Stege Sanitary District, NPDES Permit No. CA0038482, Order No. R2-2009-xxxx; and on Cease and Desist Order to City of Oakland, Order No. R2-2009-xxxx.

Dear Regional Board:

San Francisco Baykeeper (“Baykeeper”) and Our Children's Earth Foundation (“OCE”), hereby submit the following comments on the above-referenced Draft NPDES permits for the Cities of Alameda, Albany, Berkeley, Emeryville, Oakland, and Piedmont and Stege Sanitary District (“the Draft Permits”) and the draft Cease and Desist Order (“CDO”) to the City of Oakland.

I. The Permits’ Discharge Prohibition

As the Regional Board points out, the Permittees to be covered by these Draft Permits (“the Permittees”) all operate satellite sewage collection systems which convey sewage to the East Bay Municipal Utility District (“EBMUD”) sewage system for treatment and discharge. None of the Permittees operates its own sewage wastewater treatment plant (WWTP). Accordingly, these Permittees only discharge sewage in the form of raw sewage spills from manholes, broken sewer lines, or pump stations. Such sewage spills (often referred to as sanitary sewer overflows or SSOs) should be categorically prohibited as they pose serious public health risks and a failure of the intended method of treatment of the Permittees sewage wastewater, i.e., the conveyance of this wastewater to EBMUD’s system for treatment and subsequent discharge through a deep water outfall.

The Draft Permits go part way toward prohibiting the Permittees' SSOs, as they set forth the following discharge prohibitions:

- A. The discharge of untreated or partially treated wastewater to waters of the United States, is prohibited.
- B. The discharge of untreated or partially treated wastewater that creates a nuisance as defined in California Water Code Section 13050(m) is prohibited.
- C. The discharge of chlorine, or any other toxic substance used for disinfection and cleanup of wastewater spills, to any surface water body is prohibited.
- D. 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.

E.g., Oakland NPDES Permit, § III. Discharge Prohibitions.

Baykeeper and OCE support these prohibitions as far as they go; they certainly should not be omitted or further weakened. To comply with applicable law and to allow for effective enforcement, these prohibitions must be expanded upon, however, to include a categorical ban on all SSOs from the Permittees' collection systems.

A. Discharge Prohibition A. Must Be Expanded.

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.¹ To protect the public health and welfare from

¹ An example is NPDES Permit No. CA010991 issued by the Los Angeles Regional Board to the City of Los Angeles' Hyperion wastewater treatment plant and appurtenant

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.

City of Oakland, Sanitary Sewer Collection System, NPDES Permit No. CA0038512, Order No. R2-2004-0012, § A. Prohibitions, ¶ 1; City of Albany, Sanitary Sewer Collection System, NPDES Permit No. CA0038471, Order No. R2-2004-0009, § A. Prohibitions, ¶ 1; City of Alameda, Sanitary Sewer Collection System, NPDES Permit No. CA0038474, Order No.

collection system. Regional Board Order No. 94-021 ("the Hyperion Permit"). Condition IV.2 of the Hyperion Permit provides "Any discharge of wastes at any point other than specifically described in this order and permit is prohibited, and constitutes a violation thereof." The Hyperion NPDES permit describes the discharge of treated sewage from the ocean outfall downstream of the Hyperion treatment plant. Standard Provision B.7. further provides:

Any "overflow" or "bypass" of facilities, including the "waste" collection system, is prohibited. . . .

The Hyperion Permit further defines an "overflow" to mean "the intentional or unintentional diversion of flow from the collection and transport systems, including pumping facilities." Hyperion Permit Standard Provision A.31. Together, these provisions made it clear that *all* SSOs from the Hyperion system are prohibited.

Another example is the EPA-issued NPDES Permit (NPDES Permit No. HI0020877) to the City and County of Honolulu for the Honouliuli WWTP and related collection system. The Honouliuli NPDES permit contains express provisions prohibiting all unauthorized overflows of sewage, regardless of whether the spills reach waters of the United States. *See* Honouliuli Permit, Standard Provisions and Reporting Requirements ¶¶ B.7, C.2, and C.4.

R2-2004-0008, § A. Prohibitions, ¶ 1; City of Berkeley, Sanitary Sewer Collection System, NPDES Permit No. CA0038466, Order No. R2-2004-0010, § A. Prohibitions, ¶ 1; City of Emeryville, Sanitary Sewer Collection System, NPDES Permit No. CA0038792, Order No. R2-2004-0011, § A. Prohibitions, ¶ 1; City of Piedmont, Sanitary Sewer Collection System, NPDES Permit No. CA0038504, Order No. R2-2004-0013, § A. Prohibitions, ¶ 1; Stege Sanitary District, NPDES Permit No. CA0038482, Order No. R2-2004-0014, § A. Prohibitions, ¶ 1. 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.² 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.³ 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).⁴ 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

² The CIWQS database is published on the State Board's website at:
http://www.swrcb.ca.gov/water_issues/programs/ciwqs/publicreports.shtml

³ Justice Kennedy's concurring opinion provided the fifth justice needed for a majority in *Rapanos*. With respect to wetlands, Justice Kennedy opined that only wetlands with a "significant nexus" to a navigable-in-fact water body constitute waters of the United States. As the case dealt only with wetlands, whether Justice Kennedy's test extends to other surface waters, such as streams, arroyos, and artificial channels is not clear. Moreover, Justice Kennedy's test itself is highly ambiguous and subject to varying interpretation.

