

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

PROSECUTION STAFF RESPONSE TO COMMENTS
on a proposed settlement agreement and stipulation for entry
of administrative civil liability order between
the Regional Water Board and Sewer Authority Mid-Coastside

Regional Water Board prosecution staff received comments on a proposed Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order) distributed on June 25, 2018, for public comment from the following:

1. San Francisco Baykeeper – letter dated July 19, 2018
2. Ecological Rights Foundation – letter dated July 23, 2018

Prosecution staff has summarized the comments shown below in *italics* (paraphrased for brevity) and followed each comment with the prosecution staff's response. For the full content and context of the comments, refer to the comment letters.

Prosecution staff believes the comments received have been adequately addressed. Therefore, we think the proposed Stipulated Order is appropriate and recommend adoption.

1. San Francisco Baykeeper – letter dated July 19, 2018

San Francisco Baykeeper Comment 1.a

San Francisco Baykeeper (Baykeeper) questions the appropriateness of the proposed enhanced compliance action (ECA), which would expand an existing underground wastewater storage tank system from 200,000 gallons to 400,000 gallons. Baykeeper states the purpose of the project is to reduce Sewer Authority Mid-Coastside's (SAM's) unlawful sanitary sewer overflows (SSOs). Baykeeper further states that SAM's permit does not allow SAM to have any SSOs; therefore, a project aimed at reducing or eliminating SSOs is necessary for SAM to comply with its permit and thus required by law. Therefore, Baykeeper states the project is inappropriate for an ECA.

Response

We disagree. The State Water Board's Water Quality Enforcement Policy (State Water Board Enforcement Policy) defines ECAs as projects that enable a discharger to make capital or operational improvements beyond those required by law, and are separate from projects designed to merely bring a discharger into compliance. Therefore, the ECA is appropriate because it would provide benefits unrelated to SSOs and are not required by law. As described in Attachment E of the proposed Stipulated Order, the ECA would allow SAM to perform preventative maintenance on the pumps and ancillary features of the force main, and to complete repairs downstream of the force main more safely. Also, the larger storage facility will allow SAM to hold a larger portion of its peak daily flows and equalize treatment plant influent flows by metering more consistent flows into the treatment plant. This will improve treatment reliability.

We agree that SAM is not allowed to have any SSOs and that the proposed ECA will help SAM manage increased wastewater flows during rain events due to inflow and infiltration from its satellite collection systems. However, the ECA is appropriate because historical data suggest that the proposed ECA may not be necessary to prevent SSOs. Since May 2, 2007, SAM has reported 20 SSOs from its collection system, with 85 percent (17 of the 20) caused by a pipe structural problem or failure.¹ Only the one SSO that occurred in January 2008 was caused by rain exceeding the collection system design capacity.² Since 2012, SAM has reported no SSOs occurring at the Portola Pump Station when it constructed the Portola Pump Station underground storage tank system. Nevertheless, increasing the capacity of the underground storage tank system may help SAM manage any possible increases in wastewater flows associated with future inflow and infiltration from its satellite collection systems.

Baykeeper Comment 1.b

Baykeeper states that SAM's documents make clear that SAM already planned the ECA because it identified it as necessary to reduce SSOs from the sanitary sewer system. Baykeeper cites four documents:

- *General Manager's written brief to the Board of Directors for SAM's January 22, 2018, Meeting regarding SAM's Infrastructure Plan Projects for Fiscal Year 2018/2019 states that SAM's "Priority 1" projects include Project 1.12 – Wet Weather Storage Expansion Project – \$700,000.*
- *SAM's adopted Infrastructure Plan FY 2017-2022 prioritizes proposed projects, wherein Priority Level 1 (Regulatory and Safety) projects are defined as "must do" projects that "aim to ensure that SAM remains in full regulatory and safety compliance." The Infrastructure Plan states that "SAM has little to no control to defer these projects" because they are required for regulatory compliance.*
- *SAM's 20-year Capital Improvement Program references planned project 3.02 – Expand wet weather storage at Portola Pump Station – priced at \$690,000.*
- *SAM's June 2018 staff report and Resolution Approving the General Budget for Fiscal Year 2018/19 describes the Wet Weather Storage Expansion Project – expanding the Portola Pump Station storage capacity from 200,000 gallons to 400,000 gallons – as "Ranked a Priority 1 in response to the SSOs and equipment failures experienced in 2017."*

Based on these documents, Baykeeper concludes that the State Water Resources Control Board (State Water Board) Enforcement Policy and U.S. EPA Supplemental Environmental Project (SEP) Policy do not allow this ECA.

