+California Regional Water Quality Control Board
San Francisco Bay Region

RESPONSE TO WRITTEN COMMENTS

On the Tentative Order for
Central Marin Sanitation Agency, San Rafael Sanitation District,
Ross Valley Sanitary District, and Sanitary District No. 2 of Marin County,
San Rafael, Marin County

The Regional Water Board received written comments on a tentative order distributed on February 2, 2023, for public comment from the following:

1. Central Marin Sanitation Agency (CMSA) – March 6, 2023
2. Ross Valley Sanitary District, San Rafael Sanitation District, and Sanitary District No. 2 of Marin County (Districts) – March 6, 2023
3. Bay Area Clean Water Agencies (BACWA) and California Association of Sanitation Agencies (CASA) – March 6, 2023

The comments are summarized below in *italics* (paraphrased for brevity) and followed by a staff response. For the full content and context of the comment, please refer to the comment letter. To request a copy of the comment letter, see the contact information provided in Fact Sheet section 8.7 of the Revised Tentative Order.

Revisions are shown with ~~strikethrough~~ for deletions and <u>underline</u> for additions.

Central Marin Sanitation Agency (CMSA)

CMSA Comment 1: *CMSA asserts that the enterococcus bacteria effluent sample type in Table E-3 should be a grab sample, consistent with the previous order, rather than a 24-hour composite (C-24) sample.*

Response: We agree. We revised Table E-3, as follows:

Table E-3. Effluent Monitoring at Monitoring Location EFF-001

Parameter	Unit	Sample Type	Minimum Sampling Frequency
Flow [1]	MG/MGD	Continuous	Continuous/D
Enterococcus Bacteria [3]	CFU/100 mL [2]	<u>Grab</u> ~~C-24~~ [4]	2/Week

CMSA Comment 2: *CMSA requests that the once-per-permit-term monitoring period defined in Table E-9, Monitoring Periods, be extended from "once during the term of the order within 12 months prior to applying for permit reissuance" to the full permit term or, at a minimum, 2 years prior to applying for permit reissuance.*

CMSA claims most of the parameters with once-per-permit-term monitoring are priority pollutants, which require analysis at a contract laboratory. CMSA points out that these data have not changed within the past 25 years of monitoring. CMSA claims that it begins preparation of its permit reissuance application months in advance, that these data are an important part of the permit application, and that previous orders allotted the full permit term for this monitoring.

Response: We agree to modify how the once-per-permit-term monitoring period is defined to be within two years prior to applying for permit reissuance. Requiring this monitoring within two years prior to applying for permit reissuance, rather than anytime during full permit term, will ensure that the resulting data will be relatively recent and as representative as possible for analyzing reasonable potential for the next permit term. We revised Table E-9, as follows:

Table E-9. Monitoring Periods

Sampling Frequency	Monitoring Period Begins On…	Monitoring Period
Continuous/D	Order effective date	All times
⋮	⋮	⋮
1/Blending Event	Order effective date	Anytime during blending discharge event
Once	Order effective date	Once during the term of the Order within <u>two years</u> ~~12 months~~ prior to applying for permit reissuance

CMSA Comment 3: *CMSA requests that the word "facility" be used in a consistent manner throughout the permit to ensure the requirements and information describing each discharger is distinct and clear because they each have separate jurisdictional, legal, and discrete authority. CMSA requests that when referring to all the dischargers, a plural noun be used.*

CMSA also requests that the title for Figure B of Attachment B be revised, and that Attachment F section 1.1 be revised so as not to include the collection systems in the definition of "Facility."

Response: We made changes to clarify the applicability of requirements. Specifically, we revised the title of Figure B, Attachment B as follows:

Figure B. <u>CMSA</u> Facility Map

We also revised "Discharger" to be "Dischargers" (plural) throughout the tentative order.

We did not change the definition of "Facility" because the publicly-owned treatment works (POTW) includes the treatment plant and collection systems together. The term "facility" (lower case) is used throughout the permit as a general term, not intended to refer specifically to the entire Facility. We revised the tentative order in some places to avoid using the term "Facility" to refer to only one of the dischargers' collection systems.

Districts Comments

Districts Comments 1 through 26 are found in the Districts' March 6, 2023, comment letter. Districts Comments 27 through 36 are found in a markup copy of the tentative order circulated for public review that the Districts included with their comments. Comments the Districts made in the markup are not listed below if they duplicate comments made in Districts Comments 1 through 26.

Districts Comment 1: *The Districts request that we remove them from the tentative order because they are not required to be NPDES permittees under federal or state law. Additionally, the Districts point out that the tentative order requirements are not appropriate under state and federal laws because they mandate the cost and manner of compliance.*

Response: We disagree. As explained further in our response to Districts Comment 4, the collection system agencies and CMSA are part of the same POTW and are therefore all dischargers. Naming collection system agencies as dischargers is necessary to make them legally responsible for complying with the permit requirements that apply to them. For clarity, throughout the tentative order we specify which discharger is responsible for each permit requirement by assigning the requirements specifically to CMSA, the collection system agencies, or all the Dischargers. See response to Districts Comment 19 regarding the Districts' assertion that we mandated the cost and manner of compliance.

Districts Comment 2: *The Districts point out that they were not listed as permittees on the two permits (Orders R2-2007-0007 and R2-2012-0051) issued before Order R2-2018-0003. The Districts assert that, since the statewide General Waste Discharge Requirements (statewide WDRs) for Sanitary Sewer Systems (Order WQ 2022-0103-DWQ) regulate them, the Regional Water Board should not name them as co-permittees in this NPDES permit. The Districts claim that coverage under the statewide WDRs has resulted in reduced sanitary sewer overflows (SSOs), spill volumes, and inflow and infiltration.*

Response: In 2018, the Regional Water Board added the collection system agencies to this permit because they own and operate parts of the same POTW and the wastewater these systems collect is discharged to waters of the United States through the CMSA treatment plant outfall (see responses to Districts Comments 4 and 9). During wet weather, stormwater inflow and infiltration into the Districts' collection systems and sewer laterals via cross-connections, cracks, and other imperfections in system pipes, joints, and manholes can increase the wastewater volume resulting in a maximum daily effluent peaking factor[1] of approximately 14. The treatment plant can fully treat up to 30 million gallons per day (about four times its dry-weather flow), but wet weather flows often substantially exceed this capacity.

[1] The peaking factor is the maximum wet weather flow rate divided by the average dry weather flow rate.

When wet weather flows exceed the treatment capacity of CMSA's treatment plant, CMSA must route the excess flow around its biological treatment process to prevent washing out the microorganisms necessary to operate these treatment units. The diverted flow is rejoined with the portion of the flow that receives biological treatment before disinfection. This process is called "blending." Federal regulations at 40 C.F.R. section 122.41(m)(4)(i) prohibit bypass—"the intentional diversion of waste streams from any portion of a treatment facility"—including blending. However, the Regional Water Board may approve bypasses (and not take enforcement for them) if (1) they are unavoidable to prevent loss of life, personal injury, or severe property damage; (2) there are no feasible alternatives; and (3) the Regional Water Board receives notification (see Attachment D section I.7 of the tentative order).

CMSA evaluated its alternatives to reduce wet weather bypasses and concluded that there is little it can do. CMSA already upgraded most of its treatment units to handle more flow, but it has limited capacity to expand biological treatment units. Furthermore, because these units rely on microorganisms to metabolize pollutants in the wastewater, they need a minimum concentration of microorganisms to be effective. Rapid flow dilutes microorganism concentrations, making biological treatment less effective. There are, however, feasible alternatives available to reduce wet weather bypasses at the treatment plant by reducing wet weather influent flows. Wet weather flows, and in turn bypasses, can be reduced by making improvements and repairs to the sewage collection systems to decrease inflow and infiltration. CMSA does not own the collection systems (it does operate the pump stations and force mains for Sanitary District No. 2 of Marin County, and San Quentin Village Sewer Maintenance District's collection system). Since CMSA does not own any part of the collection system, nor operate the majority of it, the Regional Water Board added the Districts as co-permittees in the 2018 order. Collectively, the Districts own and operate approximately 94 percent of the collection systems that are routed to the CMSA treatment plant. The tentative order continues to name the Districts as co-permittees and includes provisions requiring them to maintain their collection systems to reduce inflow and infiltration. Requiring the Districts to implement these feasible actions provides a basis for the Regional Water Board to approve wet weather bypasses at CMSA's treatment plant.

