APPENDIX C

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

RESPONSE TO WRITTEN COMMENTS

ON THE REISSUANCE OF WASTE DISCHARGE REQUIREMENTS FOR
EAST BAY COLLECTION SYSTEM SATELLITES:

Item 11, City of Emeryville, NPDES Permit No. CA0038792
Item 12, City of Alameda, NPDES Permit No. CA0038471
Item 13, City of Albany, NPDES Permit No. CA0038491
Item 14, City of Berkeley, NPDES Permit No. CA0038466
Item 15, City of Oakland, NPDES Permit No. CA0038512
Item 16, City of Piedmont, NPDES Permit No. CA0038504
Item 17, Stege Sanitary District, NPDES Permit No. CA0038482
Alameda and Contra Costa Counties

The Board received timely written comments on the tentative order distributed on August 28, 2014, for public comment from the following groups and agencies. Since the comments apply to issues related to all the items, they are presented here as one consolidated set of responses to comments that apply to every item listed above. Many of the comments are identical to the ones made during the last permit reissuances in 2009. Since then, a Consent Decree was negotiated and entered by a federal court in a lawsuit that was brought by the Board and U.S. EPA to enforce the 2009 permits. The Consent Decree sets forth a schedule and work obligations for each satellite to cease causing or contributing to discharges from EBMUD's Wet Weather Facilities.

I. East Bay Municipal Utility District, Special District No. 1 – September 24, 2014
II. City of Emeryville – September 30, 2014
III. East Bay Collection System Satellites – October 1, 2014

The comments are in *italics* (quoted where possible, or paraphrased for brevity) followed by Board staff's response. For the full context and content of the comment, please refer to the comment letters associated with this item available at
http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/tentative_orders.shtml
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I. East Bay Municipal Utility District, Special District No. 1

EBMUD Comment 1
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 are associated with wet weather." EBMUD states that 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.

Response 1
We agree that Prohibition III.D is critical for ensuring that the satellites properly operate and maintain their respective collection systems to minimize inflow and infiltration during wet weather and cease discharges from the WWFs.

II. City of Emeryville

City of Emeryville Comment 1
The City of Emeryville (Emeryville) indicates that it physically cannot "cause or contribute" to discharges from EBMUD's WWFs. To substantiate this position, Emeryville provides a detailed discussion, based on information contained in EBMUD's Revised Final Flow Modeling and Limits Report (FMLR), dated September 2012. The FMLR provided detailed 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.

Emeryville explains that its discharge represents 1.3% of the current system-wide Peak Wet Weather Flow (PWWF) and 2.9% of the wet weather capacity of the main wastewater treatment facility. Of this total, Emeryville discharges 6.5 mgd into the North Interceptor at several locations, and 2.57 mgd into the South Interceptor at one location. In short, Emeryville indicates that based on hydraulic grade lines included the FMLR, the Interceptor is never more than two-thirds full in the vicinity of Emeryville discharges into the North Interceptor. Therefore, all co-mingled wet weather flows from Emeryville discharge directly to the main wastewater treatment plant without any impacts to any capacity limitations in the North Interceptor. Emeryville also points out that there are at least five bottlenecks in the North Interceptor upstream of Emeryville's discharge points. These bottlenecks effectively act as valves, thereby preventing any hydraulic influence of the downstream flows back upstream in the North Interceptor. Therefore, Emeryville concludes that its flows have no influence on the operation of the Point Isabel WWF. Similarly, Emeryville indicates that its discharge point into the South Interceptor is at the most downstream location and that the South Interceptor is never more than 80 percent full at that point. Therefore, Emeryville concludes that hydraulic profiles show that it will also have no impact on the San Antonio Creek or Oakport WWFs.

Response 1
We are not making changes to the Tentative Order, although we do agree that Emeryville discharges a small amount of wastewater into the North and South Interceptors relative to the other satellites. To eliminate discharges from the WWFs, the FMLR concluded that it is necessary for Emeryville to reduce inflow and infiltration into its collection system. This is because, at this time, the amount of wastewater discharged by Emeryville reduces the capacity of EBMUD's main wastewater treatment plant and interceptor system to the point where it cannot receive more wastewater flows from other satellites. Therefore, unless Emeryville reduces its wet weather flows, it will continue to cause or contribute to discharges from the WWFs.

