



California Regional Water Quality Control Board

San Francisco Bay Region



Linda S. Adams
Secretary for
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger
Governor

January 21, 2010
CIWQS Place ID: 222132 (FA)

East Bay Municipal Utility District
Attn: Mr. David Williams, Director of Wastewater
375 Eleventh Street
Oakland, CA 94607-4240

Subject: Amended Offer to Participate in Expedited Payment Program Relating to Violations of NPDES Permit No. CA 0037702 (Order No. 94-127), East Bay Municipal Utility District Water Pollution Control Plant located at 2020 Wake Avenue, Oakland, Alameda County, CA 94607

Dear Mr. Williams:

This letter is to notify East Bay Municipal Utility District (District) of alleged violations of the California Water Code and to allow the District to participate in the Regional Water Board's Expedited Payment Program for Effluent or Reporting Violations (Expedited Payment Program) to address liability (\$6,000 in mandatory minimum penalty) which may be assessed pursuant to Water Code sections 13385 and 13385.1. Please reply by **February 22, 2010**.

This letter amends the original State Water Resources Control Board (State Water Board) offer letter dated July 24, 2008, based on the information provided in the District's letters dated August 20, 2008, September 15, 2009, and October 16, 2009. The amendment involves dismissal of the alleged cyanide violations and addition of some total suspended solids exceedances. Exhibit A reflects these amendments.

The dismissal is based on the District's clarification that all cyanide effluent data reported to the Regional Water Board's electronic reporting system (ERS) for 2000 and part of 2001 were chlorinated effluent monitoring data instead of dechlorinated effluent monitoring data. Chlorinated effluent is subject to analytical interference and thus not representative of the discharge. The District correctly reported its dechlorinated effluent data in the certified paper copy of the monitoring reports. Therefore, the Regional Water Board is dismissing all the cyanide violations that the District reported in error to the ERS.

We have added three total suspended solids exceedances from 2007 to Exhibit A. These were not included in the July 24, 2008, letter because we were evaluating the District's evidence concerning whether these incidents qualified for an upset defense pursuant to 40CFR122.41(n). Though we have not made a final determination on this matter, pursuant to #43 of the State Water Board's April 17, 2001, "SB 709 and SB 2165 Questions and Answers," the TSS exceedances are subject to mandatory minimum penalties regardless of the District's upset

defense. This is because mandatory minimum penalties apply to all “exceedances” and only “violations” may be excused under the upset defense.

NOTICE OF VIOLATION

The Assistant Executive Officer alleges that the District has violated the effluent limitations identified in the Notice of Violation (NOV) attached as Exhibit A. The District will have the opportunity to address the alleged violations as discussed below.

STATUTORY LIABILITY

California Water Code Section 13385(h) and (i) require the assessment of a MANDATORY MINIMUM PENALTY of \$3,000 for specified serious and other effluent limit violations. The District is subject to discretionary administrative civil liabilities of up to TEN THOUSAND DOLLARS (\$10,000) for each day in which the violation occurs, plus TEN DOLLARS (\$10) for each gallon discharged but not cleaned up in excess of 1,000 gallons. These mandatory minimum penalties and discretionary administrative civil liabilities may be assessed by a Regional Water Quality Control Board (Regional Water Board) or the State Water Board (collectively “the Water Boards”), beginning with the date that the violations first occurred¹. The formal enforcement action which the Water Boards use to assess such liability is an administrative civil liability complaint although the Water Boards may instead refer such matters to the Attorney General’s Office for prosecution. If referred to the Attorney General for prosecution, the Superior Court may assess up to TWENTY-FIVE THOUSAND DOLLARS (\$25,000) per violation. In addition, the Superior Court may assess up to TWENTY FIVE DOLLARS (\$25) per gallon discharged but not cleaned up in excess of 1,000 gallons.

OFFER TO PARTICIPATE IN EXPEDITED PAYMENT PROGRAM

The District can avoid the issuance of a formal enforcement action and settle the alleged violations identified in the attached NOV by participating in the Regional Water Board’s Expedited Payment Program. Details of the proposed settlement are described below and addressed in the enclosed documents.

To promote resolution of these violations, the Regional Water Board makes this Conditional Offer. The District may accept this offer, waive the District’s right to a hearing, and pay the mandatory minimum penalty as indicated on Exhibit A, for the violations described in the NOV. If the District elects to do so, subject to the conditions below, the Regional Water Board will accept that payment in settlement of any enforcement action that would otherwise arise out of the violations identified in the Notice of Violation. Accordingly, the Regional Water Board will forego issuance of a formal administrative complaint, will not refer the violations to the Attorney

¹ Please note that there are no statutes of limitation that apply to administrative proceedings to assess mandatory minimum penalties. See *City of Oakland v. Public Employees’ Retirement System*, (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.) The District has not been substantially prejudiced by the passage of time between the date(s) that District reported the violations identified on Exhibit A and the date of this letter. The District was aware of the violations at the time it reported them to the Regional Water Board. Regional Water Board staff’s limited enforcement resources and competing enforcement priorities provide a rational explanation for the delay. In fact, the delay has actually benefited the District because it extended the time before payment of the mandatory minimum penalties is due. For these reasons, any delay is not unreasonable.

