# APPENDIX B

EAST BAY
MUNICIPAL UTILITY DISTRICT

BENNETT K. HORENSTEIN
DIRECTOR OF WASTEWATER

September 24, 2014

Mr. Robert Schlipf
Water Resource Control Engineer
California Regional Water Quality Control Board San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

RE: East Bay Wastewater Collection Systems NPDES Permit Renewal

Dear Mr. Schlipf:

East Bay Municipal Utility District (EBMUD) supports the Board's adoption of the proposed permits for the Cities of Alameda, Albany, Berkeley, Emeryville, Oakland, and Piedmont; and Stege Sanitary District (EBMUD's Satellites).

In particular, EBMUD supports Prohibition III.D: "The Discharger shall not cause or contribute to discharges from East Bay Municipal Utility District's (EBMUD) Wet Weather Facilities (WWFs) that occur during wet weather or that are associated with wet weather." This discharge prohibition is critical to the long-term success of the regional wet weather program developed collaboratively under a recently negotiated Federal Consent Decree.

Sincerely,

Bennett K. Horenstein

JTK:jtk

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**Via Email and U.S. Mail**

September 30, 2014

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

Re: City of Emeryville Tentative Order No. R2-2014-XXXX; NPDES No. CA0038792

Dear Mr. Wolfe:

Thank you for the opportunity to comment on the above referenced Tentative Order provided to the City of Emeryville on August 28, 2014. In addition to the comments submitted jointly with the cities of Alameda, Albany, Berkeley, Oakland, Piedmont and Stege Sanitary District, the City of Emeryville has the following additional comment with respect to the "cause and contribute" prohibitions, which must be stricken.

The City of Emeryville physically cannot "cause or contribute" to discharges from the East Bay Municipal Utility District's (EBMUD) Wet Weather Facilities (WWF's). The following discussion, based on information contained in the EBMUD *Revised Final Flow Modeling and Limits Report* (FMLR), September 2012, substantiates this position.

The FMLR provided detailed flow information for the entire service area along with 6 alternative schemes for eliminating the use of the WWFs based on Capacity Flow Limits. Although none of these schemes was ultimately adopted, the schemes illustrate a range of hydraulic conditions in the EBMUD interceptor system. Therefore, the flow analyses contained in the FMLR report has been used for the analysis presented herein.

Drainage Area

The City of Emeryville maintains a sewer system that discharges into the EBMUD Interceptor System at a number of locations. This system serves approximately 670 acres in Emeryville and 370 acres in Oakland[1]. The majority of flow from the service

area flows through Interceptor Tributary Areas (ITA) 20, 21, 22, 23, and 24, via trunk sewers into the EBMUD North Interceptor. For the most part, in ITAs that cross the city limits, the flow originates in Oakland and co-mingles with flow from Emeryville. A portion of the City of Emeryville flows through Oakland's sewers in ITA 50L, which discharges into the South Interceptor, immediately upstream of the EBMUD wastewater treatment plant.

Estimated Peak Wet Weather Flows

Based on Table 3-6 (Attachment p.1) of the FMLR[2], the total peak wet weather flow (PWWF) to the North Interceptor from the Emeryville trunk sewers (including flow from Oakland) is 18.72 mgd, which represents 5.8% of the 320 mgd wet weather capacity of the main wastewater treatment facility (WWTF) or 2.5% of the 722 mgd Peak Wet Weather Flow (PWWF). Based on Table 3-9 (Attachment p.3) of the FMLR, the total PWWF from the City of Emeryville is 9.3 mgd (1.3% of the current system-wide PWWF and 2.9% of the wet weather capacity of the main WWTF). Of this total, 6.75 mgd discharges into the North Interceptor at several locations, and 2.57 mgd discharges into the South Interceptor via ITA 50L-1 (FMLR Table 3-7 (Attachment p.2)).

Impact on Point Isabel WWF

The FMLR report includes Hydraulic Grade Line[3] calculation profiles for the flow alternatives included in the FMLR report. The hydraulic profiles of interest regarding Emeryville's relationship to the Point Isabel WWF is entitled "Profile - North Interceptor (Manhole N20 to Influent Pump Station)" and are attached hereto (Attachments p.4 – p.9). The specific locations where Emeryville trunk sewers discharge along the profile are between N30 and N41A. Regardless of the alternative selected, the North Interceptor is never more than about two-thirds full in the vicinity of the co-mingled Emeryville/Oakland discharges. Given that the North Interceptor is flowing two-thirds full in the vicinity of the Emeryville discharges, all co-mingled wet weather flows from Emeryville discharge directly to the main wastewater treatment plant without any impacts to any capacity limitations of the North Interceptor.

More importantly, there are at least five bottlenecks in the North Interceptor upstream of Emeryville's discharge points. The closest of these bottlenecks to Emeryville is at Ashby Avenue in Berkeley and further upstream, at University Avenue, also in Berkeley. These bottlenecks effectively act as valves, thereby preventing any hydraulic influence of the downstream flows back upstream in the North Interceptor. Therefore, flows to the North Interceptor from Emeryville's trunk sewers have no influence on the flows upstream of the most downstream bottleneck in the North Interceptor or on the operation of the Point Isabel WWF.

Impact on San Antonio Creek and Oakport WWFs

The hydraulic profiles of interest regarding Emeryville's contribution to the flows in the South Interceptor is entitled "Profile - South Interceptor (Manhole S47 to Influent Pump Station)." The six hydraulic profiles presented in the FMLR are attached hereto (Attachments p. 10 – p. 21). The specific location where Emeryville flow discharges to the South Interceptor via Oakland's trunk sewer, S68A, is identified on the profile (Attachments p. 10, 12, 14, 16, 18, and 20); this is the most downstream discharge location on the South Interceptor. Regardless of the alternative selected, the South Interceptor is never more than about 80 percent full at this point and all co-mingled wet weather flows from ITA 50L drain directly to the main wastewater treatment plant without any impacts on the capacity of the South Interceptor. The flow impacts prompting use of and discharges from the WWFs are well upstream of the discharge point S68A.

More importantly, there is a bottleneck in the South Interceptor between Emeryville's discharge point and the San Antonio Creek WWF (Attachment p. 11, 13, 15, 17 19, and 21) and additional bottlenecks further upstream in the South Interceptor toward the Oakport WWF. Again, these bottlenecks effectively act as valves, thereby preventing any hydraulic influence of the downstream flows back upstream in the South Interceptor. Therefore, flows to the South Interceptor from Emeryville's trunk sewers have no influence on the flows upstream of the bottlenecks in the South Interceptor and or the operation of the San Antonio Creek WWF, or further upstream at the Oakport WWF.

Therefore, any time the hydraulic grade line is below the crown of the pipe, the pipe is capable of carrying additional flow without surcharging.

Thank you for considering our proposed modifications to the Tentative Order.

Sincerely yours,

Maurice Kaufman
Public Works Director

cc: Michael Biddle, City Attorney, Emeryville
Justine Faisst, Public Works Department, Emeryville
Laurie Kermish, Environmental Protection Agency [via email only]
Patricia Hurst, United States Department of Justice [via email only]
Lila Tang, Regional Water Board [via email only]
Robert Schlipf, Regional Water Board [via email only]
John Davidson, California Attorney General's Office [via email only]
Robert Haun, Director of Public Works, Alameda [via email only]
Michael Roush, City Attorney's Office, Alameda [via email only]
Ray Chan, Public Works Director, Albany [via email only]
Andrew Clough, Director of Public Works, Berkeley [via email only]
Zach Cowan, City Attorney, Berkeley [via email only]
Brooke Levin, Director of Public Works, Oakland [via email only]
Celso Ortiz, City Attorney's Office, Oakland [via email only]
Marilee J. Allen, Bingham McCutcheon [via email only]
Chester Nakahara, Public Works Director, Piedmont [via email only]
Rax Delizo, District Manager, Stege [via email only]
Kent Alm, Myers Nave [via email only]
Sarah Quiter, Myers Nave [via email only]

[1] City of Emeryville; *Sewer System Capacity Analysis and Master Plan*; June 9, 2010.
[2] East Bay Municipal Utility District (EBMUD); *Revised Final Flow Modeling and Limits Report* (FMLR); September 2012.
[3] The surface or profile of water flowing in an open channel or a pipe flowing partially full. If a pipe is under pressure, the hydraulic grade line is that level water would rise to in a small, vertical tube connected to the pipe.

**Table 3-6: Interceptor Tributary Area Flows**

| ITA[a] | ABWF (mgd) | Basis of ABWF[b] | Dry GWI (mgd) | ADWF (mgd) | 1-hr PBWF (mgd) | 3-hr PBWF (mgd) | Max. GWI (mgd) | Rt Avg.[c] (%) | Rt Max (%) | 15-min Peak RDII[d] (mgd) | 1-hr Peak RDII[d] (mgd) | PWWF[e] (mgd) | EB SSES Method PWWF[f] (mgd) | WW PF[g] | EB SSES Method WW PF[h] |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 01-1 | 0.86 | 2010 | 0.22 | 1.08 | 1.50 | 1.47 | 2.18 | 9.8% | 18.5% | 21.0 | 20.7 | 24.0 | 24.4 | 28 | 23 |
| 02-1_2 | 1.21 | 2009 | 0.25 | 1.46 | 1.98 | 1.93 | 3.75 | 7.9% | 11.0% | 29.2 | 28.9 | 34.1 | 34.6 | 28 | 24 |
| 02-3 | 0.018 | 2010 | 0.003 | 0.021 | 0.04 | 0.04 | 0.04 | 1.0% | 1.3% | 0.17 | 0.14 | 0.23 | 0.22 | 13 | 10 |
| 10-1 | 0.59 | 2010 | 0.17 | 0.76 | 1.06 | 0.98 | 1.43 | 12.7% | 17.3% | 14.2 | 11.9 | 16.2 | 14.3 | 27 | 19 |
| 11-1 | 0.64 | 2010 | 0.10 | 0.74 | 1.12 | 1.08 | 1.01 | 16.4% | 21.0% | 12.2 | 12.1 | 13.9 | 14.2 | 22 | 19 |
| 11-2 | 0.086 | 2010 | 0.004 | 0.091 | 0.16 | 0.13 | 0.07 | 3.3% | 5.2% | 0.23 | 0.23 | 0.38 | 0.43 | 4 | 5 |
| 11-3 | 0.025 | 2010 | 0.003 | 0.028 | 0.10 | 0.07 | 0.03 | 7.5% | 8.0% | 1.72 | 1.66 | 1.78 | 1.77 | 72 | 64 |
| 12-1 | 0.167 | 2010 | 0.005 | 0.17 | 0.27 | 0.26 | 0.15 | 5.4% | 8.2% | 1.41 | 1.40 | 1.73 | 1.81 | 10 | 11 |
| 13-1 | 0.078 | 2010 | 0.012 | 0.090 | 0.16 | 0.13 | 0.27 | 15.2% | 21.0% | 3.22 | 2.88 | 3.57 | 3.29 | 46 | 36 |
| 14-1 | 0.52 | 2010 | 0.10 | 0.62 | 1.01 | 0.82 | 0.80 | 12.3% | 22.0% | 17.9 | 16.9 | 19.2 | 18.1 | 37 | 29 |
| 14-2 | 0.109 | 2010 | 0.013 | 0.12 | 0.20 | 0.16 | 0.32 | 13.6% | 22.0% | 2.80 | 2.44 | 3.23 | 2.91 | 30 | 24 |
| 14-3 | 0.057 | 2010 | 0.023 | 0.080 | 0.09 | 0.09 | 0.14 | 6.4% | 12.0% | 0.62 | 0.61 | 0.81 | 0.83 | 14 | 10 |
| 15-1 | 1.06 | 2010 | 0.19 | 1.25 | 1.70 | 1.62 | 1.27 | 10.2% | 15.0% | 10.9 | 9.25 | 13.2 | 12.1 | 12 | 10 |
| 15-2 | 0.068 | 2009 | 0.010 | 0.078 | 0.15 | 0.14 | 0.18 | 11.8% | 22.0% | 2.34 | 2.22 | 2.59 | 2.55 | 38 | 33 |
| 16-1 | 0.14 | 2010 | 0.000 | 0.14 | 0.26 | 0.23 | 0.04 | 1.8% | 3.4% | 0.25 | 0.25 | 0.43 | 0.51 | 3 | 4 |
| 17L-1 | 1.81 | 2009 | 0.32 | 2.13 | 2.89 | 2.83 | 3.58 | 11.6% | 18.0% | 20.5 | 20.4 | 25.9 | 26.8 | 14 | 13 |
| 17U-1 | 4.09 | 2010 | 0.55 | 4.64 | 6.27 | 6.00 | 3.48 | 4.8% | 6.5% | 26.4 | 23.6 | 34.0 | 33.1 | 8 | 7 |
| 20-1 | 0.39 | 2010 | 0.22 | 0.61 | 0.62 | 0.53 | 0.65 | 11.8% | 15.5% | 6.37 | 5.86 | 7.40 | 7.03 | 19 | 12 |
| 21L-1 | 0.28 | 2010 | 0.055 | 0.34 | 0.46 | 0.39 | 0.63 | 6.0% | 15.8% | 7.18 | 5.90 | 8.08 | 6.92 | 29 | 20 |
| 21L-2 | 0.130 | 2010 | 0.040 | 0.17 | 0.21 | 0.21 | 0.07 | 1.5% | 1.8% | 0.34 | 0.28 | 0.54 | 0.56 | 4 | 3 |
| 21U-1 | 0.098 | 2010 | 0.033 | 0.13 | 0.19 | 0.18 | 0.21 | 23.7% | 36.0% | 6.61 | 5.48 | 6.92 | 5.88 | 71 | 45 |
| 22-1 | 0.32 | WU | 0.066 | 0.39 | 0.42 | 0.41 | 0.24 | 4.0% | 4.0% | 1.01 | 0.86 | 1.57 | 1.50 | 5 | 4 |
| 23-1 | 0.104 | WU | 0.011 | 0.11 | 0.15 | 0.14 | 0.15 | 4.5% | 6.5% | 0.88 | 0.73 | 1.13 | 1.03 | 11 | 9 |
| 50L-1 | 1.73 | 2010 | 0.54 | 2.26 | 2.93 | 2.88 | 3.04 | 12.0% | 23.0% | 35.8 | 35.6 | 40.5 | 41.5 | 23 | 18 |
| 50U-1 | 1.64 | 2010 | 0.31 | 1.95 | 2.84 | 2.77 | 3.20 | 9.2% | 18.0% | 42.8 | 42.3 | 47.7 | 48.3 | 29 | 25 |
| 52-1 | 3.42 | 2010 | 1.35 | 4.78 | 4.91 | 4.85 | 4.06 | 10.1% | 16.0% | 40.4 | 40.2 | 47.9 | 49.1 | 14 | 10 |
| 54-1_2 | 3.37 | 2010 | 0.61 | 3.98 | 5.54 | 5.32 | 4.49 | 10.3% | 14.0% | 42.9 | 42.8 | 50.8 | 52.6 | 15 | 13 |
| 56-1 | 1.22 | 2010 | 0.31 | 1.53 | 2.20 | 2.09 | 2.35 | 5.9% | 8.3% | 16.2 | 15.8 | 19.8 | 20.2 | 16 | 13 |
| 58-1 | 1.47 | 2010 | 0.062 | 1.54 | 2.19 | 2.14 | 1.21 | 20.9% | 28.0% | 19.2 | 17.1 | 21.9 | 20.4 | 15 | 13 |
| 59-1 | 0.36 | 2010 | 0.13 | 0.49 | 0.58 | 0.56 | 0.55 | 8.4% | 10.5% | 6.00 | 5.29 | 6.91 | 6.41 | 19 | 13 |
| 60-1 | 0.39 | 2010 | 0.34 | 0.73 | 0.70 | 0.67 | 1.05 | 10.5% | 15.0% | 14.2 | 12.5 | 15.7 | 14.3 | 40 | 19 |
| 62-1 | 0.31 | 2010 | 0.025 | 0.33 | 0.49 | 0.48 | 0.21 | 8.2% | 9.5% | 3.61 | 3.20 | 4.12 | 3.89 | 13 | 12 |
| 64-01 | 0.007 | WU, Ratio | 0.001 | 0.008 | 0.01 | 0.01 | 0.01 | 0.9% | 1.1% | 0.10 | 0.09 | 0.11 | 0.11 | 16 | 14 |
| 64-01P | 0.11 | WU, Ratio | 0.015 | 0.12 | 0.15 | 0.13 | 0.12 | 0.9% | 1.1% | 1.54 | 1.52 | 1.76 | 1.77 | 16 | 14 |
| 64-02 | 0.076 | 2010 | 0.033 | 0.11 | 0.13 | 0.12 | 0.09 | 2.4% | 3.9% | 0.63 | 0.51 | 0.80 | 0.72 | 11 | 7 |
| 64-03 | 0.051 | WU | 0.009 | 0.061 | 0.09 | 0.07 | 0.12 | 6.5% | 7.5% | 0.78 | 0.62 | 0.95 | 0.81 | 18 | 13 |
| 64-04 | 0.38 | 2010 | 0.044 | 0.43 | 0.56 | 0.54 | 0.12 | 7.0% | 8.0% | 1.99 | 1.57 | 2.50 | 2.24 | 6 | 5 |
| 64-05 | 0.30 | 2010 | 0.055 | 0.36 | 0.52 | 0.51 | 0.13 | 7.3% | 8.0% | 3.30 | 1.91 | 3.74 | 2.56 | 12 | 7 |
| 64-06 | 0.33 | 2010 | 0.024 | 0.35 | 0.51 | 0.51 | 0.11 | 5.4% | 6.5% | 3.41 | 2.68 | 3.84 | 3.30 | 12 | 9 |
| 64-07 | 0.030 | WU | 0.001 | 0.031 | 0.04 | 0.04 | 0.04 | 0.9% | 1.7% | 0.42 | 0.34 | 0.49 | 0.42 | 16 | 13 |
| 64-08 | 0.079 | 2010 | 0.007 | 0.085 | 0.13 | 0.12 | 0.02 | 1.4% | 1.4% | 0.26 | 0.21 | 0.36 | 0.35 | 5 | 4 |
| 80-1 | 1.15 | 2009 | 0.18 | 1.33 | 1.89 | 1.86 | 3.33 | 7.4% | 14.0% | 16.4 | 13.9 | 20.9 | 19.1 | 18 | 14 |
| 80-2 | 0.17 | 2010 | 0.033 | 0.20 | 0.32 | 0.31 | 0.21 | 10.3% | 17.0% | 3.74 | 3.12 | 4.12 | 3.65 | 24 | 18 |
| 81-1_2 | 1.21 | 2010 | 0.20 | 1.41 | 2.03 | 1.95 | 1.83 | 17.7% | 25.5% | 13.2 | 10.8 | 16.2 | 14.6 | 13 | 10 |
| 81-3 | 0.16 | WU | 0.010 | 0.17 | 0.20 | 0.20 | 0.16 | 6.8% | 11.8% | 3.34 | 2.81 | 3.66 | 3.17 | 23 | 19 |