We recognize that the satellite collection system agencies are regulated by the statewide WDRs, but the statewide WDRs focus on preventing sanitary sewer overflows, not reducing wet weather flows transported to treatment plants. Additionally, the statewide WDRs state that they should not be interpreted as prohibiting the issuance of NPDES permits for sanitary sewer systems and that Regional Water Boards may issue NPDES permits or WDRs that are more stringent than the statewide WDRs. (See State Water Board Order 2006-0003-DWQ, Finding 11 and Provision D.2(iii) and (iv); State Water Board Order 2022-0103-DWQ (effective June 5, 2023), Provision 6.2.) The provisions of the tentative order focus specifically on reducing wet weather flows to CMSA's treatment plant to reduce wet weather bypasses.

Districts Comment 3: *The collection system agencies argue that they did not submit a Report of Waste Discharge (ROWD), did not request to be covered under an NPDES*

permit, and did not wish to be co-permittees under Order R2-2018-0003. The collection systems point out that we notified them of our intent to include them at an August 11, 2017, meeting. The Districts assert that the significance of this change and the increased liability associated with becoming NPDES permittees were not discussed at that meeting. The Districts say, back then, they did not receive an opportunity to consult with their legal counsel or their boards to discuss potential concerns about being co-permittees. The Districts also point out that Ross Valley Sanitary District and San Rafael Sanitation District formally contested the adoption of Order R2-2018-0003.

Response: This comment refers to the process the Regional Water Board undertook when preparing the previous order. Both then and now, CMSA's ROWD and NPDES application included sufficient information to justify naming the Districts in the permit, particularly since their collection systems are part of the same POTW. (See *In re Charles River Pollution Control District* (2015) NPDES Appeal No. 14-01, 16 E.A.D. 623, at pp. 641–642.) While the Districts did not submit their own ROWDs, they cannot avoid permit coverage by failing to submit applications. By not requiring the Districts to submit individual NPDES applications, the Regional Water Board effectively waived the Districts' application requirement because it had access to substantially identical information. (See 40 C.F.R. § 122.21(j); *In Re Charles River Pollution Control District*, 16 E.A.D. 623, at p. 642.) Requiring the Districts to submit separate ROWDs would not be an efficient use of the Districts' or the Regional Water Board's limited resources because any such applications would provide largely the same information contained in CMSA's materials.

We met with CMSA and the collection system agencies prior to sharing an administrative draft of the previous order with them to inform them that we intended to name them as co-permittees. After they had had approximately 30 days to review the administrative draft, we met again before we released the tentative order for formal public comment. We provided at least 30 days for public comment on the tentative order as required by statute. (See Water Code § 13167.5.) The extensive comments the Districts provided show that they were not surprised by the decision to name them and took advantage of the opportunity to provide meaningful feedback during the public comment period. The San Rafael Sanitation District and Ross Valley Sanitary District were able to provide oral comments on the previous order at the board meeting on January 10, 2018. The Board members heard these comments and adopted the previous order with the Districts listed as co-permittees. Because this all took place five years ago, the Districts have had plenty of opportunity to consult with legal counsel and their boards regarding the likelihood of being named co-permittees again in this tentative order.

Districts Comment 4: *The Districts request that we remove them from the tentative order, arguing that the justification for including them is based on the outdated notion that blending constitutes a prohibited bypass. The Districts assert that we have not provided adequate legal justification regarding why the NPDES permit is the appropriate or only option for requiring inflow and infiltration reduction.*

The Districts argue that CMSA is the only discharger named in the tentative order that is authorized as a point source to discharge pollutants to a water of the United States and, therefore, subject to NPDES permitting under Clean Water Act section 402. The tentative order proposes to include the Districts even though the NPDES permit does not authorize any discharges to waters of the United States directly from these three collection systems.

Response: Naming the collection system agencies is justified because they discharge the wastewater they collect to waters of the United States by means of the CMSA treatment plant. Along with the treatment plant, the collection systems are part of the POTW that discharges to waters of the United States. (See 33 U.S.C. § 1292(2)(A); 40 C.F.R. §§ 122.2, 403.3(q); and *In re Charles River Pollution Control Dist.* (2015) NPDES Appeal No. 14-01, 16 E.A.D. 623, at p. 632 ["municipal satellite sewer collection systems *together with* the treatment plant comprise the POTW"][emphasis in original].) Moreover, their actions contribute to blending at CMSA's treatment plant, and blending is a bypass subject to 40 C.F.R. section 122.41(m) (see response to Districts Comments 13, 14, and 15). Including the collection system agencies as co-permittees is appropriate to address the serious operational challenges caused by wet weather inflow and infiltration. (See *In re Charles River Pollution Control District*, 16 E.A.D. 623, at pp. 629–630; see also *In re Springfield Water and Sewer Commission* (2021) 18 E.A.D 430, at p. 516 ["Even if this issue were properly before the Board in this matter, we would reaffirm our legal conclusion in *Charles River* that neither the CWA nor the NPDES regulations prohibit the Region from regulating the satellite communities under a single NPDES permit with a regionally integrated plant."]) Because large volumes of inflow and infiltration entering the collection systems cause wet weather bypasses at this POTW, it is necessary to regulate the collection systems within this NPDES permit to ensure that all feasible alternatives to reduce bypasses will be implemented.

The Regional Water Board may also name the collection system agencies as co-permittees because of their discharges directly to waters of the United States through sanitary sewer overflows. All three districts reported several sanitary sewer overflows over the previous permit term.

The Regional Water Board has regularly named collection system agencies as co-permittees in NPDES permits before. For example, the San Jose/Santa Clara Water Pollution Control Plant NPDES permit (Order R2-2020-0001) is analogous to the proposed tentative order. It names the joint powers authority (the San Jose/Santa Clara Water Pollution Control Plant) that owns the treatment plant and the two cities (San Jose and Santa Clara) that operate most of the collection system feeding the plant. Like the CMSA case, the San Jose/Santa Clara Water Pollution Control Plant is a joint powers authority comprised of the two collection system agencies (the cities). Other examples include the East Bay Dischargers Authority NPDES permit (Order R2-2022-0023); South San Francisco, San Bruno, and North Bayside System Unit permit (Order R2-2019-0021), and San Mateo and Foster City Estero Municipal Improvement District permit (Order R2-2018-0016). This approach is consistent with direction from U.S. EPA. On August 14, 2006, U.S. EPA commented on the tentative order for Rodeo Sanitary District's NPDES permit reissuance and advised, "The changes made to the permits

adopted in August that describe the permitted facility as the treatment plant and the collection system should be made to this draft permit. Throughout the permit and the fact sheet, the permitted facility should be described as including the treatment plant and the permittee's collection system."

Districts Comment 5: *The Districts point out that CMSA does not own any of the collection system that feeds into the treatment plant. There are five separate entities that own portions of the collection system: Ross Valley Sanitary District, San Rafael Sanitation District, Sanitary District No. 2 of Marin County, California Department of Corrections, and the County of Marin. The Districts point out that Order R2-2018-0003 and the tentative order only list Ross Valley Sanitary District, San Rafael Sanitation District, Sanitary District No. 2 of Marin County in the tentative order, and the tentative order does not explain why the smaller collection systems agencies (California Department of Corrections and County of Marin) are not listed as co-permittees, even though they also contribute flows to CMSA.*

Response: We have not made changes in response to this comment. As noted in Fact Sheet section 2.1.3 of the tentative order, the California Department of Corrections and the San Quentin Village Sewer Maintenance District collection systems (County of Marin) account for less than six percent of the total average dry weather flow to the treatment plant. Since these two collection systems are much smaller and contribute a minimal portion of the flow to the plant, we did not name them as co-permittees in the tentative order. They are also not likely to be significant contributors of the inflow and infiltration that lead to wet weather blending at the treatment plant.

