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Via Hand Delivery, Facsimile (916-341-5620) and Email (commentletters@waterboards.ca.gov)

Ms. Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor (95814)
P.O. Box 100
Sacramento, California 95812-0100

Re: Comments to A-1771 – March 6, 2007 Board Meeting / Workshop
State Water Resources Control Board (SWRCB) Own Motion Review of East Bay Municipal Utility District (EBMUD) Wet Weather Facilities (WWFs) NPDES Permit (Order No. R2-2005-0047; NPDES No. CA0038440) and Time Schedule Order (TSO No. R2-2005-0048), San Francisco Bay Regional Water Quality Control Board (RWQCB)

Dear Ms. Her:

EBMUD hereby submits the following comments concerning the SWRCB staff's January 12, 2007 Draft Order.

I. Introduction

The Draft Order should be withdrawn for several reasons, including:

- It proposes to nullify a complex, comprehensive, and generally accepted permit and TSO approach for EBMUD's WWFs.

- The permit and TSO were carefully crafted through a stakeholder process spanning two years and involving the RWQCB, USEPA, EBMUD, and environmental citizen groups (NGOs)[1] – all ably represented by experts on water quality law and technology – and two public comment periods.

[1] Enclosed are copies of two documents reflecting that process' success: (1) a February 16, 2005 letter from USEPA to EBMUD and (2) the 2005 EBMUD WWF Settlement Agreement with the NGOs.

- The permit and TSO represent the next rational step in a decades-long process – that the SWRCB and the courts[2] have fully endorsed – of reducing the impacts of sanitary sewer overflows (SSOs) on San Francisco Bay.

- The Draft Order would be a dramatic reversal of decades of SWRCB support for that process, in reliance on which EBMUD spent $310 million for improvements that the Draft Order would make obsolete.

- The Draft Order comes over 15 months after the September 21, 2005 issuance of the permit and TSO, in reliance on which EBMUD has signed over $3 million in contracts and committed to another $500,000 of in-house staff effort to perform the studies called for by the TSO, and EBMUD has to date spent over $1 million.

- The Draft Order would compel EBMUD to comply with a standard – "secondary treatment" – that does not exist for intermittent flow facilities such as the WWFs; the only existing "secondary treatment" standard requires continuous flows of at least 30 days, which the WWFs have never experienced.

Despite the approvals of the approach reflected in the permit and TSO by USEPA, the NGOs, the RWQCB, the courts and the SWRCB itself, the Draft Order suggests SWRCB Members now have no discretion to do anything other than overturn decades of precedent and make sweeping policy changes without following legally-required policy-making procedures. Not so. The SWRCB does have discretion here, and EBMUD requests that the SWRCB exercise that discretion by rejecting the Draft Order and leaving the permit and TSO undisturbed.

II. Background

A. 1975-2002: the SWRCB, RWQCB, and USEPA Approve EBMUD's Efforts – Including Construction of the Three WWFs – to Control SSOs.

EBMUD receives wastewater from nine East Bay communities with a total population of approximately 650,000. Each community owns and operates its own wastewater collection system, which delivers wastewater to EBMUD's interceptor system. The interceptor transports wastewater to EBMUD's year-round main wastewater treatment plant (near the eastern anchorage of the Bay Bridge), which is regulated under a separate NPDES permit. Permit p. 4, Finding No. 4.

Inflow and infiltration (I/I) of stormwater into the collection systems during severe wet weather events – via mis-connections, cracks and other imperfections in system pipes, joints and manholes – can lead to a 10-fold increase in the volume of

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[2] *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980) [*Montgomery I*] and *Montgomery Envtl. Coalition v. Citizens Coordinating Comm. on Friendship Heights*, 1983 U.S. App. LEXIS 27509 (D.C. Cir. 1983) [*Montgomery II*].

wastewater that reaches EBMUD's interceptor system. Even in the best-run systems, some SSOs in extreme wet weather events are inevitable. See USEPA's January 5, 2001 draft SSO Policy.