**Table 3-7: Satellite Tributary Area Flows**

| STA[a] | ABWF (mgd) | Basis of ABWF[b] | Dry GWI (mgd) | ADWF (mgd) | 1-hr PBWF (mgd) | 3-hr PBWF (mgd) | Max. GWI (mgd) | Rt Avg.[c] (%) | Rt Max (%) | 15-min Peak RDI/I[d] (mgd) | 1-hr Peak RDI/I[d] (mgd) | PWWF[b] (mgd) | EB SSES Method PWWF[f] (mgd) | WW PF[g] | EB SSES Method WW PF[h] |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 10-S1B | 0.259 | 2010, Ratio | 0.002 | 0.261 | 0.500 | 0.467 | 0.424 | 12.0% | 15.5% | 7.79 | 7.73 | 8.47 | 8.62 | 33 | 33 |
| 11-S1B | 0.070 | 2009 | 0.032 | 0.102 | 0.165 | 0.138 | 0.149 | 12.0% | 15.5% | 2.75 | 2.23 | 2.97 | 2.51 | 42 | 25 |
| 17U-S1O | 0.056 | 2010 | 0.025 | 0.082 | 0.095 | 0.093 | 0.080 | 4.0% | 10.0% | 0.69 | 0.58 | 0.82 | 0.75 | 15 | 9 |
| 17U-S2O | 0.037 | WU, Ratio | 0.024 | 0.061 | 0.075 | 0.065 | 0.055 | 3.0% | 3.5% | 0.52 | 0.44 | 0.61 | 0.56 | 16 | 9 |
| 17U-S3O | 0.029 | WU | 0.002 | 0.031 | 0.049 | 0.043 | 0.052 | 3.0% | 6.5% | 0.60 | 0.51 | 0.68 | 0.60 | 23 | 19 |
| 20-S1O | 0.129 | 2010 | 0.040 | 0.169 | 0.218 | 0.207 | 0.227 | 16.0% | 21.5% | 3.50 | 2.98 | 3.86 | 3.41 | 30 | 20 |
| 20-S2O | 0.066 | 2010 | 0.025 | 0.092 | 0.114 | 0.110 | 0.089 | 17.0% | 17.5% | 1.88 | 1.51 | 2.03 | 1.71 | 31 | 19 |
| 21L-S1O | 0.110 | 2010, Ratio | 0.012 | 0.122 | 0.207 | 0.193 | 0.212 | 7.0% | 13.0% | 2.19 | 1.85 | 2.51 | 2.25 | 23 | 18 |
| 21L-S2O | 0.067 | 2010 | 0.032 | 0.098 | 0.135 | 0.131 | 0.280 | 25.0% | 34.0% | 1.74 | 1.72 | 2.08 | 2.14 | 31 | 22 |
| 21L-S3E | 0.037 | WU | 0.004 | 0.041 | 0.055 | 0.052 | 0.060 | 9.0% | 15.0% | 0.60 | 0.67 | 0.89 | 0.78 | 24 | 19 |
| 50L-S1E | 0.074 | 2010 | 0.042 | 0.116 | 0.132 | 0.121 | 0.163 | 12.0% | 16.5% | 2.33 | 1.93 | 2.57 | 2.21 | 35 | 19 |
| 54-S01P | 0.172 | 2010, Ratio | 0.037 | 0.211 | 0.379 | 0.338 | 0.309 | 10.0% | 13.0% | 6.67 | 6.44 | 7.15 | 7.08 | 41 | 34 |
| 54-S02P | 0.251 | 2010 | 0.050 | 0.302 | 0.489 | 0.458 | 0.470 | 12.0% | 14.0% | 8.07 | 7.79 | 8.79 | 8.72 | 35 | 29 |
| 54-S03P | 0.048 | 2010 | 0.024 | 0.072 | 0.095 | 0.074 | 0.111 | 16.0% | 17.0% | 1.36 | 1.21 | 1.51 | 1.40 | 31 | 19 |
| 54-S04P | 0.020 | WU | 0.011 | 0.031 | 0.050 | 0.044 | 0.092 | 10.0% | 13.0% | 0.81 | 0.81 | 0.92 | 0.94 | 46 | 30 |
| 54-S05P | 0.010 | 2010, Ratio | 0.005 | 0.015 | 0.018 | 0.016 | 0.021 | 8.0% | 11.3% | 0.23 | 0.23 | 0.26 | 0.26 | 27 | 18 |
| 54-S06P | 0.010 | 2010, Ratio | 0.005 | 0.014 | 0.016 | 0.014 | 0.021 | 8.0% | 11.3% | 0.23 | 0.22 | 0.26 | 0.26 | 30 | 19 |
| 54-S07P | 0.047 | 2010, Ratio | 0.020 | 0.067 | 0.097 | 0.087 | 0.064 | 3.0% | 5.0% | 0.99 | 0.95 | 1.10 | 1.10 | 24 | 16 |
| 54-S08O | 0.020 | 2010 | 0.003 | 0.023 | 0.045 | 0.038 | 0.066 | 5.0% | 7.0% | 0.94 | 0.90 | 1.03 | 1.00 | 51 | 43 |
| 54-S09O | 0.023 | 2009 | 0.014 | 0.037 | 0.046 | 0.039 | 0.115 | 6.0% | 8.0% | 0.70 | 0.70 | 0.84 | 0.85 | 36 | 23 |
| Unmetered | 0.973 | | 0.208 | 1.183 | 1.676 | 1.533 | 1.267 | 6.8% | 36.0% | 13.59 | 12.27 | 15.8 | 15.05 | 16 | 13 |

See footnotes in **Table 3-6**.

**Table 3-8: Satellite Flow Percentages in ITAs with Multiple Contributing Satellites**

| ITA | DS Satellite | US Satellite | Sewered Acreage | | Average BWF | | Average DWF | | Maximum GWI | | Avg. RDI/I Volume[a] | | 15-min Peak RDI/I[b] | | 1-hr Peak RDI/I[b] | | PWWF[c] | | EB SSES Method PWWF[d] | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | DS Satellite | US Satellite | DS Satellite | US Satellite | DS Satellite | DS Satellite | DS Satellite | US Satellite | DS Satellite | US Satellite | DS Satellite | US Satellite | DS Satellite | US Satellite | DS Satellite | US Satellite | DS Satellite | US Satellite |
| 10-1 | Albany | Berkeley<br>Stege | 40.1% | 59.6%<br>0.3% | 56.0% | 43.8%<br>0.2% | 44.6% | 44.6%<br>0.2% | 70.1% | 29.7%<br>0.2% | 43.1% | 56.5%<br>0.4% | 44.8% | 54.8%<br>0.3% | 34.6% | 65.0%<br>0.4% | 47.4% | 52.2%<br>0.3% | 39.3% | 60.3%<br>0.4% |
| 11-1 | Albany | Berkeley | 77.4% | 22.6% | 88.8% | 11.2% | 82.4% | 82.4% | 84.8% | 15.2% | 82.9% | 17.1% | 76.9% | 23.1% | 81.2% | 18.8% | 78.0% | 22.0% | 81.8% | 18.2% |
| 11-3 | Berkeley | Albany | 39.5% | 60.5% | 22.7% | 77.3% | 43.4% | 43.4% | 39.3% | 60.7% | 43.4% | 56.6% | 39.4% | 60.6% | 39.5% | 60.5% | 39.2% | 60.8% | 38.8% | 61.2% |
| 14-1 | Berkeley | Albany | 93.3% | 6.7% | 93.8% | 6.2% | 94.2% | 94.2% | 93.3% | 6.7% | 94.0% | 6.0% | 93.7% | 6.3% | 93.3% | 6.7% | 93.7% | 6.3% | 93.3% | 6.7% |
| 17L-1 | Berkeley | Oakland | 98.2% | 1.8% | 98.5% | 1.5% | 96.0% | 96.0% | 99.0% | 1.0% | 96.2% | 3.8% | 94.3% | 5.7% | 95.2% | 4.8% | 95.3% | 4.7% | 96.1% | 3.9% |
| 17U-1 | Berkeley | Oakland | 92.3% | 7.7% | 96.7% | 3.3% | 94.4% | 94.4% | 93.7% | 6.3% | 94.6% | 5.4% | 91.9% | 8.1% | 92.2% | 7.8% | 92.6% | 7.4% | 93.1% | 6.9% |
| 20-1 | Emeryville | Oakland | 42.2% | 57.8% | 38.6% | 61.4% | 16.9% | 16.9% | 39.4% | 60.6% | 16.9% | 83.1% | 0%[g] | 100% | 1.7% | 98.3% | 0%[g] | 100% | 7.0% | 93.0% |
| 21L-1 | Emeryville | Oakland | 57.1% | 42.9% | 37.7% | 62.3% | 9.7% | 9.7% | 21.3% | 78.7% | 9.7% | 90.3% | 45.3% | 54.7% | 39.5% | 60.5% | 43.2% | 56.8% | 36.6% | 63.4% |
| 21U-1 | Oakland | Berkeley | 90.8% | 9.2% | 89.7% | 10.3% | 90.8% | 90.8% | 90.8% | 9.2% | 90.8% | 9.2% | 90.4% | 9.6% | 90.4% | 9.6% | 90.4% | 9.6% | 90.4% | 9.6% |
| 22-1 | Emeryville | Oakland | 97.1% | 2.9% | 97.4% | 2.6% | 94.8% | 94.8% | 95.9% | 4.1% | 94.8% | 5.2% | 90.1% | 9.9% | 90.2% | 9.8% | 92.5% | 7.5% | 92.8% | 7.2% |
| 23-1 | Oakland | Emeryville | 20.8% | 79.2% | 28.2% | 71.8% | 29.1% | 29.1% | 20.8% | 79.2% | 29.1% | 70.9% | 20.8% | 79.2% | 20.8% | 79.2% | 21.5% | 78.5% | 21.9% | 78.1% |
| 50L-1 | Oakland | Emeryville<br>Berkeley | 95.3% | 3.4%<br>1.3% | 94.4% | 4.3%<br>1.3% | 96.4% | 96.4%<br>1.3% | 94.2% | 5.4%<br>0.5% | 96.4% | 3.2%<br>0.4% | 93.1% | 6.5%<br>0.4% | 94.3% | 5.4%<br>0.3% | 93.2% | 6.3%<br>0.4% | 94.3% | 5.3%<br>0.4% |
| 50U-1 | Oakland | Berkeley | 98.7% | 1.3% | 99.1% | 0.9% | 99.6% | 99.6% | 99.3% | 0.7% | 99.6% | 0.4% | 99.5% | 0.5% | 99.6% | 0.4% | 99.5% | 0.5% | 99.5% | 0.5% |
| 54-1_2 | Oakland | Piedmont | 61.3% | 38.7% | 81.3% | 18.7% | 61.5% | 61.5% | 71.7% | 28.3% | 61.5% | 38.5% | 53.0% | 47.0% | 54.5% | 45.5% | 56.5% | 43.5% | 58.4% | 41.6% |