As for the six alternatives evaluated in the FMLR, reliance on them in concluding that Emeryville does not contribute to WWF discharges is misguided. This is because under all these alternatives, none of the satellites, including Emeryville, causes or contributes to discharges from the WWFs. Each alternative analyzes conditions that would eliminate discharges from the WWFs assuming that peaking factors between each satellite would be the same or minimally different. The FMLR still concluded (in

its Table 4-7) that Emeryville would need to reduce peak rainfall-derived inflow and infiltration between 15 and 74 percent to eliminate discharges from the WWFs under the 5-year design storm.

Moreover, the FMLR evaluated a seventh alternative without the assumption to maintain uniform peaking factors between each satellite. In this last analysis, the FMLR assumed that the amount of inflow and infiltration reduction would be the minimum required to eliminate WWF discharges and that existing storage facilities and surcharging in the satellites' collection systems would be maximized. Even under these liberal assumptions, the FMLR concluded (in its Table 4-8) that Emeryville would need to reduce peak rainfall derived inflow and infiltration by 15 percent.

As to the "bottlenecks" theory that Emeryville relies upon in its comment, that theory has a critical error. We have learned from EBMUD that flows in its interceptor are always subcritical. Subcritical flow means that the flow velocity is slow or tranquil. Under subcritical conditions, a pressure wave can travel upstream (and downstream). Therefore, the Emeryville discharge downstream of the "bottlenecks" will create a pressure wave that impacts upstream flow capacity by further restricting the "bottleneck."

III. East Bay Satellites

East Bay Satellites (Satellites) Comment 1
The Satellites indicate that the Consent Decree and the Statewide General WDRs adequately regulate their Conveyance of Wastewater to EBMUD, and the NPDES permits are no longer necessary.

Now that the Consent Decree is effective as of September 22, 2014, NPDES permits for the Satellites are no longer necessary and are superfluous. 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 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 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 Board should not adopt the Tentative Orders.

Response 1

We do not agree that NPDES permits for the satellites are unnecessary, superfluous, and redundant due to the Consent Decree. The Consent Decree enforces the satellites' existing NPDES permits, including the same prohibition against causing or contributing to WWF discharges proposed to be continued in the tentative orders currently before the Board. Entry of the Consent Decree (or any enforcement mechanism for that matter) in no way abrogates the need for the permits that the Consent Decree enforced. Just as it would be inappropriate for the Board to revoke a permit because it adopted a cease and desist order to enforce that permit, it would be inappropriate for the Board to not reissue the permits that formed the basis of the Consent Decree. In addition, the Consent Decree is not a substitute for a permit. The Consent Decree unequivocally states that it "is not a permit, or a modification of any permit." (Consent Decree, ¶ 217.) Finally, the Consent Decree contemplates NPDES permit reissuances for the satellites, and the tentative orders comply with the Consent Decree's requirement for the Executive Officer to recommend to the Board NPDES permits for the satellites that are not materially inconsistent with the Consent Decree (the Board, however, retains full discretion to adopt NPDES permits that are materially inconsistent with the Consent Decree). (Consent Decree ¶ 220(b).) The tentative orders are not materially inconsistent with the Consent Decree and are almost identical to the existing permits that underpin and form the basis of the Consent Decree.

With respect to the SSO WDR, the NPDES permits are still necessary to address wet weather capacity issues in the satellites' collection systems. The SSO WDR is an insufficient regulatory vehicle for addressing problems of excess inflow and infiltration from a satellite that causes partially-treated sewage discharges by a downstream system as in this case. Because of the leaky condition of much of the satellites' collection systems, the NPDES permits are still necessary until the WWFs discharges cease.

Further, the State Water Board understood the need for NPDES permits to sanitary sewer system operators and left intact the Regional Water Boards' ability to adopt more stringent permits than the SSO WDR, which only sets forth the bare minimum requirements.

Satellites Comment 2

The Satellites indicate that Prohibition III.D should be eliminated or revised to mitigate anti-backsliding concerns. 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.

