

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

RESPONSE TO WRITTEN COMMENTS

ON THE REISSUANCE OF WASTE DISCHARGE REQUIREMENTS FOR:

Ellis Creek Water Recycling Facility
3890 Cypress Drive
Petaluma, Marin County
NPDES No. CA0037810

I. City of Petaluma comments – November 1, 2010

II. San Francisco Baykeeper comments – November 1, 2010

Note: The format of this staff response begins with a synopsis of the party's comments in *italics*, followed by staff's response in normal type face. Interested persons should refer to the original letters to ascertain the full substance and context of each comment. Important text revisions are shown in underline and ~~strikeout~~.

The Draft Permit was erroneously released for public comment with an outdated version of Attachment G, Regional Standard Provisions and Monitoring and Reporting Program. We revised the Draft Permit to include the most current version of Attachment G.

I. City of Petaluma (City) comments – November 1, 2010

City Comment 1

The City does not currently have the facilities to conduct flow-through bioassays. Although a previous deadline of November 1, 2011 was set for the City to begin flow-through acute toxicity testing by the 2011-2012 discharge season, the City requests that static-renewal methods continue to be allowed for the term of the proposed permit for the following reasons:

- *The City has recently spent approximately \$155 million on the new Ellis Creek Water Recycling Facility to replace a severely aging treatment plant. Due to the economic downturn and local sentiment for rollback measures for sewer rates in the near future, the City does not have funding to construct these facilities.*
- *The new Ellis Creek Water Recycling Facility is achieving significantly improved effluent quality for many constituents, as measured in the required comprehensive monitoring program, in comparison to the previous facilities.*

- *Under the best conditions, designing, bidding, constructing, and obtaining ELAP certification for the facility would require more than the 12 months currently available.*
- *To access the dechlorinated effluent for use in the flow-through bioassay, the facilities must be constructed at the southwestern edge of the wetland treatment cells (near the chlorine contact chamber). This area is close to known habitat of various endangered species. Environmental permitting for construction of the flow-through testing facility in this area is expected to be time-consuming and expensive.*
- *The analytical method for acute toxicity testing, EPA's 5th Edition Acute Toxicity Testing Method (EPA-821-R-02-012), allows testing using the static renewal approach.*

Response to City Comment 1

We agree that more time is appropriate. As such, and in anticipation of changes proposed in October 2010 by the State Water Board to toxicity assessments that may make flow-through bioassays infeasible for Bay dischargers, we changed Attachment E as suggested by the City and shown below.

Compliance with the acute toxicity effluent limitations of this Order shall be evaluated by measuring survival of test organisms exposed to flow-through bioassays if appropriate after written notification by the Executive Officer, November 1, 2011, as indicated in a letter from the Regional Water Board to the Discharger dated October 28, 2009. Static-renewal bioassays are permitted until that time November 1, 2011, to allow time for plants in the treatment wetlands to mature, for the Discharger to construct a facility capable of running flow-through bioassays, and for statewide policy on toxicity assessments to become effective.

City Comment 2

The City requests that Fact Sheet section IV.D.2.g, relating to updated copper translators, be revised to indicate that copper limits may be amended if the updated translators are either more or less stringent from those in the Final Order. The City will be providing new information for the development of copper translators in 2011. Since the Regional Water Board has yet to consider the existing copper translators as final, anti-backsliding requirements do not apply, and any new effluent limits based on revised copper translators should be computed without regard to relative stringency. The suggested revision is shown below:

This Order may be reopened to amend the copper limits if the new translators are ~~more stringent than~~ different from those in this Order.

Response to City Comment 2

We changed the Draft Permit as requested because we agree that new translators are sufficient reason to reopen the Order, regardless of whether they increase or decrease. However, we disagree that anti-backsliding requirements do not apply. CWA sections 402(o)(2) and 303(d)(4) and 40 CFR 122.44(l) require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some limited exceptions. If the City proposes less-stringent limits based on new translators, the Regional Water Board would need to consider whether the less stringent limits qualify for an exception based on the facts at that time.