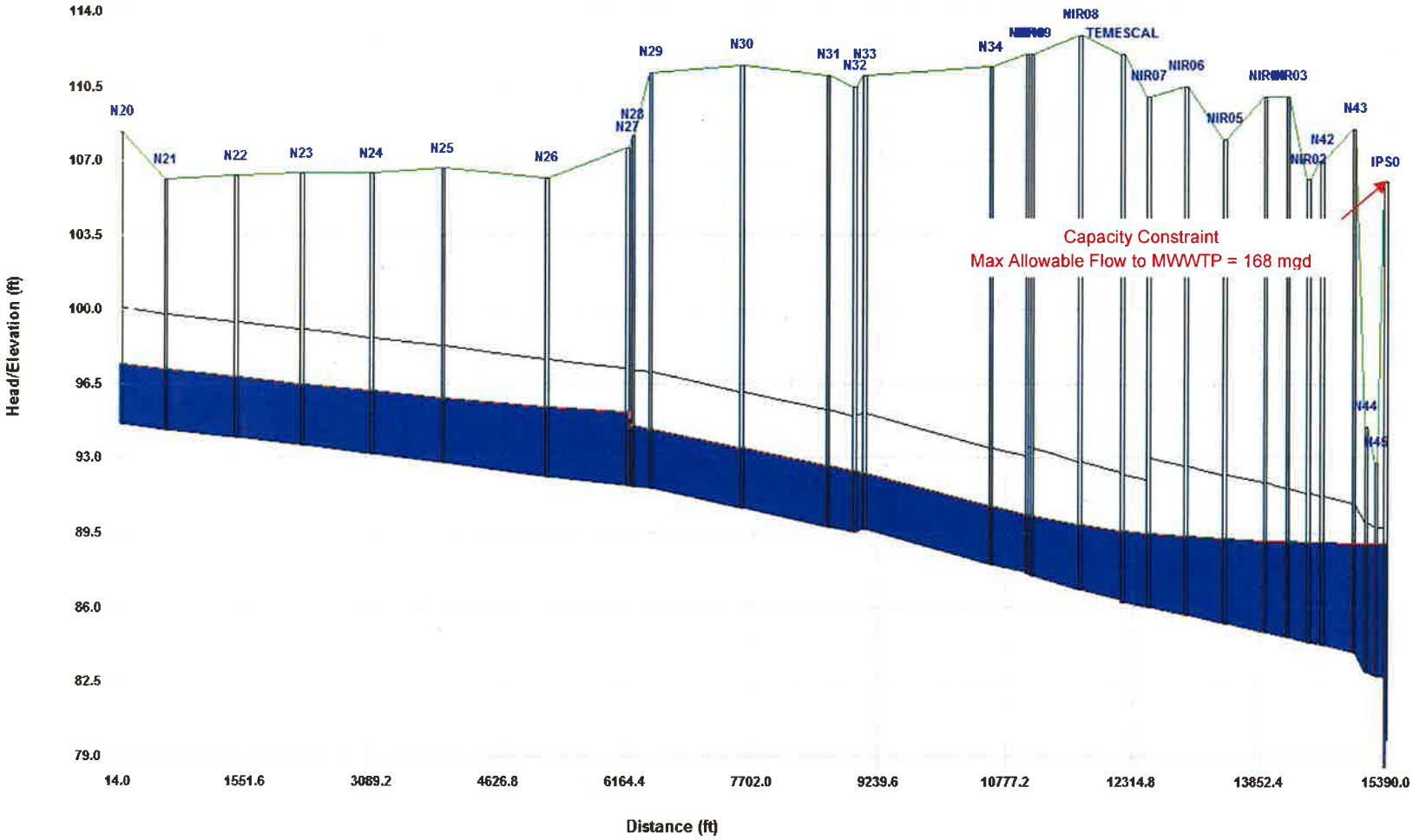
**Table 3-9: Estimated Flows by Satellite Agency**

| Satellite Agency | Sewered Area | | Average BWF | | Average DWF | | Maximum GWI | | Avg.RDI/I Volume[a] | Average Rt[e] | 15-min Peak RDI/I[b] | | 1-hr Peak RDI/I[b] | | PWWF[c] | | EB SSES Method PWWF[d] | | WW PF[f] | EB SSES Method WW PF[f] |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Acres | % of Total | (mgd) | % of Total | (mgd) | % of Total | (mgd) | % of Total | % of Total | | (mgd) | % of Total | (mgd) | % of Total | (mgd) | % of Total | (mgd) | % of Total | | |
| Alameda | 4,918 | 11.6% | 4.8 | 10.8% | 5.9 | 10.9% | 5.1 | 8.0% | 3.1% | 2.3% | 23.1 | 3.7% | 21.1 | 3.6% | 33.0 | 4.5% | 33.6 | 4.7% | 7 | 6 |
| Albany | 857 | 2.0% | 1.2 | 2.7% | 1.4 | 2.7% | 2.0 | 3.2% | 3.9% | 14.2% | 18.5 | 2.9% | 16.6 | 2.8% | 21.7 | 2.9% | 20.6 | 2.7% | 18 | 14 |
| Berkeley | 6,072 | 14.3% | 8.4 | 19.0% | 9.6 | 17.7% | 10.8 | 16.8% | 16.9% | 8.4% | 96.1 | 15.3% | 88.9 | 15.1% | 115.2 | 15.6% | 112.4 | 15.3% | 14 | 12 |
| Emeryville | 670 | 1.6% | 0.9 | 2.1% | 1.3 | 2.3% | 1.0 | 1.6% | 0.7% | 3.8% | 7.3 | 1.2% | 6.3 | 1.1% | 9.3 | 1.3% | 8.5 | 1.2% | 10 | 7 |
| Oakland | 26,032 | 61.3% | 26.1 | 59.2% | 32.7 | 60.2% | 37.8 | 59.0% | 64.0% | 7.9% | 413.8 | 65.8% | 387.6 | 65.7% | 477.7 | 64.8% | 466.0 | 64.7% | 18 | 14 |
| Piedmont | 1,001 | 2.4% | 0.6 | 1.4% | 0.8 | 1.5% | 1.3 | 2.0% | 3.4% | 9.8% | 20.2 | 3.2% | 19.4 | 3.3% | 22.1 | 3.0% | 21.9 | 3.1% | 35 | 27 |
| Stege | 2,892 | 6.8% | 2.1 | 4.7% | 2.6 | 4.7% | 6.0 | 9.3% | 8.1% | 8.5% | 50.3 | 8.0% | 49.8 | 8.4% | 58.4 | 7.9% | 59.2 | 8.3% | 28 | 23 |
| **Total** | **42,443** | **100%** | **44.1** | **100%** | **54.2** | **100%** | **64.0** | **100.0%** | **100%** | **7.6%** | **629** | **100%** | **590** | **100%** | **737** | **100%** | **722** | **100%** | **17** | **13** |

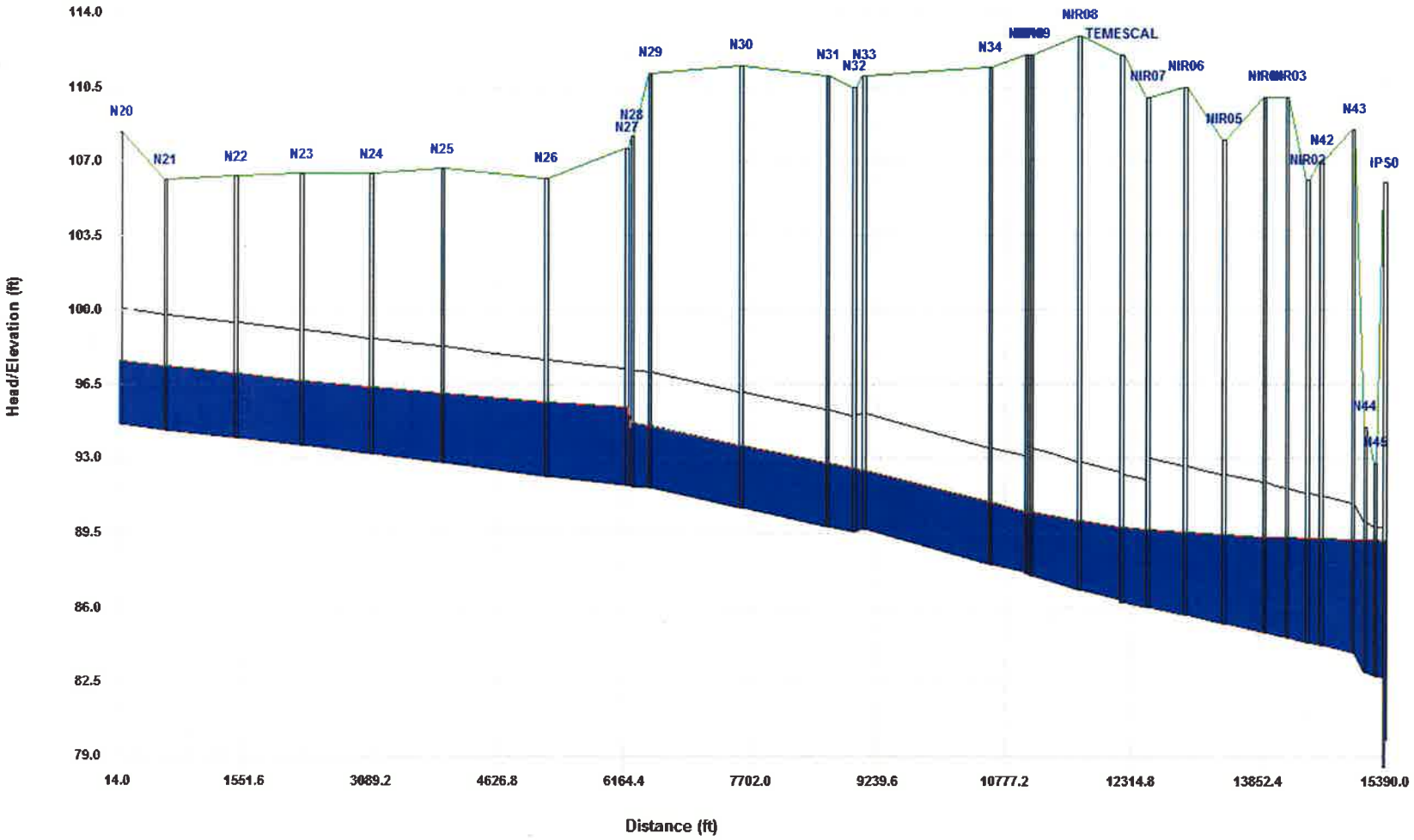
Footnotes for **Table 3-8** and **Table 3-9**:

a. Based on average of all storm events during the two-year flow monitoring period.
b. Peak RDI/I flow for EBMUD I/I Study Storm (assumes maximum soil saturation).
c. Calculated sum of ABWF, maximum GWI, and 15-minute peak RDI/I.
d. Calculated sum of 3-hour PBWF, maximum GWI, and 1-hour peak RDI/I.
e. Ratio of PWWF to ABWF.
f. Ratio of EB SSES Method PWWF to ADWF.
g. Shown as 0% because subtraction of peak flows resulted in negative flow for downstream Satellite.

Alternative 1
Profile – North Interceptor (Manhole N20 to Influent Pump Station)

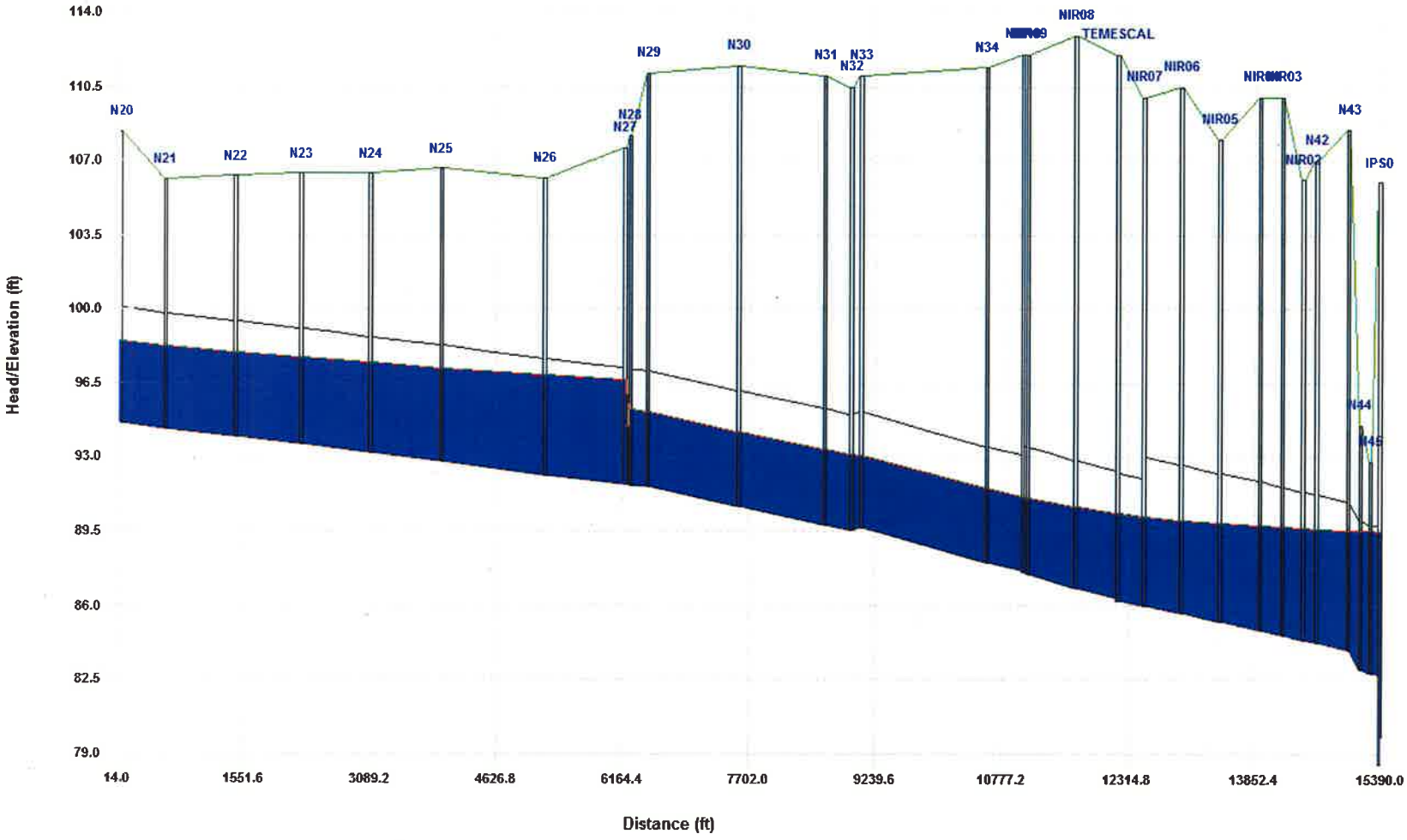


Alternative 2
Profile – North Interceptor (Manhole N20 to Influent Pump Station)



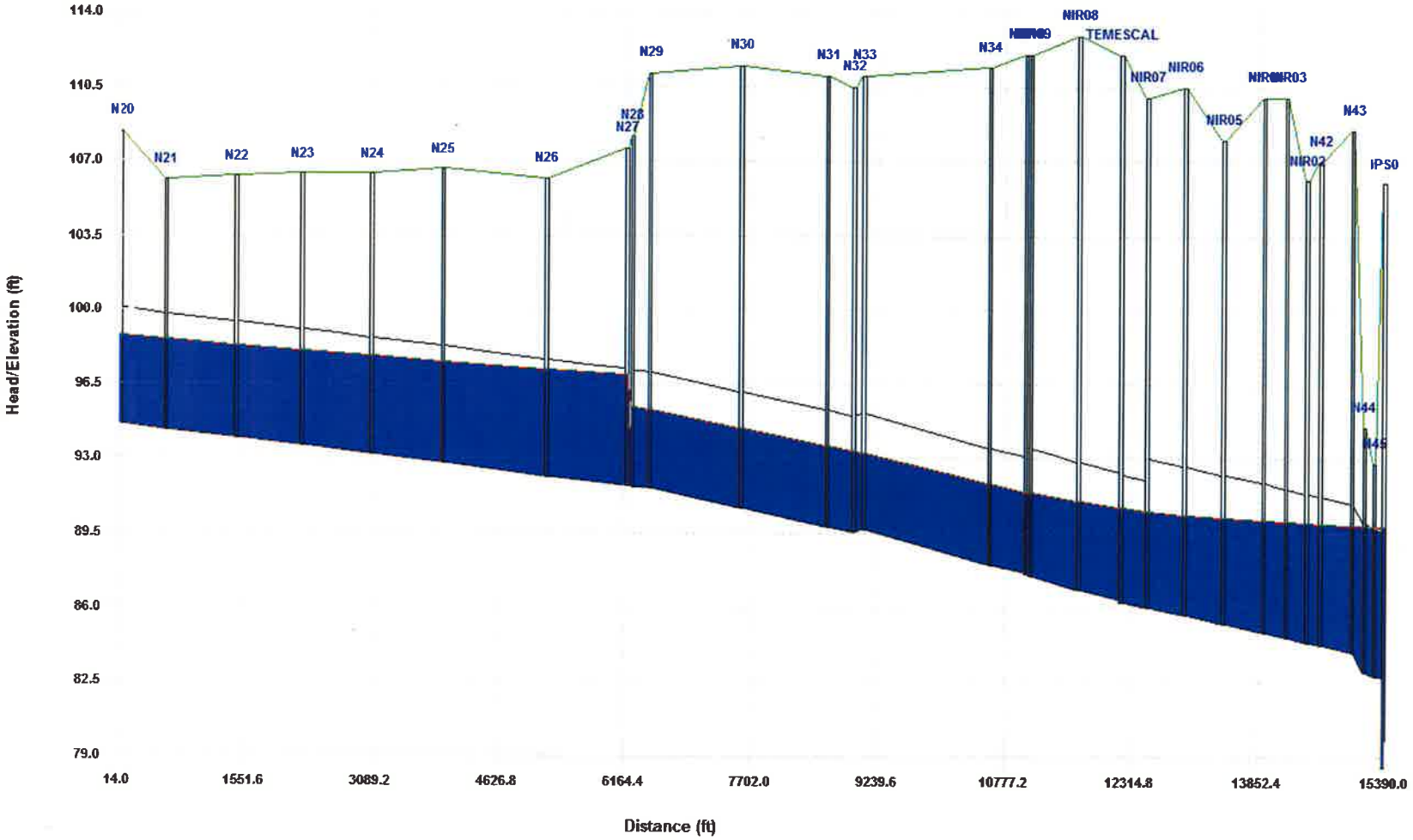
Alternative 3

Profile – North Interceptor (Manhole N20 to Influent Pump Station)