Districts Comment 6: *The Districts point out that the State Water Board chose to adopt WDRs under state law instead of an NPDES permit that could be subject to citizen enforcement. The Districts indicate that the State Water Board intended to have one statewide regulatory mechanism for consistent collection system management. Furthermore, the Districts point out that the statewide WDRs prohibit spills into waters of the United States and require that the collection system agencies properly operate, manage, and maintain all parts of their collection systems; ensure system operators are knowledgeable and adequately trained; allocate adequate resources for operations; ensure the design capacity meets or exceeds the Enrollee's System Hydraulic Evaluation and Capacity Assurance Plan's design criteria; develop and implement a Sewer System Management Plan; and control and mitigate sanitary sewer overflows, including reducing, preventing, and controlling inflow and infiltration.*

Response: The statewide WDRs do not preclude regulation of inflow and infiltration under the Clean Water Act. (See response to Districts Comment 2.) The statewide WDRs focus on preventing sanitary sewer overflows from sanitary sewer collection systems, not reducing wet weather flows transported to treatment plants. As stated in our response to Districts Comment 2, the statewide WDRs specifically state that the permit does not prohibit Regional Water Boards from regulating collection systems through NPDES permits. This tentative order requires measures specifically focused on reducing wet weather flows to CMSA's treatment plant to reduce wet weather bypasses.

Districts Comment 7: *The Districts state that they met with us regarding their concerns about the increased liability associated with being named in an NPDES permit prior to the adoption of the previous order. They point out that they proposed several options for reducing inflow and infiltration that would not involve an NPDES permit:*

1. *Individual WDRs that supplement the statewide WDRs;*

2. *Binding contract between CMSA and the collection system agencies;*

3. *Time Schedule Orders for collection system agencies not already under an enforcement order (the Ross Valley Sanitation District is subject to Cease and Desist Order R2-2013-0020);*

4. *Cease and Desist Orders for collection system agencies not already under an enforcement order; and*

5. *Individual NPDES permits*

Response: We have not made changes in response to this comment, which refers to alternatives the Districts suggested when the Regional Water Board considered the previous order. The Regional Water Board does not typically base its permitting decisions on whether there could be third-party liability; nor do we need to exhaust all other potential regulatory mechanisms before issuing an NPDES permit. Nonetheless, in this case, we do not agree that the Districts' liability would be much greater if they were regulated under this NPDES permit versus solely under the statewide WDRs, which are not subject to third-party enforcement. Third parties may already sue to enforce the Clean Water Act anytime a sanitary sewer overflow occurs. The potential liability for sanitary sewer overflows is no greater with an NPDES permit. However, the tentative order does include requirements to complete projects to reduce inflow and infiltration (see Provision 6.3.5.1 of the tentative order). Because the Districts identified the majority of the tasks themselves as actions they are committed to implementing, we do not anticipate any need for enforcement by either the Regional Water Board or a third party.

The options the Districts put forward do not address our primary reason for naming them in the tentative order (i.e., they do not provide a basis for approving bypasses of biological treatment during wet weather):

1. Individual WDRs. Regulating the collection systems separately through supplemental WDRs would not link CMSA's wet weather bypasses to any feasible actions CMSA could take to justify the Regional Water Board's approval of CMSA's wet weather bypasses. Including the collection system agencies in this tentative order will link their actions to the bypass approval and also help them coordinate their actions with those of CMSA. Moreover, regulation under one order will optimize administrative efficiencies for both the permittees and the Regional Water Board.

2. Binding Contract. The Regional Water Board would not be a party to any contract between CMSA and the collection systems agencies; therefore, it would have no means to ensure that CMSA and the collection system agencies would abide by such a contract. Moreover, the Regional Water Board cannot compel the collection system agencies to enter into a contract with CMSA, particularly if they are not subject to a Regional Water Board order, such as this permit.

3. Time Schedule Orders. Time Schedule Orders would have the same deficiencies as individual WDRs (see #1 above). They would not link CMSA's wet weather bypasses to feasible actions the collection system agencies could take to justify the approval of CMSA's wet weather bypasses. Moreover, Time Schedule Orders enforce existing or threatened violations. In this case, it is unclear what violations the Regional Water Board might enforce through any Time Schedule Orders. The Regional Water Board could not use Time Schedule Orders to enforce this permit unless the collection system agencies were co-permittees.

4. Cease and Desist Orders. Cease and Desist Orders would have the same deficiencies as Time Schedule Orders (see #3 above).

5. Individual NPDES Permits. Individual NPDES permits would have the same deficiencies and inefficiencies as individual WDRs (see #1 above). Moreover, individual NPDES permits would not provide the collection system agencies any more or less protection from third-party enforcement, and their requirements would probably not differ from those proposed in this tentative order. Individual permits would, however, be more burdensome for everyone.

Districts Comment 8: *The Districts indicate that we gave the collection system agencies until September 20, 2017, to suggest changes to an administrative draft of the previous order. Ross Valley Sanitary District and San Rafael Sanitation District suggested changes to reduce their potential liabilities. The Districts note that we did not make those changes and contend that we instead made some requirements more stringent. Ross Valley Sanitary District and San Rafael Sanitation District contested their inclusion in the previous order, and Ross Valley Sanitary District, San Rafael Sanitation District, and Sanitary District No. 2 of Marin County object to their inclusion in this tentative order.*

Response: This comment primarily refers to comments the Districts made when the Regional Water Board considered adoption of the previous order. As stated in our response to Districts Comment 3, we met with the Districts both before and after circulating an administrative draft of the previous order and provided opportunities for comment on the administrative draft and during the formal public comment period for the tentative order. We disagree that changes made to the previous order made it more stringent. Instead, the changes clarified the responsibilities of each co-permittee. In that regard, this tentative order is not significantly different than the previous order.

Districts Comment 9: *The Districts assert that the tentative order does not authorize any discharges from the collection systems to water of the United States. The Districts*

claim Discharge Prohibition 3.5, which prohibits sanitary sewer overflows, is unnecessary because the Clean Water Act and statewide WDRs already prohibit these spills. The Districts claim that this prohibition would increase the number of possible violations that could be alleged for any single spill. The Districts claim that this increased liability is not authorized by federal law and cite court cases that support the proposition that NPDES permits are only required if there is a discharge from a point source. The Districts point out that Sanitary District No. 2 of Marin County had no sanitary sewer overflows for three of the years from 2017-2021, including no sanitary sewer overflows in 2020 and 2021. The Districts request that, at a minimum, Discharge Prohibition 3.5 include exceptions for Attachment D, sections 1.7 and 1.8.

Response: We have not made changes in response to this comment. The Districts are properly named as co-permittees in the tentative order. The cases cited by the Districts do not support removing them as co-permittees. As operators of the sewer collection systems, the Districts are part of a POTW and are thus discharging pollutants from a point source. (See *In re Charles River Pollution Control District*, 16 E.A.D. 623, at p. 635 ["POTW treatment plants, like the satellite sewage collection systems that convey wastewater to the plants, are components of a POTW. Therefore, … the Towns' satellite sewage collection systems and the permitted facility comprise the POTW, which discharges from a point source."].) Although the Districts do not own the treatment plant or the discharging outfall, they are responsible for their pollutants that are discharged through CMSA's outfall. (See *In re Charles River Pollution Control District*, 16 E.A.D. 623, at p. 636 ["While it is true that the Towns do not own or operate the Charles River WWTP and the discharging outfall, they are nonetheless responsible for pollutants that are conveyed to waters of the United States from the WWTP outfall."]; see also response to Districts Comment 3.)

Discharge Prohibition 3.5 appropriately applies to the collection system agencies because it prohibits sanitary sewer overflows. This is consistent with other NPDES permits in our Region that regulate collection systems. For example, Orders R22022-0023, R2-2022-0024, and R2-2022-0025 address the collection systems of multiple East Bay communities that discharge through the East Bay Dischargers Authority's common outfall. Also, Order R2-2020-0001 includes the San Jose and Santa Clara collection systems, Order R2-2019-0021 includes the South San Francisco and San Bruno collection systems, and Order R2-2018-0016 includes the San Mateo and Foster City Estero Municipal Improvement District collection systems. This prohibition does not significantly affect potential liabilities for the collection system agencies (see response to Districts Comment 4). If the Regional Water Board enforced the prohibition, it would not treat a single overflow incident as distinct violations arising under the Clean Water Act, the statewide WDRs, the tentative order, and the Basin Plan.