City Comment 3

Toxicity testing requirements are not described consistently between Attachment E, the Monitoring and Reporting Program, and Attachment F, the Fact Sheet. More specifically, Table E-3 lists the required sample type as a 24-hour composite (C-24) for acute toxicity (consistent with static-renewal testing), while section V.A.1 of the Monitoring and Reporting Program requires flow-through monitoring beginning November 1, 2011. Also, Table E-3 indicates that acute and chronic toxicity testing must be conducted monthly and quarterly, respectively, while the fact sheet indicates that these tests are to be conducted quarterly and annually. In addition, the City understands that monitoring frequency requirements for acute and chronic toxicity testing were intended to be monthly and quarterly, respectively. The suggested revisions are shown below:

Page E-5. Compliance with the acute toxicity effluent limitations of this Order shall be evaluated by measuring survival of test organisms exposed to flow through bioassays starting November 1, 2011, as indicated in a letter from the Regional Water Board to the Discharger dated October 28, 2009. ~~Static-renewal bioassays are permitted prior to November 1, 2011, to allow time for plants in the treatment wetlands to mature.~~

Acute toxicity, page F-31. ~~Quarterly~~ Monthly 96-hour bioassay testing is required to demonstrate compliance with the effluent limitation for acute toxicity. The MRP requires the use of fathead minnow as the bioassay test species.

*Chronic toxicity, page F-31. This Order requires the Discharger to conduct ~~annual~~ quarterly chronic toxicity testing. The Discharger conducted an effluent toxicity screening study during the previous Orders' term that indicated that *Americamysis bahia* is the most sensitive species for chronic toxicity testing. The Discharger is required to re-screen in accordance with Appendix E-1 of the MRP (Attachment E) after any significant change in the nature of the effluent or prior to 180 days prior to the expiration of this Order.*

Response to City Comment 3

We changed the Draft Permit as requested regarding monitoring frequency. See our response to City Comment 2 regarding flow-through versus static renewal tests for acute toxicity.

City Comment 4

The first sentence of the fourth paragraph of Fact Sheet section IV.B, describing justification for an exception to Basin Plan Discharge Prohibition 1, indicates that the exception being granted applies to the wet season. As currently written, the second sentence appears to be also intended to refer to this wet season exception, but then includes reference to an emergency discharge condition that only applies during the dry season. The suggested revision is shown below:

The Regional Water Board historically has granted an exception to Prohibition 1 from October 21 through April 30 each year for discharges to the Petaluma River. This Order continues ~~the~~ this exception ~~when~~ ~~inflow exceeds the recycled water system capacity~~ based on the inordinate burden that would be placed on the Discharger relative to the beneficial uses protected if the exception were not granted and the equivalent level of water quality protection the Discharger achieves through alternate means. Moreover, the Discharger implements a recycled water program, which allows the Discharger to refrain from discharging during the dry months (the Discharger does not typically discharge to receiving waters between May 1 and October 20 of each year).

Response to City Comment 4

We changed the Draft Permit as requested.

City Comments 5 and 6

The City requests that the terms “Wastewater Recycling” and “Reclamation” be changed to “Water Recycling” to maintain consistency with the Draft Permit and industry standards.

Response to City Comments 5 and 6

We changed the Draft Permit as requested.

City Comment 7

Comments 7 and 8 pertain to typographical errors in the Draft Permit.

Response to City Comments 7 and 8

We corrected the typographical errors.

II. San Francisco Baykeeper comments – November 1, 2010

Baykeeper Comment A

The discharge of blended wastewater constitutes a bypass, which is illegal under federal regulations except in very narrow circumstances, including when unavoidable to prevent substantial damage to life or property or when necessary for essential maintenance. The Draft Permit allows blending as a matter of course and only requires that any bypass events be identified and recorded.

The Draft Permit does not demonstrate that there is no feasible alternative to blending as required by federal law. The permit does not demonstrate that no feasible alternative exists.

The Draft Permit does not require enhanced monitoring during blending events. It should be amended to require the City to sample any blended discharges at least daily and to analyze the blended effluent samples for all parameters that have effluent limitations. It should also require the City to collect and analyze daily receiving water samples at the edge of the discharge zone of initial dilution.