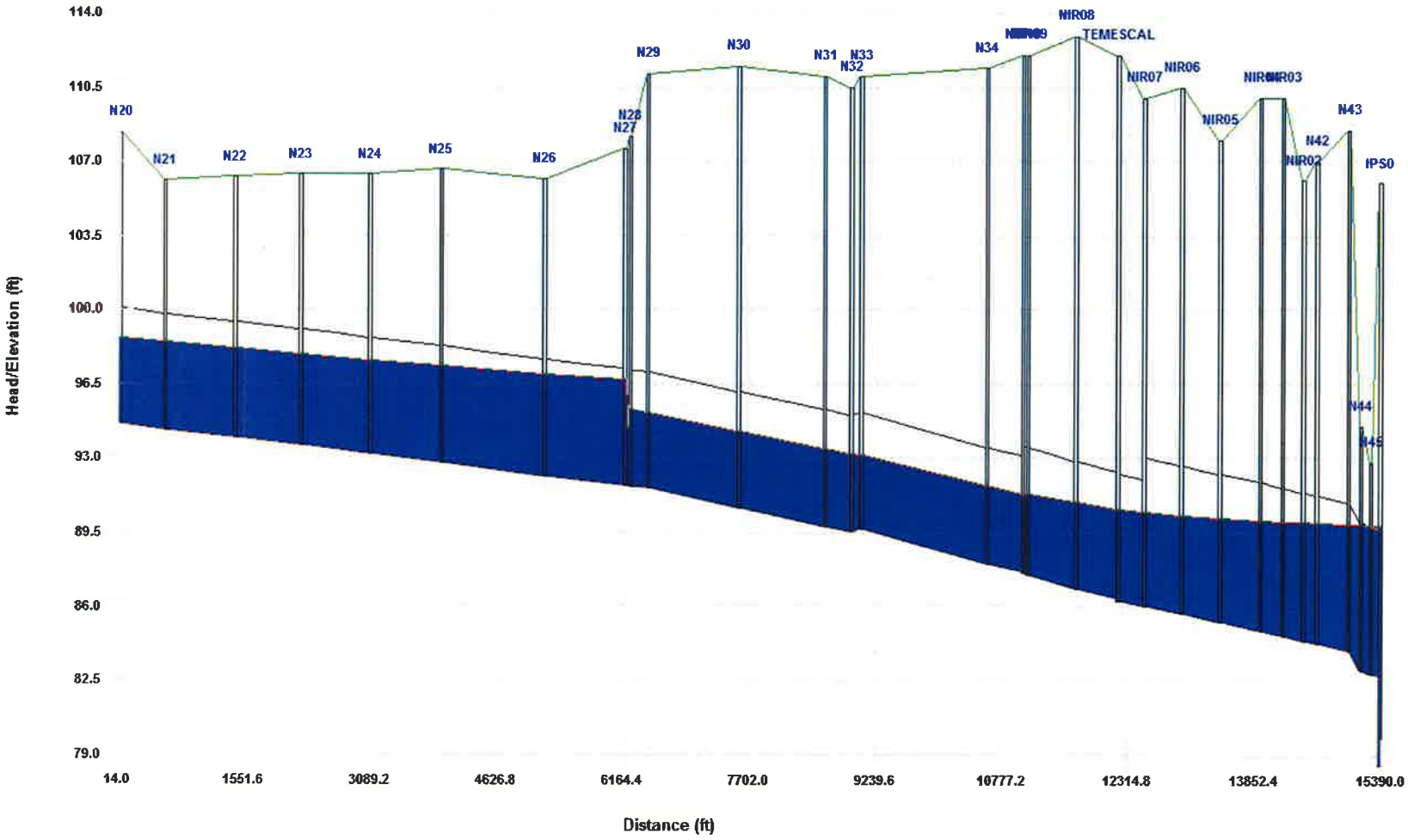


Alternative 4

Profile – North Interceptor (Manhole N20 to Influent Pump Station)

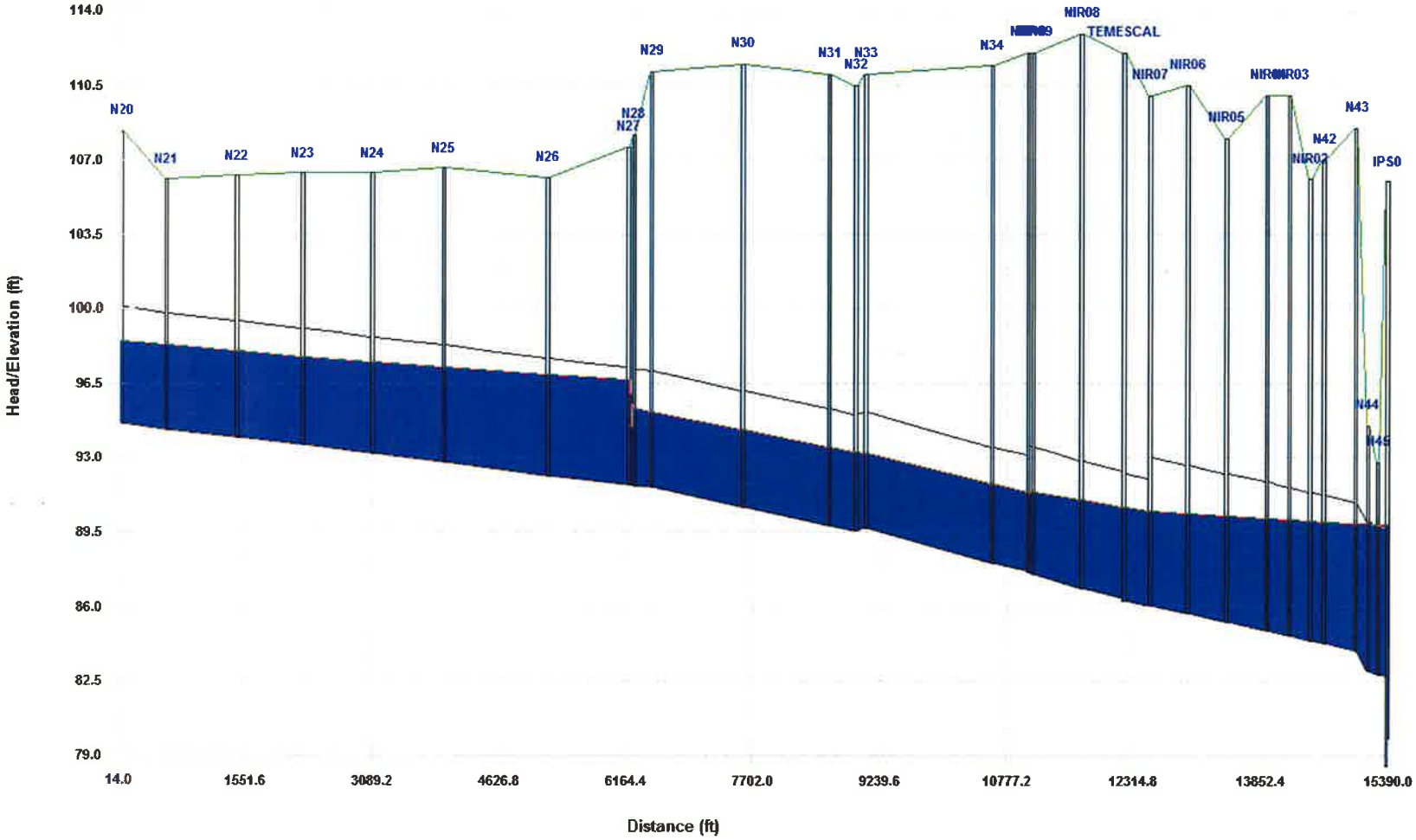


Alternative 5
Profile – North Interceptor (Manhole N20 to Influent Pump Station)

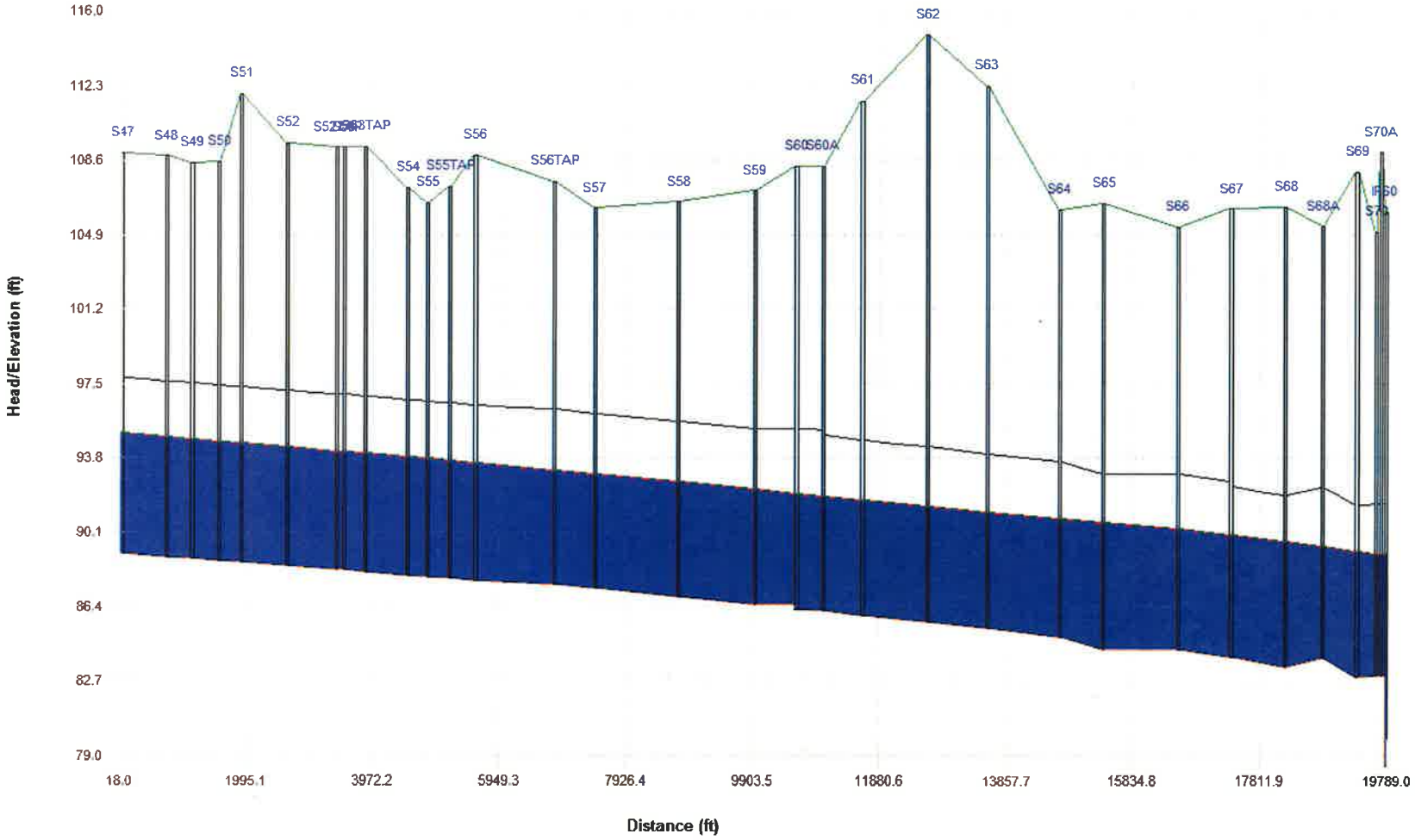


Alternative 6

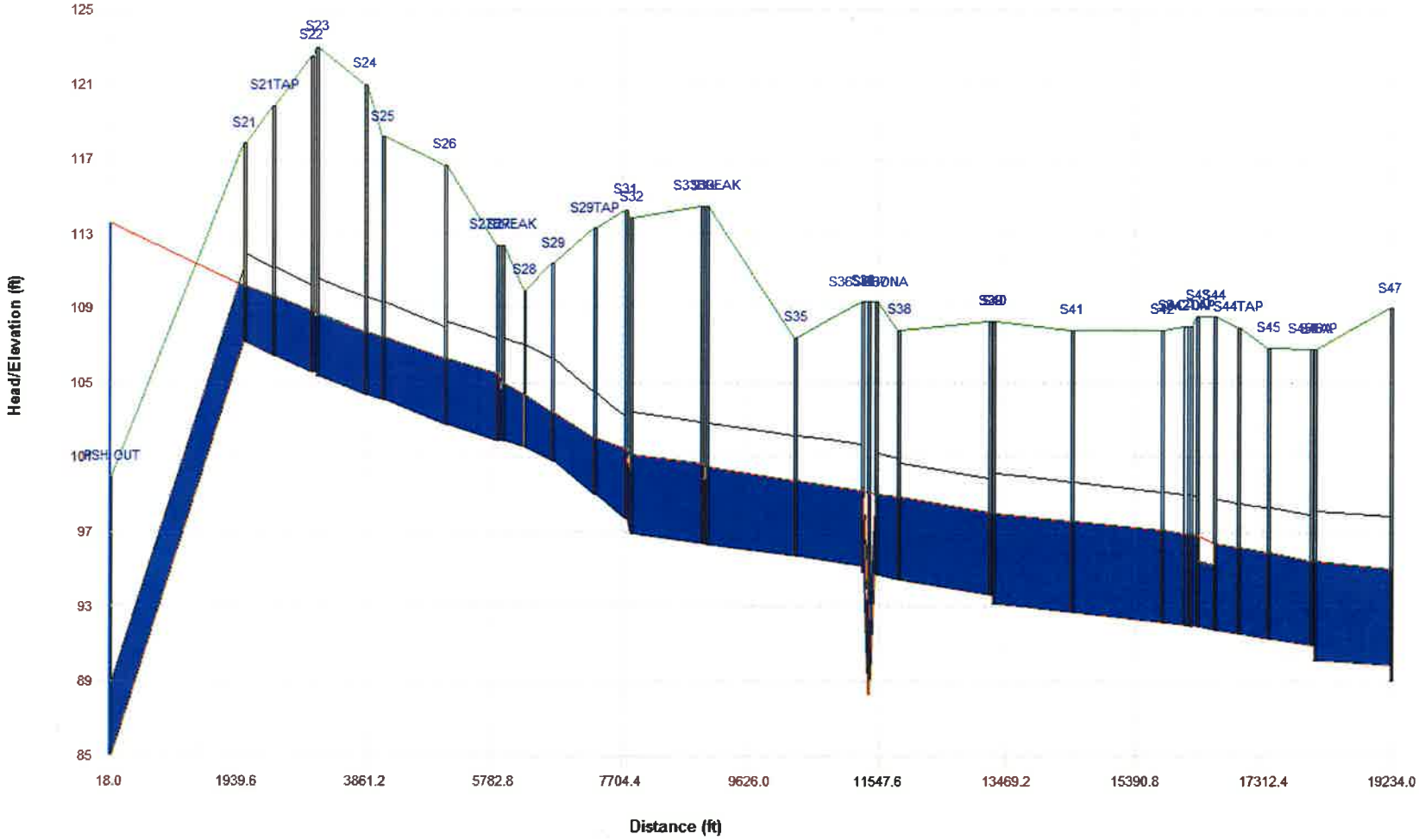
Profile – North Interceptor (Manhole N20 to Influent Pump Station)



Alternative 1
Profile –South Interceptor (Manhole S47 to Influent Pump Station)