Prior to 1975, to avoid SSOs in the form of popping manhole covers in the communities' collection systems, the interceptor system had seven designed-in overflow structures. From 1975 through 1987, under the oversight of the RWQCB and USEPA, EBMUD developed a comprehensive East Bay Wet Weather Program. That Program incorporated the results of a 6-year (1980-1986) East Bay I/I Study (Study) conducted by EBMUD and the communities, also under the oversight of the RWQCB and USEPA. The Study identified the most cost-effective combination of I/I reduction (by the communities) and interceptor system improvements (by EBMUD) to minimize the effects of SSOs on water quality in San Francisco Bay. Permit pp. 6-7, Finding Nos. 9-14.

In connection with this process, on June 3, 1986, the RWQCB sent a letter to USEPA asking for an opinion as to whether wet weather overflows from the seven structures in EBMUD's interceptor system are subject to secondary treatment requirements. USEPA responded in a June 18, 1986 letter that the seven structures are not publicly owned treatment works (POTWs), and are therefore not subject to secondary treatment requirements pursuant to 40 CFR § 122.2. Instead, USEPA said the structures are subject to Best Conventional Pollution Control Technology and Best Available Technology Economically Achievable (BPT) under CWA § 301(b)(1)(C) and § 301(b)(2). USEPA based its conclusions on (1) the fact that the structures do not convey wastewater to the main treatment plant and (2) the holding in *Montgomery Environmental Coalition et al. v. Costle*, 646 F.2d 568 (D.C. Cir. 1980) [*Montgomery I*]. Consequently, USEPA directed the RWQCB to determine and impose BPT requirements.

As a result of the Study -- and at the direction of USEPA and the RWQCB, with the full knowledge and approval of the SWRCB[3] – starting in 1987, EBMUD and the communities spent $650 million on a program that, by consensus design, included:

- improvements to reduce I/I in the communities' collection systems,
- improvements to the capacity of EBMUD's interceptor system that receives flows from the collection systems, along with additional pump stations,
- construction of the three WWFs;
- elimination of two of the seven overflow points; and
- addition of an 11-million-gallon storage basin at EBMUD's main plant and several smaller storage basins along EBMUD's interceptor system.

[3] Ray Walsh, the SWRCB's Interim Executive Director, was copied on USEPA's June 18, 1986 letter. The SWRCB explicitly approved the approach on July 20, 1995 when the SWRCB approved the RWQCB's Basin Plan, including the policies addressing SSOs (contained in Chapter 4 of the Basin Plan).

These measures have dramatically reduced the number, extent and impact of SSOs.[4]

B. 2003-Present: the RWQCB, USEPA, and NGOs Develop and Approve a New Permit and TSO for EBMUD to Further Address SSOs and Improve Water Quality

Beginning in 2003, the RWQCB, USEPA, EBMUD and NGOs participated in an intensive, two-year process of developing a revision to the permit for EBMUD's WWFs. This process resulted in (1) a permit which assures compliance with the law and protection of water quality, and (2) an accompanying TSO, which will provide the scientific basis for developing feasible alternatives for addressing wet weather flows in the EBMUD service area in the future.

On September 7, 2004, USEPA sent a letter to Bruce Wolfe, Executive Officer of the RWQCB, stating that its "conclusions made in the 1986 letter no longer reflect EPA's position," without explaining why or mentioning any changes in facts or law leading to the shift. The implication of the letter was that secondary treatment was required, but there was no explanation as to where or how. This was particularly problematic because:

- EBMUD and the communities had already spent $650 million in reliance on USEPA's 1986 letter;

- "Secondary treatment" has not been defined for WWFs. Instead, it has been defined for continuous-discharge wastewater treatment plants, with limits based on samples collected on consecutive days over periods ranging from 7 to 30 days. 40 CFR § 133.101(a) and (b). Because the WWFs only occasionally discharge (*i.e.*, during severe wet weather events), they have never experienced 7 (let alone 30) consecutive days of discharge, and the "secondary treatment" standard cannot be applied to the WWFs;

- There is no evidence that tilting at the windmill of an undefined "secondary treatment" standard would do anything other than waste a lot of money – estimates range to $1 billion – for little, if any, measurable environmental benefit.

At the same time, USEPA's 2004 letter went on to say that it "supports the implementation of the investigations, studies, and activities contained in the [TSO] ..., [and] are hopeful that these studies and activities will provide ways for the Discharger to significantly reduce the discharge of pollutants to the Bay."