Response to Baykeeper Comment A

Baykeeper is mistaken. The City does not blend, and the Draft Permit does not allow blending. Prohibition III.B specifically prohibits the bypass of untreated or partially treated wastewater to waters of the United States, except as provided for during conditions allowed by federal law. Therefore, an analysis of feasible alternatives is unnecessary. Should a bypass occur, Regional Standard Provisions (Attachment G), Section III.A.3.b.v, require that daily effluent samples be collected and analyzed for all parameters for which there are effluent limits.

Baykeeper Comment B

The sampling intervals required in the Draft Permit for some constituents are not frequent enough to determine compliance with effluent limits. For example, dioxin-TEQ monitoring is only required once per year. This frequency makes determining compliance with average monthly and maximum daily effluent limitations statistically impossible. The Regional Water Board should provide evidence that the monitoring program has been designed appropriately and that the data can be used to calculate statistically relevant effluent conditions.

Response to Baykeeper Comment B

We disagree. The sampling intervals in the Draft Permit are reasonable and will provide enough data to assure compliance. The required sampling intervals are also consistent with those for other treatment plants of similar size in the San Francisco Bay Region. Most constituents have sampling intervals that are at least monthly. For some of the more expensive constituents to measure, like dioxin-TEQ, more frequent monitoring is unwarranted. Historic concentrations for dioxin-TEQ have been low, and the Discharger has never violated its dioxin-TEQ limits so future violations are unlikely. Of the five most recent sampling events, only two had detectable concentrations of dioxin-TEQ, and only one of those was both detectable and quantifiable. That value, 1.2×10^{-9} µg/L, was less than one tenth of the effluent limit. Because each dioxin-TEQ analysis costs more than \$1,000, more frequent sampling is unjustified under these circumstances. Furthermore, if an effluent limit violation were to occur, Attachment G of the Draft Permit would require daily monitoring until compliance is demonstrated.

Baykeeper Comment C

The Clean Water Act's antidegradation policy is designed to ensure that no activity will lower water quality, and hence the policy is to support existing uses and to maintain and protect high quality waters. The Draft Permit does not meet the antidegradation policy requirements. The Draft Permit claims that the City's "permitted discharge is consistent with the antidegradation provisions" because the level of discharge in the new Draft Permit is the same as that allowed under the current permit. However, just because the amount of discharge does not change does not prove that water quality will be maintained. For example, the amount of discharge could stay the same while the pollutant load increases, which would decrease water quality. The pollutant load could increase if there are new pollutant sources to the receiving water or to the facility, or if the efficiency of pollutant removal decreases over time. The background level of pollution in the receiving water must be considered in the antidegradation analysis. In addition, the Draft Permit fails to consider any cumulative impacts to water quality. Rather than comparing the proposed effluent limitations to the prior effluent limitations, a true antidegradation analysis requires comparison of the proposed effluent limitations to the existing environmental conditions.

The Draft Permit also states that the antidegradation requirements are met "because they hold the Discharger to performance levels that will neither cause nor contribute to water quality impairment, nor further water quality degradation." Again, this conclusory statement does not show that existing water quality will actually be maintained.

The Draft Permit continues its antidegradation analysis with the following:

Because antidegradation requirements are met, there will be no lowering of water quality beyond the current level authorized in the previous Orders, which is the baseline by which to measure whether degradation

will occur. Therefore, further analysis in this permit is unnecessary, and findings authorizing degradation are unnecessary.

First, the Draft Permit claims that antidegradation requirements are met because the permit has not changed, so water quality will not change. Then, the Permit claims that, because the antidegradation requirements are met, water quality will not change. This circular analysis does not show consistency with the Clean Water Act's antidegradation policy. The Draft Permit must actually show that water quality will not be lowered. A more thorough analysis of water quality in the receiving water is required.

Response to Baykeeper Comment C

We disagree. State and federal antidegradation policies are intended to ensure that the existing level of water quality in the receiving water is maintained so beneficial uses are protected. Any activities that may produce an increase in volume or concentration of pollutants so as to potentially degrade receiving water quality must be evaluated before they can be permitted, and if degradation is foreseeable, specific findings are necessary. In this case, no increase in volume or pollutant concentration is expected, so an exhaustive analysis is unwarranted.