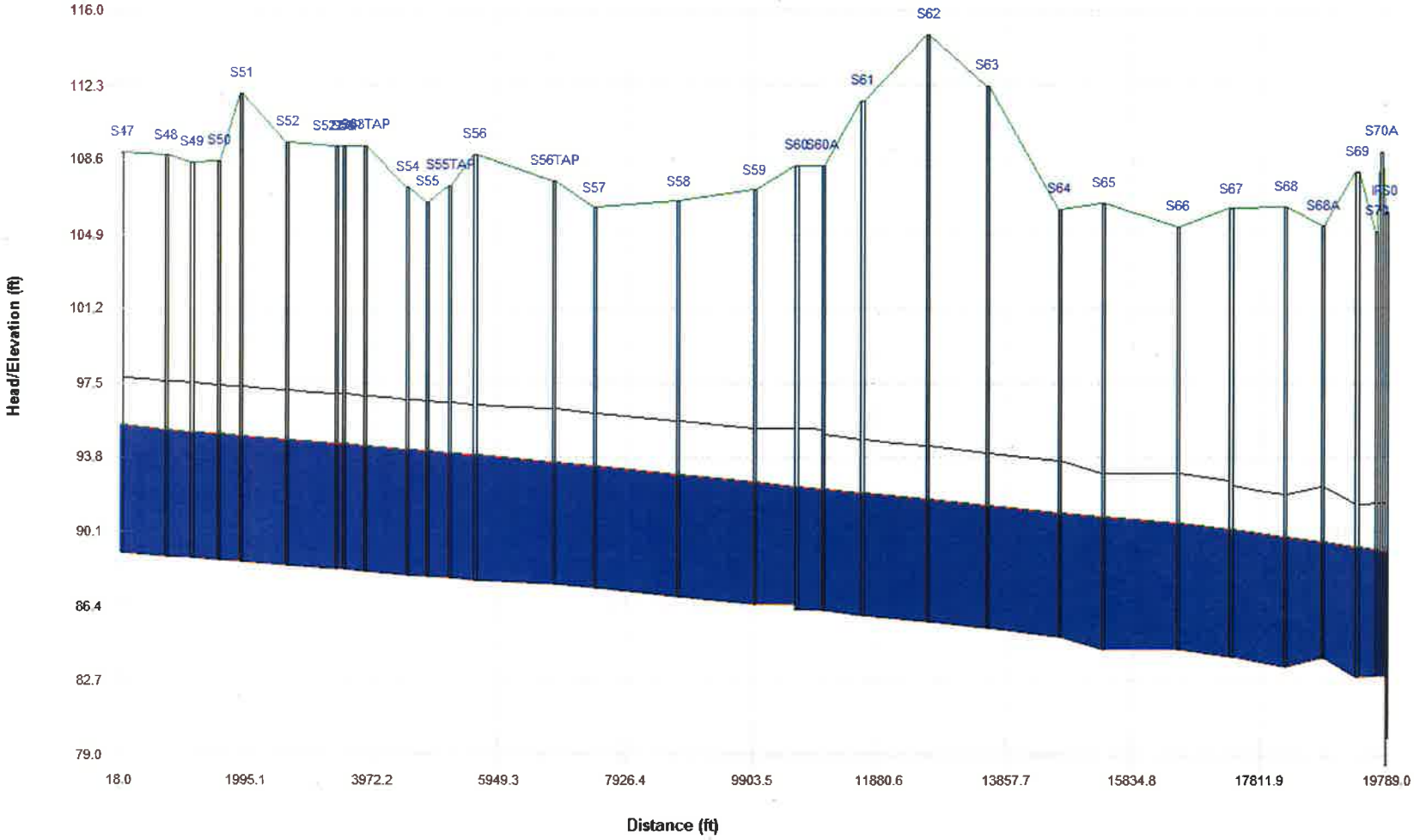


Alternative 1
Profile –South Interceptor (Pump Station H to Manhole S47)



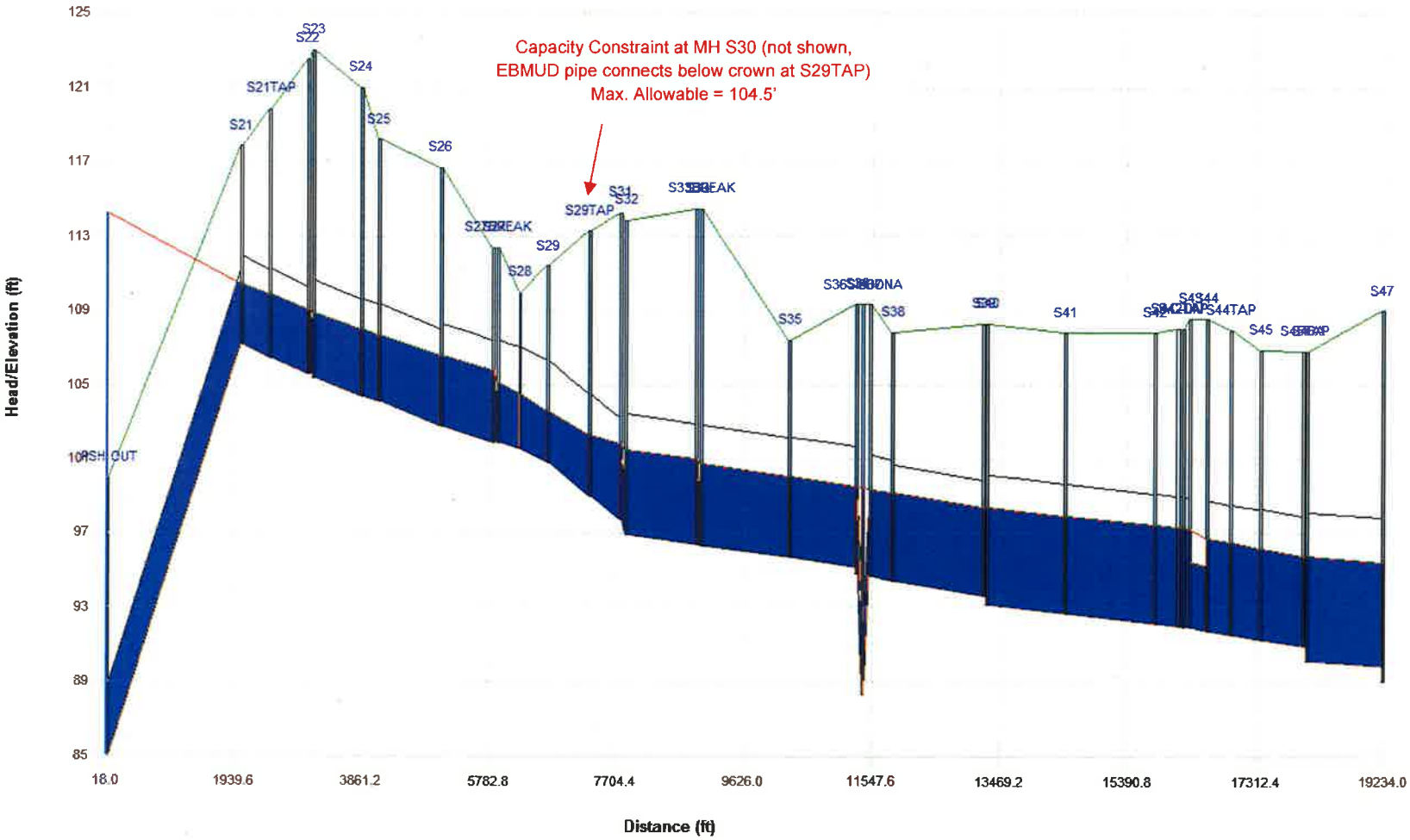
Alternative 2

Profile –South Interceptor (Manhole S47 to Influent Pump Station)

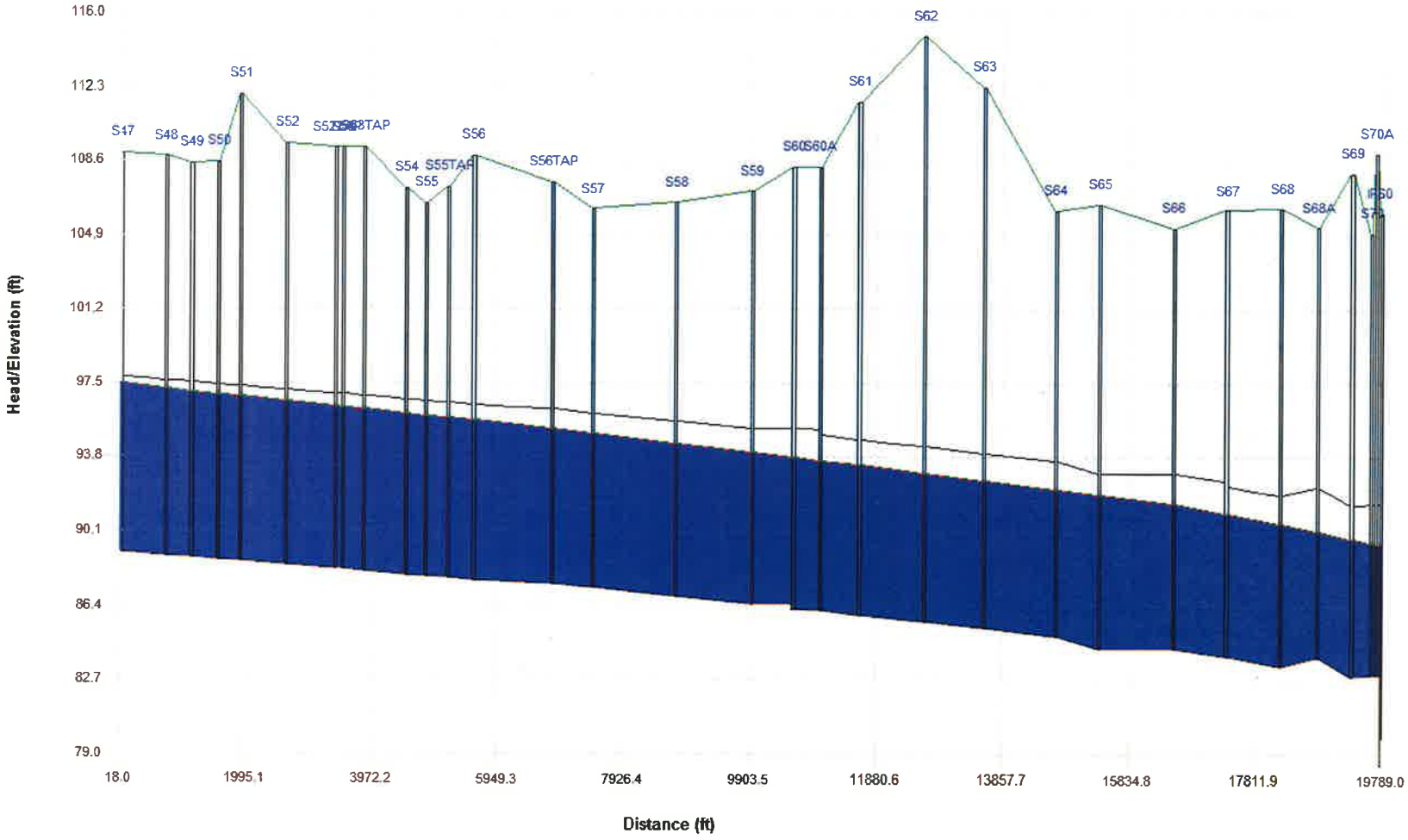


Alternative 2

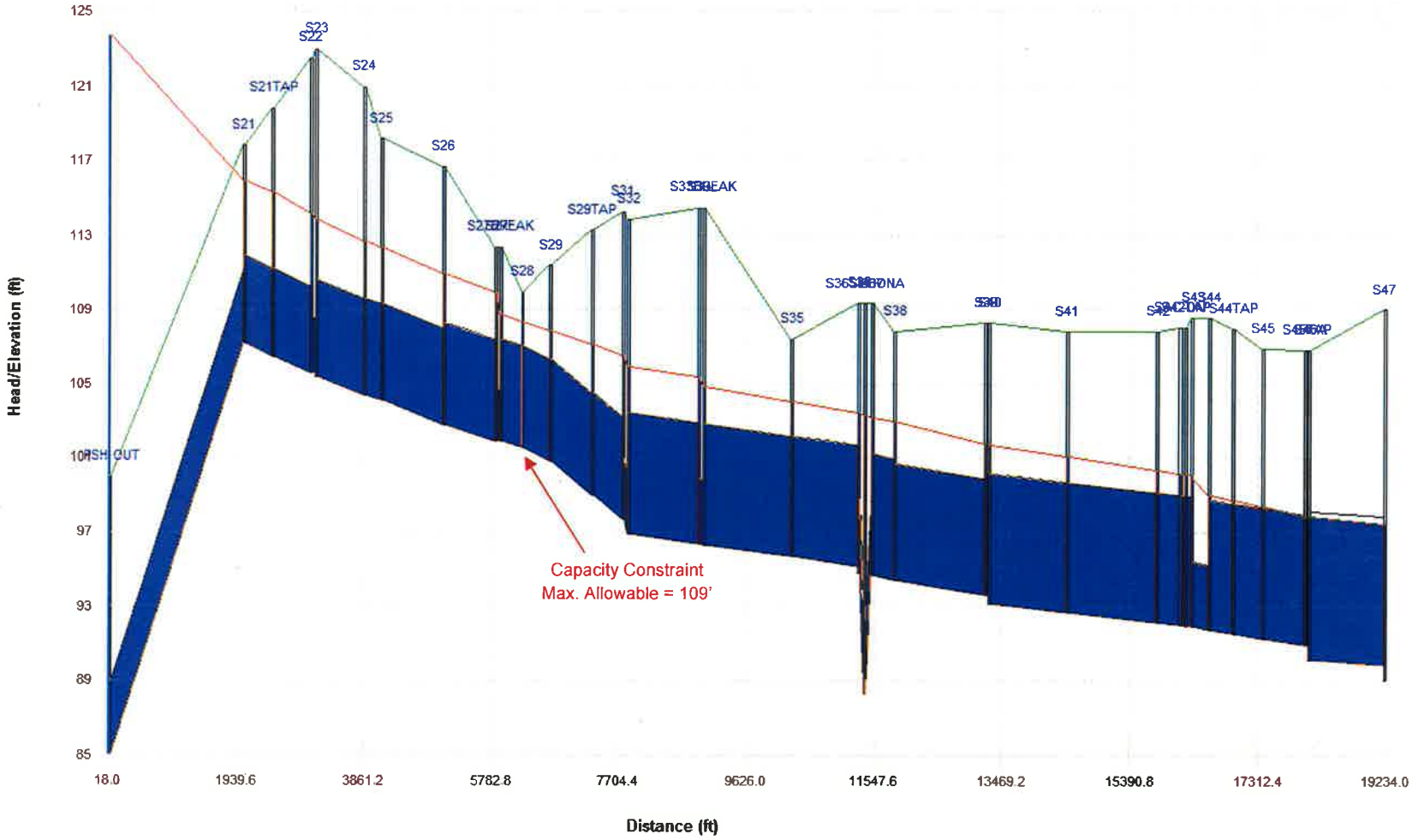
Profile –South Interceptor (Pump Station H to Manhole S47)



