

TENTATIVE ORDER

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

In the Matter of:)
)
East Bay Municipal Utility District) Order No. R2-2011-00XX
)
Complaint No. R2-2010-0068 for) Settlement Agreement and Stipulation for
Administrative Civil Liability) Entry of Order; Order (Proposed)
)

Section I: Introduction

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulation") is entered into by and between the Regional Water Quality Control Board Prosecution Staff ("Prosecution Staff") and East Bay Municipal Utility District ("EBMUD") (collectively "Parties") in reference to an adjudicative proceeding initiated by the issuance of Administrative Civil Liability Complaint No. R2-2010-0068, dated July 19, 2010 (the "Complaint"). This Stipulation is presented to the Executive Officer of the San Francisco Bay Region, California Regional Water Quality Control Board ("Regional Water Board") as the Regional Water Board's delegee for adoption as an Order, by settlement, pursuant to Government Code section 11415.60.

Section II: Recitals

1. EBMUD owns and operates a sanitary sewer system that serves the San Francisco Bay Area. EBMUD's sanitary sewer system consists of approximately 37 miles of sewer pipe, 15 pump stations, five overflow structures, four diversion structures, three wet weather facilities, and a one million gallon wet weather storage basin. Sewage flows from collection systems from seven East Bay wastewater collection agencies to EBMUD's wastewater treatment facility, and during large wet weather events to EBMUD's wet weather facilities for primary treatment and disinfection.
2. EBMUD's sanitary sewer system is subject to the requirements set forth in Order No. R2-2009-0004, National Pollutant Discharge Elimination System (NPDES) Permit No. CA0038440; Cease and Desist Order No. R2-2009-0005; and State Water Resources Control Board (State Water Board) Order No. 2006-0003 DWQ, Statewide General Waste Discharge Requirements for Sanitary Sewer Systems (General WDR).
3. The Complaint, as issued, recommends imposition of administrative civil liability totaling \$209,851 against EBMUD for alleged violations of Order No. R2-2009-0004, Discharge Prohibition B.III, and Cease and Desist Order No. R2-2009-0005, Provision 1. The alleged violations were incurred as a result of three discharges that occurred on February 17, 2009, and October 13, 2009, from two wet weather facilities and one diversion structure: the Point Isabel Wet Weather Facility in Richmond, Contra Costa County; the San Antonio Creek Wet Weather Facility in Oakland, Alameda County; and the Webster

Street Diversion Structure in Alameda, Alameda County. The proposed civil liability exceeds the estimated economic benefit of \$20,000 and includes staff costs of \$28,500.

4. The Parties have engaged in settlement negotiations and agree to settle the matter without administrative or civil litigation and by presenting this Stipulation to the Executive Officer for adoption as an Order pursuant to Government Code section 11415.60. The Prosecution Staff believes that the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the specific violations alleged in the Complaint, except as provided in this Stipulation, and that this Stipulation is in the best interest of the public.

5. To resolve by consent and without further administrative proceedings certain alleged violations set forth in the Complaint, the Parties have agreed to the imposition of administrative civil liability in the amount of \$209,851 against EBMUD, which includes \$28,500 for staff costs. The Parties acknowledge that the EBMUD wet weather facilities are the subject of ongoing state and federal enforcement actions, specifically, United States of America, and the People of the State of California ex rel. California State Water Resources Control Board, and California Regional Water Quality Control Board, San Francisco Bay Region v. East Bay Municipal Utility District, No. C-09-00186 CW, and the related Stipulated Order for Preliminary Relief as well as California Regional Water Quality Control Board San Francisco Bay Region Cease and Desist Order No. R2-2009-0005 Requiring East Bay Municipal Utility District Special District No. 1 to Cease and Desist Discharging Partially-Treated Wastewater from its Wet Weather Facilities (WWFs) to Waters of the State. Both the Stipulated Order for Preliminary Relief and the Cease and Desist Order require EBMUD to perform specific tasks related to reducing and eventually eliminating the discharges from the WWFs that are an integral part of the WWFs' original design, over a specified time period. This Stipulation is not precedential and any future enforcement actions taken by the Regional Water Board against EBMUD will be handled on a case-by-case basis and evaluated on the specific facts underlying that case, which may include consideration of the referenced Stipulated Order for Preliminary Relief and the Cease and Desist Order, in the application of the penalty calculation methodology described in the 2009 State Water Board Water Quality Enforcement Policy.

Section III: Stipulations

The Parties stipulate to the following:

6. **Administrative Civil Liability:** EBMUD shall pay a total of \$209,851 in stipulated administrative civil liability, which includes \$28,500 for staff costs, by check made payable to the "San Francisco Bay Regional Water Quality Control Board" for deposit in the State Water Resources Control Board Cleanup and Abatement Account, no later than 30 days following the Regional Water Board's Executive Officer execution of this Order. The check shall reference Complaint No. R2-2010-0068. Payment shall be submitted to Keith H. Lichten, Senior Water Resource Control Engineer, at the following address:

San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, 14th Floor
Oakland, CA 94612

7. **Compliance with Applicable Laws:** EBMUD understands that payment of administrative civil liability in accordance with the terms of this Order and/or compliance with the terms of this Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in the Complaint may subject them to further enforcement, including additional administrative civil liability.