Baykeeper states that additional analysis is required because pollutant loads may increase if there are new sources to the receiving water or the facility, or if pollutant removal efficiency decreases over time. These suggestions are speculative. The requirements of this Draft Permit are based on information in the permit application, and the Draft Permit requires that future discharges be consistent with the permit, and thus the application. The application identified no significant changes in treatment processes likely to increase pollutant loads. In fact, the level of treatment has improved because the City recently constructed a new treatment plant. Since the quality of the discharge is better than it has been in the past, no degradation of receiving water quality is likely. Moreover, the discharge would also not contribute to any cumulative degradation of water quality when considered with other discharges to the same receiving water.

The Draft Permit is consistent with State Water Board Administrative Procedures Update No. 90-004 ("Antidegradation Policy Implementation for NPDES Permitting," July 2, 1990), which states that no antidegradation analysis is required if the Regional Water Board has no reason to believe that existing water quality will be reduced due to the proposed action. Nevertheless, the Draft Permit does provide a simple antidegradation analysis in Fact Sheet sections III.C.6 and IV.D.7, and this analysis is more than adequate because any possible change in water quality could not result in any significant reduction of water quality.

We do agree that the quoted text is unclear and have changed Fact Sheet section III.C.6 as follows:

Because ~~antidegradation requirements are met~~, there will be no lowering of water quality beyond the current level authorized in the previous orders,

which is the baseline by which to measure whether degradation will occur, antidegradation requirements are met. Therefore, further analysis in this permit is unnecessary, and findings authorizing degradation are unnecessary.

Baykeeper Comment D

The cyanide action plan requirements are inadequate. Task 1 requires the City to submit an inventory of potential cyanide sources, but the City is not required to implement a program to minimize cyanide discharges if no sources are identified. The Draft Permit fails to provide specific guidance on how to identify contributors. In addition, there is no review or standard for the identification process. Thus, the City could potentially avoid the entire Action Plan if it fails to identify potential cyanide sources. The Draft Permit must be amended to provide tighter protocols for determining whether the City's cyanide source identification is adequate.

Response to Baykeeper Comment D

We disagree. The cyanide action plan requirements are adequate and no further elaboration or guidance is necessary on how the City is to identify sources. In fact, the City has already completed its cyanide source identification and found no sources (City of Petaluma, "Cyanide Source Identification Report," June 9, 2010). Most of the treatment plant influent is from residences. The City has only four industrial facilities (Clover Stornetta, Lace House Linen, Petaluma Creamery, and Petaluma Poultry), none of which use cyanide, or discharge detectable cyanide concentrations. Based on this, we have no reason to believe the City's efforts were inadequate.

Baykeeper Comment E

Provision VII.C.1 states that the City may request a permit modification based on several criteria. This section should expressly state that any such modification must first undergo public review and comment before approval.

Response to Baykeeper Comment E

Permit modification requires Regional Water Board action, which requires an opportunity for public participation. The only exceptions are for minor modifications to correct typographical errors, require more frequent monitoring, change interim compliance dates, allow for a change of ownership or operational control, change a construction schedule, or incorporate pretreatment program conditions (40 CFR 122.63). Otherwise, to provide dischargers with a reasonable amount of regulatory certainty, the Regional Water Board may not modify NPDES permits within their five-year terms, except as set forth in the permit. Therefore, Provision VII.C.1 lists the circumstances under which the Regional Water Board could re-open the permit through a Regional Water Board action subject to public review and comment.

Baykeeper Comment F

While Baykeeper agrees that Discharge Prohibition III.E should at least prohibit Sanitary Sewer Overflows (SSOs) to waters of the United States, the Draft Permit should also prohibit SSOs to waters of the State and SSOs from the City's sewage collection system.

The City's sewage collection system constitutes a Publicly Owned Treatment Works ("POTW") as that term is defined by the Clean Water Act. Therefore, the Draft Permit should prohibit SSOs from the collection system. SSOs that do not reach waters, but overflow into streets and other public places and back up into homes and businesses, pose nuisance public health threats that the State Water Board should seek to curtail. Permits issued by various California Regional Water Boards and USEPA have included such prohibitions.

The Permit must prohibit SSOs to waters of the State to comply with the California Water Code. The Draft Permit would not only be an NPDES permit, it would also be WDRs pursuant to the California Water Code, which precludes the discharge of raw sewage to waters of the State.