In the face of these developments the RWQCB concluded that the TSO-mandated studies were the next logical step regardless of whether secondary treatment standards applied, because the study results would be the first step necessary to begin the process of

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[4] EBMUD notes that the WWFs' annual discharge ranges from 214 MG (rather than 236 MG, as stated in the Draft Order) to 549 MG. DO, p. 6; Permit p. 8, Table 2.

defining the appropriate standard – whether denominated "BPT" or "secondary treatment" – for WWFs. Both USEPA and the NGOs concurred in this approach (see enclosed Settlement Agreement and February 16, 2005 USEPA letter).

In sum, the current permit and TSO represent a carefully crafted approach – conceived and approved by consensus in a lengthy public process involving all relevant stakeholders – to further improve the wet weather system's performance. EBMUD is committed to continuous improvement, and USEPA, the NGOs and the RWQCB have concurred that the current permit and TSO are the proper next step toward that end.

III. The Draft Order's "Issues and Findings"

A. Secondary Treatment

The Draft Order asserts that EBMUD's WWFs are POTWs subject to secondary treatment requirements under Clean Water Act (CWA) § 301(b)(1)(B).[5] This assertion is incorrect because (1) the WWFs are not POTWs and (2) "secondary treatment" has no discernible meaning for intermittent flow facilities such as the WWFs.[6]

1. EBMUD's WWFs are not POTWs

EBMUD's WWFs are not subject to secondary treatment because they are not POTWs. *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980) [*Montgomery I*]; *Montgomery Envtl. Coalition v. Citizens Coordinating Comm. on Friendship Heights*, 1983 U.S. App. LEXIS 27509 (D.C. Cir. 1983) [*Montgomery II*].[7]

The *Montgomery* cases concerned a sewer system – like the East Bay's – that included permitted, designed-in overflow points providing either some treatment or no treatment depending on the extremity of the wet weather event.

> When inflow exceeds the capacity of the [Blue Plains treatment] plant, as happens typically during heavy rainstorms in the summer, excess sewage is discharged into the Potomac after only *partial treatment*. Extreme loads can be beyond its capacity for even partial treatment, and then untreated sewage is discharged through the overflow points.

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[5] The Draft Order also asserts that CWA § 301(b)(1)(A) imposes secondary-treatment requirements on POTWs. DO., p. 1. This assertion is erroneous because that provision expressly applies to "point sources, other than publicly owned treatment works."

[6] As discussed in the comment letter submitted by the National Association of Clean Water Agencies (NACWA), the Draft Order's approach is also at odds with an ongoing multi-year effort by USEPA and stakeholders nationwide to develop a federal CWA policy on SSOs and WWFs. EBMUD hereby incorporates NACWA's comments by reference.

[7] Accordingly, Conclusion No. 1 of the Draft Order must be rejected.

Montgomery I, 646 F.2d at 585 (emphasis added). What constituted "partial treatment" was further explained in *Montgomery II*:

> The record demonstrates that the Blue Plains permit compels the facility to maximize treatment of the combined sewer overflows by requiring that flows to the facility be maximized, thus limiting the amount of overflow, and by requiring that the majority of any remaining overflow be given 'primary' treatment.

Montgomery II, 1983 U.S. App. LEXIS 27509 at *12 [emphasis added].

The issue was whether the overflow points constituted "treatment works," and, therefore, POTWs requiring secondary treatment under CWA section 301(b)(1)(B). The court said,

> The EPA argues that a sewage overflow point is a device discharging sewer flow without treatment, and that it is therefore not a "treatment works." This argument is buttressed by the Administrator's interpretation of the term, as embodied in EPA regulations. At the time of the original permit hearing, *n17* the Administrator's definition for NPDES permit purposes was as follows:
>
> > The term "treatment works" means any facility, method or system for the storage, treatment, recycling, or reclamation of municipal sewage or industrial wastes of a liquid nature, including waste in combined storm water and sanitary sewer systems.
>
> 40 C.F.R. § 125.1(hh) (1975), 38 Fed. Reg. 13528, 13530 (1973) (emphasis added). Since a sewage overflow point is not for "storage, treatment, recycling, or reclamation," but rather for uninhibited discharge, it is outside the definition.
>
> *n17* The Administrator's current definition, superseding the older one, is even more explicit in its denial of "treatment works" status to overflow points: "'Publicly owned treatment works' (POTW) means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a 'State' or 'municipality.' This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment." 45 Fed. Reg. 33418, 33423 (1980) (to be codified in 40 C.F.R. § 122.3).