General, and will waive its right to seek additional discretionary civil liabilities for the violations identified in the Notice of Violation. Resolution of these violations by the Regional Water Board will preclude State Water Board action for these same violations.

The Expedited Payment Program does not address liability for any violation that is not specifically identified in the Notice of Violation.

DISTRICT'S OPTIONS FOR RESPONSE TO OFFER

If you accept this offer, please complete and return the enclosed "Acceptance of Conditional Resolution and Waiver of Right to Hearing" (Acceptance and Waiver) on or before the date specified in the first paragraph of this letter. The Acceptance and Waiver will be held, pending a 30-day public notice period, and then will be counter-signed by the Executive Officer and returned to you for payment.

If you contest some but not all of the violations identified in the attached Notice of Violation, The District may elect to reserve the right to address the contested matters and resolve any uncontested violations through the payment of the mandatory minimum penalty for each uncontested violation. If the District chooses this option, please communicate with the staff contact identified below to discuss the mechanism for memorializing that election on or before the date specified in the first paragraph of this letter.

If the District chooses to contest any of the violations alleged in the Notice of Violation, please identify the specific violation and the basis for the challenge (factual error, affirmative defense, etc.) on or before the date specified in the first paragraph of this letter. The Regional Water Board staff will evaluate the contested violation and take one of two actions:

- 1) The Regional Water Board staff will determine that the violation is not supported, expunge the alleged violation from the CIWQS data base, take no further action against the District for the alleged violation, and notify the District of that determination; or
- 2) The Regional Water Board staff will determine that the alleged violation is meritorious, and will notify the District of that determination. The District will be given thirty (30) days from the date of receipt of the Regional Water Board staff determination, to submit a supplemental Expedited Payment for those violations. If the District chooses not to make a payment in response to the determination, the District should expect to be contacted regarding formal enforcement action that will be initiated with regard to the contested violations. In a formal enforcement action, the liability amount sought and/or imposed may exceed the liability amount set forth in this Conditional Offer. Moreover, the cost of enforcement is a factor which can be considered in assessing the liability amount.

CONDITIONS FOR REGIONAL WATER BOARD ACCEPTANCE OF RESOLUTION

Federal regulations require the Regional Water Board to publish and allow the public thirty (30) days to comment on any settlement of an enforcement action addressing NPDES permit violations (40 C.F.R. section 123.27(d)(2)(iii)). Upon receipt of the District's Acceptance and Waiver, the Regional Water Board staff will publish a notice of the proposed resolution of the violations.

If no comments are received within the 30-day period, and unless there are new material facts that become available to the Water Boards, the Executive Officer will execute the Acceptance and Waiver as a stipulated order assessing the uncontested mandatory minimum penalty amount pursuant to Water Code section 13385.

If, however, significant comments are received in opposition to the settlement, this Offer may be withdrawn. In that case, the District's waiver pursuant to the Acceptance and Waiver will also be treated as withdrawn. In that case, the unresolved violations will be addressed in a liability assessment proceeding. At the liability assessment hearing the District will be free to make arguments as to any of the alleged violations, and the District's agreement to accept this conditional offer will not in any way be binding or used as evidence against the District. The District will be provided with further information on the liability assessment proceeding.

In the event the Acceptance and Waiver is executed by the Executive Officer, payment of the assessed amount shall be due and payable to the Regional Water Board as specified on the invoice that will accompany the District's receipt of the notice of the Executive Officer execution. The payment period is thirty (30) days. Failure to pay the penalty within the required time period may subject the District to further liability.

Should you have any questions regarding this matter, please contact Farhad Azimzadeh at (510) 622-2310 or fazimzadeh@waterboards.ca.gov. If you need to fax a copy of the signed waiver, you may send it to the attention of Farhad Azimzadeh of my staff at (510) 622-2460.

Sincerely,

Thomas E. Mumley
Assistant Executive Officer

Enclosures: (1) Acceptance of Conditional Resolution
(2) Exhibit A - Notice of Violation

**ACCEPTANCE OF CONDITIONAL RESOLUTION
AND WAIVER OF RIGHT TO HEARING**

By signing below and returning this Acceptance of Conditional Resolution and Waiver of Right to Hearing (Acceptance and Waiver) to the Regional Water Quality Control Board (Regional Water Board), East Bay Municipal Utility District (District) hereby accepts the “Offer to Participate in Expedited Payment Program” and waives the right to a hearing before the Regional Water Board to dispute the allegations of violations described in the Notice of Violation (NOV) which is attached hereto as Exhibit A and incorporated herein by reference.