The Draft Permit's SSO prohibition is insufficient for effective SSO enforcement. The SSO reporting information in the State Water Board's California Integrated Water Quality System(CIWQS) database demonstrates that there is a problem with accurate SSO reporting. Many spill reports indicate large volume SSOs, with little to none of the spilled sewage recovered, yet the spill 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 dischargers an incentive to slant their reporting as not to show that spills reached waters of the United States, given the potential escape from liability if the spills are not reported as reaching 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. However, California Water Code sections 13260(a)(1) and 13263 provide the Regional Water Board with authority to regulate all SSOs, not just those that reach waters of the United States. Section 13260(a)(1) mandates, "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 Water Board. Any SSO has the potential to adversely affect the 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 should report all SSOs to the Regional Water Board. California Water Code section 13263, in turn, provides the Regional Water Board with authority to impose conditions regulating reported waste discharges, including conditions necessary to avoid public nuisance or indirect harm to waters.*

Response to Baykeeper Comment F

We did not make changes in response to this comment because the Draft Permit would provide adequate regulatory oversight of SSOs at this time. Although Prohibition III.D only relates to discharges to waters of the United States, the Draft Permit would also prohibit SSOs that cause pollution or nuisance regardless of their destination consistent with the California Water Code (see Regional Standard Provisions, Attachment G, section I.I.1). Furthermore, the Draft Permit would require operators to report all SSOs, regardless of destination or impact. These include (1) overflows or releases of untreated or partially treated wastewater that reach waters of the United States, (2) overflows or releases of untreated or partially treated wastewater that do not reach waters of the United States, and (3) wastewater backups into buildings and on private property that are caused by blockages or flow conditions within the publicly owned portion of a sanitary sewer system.

Furthermore, while the prohibition at issue does not specifically prohibit discharges to waters of the State, this does not mean that such discharges are permitted. Any SSO to waters of the State would violate California law. Water Code Section 13260 requires that any person discharging waste, or proposing to discharge waste, that could affect the quality of the waters of the State file a report of waste discharge. Violations are directly enforceable under California Water Code sections 13304 and 13350.

Finally, we disagree that the current language in the Draft Permit provides an incentive for sewer system operators to under-report the sizes of their SSOs. To knowingly misreport information is a criminal offense, and we believe few individuals are inclined to risk criminal enforcement to protect their employers.

Baykeeper Comment G

The Draft Permit inappropriately allows the City to seek to refute its monitoring reports by claiming that chlorine residual exceedances are “false positives.” This is contrary to Congress’ intent and case law holdings that the Clean Water Act create a simple enforcement scheme based on a discharger’s obligations to self-monitor and conclusively report its effluent limit violations. This provision should be deleted.

This provision is particularly problematic to effective enforcement in that it provides no deadlines for the City to make a claim that its chlorine residual exceedances are false positives. This would allow the City to raise a false positive affirmative defense years after a reported exceedance when the relevant information will be stale and inherently harder to evaluate. This is contrary to the approach, for example, in USEPA’s bypass regulation, which puts a strict time limit on making a claim that a bypass meets the requirements for an allowable bypass. If the Regional Water Board is going to leave a false positives affirmative defense provision in the Draft Permit, it should at least specify a deadline for the City to assert that a result is a false positive.

Response to Baykeeper Comment G

We did not make changes in response to this comment. Because chlorine is extremely toxic to aquatic life at low concentrations and even over short durations, we encourage dischargers to implement continuous chlorine monitoring. However, one of the drawbacks of continuous chlorine monitoring is that these devices are occasionally subject to signal spikes or false positives when no chlorine is discharged. To encourage dischargers to use continuous monitoring devices without triggering erroneous violations, it is appropriate to provide dischargers with an opportunity to provide evidence regarding whether detected chlorine values are accurate. We do not believe the Clean Water Act holds dischargers responsible for effluent limit violations when clear evidence exists that no violation took place.

Unlike the timeframes required to provide notification of a bypass, federal regulations do not specify time limits for when a discharger must raise an affirmative defense. However, the Draft Permit makes a substantial delay unlikely because the City is required to investigate the cause and implement corrective actions whenever it violates any effluent limitation, including the chlorine limitation. Specifically, the Federal Standard Provisions, Attachment D, section V.E.1, state:

The Discharger shall report any noncompliance that may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the Discharger becomes aware of the circumstances. A written submission shall also be provided within five (5) days of the time the Discharger becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. (40 CFR §122.41(1)(6)(i).)