Response

We disagree. Each of these documents originated after prosecution staff and SAM entered into confidential settlement discussions. Prosecution staff issued an Administrative Civil Liability Complaint on August 21, 2017. Subsequently, confidential settlement discussions began on September 27, 2017. Through the confidential settlement discussions, prosecution staff reviewed SAM's proposed ECAs and agreed to an ECA that would expand the underground storage tank system. To ensure that the ECA could move forward, SAM initiated discussions with its Board of Directors. The following describes

¹ State Water Board first required SSO reporting on May 2, 2007.

² The January 2008 SSO occurred at the Montara Pump Station located in the northernmost part of SAM's service area. The inflow and infiltration that contributed to this SSO most likely occurred in the Montara Water and Sanitary District collection system. (The wastewater in SAM's collection system generally flows south to SAM's wastewater treatment plant.)

SAM's processes to ensure that the ECA would be viable, to secure necessary funds, and to construct the ECA during the next fiscal year:

- SAM added the ECA to its draft infrastructure budget for FY 2018/19 months after confidential settlement discussions regarding possible ECAs began. It added the ECA funding in response to a prosecution staff request that SAM demonstrate a commitment to fund the additional \$400,000 for the ECA (the portion above the suspended liability set forth in the proposed Stipulated Order.
- SAM's 5-Year Infrastructure Plan, as adopted in March 2017, does not identify the proposed Wet Weather Storage Expansion Project. SAM added the project as a Priority 1 project much later in anticipation of the ECA being included in the proposed Stipulated Order. If the proposed Stipulated Order and ECA are approved, SAM's member agencies will need to fund the ECA through their respective FY 2018/19 assessments. The SAM Board would not have included the ECA in the FY 2018/19 budget if not for the negotiations related to the proposed Stipulated Order.
- SAM's proposed 20-Year Capital Improvement Plan (CIP) expanded on the adopted 5-Year Infrastructure Plan. SAM added the ECA to the proposed 20-Year CIP after its Board added it to the 5-Year Infrastructure Plan and after prosecution staff had given its preliminary approval of the ECA.
- Due to the confidential nature of the settlement discussions, SAM was unable to openly discuss the ECA as part of the proposed settlement agreement. Therefore, ECA funding had to be included in the budget without identifying the source.

Regarding the appropriateness of the proposed ECA and the State Water Board Enforcement Policy, see Response to Baykeeper comment 1.a. Regarding the U.S. EPA SEP Policy, see Responses to ERF Comments 2.a and 2.b.

2. Ecological Rights Foundation – letter dated July 23, 2018

Ecological Rights Foundation Comment 2.a

Ecological Rights Foundation (ERF) states that the proposed Stipulated Order is improper because the proposed ECA is already required for SAM to comply with the law and is already being implemented. ERF says this violates the State Water Board Enforcement Policy and the U.S. EPA's SEP Policy.

Response

We disagree. Regarding the appropriateness of the proposed ECA and its compliance with the State Water Board Enforcement Policy requirements for an ECA, see the Responses to Baykeeper Comments 1.a and 1.b. Regarding U.S. EPA's SEP Policy, that policy applies to U.S. EPA and the U.S. Department of Justice when representing U.S. EPA. As stated in section I.C of the policy, it is "intended for use by U.S. EPA enforcement personnel in settling cases." (U.S. EPA SEP Policy, 2015 Update, p. 3.) The State and Regional Water Boards, as California agencies, are separate agencies from U.S. EPA and, therefore, not subject to its SEP Policy. Further, the State Water Board has adopted its own SEP Policy and its own Enforcement Policy, which govern ECAs in Water Board settlements. The State Water Board SEP Policy and Enforcement Policy do not contain the same prohibition against previously planned projects as the U.S. EPA SEP Policy. The proposed ECA meets the requirements of the State policies.

ERF Comment 2.b

ERF states that the proposed Stipulated Order is improper because it grossly exceeds the scope of the specific facts alleged in the August 21, 2017, complaint. It claims this further violates the State Water Board Enforcement Policy.

Response

We disagree. ERF points to Enforcement Policy language to claim that the proposed settlement exceeds the scope of the facts included in the August 21, 2017, complaint. The language referenced is a prohibition against resolving unknown claims. It is not a requirement that the Regional Water Board issue a complaint to resolve any and all alleged violations. The Regional Water Board may resolve violations through settlement as long as a stipulated order identifies the facts regarding those violations. The fact that the complaint addressed only one SSO does not prohibit Regional Water Board prosecution staff from including additional violations in the proposed Stipulated Order. Further, the public comment period for the proposed Stipulated Order provides an opportunity to comment on new facts and alleged violations, and provides sufficient notice and due process for any additional facts and alleged violations.