The District agrees that the NOV shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the Regional Water Board to assert jurisdiction over the alleged violations through its Assistant Executive Officer. The District agrees to pay the penalties authorized by California Water Code section 13385, which shall be deemed payment in full of any civil liability pursuant to the Water Code sections 13385 and 13385.1 that otherwise might be assessed for the violations described in the NOV.

The District understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the Notice of Violation.

Upon execution by the District, the Acceptance and Waiver shall be returned to:

Expedited Payment Program
California Regional Water Quality Control Board
San Francisco Bay Region
Attn: Farhad Azimzadeh
1515 Clay Street, Suite 1400
Oakland, California 94612

The District understands that federal regulations set forth at title 40, Code of Federal Regulations, section 123.27(d)(2)(iii) require the Regional Water Board to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action. Accordingly, this Acceptance and Waiver, prior to execution by the Executive Officer of the Regional Water Board, will be published as required by law for public comment.

If no comments are received within the notice period which causes the Executive Officer of the Regional Water Board to reconsider the Expedited Payment Amount, the Executive Officer will execute the Acceptance and Waiver. Resolution of these violations by the Regional Water Board will preclude State Water Board action for these same violations.

East Bay Municipal Utility District Water Pollution Control Plant
Acceptance of Conditional Resolution and Waiver of Right to Hearing - Page 2

The District understands that if significant comments are received in opposition to the Expedited Payment Amount, the offer on behalf of the Regional Water Board to resolve the violations set forth in the NOV may be withdrawn. In that circumstance, the District will be advised of the withdrawal and an administrative civil liability complaint may be issued and the matter may be set for a hearing before the Regional Water Board or the State Water Board. For such a liability hearing, the District understands that this Acceptance and Waiver executed by the District will be treated as a settlement communication and will not be used as evidence in that hearing.

The District understands that once the Acceptance and Waiver is executed by the Executive Officer of the Regional Water Board, payment of the amount in full no later than 30 days after the date of the Executive Officer's signature is a condition of this Acceptance and Waiver. The District must submit its payment in full by check made out to "California Regional Water Quality Control Board" and sent to the address indicated above, together with a copy of this Acceptance and Waiver after execution by the Executive Officer.

I hereby affirm that I am duly authorized to act on behalf of and to bind the District in the making and giving of this Acceptance and Waiver.

East Bay Municipal Utility District

By: _____
(Signed Name)

(Date)

(Printed or typed name)

(Title)

IT IS SO ORDERED PURSUANT TO WATER CODE SECTION 13385

By: _____
Bruce H. Wolfe
Executive Officer
Regional Water Quality Control Board

Note to Discharger: Please return the signed waiver with Exhibit A, together.

EXHIBIT A

East Bay Municipal Utility District
 Water Pollution Control Plant
 Located at 2020 Wake Avenue, Oakland, Alameda County, CA 94607
 (Discharges to the Central San Francisco Bay)

Mandatory Minimum Penalties without Enforcement

The following table lists this facility's alleged permit exceedances of California Water Code Sections 13385(h) and (i) during the November 25, 2006, through September 30, 2007, period for which the Water Board has not assessed a mandatory minimum penalty. Final calculation of MMP amounts owed, and descriptions of the abbreviations that appear in the table are also listed in the table below.

| No | CIWQS Violation ID No. | Date of Occurrence | Effluent Limitation Description (Unit) | Effluent Limit | Reported Value | Percent a Group I or Group II Pollutant is over Effluent Limitation | Type of Exceedance | CWC Section 13385(h) and/or (i) Required MMP |
|--------------|------------------------|--------------------|--|----------------|----------------|---|--------------------|--|
| 1 | 773755 | 11/25/06 | Total Suspended Solids Weekly Average (mg/L) | 45 | 92 | 104% | C1, S | \$3,000 |
| 2 | 773769 | 11/30/06 | Total Suspended Solids Weekly Average (mg/L) | 30 | 42 | 41% | C2, S | \$3,000 |
| 3 | 773760 | 9/15/07 | Total Suspended Solids Weekly Average (mg/L) | 45 | 60 | 33% | C1 | |
| 4 | 773766 | 9/22/07 | Total Suspended Solids Weekly Average (mg/L) | 45 | 54 | 21% | C2 | |
| 5 | 773771 | 9/30/07 | Total Suspended Solids Weekly Average (mg/L) | 30 | 37 | 24% | C3 | |
| Total | | | | | | | | \$6,000 |

Legend for Table:

CIWQS = California Integrated Water Quality System database used by the Water Boards to manage violation and enforcement activities.

Violation ID = Identification number assigned to a permit exceedance in CIWQS.

CWC = California Water Code.

C = Count – The number that follows represents the number of exceedances the Discharger has had in the past 180 days, including this violation. A count greater than C3 means that a penalty under Water Code Section 13385(i) applies.

S = Serious, which means that a penalty under Water Code Section 13385(h) applies when an effluent limitation is exceeded 40% or more for a Group I pollutant or 20% or more for a Group II pollutant.

For internal purpose: CIWQS Regulatory Measure ID No.: 353600