We concur that Sanitary District No. 2 of Marin County did not have any sanitary sewer overflows that reached surface waters in 2017, 2020, and 2021; however, in 2018 and 2019, it reported sanitary sewer overflows to surface waters at a much higher rate than other collection systems in the San Francisco Bay Region and the State of California (see Fact Sheet Table F-3 of the tentative order). It also reported four sanitary sewer overflows that reached surface waters in 2022.

Attachment D sections 1.7 and 1.8 do not apply to Discharge Prohibition 3.5 (see response to Districts Comment 29).

Districts Comment 10: *The Districts assert that the State Water Board recognized that an NPDES permit is only required if there is a discharge from a point source when it adopted the 2006 statewide WDRs as a state-law-only permit, instead of as an NPDES permit. The Districts refer to a State Water Board finding that satellite collection systems (i.e., systems not owned and operated by a POTW) have not generally been subject to NPDES permit requirements.*

The Districts claim that listing the collection system agencies as co-permittees contradicts the Regional Water Board's decisions in 2007 when it removed collection system agencies from NPDES permits following the adoption of the statewide WDRs in 2006.

Response: In the fact sheet for the 2006 statewide WDRs, the State Water Board identified several reasons why an NPDES permit was not the appropriate vehicle for statewide regulation of sanitary sewer systems. However, both the 2006 fact sheet and the statewide WDRs themselves make it clear that the statewide WDRs do not preclude the Regional Water Board from regulating sewer systems under an NPDES permit. (See Fact Sheet for State Water Board Order 2006, pp. 5, 9; and response to Districts Comment 2.) The Districts' referral to actions of the Regional Water Board in 2007 is outdated. The Regional Water Board reconsidered its decision in 2018, and the tentative order is consistent with the previous order. Also, since 2006, this Regional Water Board has regularly named collection systems in other permits for POTWs (see response to Districts Comment 4). As stated in our responses to Districts Comments 3 and 9, collection systems may be point sources on their own (e.g., in the event of a sanitary sewer overflow that discharges to waters of the United States) or as part of the POTW.

Districts Comment 11: *The Districts reiterate their contention that the Regional Water Board cannot legally include the collection systems as co-permittees and that doing so substantially increases their potential liabilities. They note that the Ross Valley Sanitation District settled two citizen suits with Riverwatch in 2005 and 2009, and the San Rafael Sanitary District settled a citizen suit with Riverwatch in 2009 and a potential citizen suit with Riverwatch in 2021. Riverwatch alleged violations of this NPDES permit (i.e., the previous order). They state that this indicates the increased liability resulting from being listed as co-permittees under an NPDES permit.*

Response: We do not agree that the NPDES permit appreciably increases the Districts' potential legal risks (see response to Districts Comment 7). In 2001, the Regional Water Board named Ross Valley Sanitary District in this NPDES permit (Order R2-2001-105); in 2007, the Regional Water Board did not name Ross Valley Sanitary District in this NPDES permit (Order R2-2007-0007). Ross Valley Sanitary District was sued in 2005 when it was named as a discharger in the NPDES permit and again in 2009 when it was not named as a discharger in the NPDES permit. We have no evidence that Ross Valley Sanitary District was subject to additional liability in 2005 versus 2009 because it

was subject to NPDES permit requirements at that time. Similarly, the Districts have not substantiated that the Regional Water Board's decision to regulate the San Rafael Sanitary District with an NPDES permit meaningfully affected its settlement with Riverwatch. Moreover, the Regional Water Board does not typically make permitting decisions based on how those decisions will affect third-party liability.

Districts Comment 12: *The Districts claim that they have potential liability for spills to waters of the United States, but they do not want the increased liability of being listed as co-permittees on an NPDES permit (e.g., additional duplicative prohibitions, additional liability for operation and maintenance under federal law, and increased exposure to citizen suits).*

Response: We have not made changes in response to this comment. As stated in our response to Districts Comment 11, we do not view the requirements imposed by the tentative order as significantly increasing the Districts' liabilities.

Districts Comment 13: *The Districts claim that they are already working on reducing inflow and infiltration and preventing spills from their systems through activities that are the same as, or similar to, the requirements of the tentative order. The Districts claim that they will complete actions to reduce inflow and infiltration and spills from their systems regardless of their coverage under the tentative order. The Districts claim that the Regional Water Board has not provided sufficient evidence to prove that inflow and infiltration are causing water quality impacts, and thus have not provided sufficient justification for including the Districts as co-permittees.*

Response: We recognize that the collection system agencies are taking actions to reduce inflow and infiltration. However, the Regional Water Board cannot find that the "discharger" is implementing the feasible measures to reduce wet weather bypasses if the "discharger" is only CMSA and does not include the collection system agencies. If the Regional Water Board cannot make this finding, it cannot approve wet weather bypasses.

Sufficient evidence exists to prove that inflow and infiltration significantly contributes to high wet weather flows. The wet weather daily effluent peaking factor at CMSA was about 14 during the previous order term, while the average influent wet weather peaking factors for all the other Marin wastewater treatment plants (Sausalito-Marin City Sanitary District Wastewater Treatment Plant, Las Gallinas Valley Sanitary District Sewage Treatment Plant, Sewerage Agency of Southern Marin Wastewater Treatment Plant, Paradise Cove Treatment Plant) was about 10 during the same timeframe. (Average dry weather flow used to calculate the peaking factor is determined at the effluent monitoring location at CMSA since the variability of influent flows to CMSA makes the influent flow data less reliable.) The only treatment plant in Marin County with a greater peaking factor than CMSA's peaking factor was the Sewerage Agency of Southern Marin Wastewater Treatment Plant, which had a peaking factor of about 16. The NPDES permit regulating the Sewerage Agency of Southern Marin Wastewater Treatment Plant and its wastewater collection system, Order R2-2018-0039, also requires its collection system to reduce blending events.

We disagree that inflow and infiltration must cause water quality impacts if the Districts are to be named as co-permittees in the permit. Nevertheless, during blending events, the wastewater does not receive full treatment, which increases pollutant loading and the potential for water quality impacts.

Districts Comment 14: *The Districts request that we remove the collection system agencies as co-permittees from the tentative order, and that we remove Provision 6.3.4.3, Collection System Management. The Districts propose that we revise Provision 6.3.5.1, Collection System Agency Tasks to Reduce Blending, to remove all requirements. Instead, the Districts propose that we include a requirement for CMSA to annually report on the Districts' efforts to reduce wet weather bypasses. The Districts claim that the Regional Water Board cannot justify naming the Districts as co-permittees because blending events did not decrease during the previous permit term when the Districts were listed as co-permittees.*

Response: We have not made changes in response to this comment. As explained in our responses to Districts Comments 2, 4, and 7, naming the collection system agencies and requiring the tasks listed in Provision 6.3.5.1 are necessary to ensure that all feasible measures to reduce wet weather bypasses are being implemented, which is necessary for the Regional Water Board to conditionally approve wet weather bypasses in accordance with 40 C.F.R. section 122.41(m). As pointed out in Districts Comment 5, CMSA is not responsible for any of the collection system agencies; therefore, requiring CMSA to prepare annual reports to summarize collection system agency actions would not guarantee that any actions take place.

We see no reason to remove Provision 6.3.4.3, which simply requires the Districts to properly operate and maintain their respective collection systems, report any noncompliance, and mitigate any discharges that violate the tentative order. These requirements are standard provisions applicable to all NPDES permits. (See 40 C.F.R. § 122.41, subdivisions (d), €, and (l).) The tentative order allows the Districts to rely on compliance with the statewide WDRs to demonstrate compliance with this NPDES permit requirement.