The Satellites are concerned that, if interpreted strictly, 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 Board and/or required by the Consent Decree or the Satellites Stipulated Order 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 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; <u>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.</u>*

<u>Response 2</u>
We cannot include the proposed language because it inappropriately limits the Board's future enforcement discretion. The Consent Decree is clear that it "shall not be construed to prevent or limit the rights of [the Board or EPA] to obtain penalties, injunctive relief or other appropriate relief under the [Clean Water Act] or the California Water Code, or under other federal or State laws, regulations, or permit conditions, except as to the claims specifically alleged in the Complaints." (Consent Decree ¶ 215(a).) Moreover, by consenting to entry of the negotiated Consent Decree, the Board and EPA did not "warrant or represent in any manner that the Defendants' compliance with any aspect of the Consent Decree will result in compliance with the [Clean Water Act] or the California Water Code." (Consent Decree ¶ 217.) It is, therefore, necessary for the Board to retain its full discretion to enforce the permits as may be appropriate and necessary in the future.

All that said, the Consent Decree is the mechanism for the satellites to conduct work that is expected to achieve compliance with Prohibition III.D. This is reflected by the fact that the tentative orders for the

satellites do not require additional work and that the Fact Sheet of each of the tentative orders states that the Consent Decree sets forth a time schedule and work obligations for the satellites that will achieve compliance with Prohibition III.D. The modeled wet weather flows from each satellite after Consent Decree implementation can be used to inform future compliance with Prohibition III.D and/or anti-backsliding provisions under the Clean Water Act. On the latter issue, Board staff has already concurred with the satellites during the last permit reissuances that anti-backsliding would not be violated should the narrative Prohibition III.D were to become a numeric one or to be expressed through another detailed standard that achieves the same result as the existing prohibition.

Satellites Comment 3

The Satellites indicate that 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 Board does not eliminate Discharge Prohibition III.D from the Tentative Orders, at a minimum the Board should eliminate its reference to section 122.41(e) from the Fact Sheet.

Response 3

We disagree with this comment the satellites reiterate from the last permit reissuances. Section 122.41(e) is an appropriate basis for Prohibition III.D. As staff have stated before, the satellites have not been properly operating and maintaining their collection systems such that, during wet weather, the satellites have contributed excessive inflow and infiltration flows to EBMUD's interceptors, causing or contributing to illegal WWF discharges. The prohibition, rooted in section 122.41(e), is therefore necessary as it sets forth the standard for what is proper operation and maintenance (i.e., to control inflow and infiltration to a level where the inflow and infiltration would not cause or contribute to illegal discharges from the WWFs). (See also response to satellites comment 4 below.)

We recognize that even new collection systems will have some inflow and infiltration, but new collection systems would not have peaking factors that would result in discharges from the WWFs.

Satellites Comment 4

The Satellites indicate that 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.

Response 4

We have not made changes in response to this comment reiterated from the last permit reissuances. The prohibition is not vague, as evidenced by the fact the Consent Decree, including the model on which it is based, sets forth a clear path for each satellite to achieve compliance with the prohibition. As the Fact Sheet of each tentative order for the satellites states, the Consent Decree sets forth a time schedule and specific work obligations for each satellite that are expected to achieve compliance with Prohibition III.D. If the satellites want even more clarity than already exists, Board staff can entertain establishing flow limits along with monitoring based on the reductions modeled under the Consent Decree. This, however, appears contrary to the satellites' apparent preference underlying Comment 2 to look solely to the Consent Decree.

Satellites Comment 5

The Satellites indicate that the Tentative Order improperly exceeds the scope of the Clean Water Act 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.