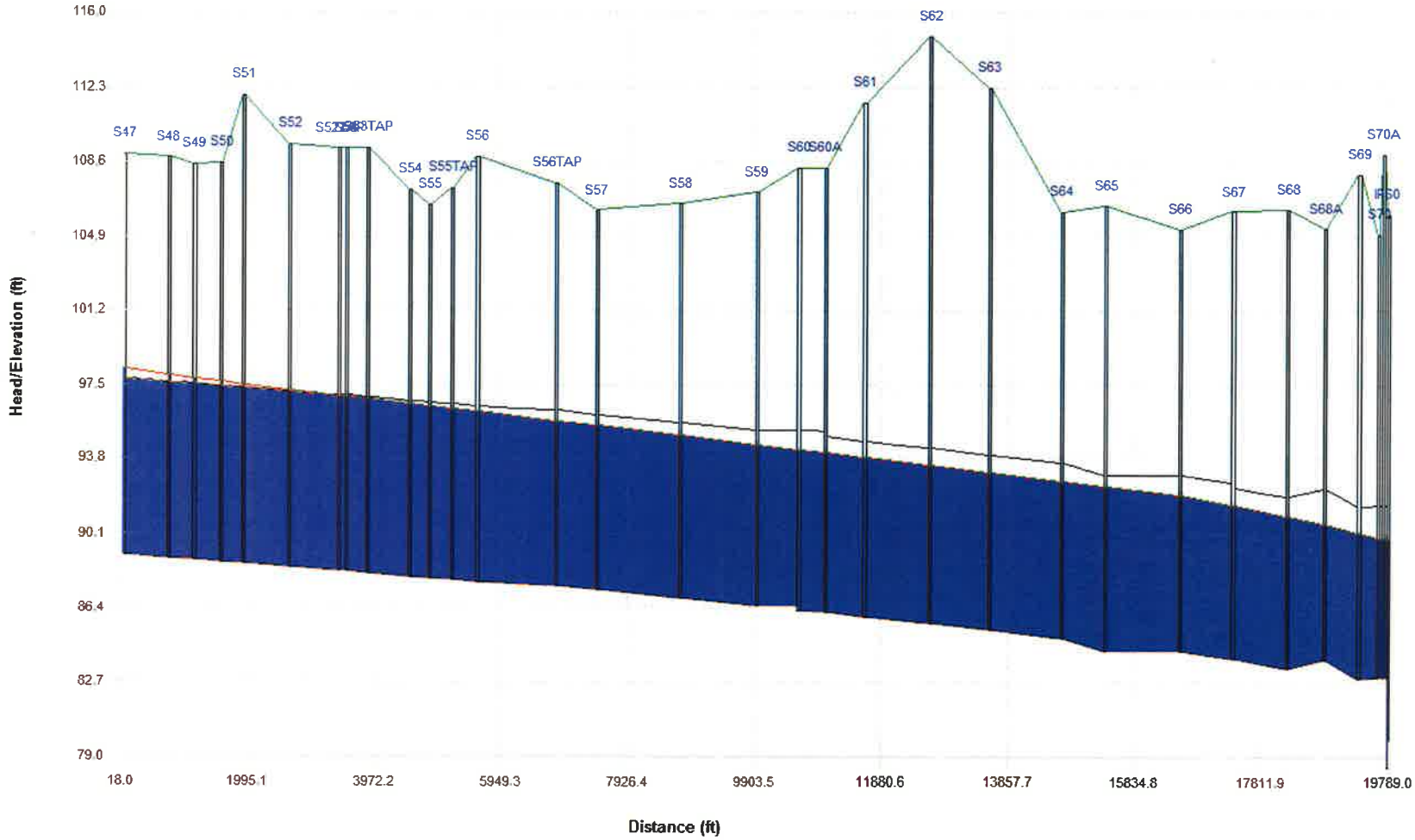
Alternative 3
Profile –South Interceptor (Manhole S47 to Influent Pump Station)



Alternative 3
Profile –South Interceptor (Pump Station H to Manhole S47)

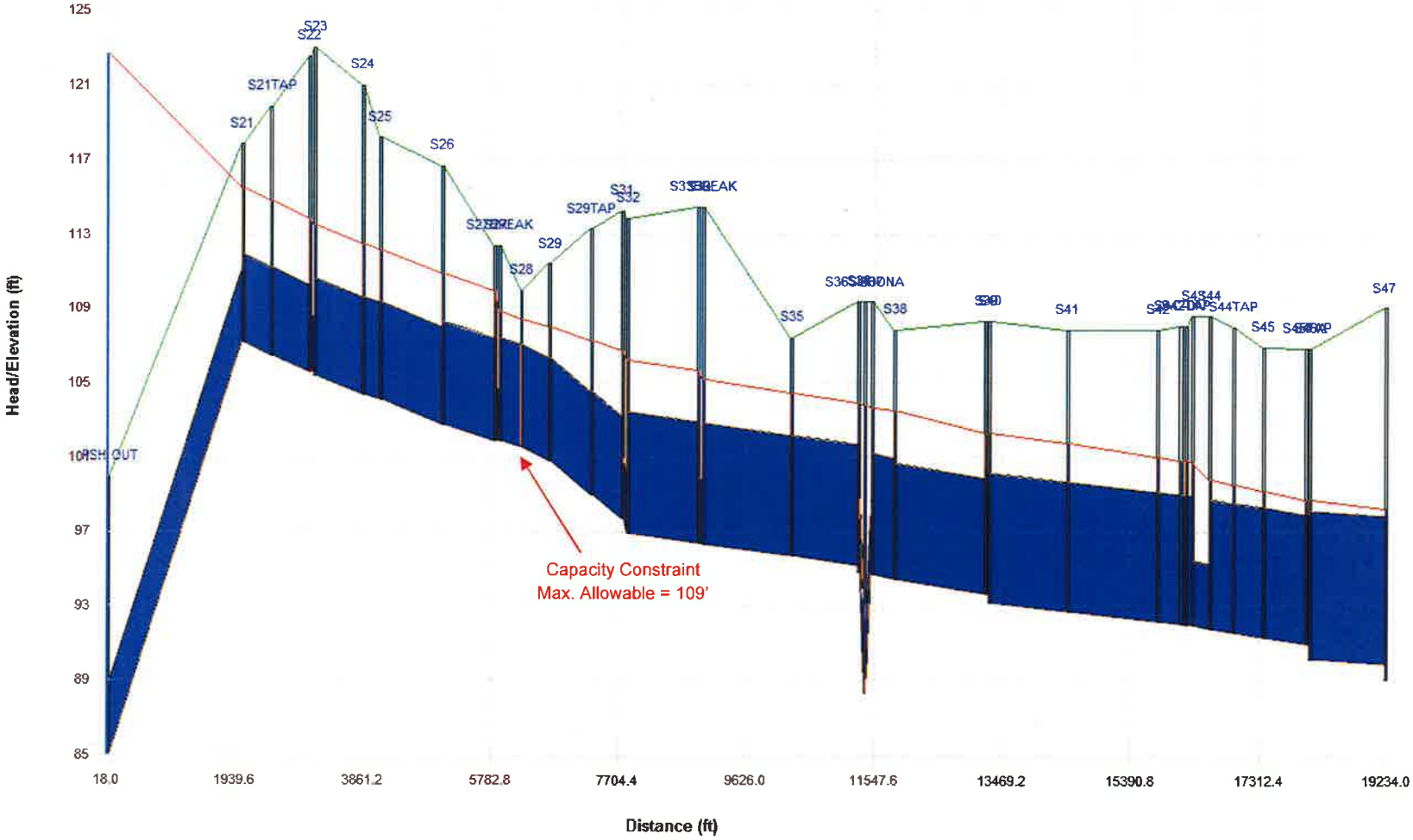


Alternative 4
Profile –South Interceptor (Manhole S47 to Influent Pump Station)

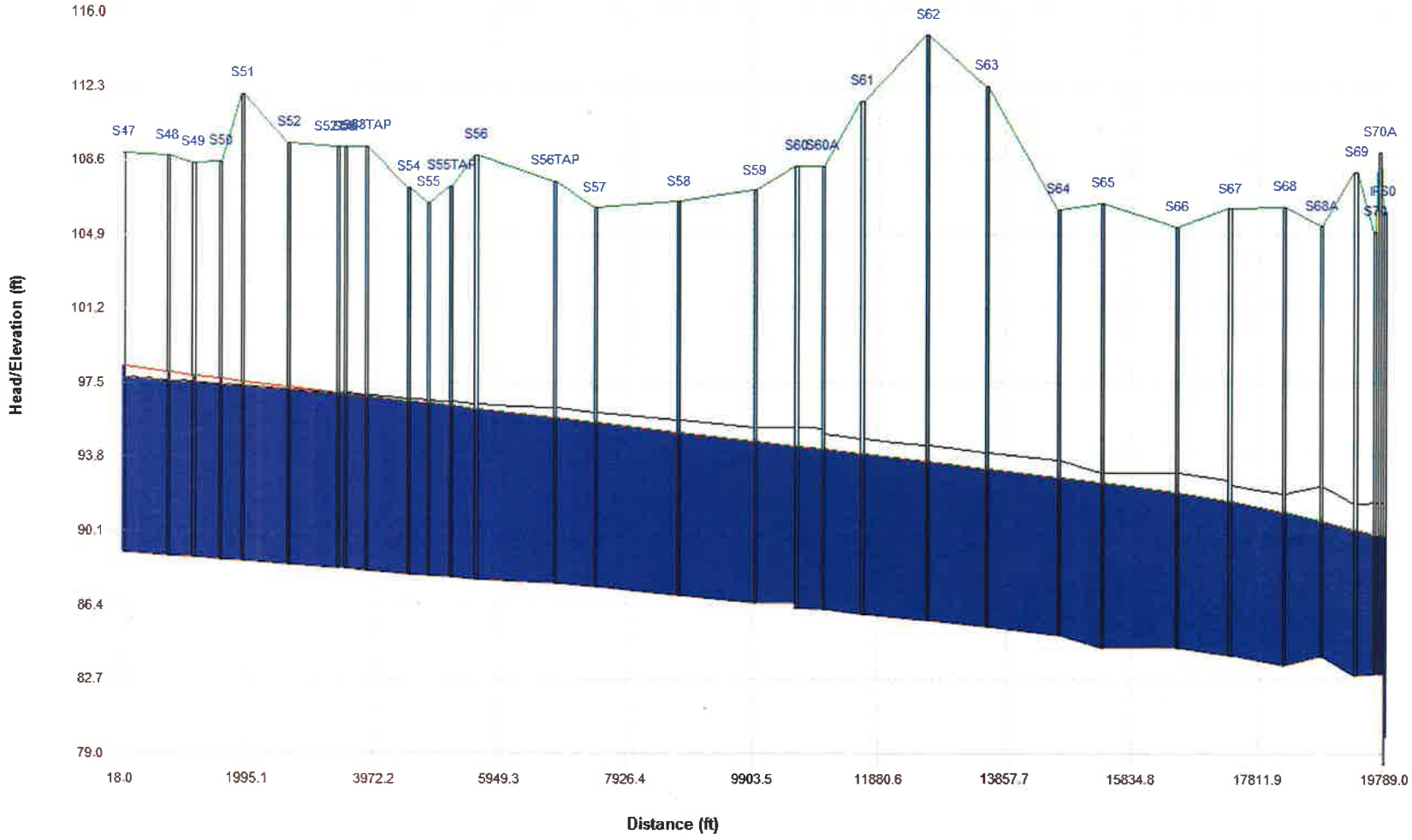


Alternative 4

Profile –South Interceptor (Pump Station H to Manhole S47)

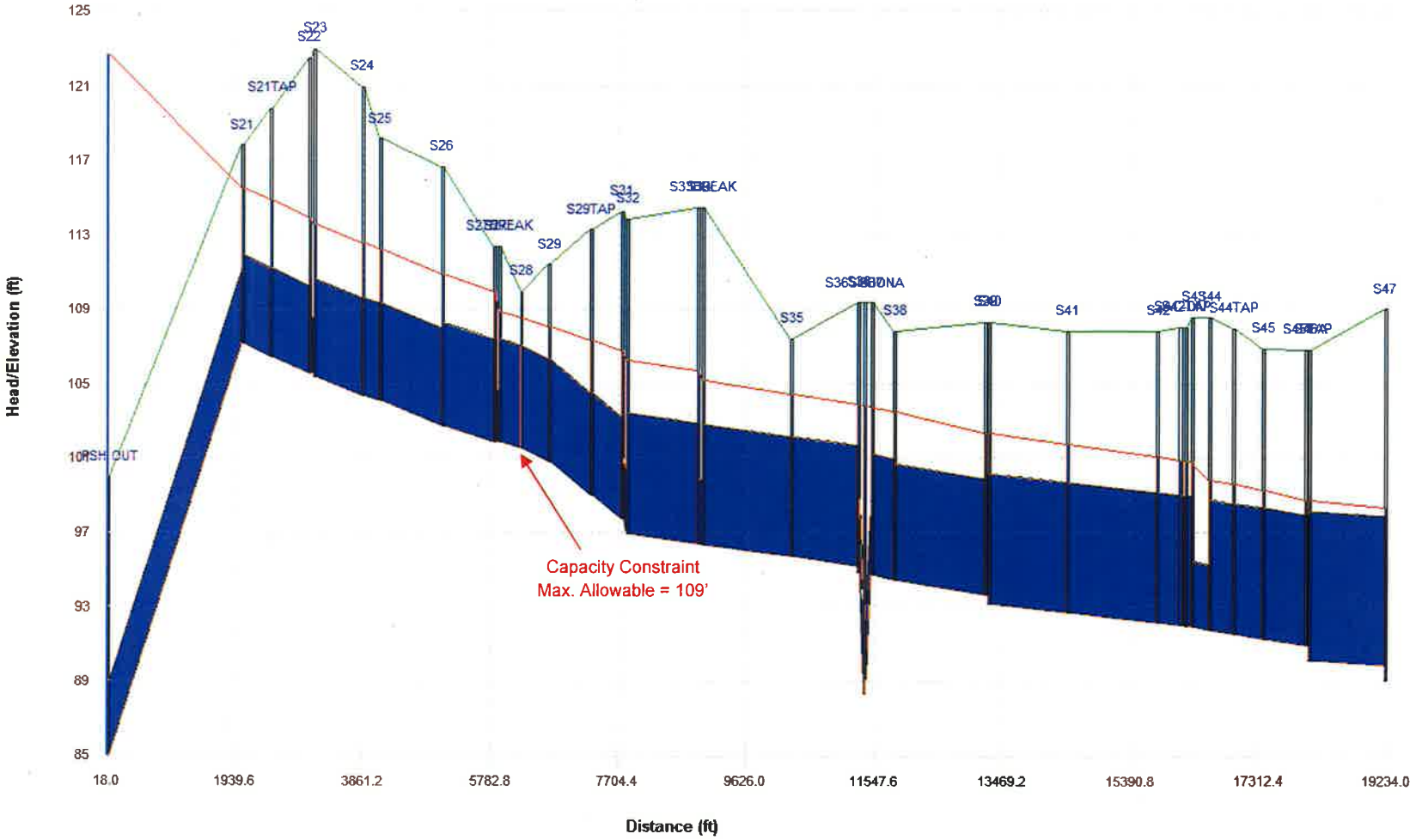


Alternative 5
Profile –South Interceptor (Manhole S47 to Influent Pump Station)