Montgomery I, 646 F.2d at 590 [emphasis added].[8]

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[8] The underscored language – that was enacted too late to apply in *Montgomery I*, but that the Court found would have strengthened the "no treatment works" argument – has been further amended so it now reads:

> ... POTW means a treatment works ... which is owned by a ... municipality.... This definition includes ... sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant....

40 CFR § 403.3(q) [emphasis added].

The permit opponents in the *Montgomery* cases argued that the primary treatment of some overflows transformed the affected overflow points into "treatment works." The court rejected this argument:

> Petitioners maintain that these fifty-eight discharge points, as well as the first, partly regulated discharge point, are part of the Blue Plains "treatment works" within the meaning of section 301(b)(1)(B) of the Act, and therefore should have been subjected to effluent limitations based upon secondary treatment in the permit. *n8* The EPA has denied that these point sources are part of the treatment works, but insists that the controversy is now moot because the renewal permit does contain effluent limits for these points. Petitioners, however, continue to demand effluent limitations based on the secondary treatment standard for these fifty-nine point sources, limitations that would be stricter than those currently included in the renewal permit. Since the EPA continues to deny that secondary treatment is required, the inclusion of weaker effluent limitations is not enough to prevent repetition of the challenged action, and petitioners' challenge is not moot.
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> *n8* As will be more fully discussed *infra*, the Act requires publicly owned treatment works to achieve effluent limitations attainable through a technology known as "secondary treatment" to be defined by the Administrator, §§ 301(b)(1)(B), 304(d)(1). All other point sources are judged by a "best practicable technology" standard. § 301(b)(1)(A).
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> ...
>
> When inflow exceeds the capacity of the plant, as happens typically during heavy rainstorms in the summer, excess sewage is discharged into the Potomac after only partial treatment. Extreme loads can be beyond its capacity for even partial treatment, and then untreated sewage is discharged through overflow points.
>
> ...
>
> Petitioners challenge the failure of the original permit to impose effluent limitations on combined sewer overflow points. These overflow points are places at which the sewer network feeding into the Blue Plains plant is allowed to discharge excess capacity that Blue Plains is unable to treat. Petitioners argue that these overflow points are part of the Blue Plains waste treatment works for purposes of the permitting process, and therefore must be subjected to effluent limitations based on the "secondary treatment" standard as required by section 301(b)(1)(B) of the Act. ... The EPA argues that the sewer overflows are not part of the treatment works within the meaning of the statute, and therefore their effluent limits are to be set in accordance with the "best practicable technology" standard applying to "point sources, other than publicly owned treatment works," Act § 301(b)(1)(A).

> We held above that this controversy is not mooted by the imposition of effluent limitations on the overflow points in the current permit, because petitioners continue to insist that the law requires limitations based on secondary treatment, while the EPA continues to use the best practicable technology standard. The EPA does not argue that these point sources should be exempt from permit requirements, and petitioners do not specifically challenge the EPA's assessment of practicability in this court. The essence of the controversy is thus the legal question of whether the overflow points are part of the "treatment works" within the meaning of section 301(b)(1)(B), which applies the secondary treatment standard to publicly owned treatment works.

Montgomery I, 646 F.2d at 583, 585, 589-90 [emphasis added]. As noted above, *Montgomery II* explains that the "partial treatment" required of most of those overflows was in fact "primary treatment." *Montgomery II*, 1983 U.S. App. LEXIS 27509 at *12.

The *Montgomery I* court concluded, "These overflow points are to be subject to the same standard [i.e., BPT] as private dischargers of pollution, rather than the 'secondary treatment' standard applicable to publicly owned treatment works." *Montgomery I*, 646 F.2d at 592. Thus, the primary treatment applied (pursuant to the Blue Plains permit) to some of the overflows did not transform the affected overflow points into "treatment works" requiring secondary treatment. *Id.*

This should not be surprising because the alternative rule would lead to the following absurd bootstrap process:

1. A discharger is ordered to implement primary treatment as BPT at an overflow point, on the ground that the overflow point is not for "storage, treatment, recycling, or reclamation."

2. The day the primary treatment system becomes operational, the discharger is ordered to replace it with a secondary treatment system because the overflow point now "treats" the wastewater.