We agree that blending events have not decreased during the previous permit term; however, this does not mean that we should no longer include the Districts as co-permittees. Instead, it suggests that the Districts need to implement additional improvements beyond those taken during the previous permit term to reduce blending. As stated in our response to Districts Comment 13, the wet weather peaking factor for CMSA is quite large, indicating that the Districts need to continue to rehabilitate their respective collection systems to reduce inflow and infiltration.

Districts Comment 15: *The Districts say at least one federal court has ruled that blending is not an illegal bypass subject to the bypass prohibitions and provide a history of blending regulation and guidance. The Districts claim that blending at the CMSA treatment plant is designed to occur automatically and is therefore not a bypass since they claim it is not an "intentional diversion." The Districts say the bypass rule is not itself an effluent standard but merely piggybacks existing requirements. The Districts*

say its purpose is to ensure that dischargers properly operate and maintain their treatment facilities, and meet technology-based standards by requiring wastewater to move through the facility as designed. They say the bypass rule does not require any particular treatment method or technology; thus, if a treatment facility is designed to blend, as CMSA's treatment plant is, the Districts conclude that the bypass regulation does not apply. Even if the bypass rule did apply, the Districts argue that CMSA's no feasible alternatives analysis is complete because CMSA concluded that CMSA cannot implement any additional feasible measures to reduce blending. CMSA cannot feasibly regulate the collection systems because they are owned by different and distinct legal entities. The Districts also assert that even if the bypass rule did apply, only bypasses that result in effluent limit violations are prohibited by 40 C.F.R. section 122.41(m). The Districts add that CMSA did not violate effluent limits during the current permit term.

Response: We disagree. Federal regulations at 40 C.F.R. section 122.41(m) are clear that the intentional diversion of waste streams from any portion of a treatment facility is a bypass. This means routing flows around CMSA's biological treatment process is a bypass specifically because CMSA designed its facility to do so. The bypass provision "requires that permittees operate pollution control equipment at all times, thus obtaining maximum pollutant reductions consistent with technology-based requirements mandated by section 301 of the CWA and furthering the Act's goal of eliminating the discharge of all pollutants." (53 Fed. Reg. 50562-01, 40607.) "The prohibition of bypass in the NPDES regulations applies even where the permittee does not violate permit limitations during the bypass." (*Id.*) If we were to accept the Districts' argument that routing wastewater around CMSA's biological treatment process is not a bypass because the facility was designed to operate that way, nothing would prevent any POTW from designing its treatment system to route as little wastewater through its biological treatment process as possible as long as it could still comply with effluent limits. Designing a facility to bypass biological treatment once its influent reaches a certain flow rate is an "intentional diversion." CMSA's NPDES permit never unconditionally allowed wet weather bypasses by finding that they are unintentional (see Orders 80-056, 85-118, 91-003, 96034, 01-105, R2-2007-0007, and R2-2012-0051).

In these orders (prior to the previous order), the Regional Water Board found there were no feasible alternatives to wet weather bypasses and re-evaluated this conclusion with each permit reissuance. In evaluating whether feasible alternatives exist at this time, we agree that CMSA cannot implement any additional meaningful measures to reduce blending. This is why we included the collection system agencies in the tentative order. The collection system agencies can implement meaningful measures to reduce blending. The Districts' referral to the federal regulations at 40 C.F.R. section 122.41(m)(2) for "Bypass not exceeding limitations" does not apply to CMSA's blending. Section 122.41(m)(2) states, "The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation." CMSA's blending during wet weather due to high flows is not for "essential maintenance."

We agree that the bypass rule does not require the use of a particular treatment or technology. As noted in a case the Districts cited, however, the decision to bypass or to turn off treatment is not a choice of treatment technology. (See *National Resources Defense Council v. U.S. EPA* (D.C. Cir. 1987) 822 F.2d 104, 123 [“this argument requires the assumption that “on-off” regulation constitutes a choice of treatment technologies. Since that sort of option does nothing to further the goal of exploring diverse treatment technologies, we are unpersuaded that the “on-off” decision is the sort of technological choice Congress intended to leave entirely to the discharger.”].) Regarding the federal court ruling related to blending, see response to Districts Comment 18.

Districts Comment 16: *The Districts expand on the history of blending regulations and guidance. In 2001, U.S. EPA’s draft guidance allowed blending, provided that discharges met effluent limits; the permit application and permit recognized blending consistent with generally accepted practices and design criteria; alternative flow routing occurred only when flows exceeded the capacity for storage and biological treatment; the treatment system was operated as designed; and the permit contained requirements for collection system design, operation, and maintenance. In 2003, U.S. EPA proposed a policy that would have allowed blending provided that the discharge met effluent limitations and water quality standards, that it passed through a primary treatment unit prior to discharge, and that wastewater was only routed around biological treatment units if the units were operating at capacity. In 2005, U.S. EPA abandoned the previous proposals, concluding in a draft rule that blending is a bypass and may only be approved when there are no feasible alternatives. The Districts claim that the previous order and the tentative order are based on this draft rule, and that no other authority is cited to justify that blending is a prohibited bypass. The Districts claim that the Regional Water Board did not provide adequate proof to support its finding that blending is a prohibited bypass. Thus, the Districts’ conclude that the NPDES requirements to reduce blending are unlawful.*

Response: We disagree. The previous order and the tentative order are not based on U.S. EPA’s 2005 draft policy; they refer to the policy only as guidance for evaluating feasible alternatives to bypassing (see response to Districts Comment 35).

As with the previous order, the basis for this tentative order prohibiting bypasses is the bypass rule set forth in 40 C.F.R. section 122.41(m) (see Attachment D section 1.7). The regulation itself lists equipment maintenance (such as the maintenance the tentative order requires of the collection agencies) as an example of a “feasible alternative.” (See 40 C.F.R. section 122.41(m)(4)(i)(B).) Our finding that blending is a type of bypass is based on the definition of “bypass” in 40 C.F.R. section 122.41(m) and Attachment D section 1.7. “‘Bypass’ means the intentional diversion of waste streams from any portion of a treatment facility. (40 C.F.R. § 122.41(m)(1)(i).)” As stated in 40 C.F.R. section 122.41(m) and Attachment D section 1.7, bypasses are prohibited unless they meet the following three criteria: bypass is “unavoidable” for safety or extreme property damage prevention, there are no feasible alternatives to bypassing, and the discharger submitted advance notice in accordance with Attachment D section 1.7.5 to the Regional Water Board.

Districts Comment 17: *The Districts claim our interpretation of the bypass rule conflicts with secondary treatment regulations and the California Water Code. They contend that regulating blending as a bypass effectively dictates treatment design.*

The Districts say that, until 2005, U.S. EPA had not viewed blending as a bypass that triggers the need for a no-feasible-alternatives analysis. They say that is why blending requirements first appeared in CMSA's NPDES permit in 2007. They point to a 2004 report to Congress in which U.S. EPA praised the use of blending processes to deal with peak wet weather flows and made no reference to a no-feasible-alternatives requirement. They note that California and the remainder of the United States have issued many permits that allow blending with no U.S. EPA objection.

Response: We disagree. The Districts conflate the bypass requirements with the secondary treatment standards. The bypass prohibition and secondary treatment standards apply independently of one another. The tentative order implements the secondary treatment standards by imposing the carbonaceous biochemical oxygen demand, total suspended solids, and pH effluent limitations listed in Table 2 of the tentative order. The tentative order does not specify the manner of compliance with these effluent limits.

The tentative order separately implements the bypass rule by incorporating federally required standard provisions (40 C.F.R. § 122.41(m)) within Attachment D section I.G. If the bypass provision did not exist, CMSA would have little incentive not to bypass some flows around its biological treatment units and possibly its primary treatment units as long as it could still meet its effluent limits (i.e., by using treated wastewater to dilute untreated or partially treated wastewater). This would be contrary to the national Clean Water Act goal of eliminating the discharge of all pollutants and the NPDES regulations goal of ensuring proper operation and maintenance of all treatment facilities. (See 33 U.S.C. § 1251(a)(1); *National Resources Defense Council v. U.S. EPA* (1987) 822 F.2d 104, at p. 123 ["In the context of a statute which seeks the elimination of pollution, it is difficult to believe that Congress *intended* that dischargers be entitled to shut off their treatment facilities and "coast" simply because they were momentarily not in danger of violating effluent limitations."] [emphasis in original].) While California has issued many permits that approve blending bypasses, such bypasses can only be approved in accordance with the conditions set forth in 40 C.F.R. section 122.41(m) (see Attachment D section I.G).