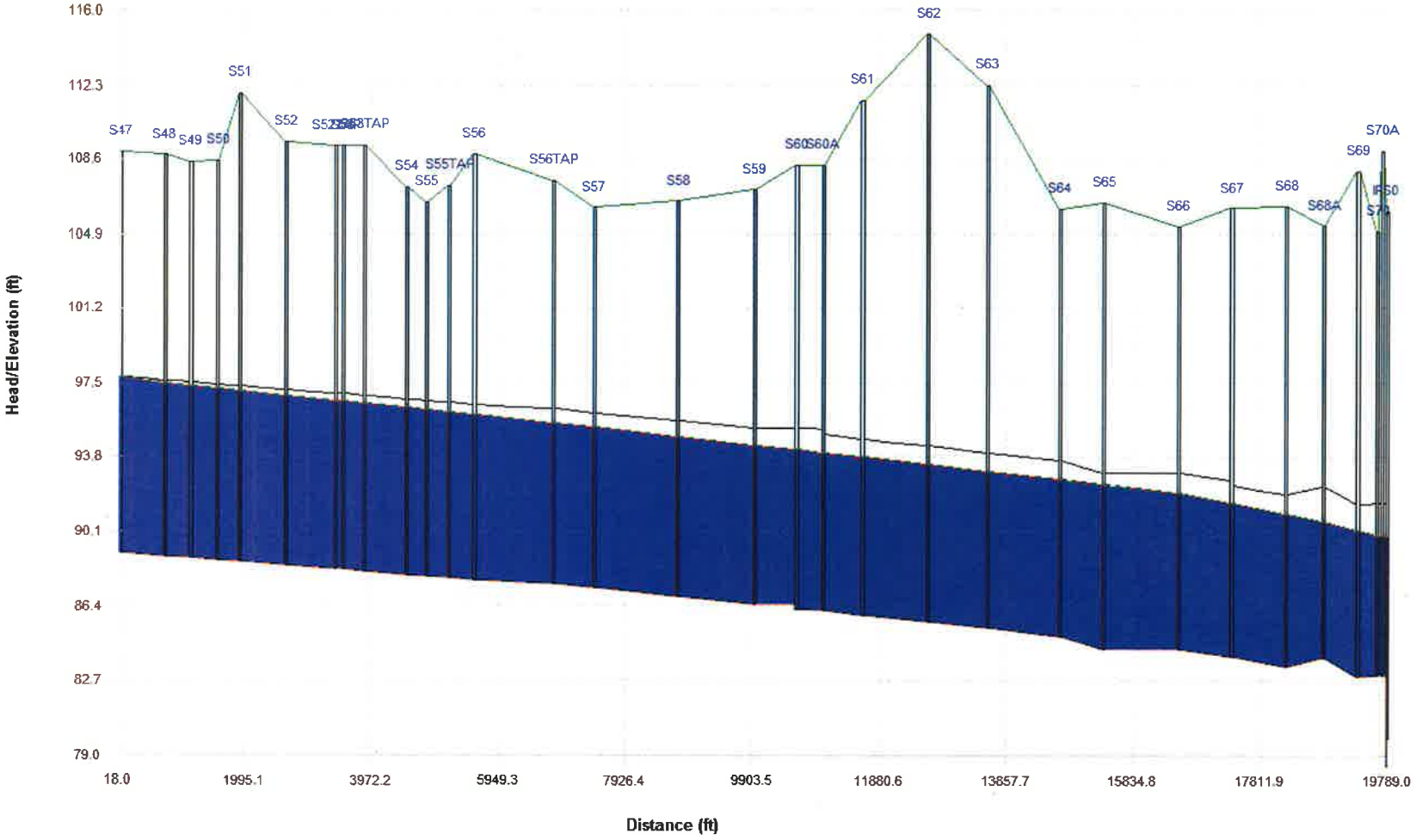


Alternative 5

Profile –South Interceptor (Pump Station H to Manhole S47)

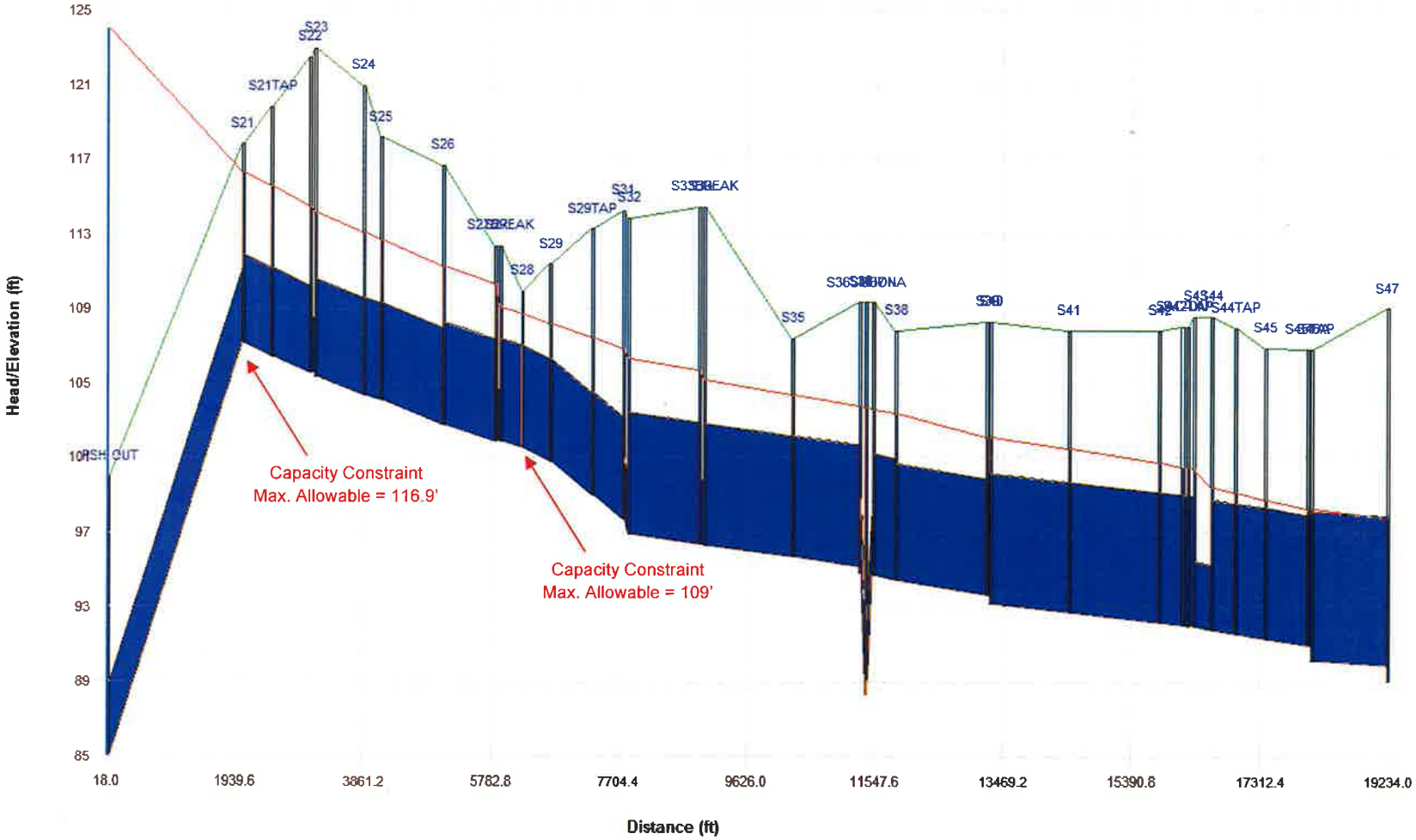


Alternative 6
Profile –South Interceptor (Manhole S47 to Influent Pump Station)



Alternative 6

Profile –South Interceptor (Pump Station H to Manhole S47)



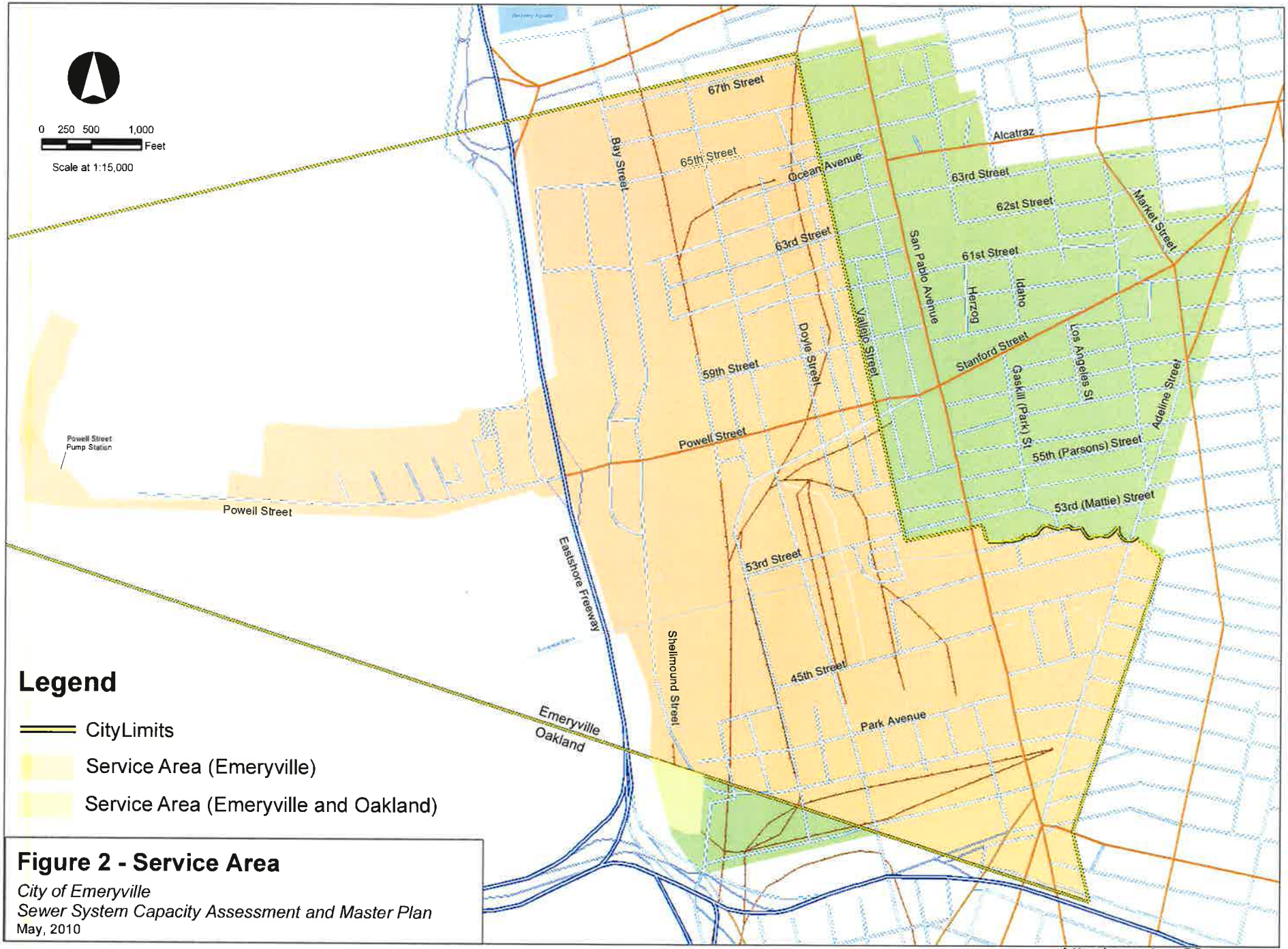



**Figure 2 - Service Area**

*City of Emeryville*
*Sewer System Capacity Assessment and Master Plan*
May, 2010

October 1, 2014

Via Email and U.S. Mail

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

**Re: Comments of Satellites on Tentative Order Nos. R2-2014-XXXX NPDES Nos. CA0038474, CA0038471, CA0038466, CA038792, CA0038512, CA0038504, CA0038482**

Dear Mr. Wolfe:

This letter sets forth the comments of the Cities of Alameda, Albany, Berkeley, Emeryville. Oakland, Piedmont and Stege Sanitary District (the "Satellites") on their respective Tentative Order Nos. R2- 2014-XXXX, NPDES Nos. CA0038474, CA0038471, CA0038466, CA038792, CA0038512, CA0038504, CA0038482 ("Tentative Orders"), provided to the Satellites on or about August 28, 2014. These comments are in addition to any individual comments by these agencies which may be submitted by separate letter. The Satellites have worked closely with Regional Water Board staff to address numerous issues raised by the Tentative Orders and the September 2014 Consent Decree described below, and Regional Water Board staff has been professional and cooperative. We highly commend staff's collaborative work with the Satellites to find productive and feasible solutions to water quality problems confronting our communities.

## BACKGROUND

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

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

In 1986, the Regional Water Board issued Cease and Desist Order No. 86-17. In that order, the Regional Water Board accepted the program developed by EBMUD and the Satellites, and

directed the Satellites to implement their Compliance Plans. Some of the Satellites requested an extension of the Order No. 86-17 deadlines, and a revised Cease and Desist Order was issued in 1993.

In 2007, the State Water Board issued Order WO 2007-0004, which essentially rejected the approach to wet weather compliance that the Regional Water Board, the United States Environmental Protection Agency ("USEPA"), EBMUD and the Satellites had agreed to previously. In 2009, the Regional Water Board adopted Order No. R2-2009-0004, reissuing the EBMUD permit and prohibiting any discharge from EBMUD's three Wet Weather Facilities (WWFs). Shortly afterwards, the USEPA, and the Regional and State Water Boards, filed a Federal Action ("the EBMUD lawsuit") against EBMUD for discharges in violation of this prohibition and entered into a Stipulated Order ("the EBMUD SO") based on EBMUD's inability to comply immediately. EBMUD performed the studies and actions required by the EBMUD SO.

The USEPA, and Regional and State Water Boards, renewed the Satellites' individual NPDES permits on November 18, 2009 and on the same day, EPA entered Administrative Orders on Consent with each Satellite for certain work and studies to be performed, including preparation of asset management implementation plans (AMIPs). EPA and the Regional and State Water Boards then filed a Federal Action against the seven Satellites on December 3, 2009 ("the Satellites lawsuit"). The parties to the Satellites lawsuit immediately began intense negotiations, and in due time the discussions resulted in a Stipulated Order ("the Satellites SO") entered by the Court on September 6, 2011. Intervenors participated in both lawsuits and their negotiations. The Satellites SO required certain studies and cooperative actions by the Satellites to strategize how to reduce wet weather flows, and it replaced the Administrative Orders issued in 2009. The ultimate objective of the studies and actions required by both the EBMUD SO and the Satellites SO was reduction in the use of the Wet Weather Facilities. EPA has acknowledged in filings in the federal court lawsuits that "*work under these partial settlements [SOs] has proceeded without issue.*" (emphasis added).

All parties to the lawsuits, including defendant Satellites whose NPDES permits here are up for renewal, negotiated monthly or more frequently from early 2012 until July 2014 regarding a full Consent Decree that would cover work and computer modeling check-ins, to reduce and eventually eliminate discharges from EBMUD's three WWFs by a set date of December 2035. A 200-page Consent Decree was lodged with the Federal Court on July 28, 2014, and after the required 30 day comment period, was submitted to the Court for entry. The Court signed the Consent Decree on September 22, 2014. The Consent Decree provides very specific steps for each defendant in work sections, and includes timelines and potential stipulated penalties related to such work. The Consent Decree focuses on three areas to reduce flow to manageable levels to the WWFs: from private sewer laterals needing repair, from Inflow and Infiltration (I&I) from public sewer mains and connections, and from possible sources of inflow and rapid infiltration during storms that will be investigated through a specific regional technical support program. The approach taken in the Consent Decree is an asset management approach, on a regional basis with all defendants working together.

Returning to the NPDES permit renewals, there are three overarching contentions the Satellites address here. First, the Satellites do not want to undercut the Consent Decree, which has very

specific work steps and timelines plus remedies for non-compliance. The Satellites intend to fully comply with the Consent Decree; as a result, there is no need for NPDES permits at this time. The combination of the Consent Decree and the statewide general Waste Discharge Requirements for sanitary sewer systems provide all the work requirements and spill proscriptions that are necessary. Any enforcement by the State should be under the Consent Decree (or the general Waste Discharge Requirements). Second, even if the NPDES permits are renewed, given the Prohibitions set forth in the Tentative Orders, neither the Satellites as a group nor any of the individual entities can immediately meet the requirements of Prohibition III.D, regardless of any near-term maintenance or operational activities they may undertake. There are legal reasons for deleting this prohibition. Third, equitable reasons exist both to delete Prohibition III.D and to no longer require NPDES permits generally, given the past history.

## COMMENTS

### 1. The Consent Decree and the Statewide General WDRs Should Regulate the Satellites' Conveyance of Wastewater to EBMUD, not NPDES Permits

Now that the Consent Decree is effective as of September 22, 2014, NPDES permits for the Satellites are no longer necessary and are superfluous. As explained above, the Consent Decree implements a regional asset management program that puts EBMUD on a path to eliminating discharges from EBMUD's Wet Weather Facilities. The Consent Decree provides the relevant enforcement mechanism, in the form of stipulated penalties, to require the Satellites to rehabilitate and clean sanitary sewer infrastructure, identify and eliminate sources of I&I to the sewer systems, and continue to require repair and replacement of private sewer laterals under local and regional ordinances by articulated timelines. By its very specific terms and conditions, the Consent Decree regulates the Satellites much more closely, and for a much longer period of time, than any NPDES permit. The Consent Decree therefore renders NPDES permits for the Satellites to be unnecessary and redundant at this time, especially Discharge Prohibition III.D. The Regional Water Board so much as acknowledges this fact, by indicating "this Order does not require that the Discharger report noncompliance with Prohibition III.D" because "EBMUD is responsible for such reporting pursuant to the Consent Decree." (Tentative Order, § IV.B.1.) Rather than control the Satellites' discharges through NPDES permits, the Regional Water Board should allow the Consent Decree to act as the primary instrument for enforcement.