The *Montgomery* court did not countenance such a bootstrap argument, and neither should the SWRCB here. (See DO, p. 10.) In other words EBMUD and its ratepayers should not be penalized for doing exactly what USEPA and the RWQCB directed – and the SWRCB later approved – spending hundreds of millions of dollars to build system improvements including the WWFs. To the contrary, applying the *Montgomery* decisions, EBMUD's WWFs and overflow structures are properly subject to BPT – not secondary treatment – because they, like the Blue Plains overflow points, are not POTWs.

The Draft Order also attempts to distinguish the *Montgomery* decisions on the basis that those cases involved combined sewers whereas the EBMUD system is a sanitary sewer. DO, pp. 13-14. Nothing in the *Montgomery* decisions suggests that

distinction has any legal significance, and the Draft Order cites no legal authority supporting such a suggestion. This purported distinction begs the question of why a separate sanitary sewer experiences increased flows during wet weather events. The answer, as alluded to above and exhaustively analyzed in the early-to-mid-1980s studies, is that I/I makes a separate sewer behave like a combined sewer system during wet weather events. Because it is established that wet weather events cause sewage flows to exceed the capacity of the main sewage treatment plant, it matters not – for purposes of applying the *Montgomery* decisions – whether the system at issue is designated a combined or a sanitary sewer system.[9]

2. *Even if EBMUD's WWFs Were POTWs, "Secondary Treatment" Has No Discernible Meaning for Such Intermittent Flow Facilities.*

Even if EBMUD's WWFs were deemed to be POTWs requiring secondary treatment, the federal secondary treatment requirements of 40 CFR Part 133 make no sense when applied to intermittent flow facilities with short-term discharges.

The secondary treatment standards of 40 CFR Part 133 are based on 7-day and 30-day averages. To determine compliance, the source must measure samples collected over either 7 or 30 "consecutive days." 40 CFR § 133.101(a), (b). The WWFs have never discharged effluent for seven – let alone 30 – consecutive days and the average discharge duration is less than one day.

Therefore, even if the WWFs were considered POTWs, "secondary treatment" has not yet been defined for such intermittent flow facilities. Unless and until a definition is promulgated – following "notice-and-comment" rule-making, as required by the Administrative Procedure Act (APA) – it cannot be applied.[10]

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[9] The Draft Order makes a similar error in Conclusion No. 3. DO, p. 33. That Conclusion interprets the 1986 USEPA letter referenced above as determining that "the EBMUD overflow structures were CSOs." USEPA made no such determination, and no such determination is necessary for *Montgomery I* to apply. Instead, USEPA determined that *Montgomery I* applied because the EBMUD overflow structures "function" like CSOs, given the amount of I/I. The same logic applies here.

[10] EBMUD's statement herein that the federal secondary treatment regulations – as currently drafted – are only applicable to continuous flow facilities should not be mistaken for an assertion that those requirements mandate a specific treatment process. To the extent the Draft Order's Conclusion No. 2 suggests EBMUD made such an assertion, it is wrong and should be rejected.

Further, because the secondary treatment regulations cannot be applied in practice to EBMUD's intermittent flow WWFs, the RWQCB's decision not to make a definitive determination regarding the purely theoretical application of secondary treatment regulations – which is faulted in Conclusion No. 4 – was a valid exercise of the RWQCB's discretion.

B. Water-Quality Based Effluent Limitations (WQBELs)

1. Coliform

The Draft Order asserts the "permit must include water quality-based coliform limits that implement applicable Basin Plan objectives or explain the San Francisco Bay Water Board's rationale for why limits are not legally required." DO, p. 20. The RWQCB's fact sheet, however, explains why limits (beyond those imposed) are not required: "Upon review of the total coliform data, it appears these limits remain appropriate." Fact Sheet, p. 8. In other words, the RWQCB found no "reasonable potential," which the Draft Order concedes is the *sine qua non* for imposing WQBELs under CWA section 301(b)(1)(C). It should be noted that this is consistent with conclusions the RWQCB has regularly reached at Bay Area POTWs over the last two decades.

2. Whole Effluent Toxicity (WET)

The Draft Order complains that the permit contains neither a WQBEL nor a reasonable potential analysis for WET. DO, pp. 20-21. The reason is simple. There are no data. EBMUD proposes that the permit be modified – through an RWQCB permit reopener – to direct EBMUD to collect such data. In fact, EBMUD has already begun to collect such data, although neither the permit nor the TSO requires it to do so.