Districts Comment 18: *The Districts claim that the Eighth Circuit Court of Appeals has held that blending flows around biological treatment does not need to meet the no-feasible-alternatives requirement. The Districts also claim that the Court held that U.S. EPA could not implement its 2005 draft policy because it had not adopted the policy pursuant to the Administrative Procedures Act. The Districts point out that the bypass regulations were adopted in 1983, and the CMSA facility was constructed in 1985 and designed to blend. Most funding for the CMSA facility's construction came from federal and state grants, with a requirement for these funds that the plant not be subject to excessive inflow and infiltration. Before 2005, the Regional Water Board and U.S. EPA did not implement "no feasible alternatives" requirements for dischargers that*

blend. Since the Eighth Circuit Court of Appeals decision was issued after the CMSA permit reissuance in 2012, and before the previous order was reissued in 2018, the Districts appealed the previous order, requesting that it be revised to remove what they considered an unlawful interpretation that blending represents a prohibited bypass. The Districts contest the tentative order for the same reasons.

Response: The Eighth Circuit Court of Appeals decision in *Iowa League of Cities* does not require changes to our application of the bypass provision. The Eighth Circuit's decision is not precedential or otherwise binding in California. Moreover, the decision is not persuasive as guidance because the facts of that case are different from the facts here. In *Iowa League of Cities*, the wastewater treatment plant re-routed wastewater to a physical treatment process in lieu of biological treatment; whereas here, CMSA is re-routing wastewater around biological treatment and providing no further treatment. The case also invalidated a 2011 U.S. EPA determination that the draft 2005 blending policy applied to situations in which wastewater was re-routed through physical, not biological, treatment processes. In the case of this tentative order, we are not relying on the 2005 draft policy, much less the 2011 determination. (See *Iowa League of Cities* (2013) 711 F.3d 844, 875-877.) The Regional Water Board's basis for prohibiting bypasses and authorizing exceptions to the prohibition is firmly grounded in 40 C.F.R. section 122.41(m).

As stated above in our response to Districts Comment 15, none of CMSA's previous orders unconditionally permitted bypasses. Although the Regional Water Board did not identify any feasible alternatives to bypasses during some of the previous permit reissuances, we have now identified feasible measures that the collection systems are capable of implementing to reduce bypasses.

The Districts wrongly conflate the bypass requirements with the secondary treatment standards, which are separate and independent rules. As the Districts point out in Districts Comment 15, "The bypass rule 'is not itself an effluent standard,' but instead 'merely "piggybacks" existing requirements.'" … "The rule's purpose was to 'ensure that users properly operate and maintain their treatment facilities…." (See *Iowa League of Cities v. EPA* (2013) 744 F.3d 844, 859 [citing Fed. Reg. 40562, 40609 (Oct. 17, 1988)]; see also response to Districts Comments 16 and 17.) The tentative order correctly implements the secondary treatment standards end-of-pipe, without dictating the manner of compliance with those standards. It also requires the Dischargers to implement all feasible alternatives (including reducing inflow and infiltration) before bypassing biological treatment units during wet weather.

Districts Comment 19: *The Districts point out that state and federal law do not allow the Regional Water Board to specify the method or means of compliance (see Water Code § 13360[a]). It can impose effluent limits based on the secondary treatment standards, but may not prescribe how much must be spent or the treatment methods or control strategies to be employed to meet those limits. The Districts point to case law determining that permitting authorities may not go beyond the imposition of effluent limits to regulate the internal processes of a treatment plant.*

For these reasons, the Districts indicate that the Regional Water Board should not regulate the inner workings of the CMSA treatment plant and collection systems to regulate blending. The Districts opine that, if CMSA meets all of its technology-based and water quality-based effluent limits, then receiving water quality is maintained regardless of whether blending occurs. The Districts argue that regulating the treatment plant and collection systems to reduce inflow and infiltration is essentially regulating the inner workings of the facility and imposing secondary treatment standards inside the plant prior to discharge.

Response: We disagree. The tentative order correctly implements the secondary treatment standards end-of-pipe, without dictating the manner of compliance with those standards. The tentative order does not regulate the internal processes of the treatment plant, nor does it apply the secondary treatment standards to the collection systems. Instead, it requires all wastewater to pass through all treatment units. If the Regional Water Board is to approve (i.e., not enforce against) circumstances whereby some wastewater does not pass through all treatment units, it may do so if (1) the bypass is unavoidable to prevent loss of life, personal injury, or severe property damage; (2) there are no feasible alternatives; and (3) the Regional Water Board receives notification (see Attachment D section I.G of the tentative order and 40 C.F.R. § 122.41[m]). See response to Districts Comments 15, 17, and 18.

The tasks in Tables 3 and 4 do not dictate the manner of compliance. The requirements included in Table 3 are projects mainly proposed by the Districts themselves to reduce inflow and infiltration, and the Districts have flexibility as to how they comply with the tasks. Table 4 includes monitoring and reporting tasks and does not dictate how CMSA can comply with them. Moreover, Water Code section 13360 does not apply to NPDES permits that are issued under federal law. (See Water Code §§ 13372, 13377 ["Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, . . ."; see also State Water Resources Control Board Order Nos. WQ 80-19, pp. 19–21; WQ 82-5, pp. 10–11.] The tasks in Tables 3 and 4 are necessary for the Regional Water Board to make the requisite findings to conditionally approve bypasses under 40 C.F.R. section 122.41(m) and thus are not subject to Water Code section 13360.

Districts Comment 20: *The Districts claim that restrictions on inflow and infiltration are not required when inflow and infiltration are not excessive, and further claim that their inflow and infiltration are not excessive based on 40 C.F.R. section 133.103(d) and 40 C.F.R. section 35.2005(b)(16). The Districts state the Regional Water Board previously claimed that there was excessive inflow and infiltration in the system because of flows being "as high as 285 gallons per capita per day" (gcpd). The Districts assume this calculation was based on their population of 104,500 and the treatment plant's wet weather peak wet weather biological treatment design flow. The Districts argue that this calculation was done incorrectly and should not have been based on their higher flow days, and that the flows at the treatment plant rarely exceed 30 million*

gallons per day. They cite U.S. EPA's "Infiltration/Inflow, I/I Analysis and Project Certification" (May 1985) and argue that the Regional Water Board cannot conclude that inflow and infiltration are excessive without first performing a cost-effectiveness analysis. The Districts also say reducing inflow and infiltration would limit the amount of water that could be recycled.

Response: The focus on whether inflow and infiltration meet the definition of "excessive" is misplaced. Although we included a reference to excessive inflow and infiltration in our 2018 response to comments, a finding that there are feasible alternatives to bypass does not require a finding of excessive inflow and infiltration. The Districts' inflow and infiltration is clearly contributing to the high flows during wet weather based on the treatment plant's maximum daily effluent peaking factor of 14. If the Districts implement the feasible measures to reduce inflow and infiltration as required in the tentative order, it will reduce bypass events.

The Districts present no evidence indicating that the measures listed in Provision 6.3.5.1 are infeasible. We maintain that they are feasible, particularly since the Districts themselves identified the majority of these tasks. See response to Districts Comment 2.

As for the Districts suggestion that reducing inflow and infiltration would reduce the amount of water available for recycling, we point out that CMSA does not recycle a significant portion of its effluent and has no plans to do so. If CMSA were to develop water recycling facilities, it would base its design on consistent and reliable dry weather flows. It would be particularly difficult to effectively design water recycling facilities for wet weather flows that can, for relatively short periods, be more than 10 times above dry weather flows. Furthermore, most recycled water demand occurs during dry weather, when irrigation needs are greatest.

Districts Comment 21: *The Districts reiterate that CMSA met all secondary treatment requirements during all blending events over the last permit term, and therefore they believe there is no justification for additional requirements to reduce blending.*

Response: We disagree. The proposal to name the collection system agencies in the tentative order and impose requirements to minimize inflow and infiltration, and thus blending, is not based on CMSA's record of compliance with the secondary treatment standards. It is based on 40 C.F.R. section 122.41(m).