⁴ The State Board's current enforcement policy (adopted in February 2002) is published at a link set forth on the State Board's website at:
http://www.swrcb.ca.gov/water_issues/programs/enforcement/

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.

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

Baykeeper and OCE support Discharge Prohibition B. California Water Code Section 13050(m) prohibits wastewater discharges which creates nuisances. Thus, the Draft Permits properly must prohibit such discharges to comply with the California Water Code.

Baykeeper and OCE further support Discharge Prohibition C. In the past, many sewage collection system operators have used chlorine or similar toxic substances to disinfect areas affected by SSOs. Unfortunately, this has at times led to the discharge of such toxic substances into waterways—compounding the environmental harm from the SSO. This prohibition is important to curtail such practices.

Finally, Baykeeper and OCE support Discharge Prohibition D. This Discharge Prohibition appropriately prohibits the Permittees from causing or contributing to discharges from EBMUD’s Wet Weather Facilities (“the WWFs”). This Prohibition is necessary to give effect to the State Water Resources Control Board’s recent decision setting aside the Regional Board’s previous NPDES permit to the WWFs. This State Board decision made plain that the Regional Board may not issue a permit that authorizes discharges from the WWFs without also imposing secondary treatment-based effluent limits set pursuant to CWA section 301(b)(1)(B)⁵ and appropriate water quality standard-based effluent limitations (“WQBELs”) set pursuant to CWA section 301(b)(1)(C).⁶ *In the Matter of Own Motion Review of EBMUD Wet Weather Permit* (Order No. WQ 2007-0004) (May 1, 2007). Since it is clear that the WWFs cannot meet such effluent limitations given that they do not provide the necessary level of treatment, to

⁵ 33 U.S.C. § 1311(b)(1)(B).

⁶ 33 U.S.C. § 1311(b)(1)(C).

comply with the *EBMUD* decision, the Regional Board must both ban the WWF discharges (as its recent permit to the WWFs does) and to prohibit the Permittees, whose excess wastewater discharges to EBMUD's system cause the WWFs' discharges, from continuing past practice of discharging excessive wastewater to the EBMUD system.

II. The Draft Permits Improper Upset Defense Provision Should Be Deleted.

The Draft Permits include the following objectionable "upset defense" provision:

Enforcement of Prohibition III.A [prohibiting SSOs to waters of the United States]. The Regional Water Board may take enforcement action against the Discharger for any sanitary sewer system discharge, unless the Discharger documents that an upset, defined in Attachment D, Standard Provisions I.H, occurred.

E.g., Oakland Permit § IV. Provisions, ¶ B.1. 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.

III. The Regional Board Should Improve the Draft Permits' Reporting Provisions.

Compliance with the CWA and accompanying EPA regulations requires that NPDES permits, even no discharge permits, include appropriate monitoring and reporting requirements. *See* CWA § 402(b)(1)(A)⁷ (NPDES permits must include the applicable requirements of CWA sections 301, which in turn mandates appropriate technology-based and water quality standard-based effluent limitations on point source discharges); 40 C.F.R. § 122.44 (NPDES permits must include effluent limitations); 40 C.F.R. § 122.41(j) (NPDES permits must include monitoring requirements); 40 C.F.R. §§ 122.41(l)(4), 122.48 (NPDES permits must specify reporting requirements); *see* California Water Code § 13377 (authorizing Regional Boards to prescribe NPDES permit conditions to ensure CWA compliance).

As noted above, there are significant problems with accurate SSO reporting. SSOs are typically brought to the attention of sewage system operators by calls from the public. Crews typically do not arrive at the site of a sewage spill until well after the sewage spill has commenced. Many sewage system operators report the volume of spills based on their observations after their response crews have arrived at the site of a spill, meaning that reports do not accurately account for the volume of sewage spilled before the crews arrived.

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.

IV. The Oakland CDO

The Oakland CDO amends a prior CDO to Oakland and other EBMUD satellite systems, Order No. 93-014. Order No. 93-014, *inter alia*, required Oakland to complete relief sewer projects to reduce wet weather-related SSOs from Oakland's collection system—by allowing infiltration and inflow (“I/I”)—driven peak sewage flows to be conveyed more rapidly to EBMUD's system. These relief sewers would have tended to reduce Oakland's SSOs at the expense of increasing discharges from the WWFs. The new CDO revises Order No. 93-014 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

⁷ 33 U.S.C. § 1341(b)(1)(A).

equivalent to the amount Oakland would otherwise have spent on relief sewers to meet the requirements of Order No. 93-014. 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.

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.

Baykeeper and OCE hereby request to be placed on any list of interested persons to be notified of any further proceedings before the Regional Board or the State Board concerning the Draft Permits or CDO. Please send any notices to:

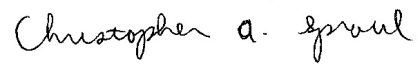
Sejal Choksi
San Francisco Baykeeper
785 Market Street, Suite 850,
San Francisco CA 94103
E-mail: amy@baykeeper.org

Mike Costa
Staff Attorney
Our Children's Earth Foundation
100 First St., Suite 100-367
San Francisco, CA 94105
email: mike@ocefoundation.org

Christopher Sproul
5135 Anza Street
San Francisco, CA 94121
E-mail: csproul@environadvocates.com

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink that reads "Christopher a. sproul". The signature is written in a cursive, lowercase style.

Christopher Sproul
Environmental Advocates
Counsel for Baykeeper and OCE