Response 5

We disagree that the tentative orders exceed the scope of the Clean Water Act. The cases cited by the satellites in support of this claim are inapposite. In *Waterkeeper Alliance, Inc. v. U.S.EPA*, the Second Circuit Court of Appeals invalidated a U.S.EPA rule that required all Concentrated Animal Feeding Operations (CAFOs) to apply for an NPDES permit regardless of whether they in fact discharged any pollutants under the Clean Water Act. In contrast, here, the satellites *are* in fact discharging pollutants (i.e., partially-treated sewage) into waters of the U.S. through the WWFs during high rainfall events. *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.* merely stands for the proposition that the Clean Water Act provision requiring stormwater permits does not confer causes of action beyond noncompliance with a permit. In so holding, the district court cited *Waterkeepers* to disavow interpretations inconsistent with the text and purpose of the Clean Water Act. The *Rapanos* footnote on what is not likely a water of the U.S. is irrelevant because the satellites are not only discharging into a wastewater treatment plant, they are discharging pollutants into waters of the U.S. through the WWFs, which do not fully treat the waste.

Satellites Comment 6

The Satellites indicate that "cause and contribution" prohibitions are inequitable to the extent they arise from State Water Board Order WQ 2007-0004, which was erroneously decided.

Over the past twenty years, prior Board and State Water Board decisions and orders have been made with respect to EBMUD's Treatment Facility and its WWFs. In Order WQ-2007-0004, the State Water Board held that EBMUD's WWF's are subject to secondary treatment, which rejected the approach that the Board, USEPA, EBMUD, and the Satellites had implemented for decades. In 2009, EBMUD admitted and the 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-2007-0004 was based on mistaken principles and was erroneously decided. The Tentative Orders are therefore invalid because they trace back to Order WQ 2007-0004.

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.

Response 6

To the extent that the satellites are challenging the State Water Board's Order WQ-2007-0004 ("EBMUD WWF Order"), it is too late. The only timely petition and lawsuit of the EBMUD WWF Order was filed by EBMUD, which subsequently dismissed the lawsuit. The EBMUD WWF stands as a valid and precedential water quality order that holds that the WWFs are POTWs and subject to secondary treatment standards (U.S. EPA has come to the same conclusion). The Board is without authority to disavow a precedential State Water Board order.

As to the claim that the satellites did not have a say in EBMUD's permit changes, the satellites provided a comment letter dated December 19, 2008, on EBMUD's permit changes that were adopted in 2009.

Satellites Comment 7

The Satellites indicate that 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.

Response 7

The basis for issuing an NPDES permit for the satellites is for their actual discharges of pollutants via the WWFs into waters of the U.S., not potential SSO discharges. During wet weather, flows from the satellites' collection systems are over 10 times higher than average dry weather flow. Until the satellites complete upgrades to their collection systems and the other work required in the Consent Decree, there will continue to be actual discharges of partially-treated sewage from the WWFs.

Satellites Comment 8
The Satellites indicate that res judicata / estoppel bars the current NPDES permits.

As the 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 Board and EPA. These projects were undertaken to comply with injunctive provisions of 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 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 Board and EPA demanding construction of the Wet Weather Facilities and the Satellites' improvements, and the Board and EPA knew of this reliance, the Board is now estopped from requiring further and different actions from the Satellites.

Response 8
We disagree that the doctrine of res judicata bars the Board from adopting the permit or seeking further relief. The doctrine bars repetitious lawsuits involving the same cause of action. It provides that when a court of competent jurisdiction has entered a final judgment on the merits, it is conclusive of the rights of the parties and those in privity with them and is a complete bar to a new suit between them on the same cause of action. *See, e.g., Goddard v. Security Title Ins. & Guarantee Co et al*, (1939) 14 Cal.2d 47. There has been no judgment on the merits in the lawsuit between the Board and the satellites. Rather, a negotiated settlement in the form of the Consent Decree was approved and entered by the court. Thus, res judicata is inapplicable.

The satellites estoppel claim is also without merit. A valid claim of equitable estoppel consists of the following elements: (a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was induced to act on it. (*See Wood v. Blaney* (1895) 107 Cal. 291, 295.) There is absolutely no evidence to suggest that the Board did any of these things in discharging its regulatory duties.

As for the satellites' corrective programs to reduce inflow and infiltration in their collection systems and for EBMUD's construction of the three WWFs, these were proposals by the satellites' and EBMUD as a means for ensuring that their discharges would not be injurious to public health. Based on these proposals, the Board adopted cease and desist orders that required implementation of the satellites' and EBMUD's proposals.