3. Un-ionized Ammonia

The Draft Order asserts that a WQBEL for un-ionized ammonia and related monitoring requirements should be added to the permit. DO, p. 21. The Draft Order (a) concedes the permit includes receiving water limits for ammonia, and (b) cites no evidence specific to any of the regulated discharges or receiving waters indicating the discharges have a "reasonable potential." Instead, the Draft Order (i) cites the Basin Plan's statement that ammonia is generally accepted as one of the principal toxicants in municipal waste discharges and (ii) asserts that two of the three WWFs discharge with "minimal dilution." DO, p. 21. The outflows of all three WWFs, however, receive primary treatment and are highly diluted, stormwater comprising approximately 80% of the flows. Permit, p. 9, Finding No. 16. Also, the Basin Plan states: "In most instances, ammonia will be diluted or degraded to a nontoxic state fairly rapidly." Basin Plan § 3.3.20. Therefore, the RWQCB's best professional judgment – that there is no reasonable potential – should not be disturbed. It should also be noted that EBMUD has already begun to collect un-ionized ammonia data (which can be used in the next permit round's reasonable potential analysis), although neither the permit nor the TSO requires it to do so.

4. Lead, Nickel, and Zinc

The Draft Order erroneously asserts that the RWQCB failed to use the Basin Plan objectives that were incorporated into the Basin Plan effective January 5, 2005 in the

RWQCB's reasonable potential analysis (RPA) for these metals. DO, p. 22.[11] EBMUD agrees that the RPA for the permit should be based on the Basin Plan objectives that became effective on January 5, 2005 as approved by USEPA. In fact, the RPA tables contained in the permit use 8.1 µg/L, 8.2 µg/L and 81 µg/L as the criteria for lead, nickel and zinc, respectively, which are the 2005 Basin Plan objectives. Permit, pp. 15-16; Basin Plan, Table 3-3.

5. Final Limits

The Draft Order complains that the final limits for toxics were placed in the fact sheet, rather than in the permit. DO, pp. 22-23.

As to the metals (copper, mercury, lead, nickel, silver and zinc), the compliance schedules exceed the length of the permit. Permit, pp. 22-23, Effluent Limitation No. 2. Under these circumstances, the State Implementation Plan (SIP) requires that the final limits be included in the permit findings, not the permit provisions. SIP, p. 22, § 2.2.1. The fact sheet (including the final limits) is incorporated in the permit findings at paragraph 26.

As to the organics (benzo(a) pyrene, chrysene, cyanide, DDD, DDE, DDT, dichlorobromomethane, dieldrin, dioxin, endrin, heptachlor epoxide, hexachlorobenzene and tetrachloroethene), the permit explains that there are insufficient data to set an interim limit, and EBMUD has been ordered to conduct accelerated monitoring to develop such data. Permit, p. 18, Finding No. 42. Until appropriate and sufficient data are developed, it is inappropriate to find a reasonable potential, and the final limits should be deleted from the fact sheet. SIP p. 5, §1.2 ("The RWQCB shall have discretion to consider if any data are inappropriate or insufficient for use in implementing this Policy.").

6. Compliance Schedules

The Draft Order complains that the compliance schedules are stated in the form "until [date] or until the Board …," without including the language "whichever comes first." DO, p. 25. EBMUD does not object to adding this language.

The Draft Order states,

> Compliance schedules are required to contain an enforceable schedule of remedial measures leading to compliance with the applicable standards. The EBMUD permit contained interim limits and study requirements during the four and one-half year permit term. The studies are primarily "a paper effort", entailing review of available literature and data. We do not believe that these provisions meet the

[11] Although the permit correctly contains the January 5, 2005 objectives, the fact sheet contains the out-dated objectives. This apparently inadvertent oversight may have led to the misunderstanding reflected in the Draft Order.

regulatory requirement for a schedule of enforceable remedial measures leading to compliance with water quality standards.