Because the City is required to immediately determine the cause of noncompliance, its 5-day letter would need to address the potential for false positives (e.g., examine the ratio of sodium bisulfite to chlorine used). However, if additional evaluation is needed, the Regional Standard Provisions, Attachment G, section V.C.1.a.5, allow 60 days to invalidate a measurement so violations can be expeditiously investigated and resolved:

...Data should not be submitted in an SMR if it does not meet quality assurance/quality control standards. However, if the Discharger wishes to invalidate any measurement after it was submitted in an SMR, a letter shall identify the measurement suspected to be invalid and state the Discharger's intent to submit, within 60 days, a formal request to invalidate the measurement. This request shall include the original measurement in question, the reason for invalidating the measurement, all relevant documentation that supports invalidation [e.g., laboratory sheet, log entry, test results, etc.], and discussion of the corrective actions taken

or planned [with a time schedule for completion] to prevent recurrence of the sampling or measurement problem.

Baykeeper Comment H

The limitations for acute toxicity do not appear to be based on scientific reasoning, and appropriate assay procedures have not been specified. The Regional Water Board should, at a minimum, provide evidence that 90% survival has been determined to be a statistically significant toxicity level, either by resource agencies or within scientific literature. Also, section IV.C.1.c should cite the currently approved bioassay protocols to be followed and the standards the Executive Officer must consider and review prior to granting exceptions to bioassay testing.

Response to Baykeeper Comment H

We disagree. The acute toxicity limits in the Draft Permit are based on the Basin Plan's acute toxicity objective, set forth in Basin Plan section 3.3.18. The Draft Permit's Monitoring and Reporting Program, Attachment D, section V.A.3, specifies protocols for acute toxicity testing: "All bioassays shall be performed according to the most up-to-date protocols in 40 CFR 136, currently in *Methods for Measuring the Acute Toxicity of Effluents and Receiving Water to Freshwater and Marine Organisms*, 5th Edition." To obtain an exception from these protocols, the Draft Permit requires the City to provide a justification and obtain approvals from both the Executive Officer and the Environmental Laboratory Accreditation Program (ELAP). These requirements are adequate. In practice, the Executive Officer has rarely granted exceptions. The few examples include (1) pH adjustment to remove ammonia (ammonia is regulated separately based on its own numeric water quality objectives and its toxicity can interfere with the test), and (2) use of a different test species when the required species is unavailable (some test species must be collected from the wild and may only be available seasonally).

Baykeeper Comment I

The Draft Permit's section on Best Management Practices (BMPs) and Pollution Minimization Program (PMP) is too vague. For example, requirements include that a PMP report must "periodically" determine which pollutants are "a problem," and which may become "a problem." These vague requirements are unenforceable and do not place appropriate regulatory oversight within the hands of the Regional Water Board. The Draft Permit should define the period of assessment, and should define, or provide meaningful guidance, as to what pollutants may cause degradation of receiving waters.

Further, the Draft Permit states that when a priority pollutant exceeds effluent limitations, the PMP shall include a control strategy "designed to proceed toward the goal of maintaining concentrations of the reportable priority pollutants in the effluent at or below the effluent limitation." This must be strengthened to require the PMP to attain and maintain, as quickly as possible, compliance with the effluent limitation. A control strategy "designed to proceed toward the goal" of attainment will not necessarily reach

attainment. In addition, the PMP must require implementation of the best available technology economically achievable, not merely “appropriate cost-effective control measures,” as the permit currently requires.

Response to Baykeeper Comment I

We disagree. PMP requirements are purposely flexible to provide the Discharger the ability to solve its specific problems in the most appropriate manner. Because each discharger is unique, its problems and solutions are unique. It is therefore challenging to set forth PMP requirements that are flexible enough to allow the Discharger room for creativity in solving its problems without being overly prescriptive resulting in unnecessary and wasted efforts. We think the Draft Permit strikes a good balance. The Draft Permit requires that a PMP report be submitted annually to allow Regional Water Board staff a chance to review the PMP and identify improvements.