Districts Comment 22: *The Districts claim that, by mandating particular projects, the tentative order would restrict their ability to prioritize projects or account for issues that may cause schedule delays. The Districts point out that the statewide WDRs provide collection system agencies with the ability to create their own Sewer System Management Programs and Capital Improvement Programs, which can be updated as necessary.*

Response: We disagree. The tentative order's requirements are flexible and will allow each District to allocate funds toward the projects that will have the most benefit. For example, it requires that each District either replace or rehabilitate a certain mileage of

its collection system or allocate a certain amount of money toward rehabilitation and replacement. It also requires that they continue to implement or develop private lateral sewer ordinances that suit their circumstances.

Nevertheless, the tentative order's requirements must go beyond those of the statewide WDRs. While the statewide WDRs provide collection system agencies flexibility in proposing their own capital improvement projects, this flexibility does not ensure that all feasible measures to avoid bypasses will be implemented, as is necessary for the Regional Water Board to approve blending bypasses. Moreover, there is no guarantee that collection system agencies will complete the proposed projects in their Sewer System Management Programs and Capital Improvement Programs since the plans can be revised. Our approach for this tentative order is consistent with our approach for the 11 other permits issued to treatment plants in this Region that bypass biological treatment units during wet weather (36 treatment plants in the Region do not bypass biological treatment units during wet weather). All of these permits have blending-reduction requirements similar to those in the tentative order.

Districts Comment 23: *The Districts claim that the tentative order does not address the alleged additional liability of listing the collection system agencies as co-permittees. The Districts claim that, with the implementation of the tentative order as proposed, third-party citizen lawsuits could be filed for violations of Discharge Prohibition 3.5, Provision 6.1 (Attachments D and G), and sections 6.3.4.3 and 6.3.5.1, in addition to potential lawsuits for spills to waters of the United States. The Districts claim this could make them subject to multiple violations for a single spill and therefore potentially subject to higher costs. The Districts argue that the tentative order requirements are duplicative and the duplicative requirements should be removed.*

Response: We disagree. As stated in our responses to Districts Comments 7, 9, and 11, we do not agree that listing the collection system agencies as co-permittees significantly increases their liabilities. First, as long as the Districts comply with the permit, they cannot be liable for non-compliance. Second, Regional Water Board enforcement is governed by the State Water Board's Enforcement Policy, which imposes penalties based on days of violation and discharge volume. Discharge volume is not "double counted" to increase fines. Finally, as stated in our response to Districts Comment 2, listing the collection systems as co-permittees and requiring actions for collection system management is necessary to grant CMSA approval to blend. Without that approval, CMSA would be liable for violations of Prohibition 3.3, which prohibits bypass of untreated or partially treated wastewater to waters of the United States, except as provided for in Attachment D section 1.7 of the tentative order.

Districts Comment 24: *The Districts reiterate their assertion that, since they are covered under the statewide WDRs, listing them as co-permittees increases their liability. The Districts repeat that their suggestions for other regulatory options were rejected in 2018, and that CMSA submitted a no feasible alternatives analysis to blending.*

Response: We disagree. As stated in our response to Districts Comments 7 and 11, we do not agree that listing the Districts as co-permittees significantly increases their liability, and the other approaches that the Districts proposed would not allow the Regional Water Board to conditionally approve blending bypasses. We agree that CMSA cannot, by itself, implement any additional meaningful measures to reduce blending. This is why we included the collection system agencies in the tentative order. The collection system agencies can.

Districts Comment 25: *The Districts claim that listing the collection system agencies as co-permittees in the previous order did not benefit water quality or Regional Water Board oversight. The Districts claim that they did not receive any interaction with Regional Water Board staff over the previous permit term until the administrative draft was released, and request that they no longer be included in the tentative order.*

Response. We did not make any changes in response to this comment. We agree that, during the previous permit term, wet weather flows were not meaningfully reduced. However, this does not mean the requirements of the previous order were ineffective. It suggests that more work needs to be completed to make a difference. The amount of inflow and infiltration the plant receives is still significant, as stated in our response to Districts Comments 13 and 20, indicating there is still significant room for progress to be made in reducing inflow and infiltration and blending events.

Because the previous order's requirements were based on each District's own proposed projects, significant staff interaction was unnecessary. Although Regional Water Board staff may not have provided much feedback regarding the District's reports, that does not mean staff did not review them. If the Districts seek additional Regional Water Board staff guidance or oversight, we can and will provide it.

Districts Comment 26: *The Districts request that the tentative order not be adopted as proposed. The Districts request that we remove the collection system agencies from the tentative order and that we accept the edits proposed by the Districts to allow the Districts to reduce blending, protect water quality, and recognize and properly allocate limited public resources, while protecting the collection system agencies from unnecessary liability.*

Response: As explained in our responses to Districts Comments 2 and 22, naming the collection system agencies is necessary to ensure that all feasible measures to reduce wet weather bypasses are being implemented, which in turn is necessary to allow the Regional Water Board to conditionally approve wet weather bypasses in accordance with 40 C.F.R. section 122.41(m).

Districts Comment 27: *The Districts request that section 1 of the tentative order be revised to refer to the collection systems as "upstream satellite collection systems."*

Response: We agree. We revised section 1 of the tentative order as follows:

> *Information describing the Central Marin Sanitation Agency (CMSA) Wastewater Treatment Plant and <u>about</u> the <u>upstream satellite</u> collection*

systems operated by the San Rafael Sanitation District, Ross Valley Sanitary District, and Sanitary District No. 2 of Marin County is summarized on the cover page and in Fact Sheet (Attachment F) sections 1 and 2.

Districts Comment 28: *The Districts claim Table 1 is missing from the tentative order.*

Response: We disagree. Table 1, Discharge Location, is located on page 1 of the tentative order.

Districts Comment 29: *The Districts request that Prohibition 3.5 include sewage spills and exceptions based on Attachment D sections 1.7 and 1.8.*

Response: We disagree. Discharge prohibitions 3.1, 3.2, and 3.3 already cover "sewage spills." Moreover, sanitary sewer overflows are not bypasses since they do not occur within the treatment plant; thus, Attachment D section 1.7 cannot apply. Likewise, Attachment D section 1.8 applies only when upsets cause effluent limitation violations. No effluent limitations apply to sanitary sewer overflows or sewage spills.

Districts Comment 30: *The Districts point out that Task 12 of Table 3, Collection System Agency Tasks to Reduce Blending, in Provision 6.3.5.1 includes a compliance date prior to the proposed tentative order adoption date.*

Response: We agree. We revised the dates for Tasks 12 and 13 as follows:

> Task 12 Compliance Date: July 31 ~~March 31~~, 2023
>
> Task 13 Compliance Date: August 31 ~~June 30~~, 2023

Districts Comment 31: *The Districts request that we use "Permittee" instead of "Discharger" to be consistent with Fact Sheet section 1.1 of the tentative order. The Districts also request clarifying revisions to Fact Sheet section 1.1.*

Response: We disagree with the District's request to replace "Discharger" with "Permittee." "Discharger" is the term we use in all NPDES permits in our region. As stated in our response to Districts Comment 4, listing the collection system agencies as dischargers, not merely permittees, is justified because they discharge to waters of the United States through the CMSA treatment plant outfall. For this reason, we also disagree with the Districts' proposal to remove the collection system agencies from the definition of the "Facility." As stated in our response to Districts Comment 4, the collection systems are part of the POTW and therefore part of the Facility.