Alternatively, the State Water Resources Control Board has already issued statewide general Waste Discharge Requirements for circumstances where a Satellite sanitary sewer overflow ("SSO") occurs and reaches "a water of the United States." Order No. 2006-0003-DWQ, *Statewide General Waste Discharge Requirements for Sanitary Sewer Systems* ("SSO WDR"). The first finding in the SSO WDR states,

> All federal and state agencies, municipalities, counties, districts, and other public entities that own or operate sanitary sewer systems greater than one mile in length that collect and/or convey untreated or partially treated wastewater to a publicly owned treatment facility in the State of California are required to comply with the terms of this Order.

The SSO WDR also prohibits the "discharge of untreated or partially treated wastewater

to waters of the United States," which is the exact same prohibition found in the Tentative Orders. The SSO WDR acts as the main permit for most sewer collection systems in the State. The SSO WDR, combined with the Consent Decree (which allows for stipulated penalties for SSOs as well), therefore provides the only other appropriate regulatory mechanism for the Satellites' conveyance of sewage to EBMUD at this time, not an NPDES permit. Consequently, the Regional Water Board should not adopt the Tentative Orders.

**2. Prohibition III.D Should Be Eliminated or Revised to Mitigate Anti-Backsliding Concerns**

If the Regional Water Board still deems NPDES permits to be necessary, one of the Satellites' greatest concerns with the Tentative Orders is the possibility that Anti-Backsliding Rules under the Clean Water Act might be argued to apply to Discharge Prohibition III.D or planned future revisions to it. Discharge Prohibition III.D provides:

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

If interpreted strictly, the Satellites are concerned that any flow contributed into EBMUD's system when EBMUD discharges from the Wet Weather Facilities would be considered a violation of Discharge Prohibition III.D — even for Satellites that have fully implemented all I&I reduction programs ordered by the Regional Water Board and/or required by the Consent Decree or the Satellites SO which contained all requirements until the Consent Decree's entry on September 22, 2014. Such an interpretation of Prohibition III.D would unfairly place the Satellites in the position of potentially being strictly liable for a permit violation they have no ability to prevent. The Satellites cannot control EBMUD's operation of the Wet Weather Facilities, and individual Satellites cannot control the amount of flow contributed by other Satellites or which flows reach EBMUD's treatment plant first.

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

If NPDES permits are deemed still necessary, the Satellites are appreciative that Regional Water Board staff has agreed to make modifications to the Tentative Orders to preclude improper application of Anti-Backsliding rules to future refinement of Discharge Prohibition III.D. These modifications include a revised section of the Fact Sheet, page F-12 Section IV.4, and indicate therein that any violation of Prohibition III.D is being addressed under the requirements and timetables of the Consent Decree, as well as recitation of anti-backsliding findings in Section III.C.5. Nonetheless, the Satellites hereby formally request that Prohibition III.D be eliminated, or if it is not, that at a minimum, a revision to the following paragraphs be included in the final Order as follows:

> Section III. DISCHARGE PROHIBITIONS
>
> **…**
>
> D. The Discharger shall not cause or contribute to discharges from East Bay Municipal Utility District (EBMUD's) Wet Weather Facilities (WWFs) that occur during wet weather or that are associated with wet weather; provided however that this prohibition shall not be enforced by the State except through the federal Consent Decree entered by the Court on September 22, 2014.

### 3. 40 C.F.R. § 122.41(e) does not Provide Authority for the Imposition of Discharge Prohibition III.D

The Regional Board continues to improperly rely upon 40 C.F.R. § 122.41(e) for the imposition of Discharge Prohibition III.D in the Tentative Orders. In the Fact Sheet of the Tentative Order, the Regional Board explains that Discharge Prohibition III.D "is necessary to ensure that the Discharger properly operates and maintains its wastewater collection system":

> During wet weather, excessive I/I into the Discharger's wastewater collection system causes peak wastewater flows to EBMUD's system that EBMUD cannot fully store or treat. This in turn results in Discharger's and other Satellite Agencies' partially treated wastewater to be discharged from the WWFs in violation of the Clean Water Act. Therefore, this specific prohibition is necessary to ensure that the Discharger properly operates and maintains its facilities to reduce I&I, and by doing so not cause or contribute to violations of the Clean Water Act.

(Tentative Order, F-12.) According to the Regional Board, 40 C.F.R. section 122.41(e) provides the basis for this prohibition. Section 122.41(e) provides:

> The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

Section 122.41(e) is not a proper basis for Discharge Prohibition III.D. Section 122.41(e) is a standard operation and maintenance requirement, but Discharge Prohibition III.D is a narrative flow limitation; the former simply does not legally authorize the latter. Proper operation and maintenance does not prevent the potential to cause or contribute discharges during wet weather. It is well understood that even a collection system that has installed the latest, most advanced equipment and operates at the highest national standard is not bulletproof against some level of I&I. Strict compliance with section 122.41(e) simply does not translate to strict compliance with Discharge Prohibition III.D. There is no logical connection between the two, especially given

that the Satellites have no ability to control EBMUD's operation of the Wet Weather Facilities, nor can they control the amount of flow contributed by each other's collection systems. If the Regional Water Board does not eliminate Discharge Prohibition III.D from the Tentative Orders, at a minimum the Regional Water Board should eliminate its reference to section 122.41(e) from the Fact Sheet.

**4. Discharge Prohibition III.D Violates Substantive Due Process**

Discharge Prohibition III.D violates substantive due process because it is a vague and overbroad narrative provision. The Satellites have no means of knowing how to control the operation of their collection systems during wet weather to comply with Discharge Prohibition III.D.

The Supreme Court has held, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108; see also *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1057 (9th Cir.1986) ("A fundamental requirement of due process is that a statute must clearly delineate the conduct it proscribes.").) In evaluating whether a statute is unconstitutionally vague, the Ninth Circuit "ordinarily look[s] to the common understanding of the terms of a statute" unless the statute uses technical words or phrases that enables those with specialized knowledge to interpret their meaning. (*U.S. v. Weitzenhoff* (9th Cir. 1993) 35 F.3d 1275, 1289.) In other words, "[a] defendant is deemed to have fair notice of an offense if a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question." (*Pickup v. Brown* (9th Cir. 2014) 740 F.3d 1208, 1233 (quoting *Weitzenhoff*, 35 F.3d at 1289).) Yet the Supreme Court has also explained that notice is less important than standards for determining compliance. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-58.) The absence of minimal guidelines to determine compliance encourages arbitrary enforcement of the statute in question. (*Ibid.*; see also *In re Petition of Aerojet General Corp.*, State Water Resources Control Bd. WQ Order No. 80-4 (noting that reasonable certainty of the manner of compliance does not violate due process).)

Here, Discharge Prohibition III.D is void for vagueness because the Satellites cannot ascertain the line between what causes or contributes to discharges from the EBMUD WWFs, and what does not. The Tentative Orders lack measurable standards for when this prohibition may be triggered. Otherwise stated, the phrase "cause or contribute" does not identify the quantity of flow that would violate the prohibition; a discharger has no reasonable certainty whether "cause or contribute" equates to one molecule, one gallon, or one hundred gallons. Not only is the meaning of "cause or contribute" unclear to a reasonable person of ordinary intelligence, but persons with specialized knowledge in the operation of sewer collection systems—here, the Satellites themselves—are likewise unable to comprehend its meaning and determine what amount of discharge is prohibited. Even if a Satellite's conveyance of wastewater to EBMUD is *no greater* than the average dry weather flow, such flow could arguably be deemed to "cause or contribute" in violation of this prohibition because it would take up some level of capacity in the system. The potential for such violation is unfair. The vagueness of this definition prejudices the Satellites, especially because the Satellites have no control over EBMUD's operation of the WWFs or each other's collection systems. Discharge Prohibition III.D should therefore be stricken as a violation of substantive due process.

**5. The Tentative Order Improperly Exceeds the Scope of the Clean Water Act: Conveyance of Wastewater to EBMUD Does Not Require An NPDES Permit**

An NPDES permit is not required because conveyance of wastewater from the collection system to a treatment plant is not a discharge to a "water of the United States," a fundamental prerequisite of an NPDES permit. (33 U.S.C. §§ 1311(a); 1342.) Even though a collection system may be a point source, the Clean Water Act does not regulate point sources alone. (*Natural Resources Defense Council v. EPA*, (D.C. Cir. 1988) 859 F.2d 156, 170 (noting that "the [Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants").) Rather, there must be an actual discharge of a pollutant into a "water of the United States" to trigger the CWA's NPDES requirements. (33 U.S.C. § 1342.) As the Second Circuit has held,

> [U]nless there is a "discharge of any pollutant," there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.

(*Waterkeeper Alliance, Inc. v. U.S. E.P.A.* (2d Cir. 2005) 399 F.3d 486, 504; see also *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.* (N.D. Cal. 2007) 469 F.Supp.2d 803, 827, quoting *Waterkeeper Alliance*, ("[I]n the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.").) The Supreme Court has recognized that a discharge to "highly artificial, manufactured, enclosed conveyance systems—such as 'sewage treatment plants'…likely do not qualify as 'waters of the United States,' despite the fact that they may contain continuous flows of water." (*Rapanos v. U.S.* (2006) 547 U.S. 715, 736, n.7.)

Here, the Satellites own and maintain sanitary sewer collection systems that route sewage to EBMUD's wastewater treatment facilities. Unless a SSO occurs and reaches a water of the United States, the Satellites' mere conveyance of sewage through their collection systems for treatment is not a "discharge of a pollutant" that requires an NPDES permit. (*Waterkeeper Alliance*, 399 F.3d at 504; *Envtl. Prot. Info. Ctr*, 469 F.Supp. at 827.) The Tentative Orders therefore exceed the scope of the Clean Water Act because the permit does not regulate discharges to waters of the United States.

**6. "Cause and Contribution" Prohibitions Are Inequitable to the Extent They Arise from State Water Board Order No. WO 2007-004, Which Was Erroneously Decided**

Over the past twenty years, prior Regional Water Board and State Water Board decisions and orders have been made with respect to EBMUD's Treatment Facility and its WWFs. In Order No. WQ-2007-004, the State Water Board held that EBMUD's WWF's are subject to secondary treatment, which rejected the approach that the Regional Water Board, USEPA, EBMUD, and the Satellites had implemented for decades. In 2009, EBMUD admitted and the Regional Water Board ordered that the WWFs cannot possibly do secondary treatment, and instead prohibited discharges from EBMUD's WWFs in Order No. R2-2009-0004 ("2009 EBMUD permit"). The

complete reversal of State and Regional Water Board decisions from 1986 through 2007, resulting in the 2009 EBMUD permit and Order, gave rise to the "cause and contribute" prohibition in the Satellites' 2009 NPDES permits and the current Tentative Orders. This raises an equitable argument for the Satellites. To preserve this equitable issue, the Satellites believe that the State Water Board's Order No. WQ-2007-004 was based on mistaken principles and was erroneously decided. The Tentative Orders are therefore invalid because they trace back to Order No. WQ 2007-004.

As discussed in EBMUD's Petition for Review of Waste Discharge Requirements Order No. R2-2009-0004 and Cease and Desist Order No. R2-2009-005 (''EBMUD Petition"), the State Water Board's conclusions in the 2007 Order were erroneous because secondary treatment standards do not apply to facilities that discharge intermittently during wet weather. In addition, the WWFs are not subject to secondary treatment standards because they do not fall within the definition of a "publicly owned treatment works." Furthermore, EBMUD's permit and time schedule order were consistent with the regulatory strategy in the Basin Plan, which was approved by the State Water Board.

The Satellites agree with and incorporate by reference the arguments made in EBMUD's Petition regarding the validity of the 2007 Order. Accordingly, to the extent that the State Water Board erroneously determined that the WWFs are subject to secondary treatment standards, the basis for Discharge Prohibition III.D is invalid, and moreover, inequitable as applied to the Satellites who had no say in EBMUD's permit changes.

**7. The Tentative Orders Improperly Exceed the Scope of the Clean Water Act: NPDES Permits Cannot Regulate Potential Discharges**

Consistent with our contentions in Comment 1 that an NPDES permit is both unnecessary and redundant, the Satellites also question whether it is appropriate—or lawful—for the Tentative Orders to regulate potential discharges of SSOs. An NPDES permit here exceeds the scope of the Clean Water Act because it improperly regulates the discharge of potential SSOs. The Clean Water Act gives the EPA and States jurisdiction to regulate and control only actual discharges—not potential discharges. (*Waterkeeper Alliance, Inc. v. U.S. E.P.A.* (2d Cir. 2005) 399 F.3d 486, 505.) *Waterkeeper Alliance* involved a challenge to an EPA rule requiring all Concentrated Animal Feeding Operations ("CAFOs") to apply for an NPDES permit regardless of whether they had in fact discharged any pollutants under the Clean Water Act. The Second Circuit court disavowed this interpretation as inconsistent with the text and purpose of the Clean Water Act. (*Ibid.*) The EPA later sought to clarify the CAFO rule, requiring CAFOs to apply for an NPDES permit if they "propose to discharge." The Fifth Circuit struck down this rule, however, concluding that "the EPA cannot impose a duty to apply for a permit on a CAFO that 'proposes to discharge' or any CAFO before there is an actual discharge." (*National Pork Producers Council v. U.S. E.P.A.* (5th Cir. 2011) 635 F.3d 738, 751.)

Based on the foregoing, the Regional Board has no authority to issue an NPDES permit based upon the mere potential or probability that an SSO will occur. The Satellites neither propose nor intend to discharge SSOs to waters of the United States. Indeed, the Satellites have spent and will continue to spend significant resources on sewer system cleaning, rehabilitation, and maintenance to prevent SSOs from occurring altogether. Because the Tentative Orders regulate

only the potential for discharges to reach Waters of the United States, they each are *ultra vires* for exceeding the scope of the Clean Water Act and should not be adopted.

**8. Res Judicata / Estoppel Bars the Current NPDES Permits**

As the Regional Water Board is aware, the Wet Weather Facilities and the Satellites' improvements under the East Bay Infiltration/Inflow Correction Program were constructed at the direction of, and with the consent of, both the Regional Water Board and EPA. These projects were undertaken to comply with injunctive provisions of Regional Water Board orders issued to resolve the agency's claims under the Clean Water Act and Porter-Cologne regarding wet weather discharges from the East Bay sanitary sewer systems. The CD and these administrative orders are final, and the Regional Water Board, as well as EPA, is barred by the doctrine of res judicata from seeking further relief on the basis of the same claims. In addition, because the Satellites relied on representations from the Regional Water Board and EPA demanding construction of the Wet Weather Facilities and the Satellites' improvements, and the Regional Water Board and EPA knew of this reliance, the Regional Water Board is now estopped from requiring further and different actions from the Satellites.

## CONCLUSION

As noted above, the Satellites are pleased with the cooperative efforts of Regional Water Board staff, members of the USEPA, and the NGO groups, in finalizing the Consent Decree and work delineated therein. However, the Satellites seek to set forth these legal assertions as objections to the Tentative Orders both to raise issues of their necessity at all, and to preserve these legal issues as may be required in the future.

The Satellites look forward to continuing their work in partnership with the Regional Water Board to protect water quality.

Very truly yours,

[signatures appear on following pages]

**City of Alameda**

Robert Haun, Director of Public Works

**City of Albany**

Ray Chan, Public Works Director

**City of Berkeley**

Andrew Clough, Director of Public Works

**City of Emeryville**

Maurice Kaufman, Public Works Director

**City of Oakland**

Brooke Levin, Director of Public Works

**City of Piedmont**

Chester Nakahara, Public Works Director

**Stege Sanitary District**

Rex Delizo, District Manager

cc: Laurie Kermish, Environmental Protection Agency
Patricia Hurst, United States Department of Justice
Lila Tang, Regional Water Board
Robert Schlipf, Regional Water Board
John Davidson, California Attorney General's Office

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