8. **Party Contacts for Communications related to this Stipulation and Order:**

For the Regional Water Board:

Keith H. Lichten, Senior WRCE
 San Francisco Bay Regional Water
 Quality Control Board
 1515 Clay Street, 14th Floor
 Oakland, CA 94612
KLichten@waterboards.ca.gov
 (510) 622-2380

For EBMUD:

David R. Williams
 Director of Wastewater
 East Bay Municipal Utility District
 P.O. Box 24055, MS #702
 Oakland, CA 94623-1055
dwilliam@ebmud.com
 (510) 287-1496

9. **Attorney's Fees and Costs:** Each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

10. **Matters Addressed by Stipulation:** Upon adoption by the Executive Officer as an Order, this Stipulation represents a final and binding resolution and settlement of all claims, violations, or causes of action alleged in the Complaint. The provisions of this Paragraph are expressly conditioned on the full payment of the administrative civil liability by the deadline specified in Paragraph 6.

11. **EBMUD's Denial of Liability:** In settling this matter, EBMUD does not admit that any of the allegations of the Complaint or any potential defenses thereto is true, provided, EBMUD agrees that in the event of any future enforcement actions by the Regional Water Board, this Order may be used as evidence of a prior enforcement action consistent with CWC section 13327.

12. **Public Notice:** EBMUD and the Regional Water Board Prosecution Team understand that this Stipulation and Order must be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board or its delegee. In the event objections are raised during the public review and comment period, the Regional Water Board or the Executive Officer may, under certain circumstances, require a public hearing regarding the Stipulation and Order. In that event, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the proposed Order as necessary or advisable under the circumstances.

13. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for adopting the Order by the Regional Water Board and review of this Stipulation by the public is lawful and adequate. In the event procedural objections are raised prior to the Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.

14. **Interpretation:** This Stipulation and Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. EBMUD is represented by counsel in this matter.

15. **Modification:** This Stipulation and Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved the Regional Water Board or its delegee.

16. **If Order Does Not Take Effect:** In the event that this Order does not take effect because it is not approved by the Regional Water Board, or its delegee, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:

- a. Objections related to prejudice or bias of any of the Regional Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the Complaint in this matter; or
- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

17. **Waiver of Hearing:** EBMUD has been informed of the rights provided by CWC section 13323, subdivision (b), and hereby waives its right to a hearing before the Regional Water Board prior to the adoption of the Order.

18. **Waiver of Right to Petition:** EBMUD hereby waives its right to petition the Regional Water Board's adoption of the Order for review by the State Water Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.

19. **Water Board is Not Liable:** Neither the Regional Water Board members nor the Regional or State Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulation, Order, or SEP, nor shall the Regional Water Board, its members or staff be held as parties to or guarantors of any contract entered into by EBMUD, its directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Stipulation and Order.

20. **EBMUD's Covenant Not to Sue:** EBMUD covenant not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by the Complaint, this Stipulation and Order, or the SEP.

21. **Authority to Bind:** Each person executing this Stipulation in a representative capacity represents and warrants that he or she is authorized to execute this Stipulation on behalf of and to bind the entity on whose behalf he or she executes the Stipulation.

22. **Counterpart Signatures:** This Stipulation may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

23. **Effective Date:** This Stipulation is effective and binding on the Parties upon the entry of this Order by the Regional Water Board or its delegee, which incorporates the terms of this Stipulation.

IT IS SO STIPULATED.

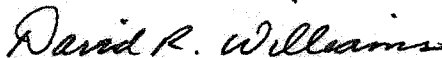
**California Regional Water Quality Control Board,
San Francisco Bay Region Prosecution Team**

Date: 4/6/2011

By: 
**Dyan Whyte,
Assistant Executive Officer**


EBMUD

Date: 4/4/2011


By: 
**David R. Williams
Director of Wastewater**

Approved as to Form:

Date: April 6, 2011

By: 
**Ann K. B. Carroll,
State Water Resources Control Board,
Office of Enforcement
Attorney for Prosecution Team**

Date: March 31, 2011

By: 
**Veronica Y. Fauntleroy
Office of General Counsel, EBMUD
Attorney for EBMUD**

Order of the Regional Water Board

24. The Regional Water Board incorporates the foregoing Stipulation, set forth in Paragraphs 1 through 23 above, by this reference, as if set forth fully herein.

25. The Regional Water Board finds that the Recitals set forth herein in Section II are true.

26. This Stipulation and Order are severable; should any provision be found invalid the remainder shall remain in full force and effect.

27. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in CWC sections 13327 and 13385(e). The Regional Water Board's consideration of these factors is based upon information obtained by the Prosecution Team in investigating the allegations in the Complaint, or otherwise provided to the Regional Water Board. In addition to these factors, this settlement recovers the costs incurred by the Prosecution Team in investigating and pursuing enforcement of the allegations addressed herein.

28. This is an action to enforce the laws and regulations administered by the Regional Water Board. The Regional Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.

29. The Executive Officer is authorized to refer this matter directly to the Attorney General for enforcement if EBMUD fails to perform any of its obligations under the Order.

Pursuant to CWC section 13323 and Government Code section 11415.60, **IT IS HEREBY ORDERED** on behalf of the California San Francisco Bay Regional Water Quality Control Board.

Bruce H. Wolfe
Executive Officer

Date: _____