We did, however, revise the first paragraph of Fact Sheet section 1.1 as follows:

> Central Marin Sanitation Agency (CMSA) owns and operates the Central Marin Sanitation Agency Wastewater Treatment Plant, which provides secondary treatment of wastewater collected from its service area and

> discharges to Central San Francisco Bay. CMSA was formed in 1979 by a Joint Exercise of Powers Agreement by three collection system agencies that own and operate portions of the collection system, including the force mains, and route waste to the treatment plant: the San Rafael Sanitation District, Ross Valley Sanitary District (formerly known as Sanitary District No. 1 of Marin County), and Sanitary District No. 2 of Marin County (a subsidiary of the Town of Corte Madera). The Joint Exercise of Powers Agreement no longer includes the City of Larkspur as of 2020; its collection system is now owned and operated by Ross Valley Sanitation District. CMSA is governed by a board that includes representatives from the three satellite collection system agencies. Neither CMSA nor any collection system agency has ~~does not have~~ authority over any of the other collection system agencies in the Joint Exercise of Powers Agreement that governs CMSA.

Districts Comment 32: *The Districts request that we refer to them as "collection system agencies" instead of "Dischargers" when describing sanitary sewer overflows, point out that the definition of Category 1 sanitary sewer overflows has changed, and propose that we revise Fact Sheet section 2.4.2.*

Response: We agree. We believe that the Districts' revision to refer to themselves as the "collection system agencies" here rather than "Dischargers" helps to clarify that the collection system agencies, rather than CMSA, are responsible for sanitary sewer overflows. We made the following revisions to Fact Sheet section 2.4.2:

> The table below summarizes the ~~Dischargers'~~ collection system agencies' Category 1 sanitary sewer overflow (SSO) rates for the last five years. Category 1 SSOs were defined under the 2006 statewide WDRs as ~~are~~ those that reach waters of the United States and thus may violate Prohibition 3.5 of this Order.

Districts Comment 33: *The Districts clarify that the San Rafael Sanitation District will bring a private sewer lateral ordinance to its board for consideration, but board adoption is not guaranteed.*

Response: We agree. We revised Fact sheet section 2.4.2 (first bullet) as follows:

> **San Rafael Sanitation District.** During the previous order term, San Rafael Sanitation District replaced or repaired about 3.2 miles of sewer mains and laterals, conducted video inspections of about 30 miles of sewer mains, and developed a private sewer lateral ordinance that it plans to bring to its Board to consider for adoption by June 30, 2024.

Districts Comment 34: *The Districts request that Fact Sheet section 4.3.1 refer to reasonable potential to cause or contribute to an "instream" exceedances of water quality standards.*

Response: We disagree. The Districts' proposed revision is inconsistent with 40 C.F.R. section 122.44(d)(1)(i) ("Limitations must control all pollutants or pollutant parameters [either conventional, nonconventional, or toxic pollutants] which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.") and does not provide helpful clarification, particularly for a discharge to San Francisco Bay, which is not a stream.

Districts Comment 35: *The Districts request that Fact Sheet section 6.3.5.2 be revised to remove the reference to U.S. EPA's proposed Peak Wet Weather Policy (December 2005).*

Response: We disagree. As we noted in our response to District Comment 18, we refer to the U.S. EPA 2005 draft policy only for guidance in determining feasible alternatives. The analysis and reporting requirements are based on federal regulation (i.e., 40 C.F.R. § 122.41[m]). However, we revised Fact Sheet section 6.3.5.2 for clarity as follows:

> **CMSA Tasks to Reduce Blending.** Consistent with Attachment D section I.G and 40 C.F.R. section 122.41(m), CMSA submitted a No Feasible Alternatives Analysis with its permit reissuance application to determine whether any feasible alternatives are available to CMSA to reduce blending. … Provision 6.3.5.2 of this Order requires CMSA to perform feasible tasks within its control and to assist the collection system agencies. The analysis and reporting requirements are based on 40 C.F.R. section 122.41(m). The requirement to complete a utility analysis that contains the elements described in ~~part on~~ U.S. EPA's proposed Peak Wet Weather Policy (December 2005) relies on U.S. EPA's draft policy as guidance. The draft policy describes information suitable to demonstrate that the conditions of 40 C.F.R. section 122.41(m)(4)(b) are met.

Districts Comment 36: *The Districts request that Provision 6.3.5.2, Table 4, item 3, be revised to refer to bypasses during wet weather as "blending"; remove the reference to U.S. EPA's proposed Peak Wet Weather Policy (December 2005); remove citations to the federal regulations and Attachment D, section 1.7; and add that the collection systems should identify through the utility analysis what feasible actions they "may implement over the next five years."*

Response: We did not revise the tentative order in response to this comment. As explained previously, blending is a type of bypass and U.S. EPA's proposed Peak Wet Weather Policy is cited for guidance only (see response to Districts Comments 2, 16, and 35). Our references to the federal regulations and Attachment D section 1.7 are necessary to support the requirements of the provision. The Districts' proposed revision to add that the Districts need only submit feasible actions they "may" implement is inappropriate because bypass approval pursuant to 40 C.F.R. § 122.41(m)(4)(i) and Attachment D section 1.7.4 requires implementation of all feasible alternatives.

BACWA and CASA (Associations) Comments

Associations Comment 1: *The Associations support addressing inflow and infiltration as the primary means to reduce wet weather bypasses but do not support including requirements for collection systems in an NPDES permit. The Associations reference California Water Code section 13360(a), which prohibits the Regional Water Board from mandating the manner of compliance (i.e. specific projects to reduce blending).*

Response: We disagree. See response to Districts Comments 19, 22.

Associations Comment 2: *The Associations request that we remove the collection system agencies as co-permittees in the tentative order, and that we move Table 3 Collection System Agency Tasks to Reduce Blending, to the Fact Sheet rather than including it as an enforceable requirement. The Associations re-iterate the proposal from the Districts to instead include a requirement for CMSA to annually report on the tasks completed by the collection system agencies to reduce inflow and infiltration.*

Response: We disagree. See response to Districts Comment 14.

Associations Comment 3: *The Associations note that the statewide WDRs already regulate the collection systems, including provisions for controlling inflow and infiltration. They contend that the State Water Board rejected the idea of NPDES coverage for satellite collection systems. The Associations contend that the collection system agencies are not regular dischargers, and they should therefore not be subject to NPDES permit requirements. The Associations claim that including the collection system agencies in the tentative order increases potential liability without a water quality basis. The Associations request that the Regional Water Board consider other ways to regulate the collection system agencies, including the requirements covered by the statewide WDRs.*

Response: We disagree. See responses to Districts Comments 2, 4, 6, 7, and 13.

Associations Comment 4: *The Associations argue that the collection system agencies are already highly regulated under the statewide WDRs, and that the collection system agencies are already required to implement and update Sewer System Management Plans, implement and update Capital Improvement Programs, provide annual reports on maintenance progress, implement capital improvement projects to provide adequate hydraulic capacity to prevent impacts to the treatment plant, prioritize assessment of higher risk areas for environmental impacts, and prioritize corrective actions based on assessments. The Associations claim that these requirements are even more duplicative with the tentative order than the previous order. The Associations assert that, by mandating particular projects, the tentative order would restrict the collection system agencies' capacity to respond to urgent problems and fails to allow for schedule changes in unexpected circumstances.*

Response: We disagree. See responses to Districts Comments 2, 14, and 23.

Associations Comment 5: *The Associations say the tentative order incorporates the statewide WDRs by reference, which exposes the permittees to federal liability for requirements to which they are already subject. If the collection system agencies must remain in the tentative order, the Associations recommend changing Provision 6.3.4.3. Specifically, the Associations request that we delete text explaining that implementing the operations and maintenance requirements of the statewide WDRs will be deemed to satisfy the requirements of Attachments D and G of the tentative order, and that following the reporting requirements of the statewide WDRs will be deemed to satisfy the reporting requirements in Attachments D and G. The Associations further request that the tentative order be revised to explicitly state that the collection system agencies are only required to comply with "applicable" portions of Attachment D and G.*

Response: We disagree. The tentative order does not incorporate the statewide WDRs by reference. (See response to Districts Comment 14.) We did not revise Provision 6.3.4.3 because, as written, it provides assurance to the collection system agencies that they will not be subject to federal liability if they comply with the statewide WDRs. Revising the tentative order to state that the collection system agencies are only required to comply with "applicable" portions of Attachment D and G is also inappropriate because federal regulations require the provisions of Attachment D be imposed on all dischargers, and because Provision 6.1.2 already says the Dischargers need only comply with the applicable provisions of Attachment G.