We disagree that the language regarding the goal of the control strategy needs strengthening. The proposed goal is taken nearly verbatim from the State Implementation Policy that forms the basis for the PMP requirement. Moreover, if a priority pollutant exceeds its effluent limitation, it constitutes a permit violation subject to penalties and other enforcement. The Draft Permit’s Attachment D at I.C already would require the Discharger to take reasonable steps to minimize discharges in violation of requirements. An additional narrative requirement instructing the Discharger to address the violation is unnecessary and unwarranted.

There is no regulatory basis for requiring that the PMP implement “best available technology economically achievable.” This term relates only to technology-based limitations that this Draft Permit would implement through its TSS, BOD, oil and grease, and pH limits.

Baykeeper Comment J

The Draft Permit should be amended to clarify that minimum levels/reporting levels (MLs/RLs) are to be used only for purposes of reporting and administrative enforcement, but not to effectively alter the Draft Permit’s water quality-based effluent limitations (WQBELs). The Clean Water Act requires permits to include WQBELs based upon water quality standards that are sufficiently stringent to ensure attainment of those standards. The Draft Permit effectively specifies that the RLs for pollutant parameters rather than the WQBELs are the City’s enforceable limits. Specifically, the Draft Permit specifies that the City shall be deemed out of compliance with the Permit’s WQBELs only if the concentration of a given pollutant exceeds both the WQBELs and the RLs for that constituent. The RLs are typically higher than the Draft Permit’s WQBELs, effectively changing the City’s applicable effluent limitation.

This RLs approach is unlawful. In Waterkeepers N. California v. State Water Resources Control Board, the First Division of the California Court of Appeal held that, while the State Board may provide enforcement guidelines for the Regional Water Boards, it lacks

authority to “frame effluent requirements to reflect the technological limits for detection in discharge samples.” To prevent RLs from essentially supplanting WQBELs in situations where the RL is equal to or greater than applicable WQBEL, RLs must be used only to determine compliance for purposes of reporting and the exercise of enforcement discretion.

Moreover, at least some RLs have been set higher than at least some laboratories’ true technological capability of detecting the levels of pollutants in an effluent. This is reflected by dischargers region-wide often reporting lower levels of pollutants than the RL levels, but levels that exceed applicable WQBELs—demonstrating that laboratories are often capable of reliably measuring pollutant levels less than the RL but higher than the WQBEL. Indeed, many Regional Water Board permits have expressly acknowledged that laboratories can, at least on occasion, detect pollutants in effluents at levels below the RLs, i.e., at levels equal to the laboratory’s “Method Detection Level” (MDL). This underscores that the Regional Water Board’s approach to MLs is rendering NPDES permits unduly lenient.

Response to Baykeeper Comment J

We did not make changes in response to this comment. The Draft Permit, section VII, already addresses this concern:

...For purposes of reporting and administrative enforcement by the Regional and State Water Boards, the Discharger shall be deemed out of compliance with effluent limitations if the concentration of the priority pollutant in the monitoring sample is greater than the effluent limitation and greater than or equal to the reporting level (RL).

This language in no way changes the water quality-based limitations in the Draft Permit.

The ML¹ is the concentration at which the entire analytical system gives a recognizable signal and acceptable calibration point. Since values reported below the ML represent values where the analytical system produces less reliable results, such values are merely estimates. Regardless of the pollutant, it is bad public policy to use mere estimates for compliance purposes. Further, the MLs required by the Draft Permit are consistent with the State Water Board’s *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays and Estuaries of California*.

Finally, we are unable to substantiate Baykeeper’s assertion that laboratories are able to quantify pollutants at levels below the RL or equal to the MDL. The MDL is the point at which the presence or absence of a pollutant can be assessed; it is not a point at which the

¹ The ML is based on the proper application of method-based analytical procedures for sample preparation and the absence of matrix interferences. Other factors may be applied to the ML depending on the specific sample preparation steps employed. For example, the treatment typically applied in cases where there are matrix-effects is to dilute the sample by a factor of ten. In such cases, this additional factor must be applied to the ML in the computation of the RL.

concentration of the pollutants can be reliably quantified. Dischargers do sometimes erroneously report MDLs as RLs in discharge reports because these two concepts are easily misunderstood.