DO, p. 26 [emphasis added]. The underscored language invites the SWRCB to articulate an unsubstantiated belief contrary to that shared by USEPA, the RWQCB, the NGOs and EBMUD, based on years of investigation, public discussion and analysis, as reflected in the record. Moreover, the Draft Order does not suggest any remedial measures that are more likely (than those required by the permit and TSO) to achieve compliance, and the un-contradicted evidence in the record indicates the $3.5 million in TSO-mandated studies are the best way to identify the next steps toward that end. Therefore, the baldly stated "belief" should be rejected.

The Draft Order also notes that the new (January 5, 2005) Basin Plan criteria for lead, nickel and zinc are less stringent than the prior Basin Plan standards, and asserts that, therefore, no compliance schedule should be allowed despite EBMUD's undisputed showing of compliance infeasibility. DO, p. 28. The Draft Order cites no authority for this proposition, and we are aware of none. To the contrary, the Basin Plan expressly authorizes compliance schedules wherever infeasibility is shown.

The Draft Order asserts the deadline for the silver compliance schedule should be changed from January 1, 2015 to May 18, 2010. DO, p. 27. The silver objective, however, was added to the Basin Plan on January 5, 2005, and the Basin Plan expressly authorizes compliance schedules of up to 10 years after new objectives or standards take effect. Therefore, the January 1, 2015 deadline is authorized by the Basin Plan and should remain undisturbed.

The Draft Order asserts that there was nothing new about the mercury limit in EBMUD's permit and that, therefore, no interim limit or compliance schedule was authorized. DO, p. 29. There was no mercury limit in EBMUD's prior (1998) permit, and the impetus for including one in the current permit was the promulgation of the SIP. The Basin Plan authorizes compliance schedules of up to 10 years from when "new objectives or standards take effect." The SIP-based mercury standard at issue here took effect (with the other CTR-based standards in the SIP) on May 18, 2000. 65 Fed. Reg. 31682. The existence of prior mercury standards – that did not have the SIP's numerical-mercury-permit-limit-forcing effect – is legally irrelevant. Therefore, the April 28, 2010 deadline imposed by the permit is consistent with the Basin Plan.

The Draft Order similarly asserts there was nothing new about the cyanide and tetrachloroethene limits in EBMUD's permit. This is inapposite for the same reasons, with the only variation being that SIP standards (such as these) based on the National Toxics Rule (NTR) took effect on April 28, 2000. SIP, p. 3. In any event, the issue is moot because, as noted above, there is insufficient data to perform the RPA for these organics.

More broadly, rules regarding compliance schedules raise far-reaching issues that are the subject of intense interest by a multitude of stakeholders state-wide and

nationally.[12] To engage in rule-making in this abbreviated permit proceeding is both improper in light of the issues and interests at stake and contrary to the APA. Any new rules, policies, or guidelines governing compliance schedules should be developed with ample public participation under quasi-legislative procedures, not in this adjudicative proceeding.

C. Additional Issues

The four "Additional Issues" presented in Section II.C of the Draft Order are addressed briefly here.

1. The Draft Order asserts the RWQCB should change the permit to ban all discharges from EBMUD's overflow structures. DO, pp. 30-31. The only stated basis for this assertion is that the overflow structures are POTWs. As explained above, the *Montgomery* cases hold otherwise. The permit should not be changed in this regard, and Conclusion No. 19 in the Draft Order should be rejected.

2. The Draft Order states that the RWQCB erroneously granted an exemption to EBMUD from Basin Plan Prohibition No. 1 because it did not expressly consider the provision of an "equivalent level of environmental protection." DO, pp. 31-32. This statement is incorrect. The cited RWQCB findings – Nos. 20 and 21 – discuss in detail the environmental enhancement projects to be implemented by EBMUD "to provide environmental benefits to San Francisco Bay," as well as the substantial funds that EBMUD will expend on such projects.[13] Therefore, Conclusion No. 2 in the Draft Order should be rejected.

3. The Draft Order asserts that sweeping changes should be made to the self-monitoring program for the WWFs. DO, pp. 32-33. The Draft Order is devoid of any comparison of the costs (which will be exorbitant) and benefits (if any) of the proposed changes, and there is no evidence in the record to support such a comparison in any event. In these respects, the Draft Order contravenes California Water Code section 13267(b), which provides, in relevant part:

> The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written

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[12] The comment letter submitted by the California Association of Sanitation Agencies (CASA) explains that the Draft Order's language addressing compliance schedules has significant implications for all public wastewater agencies in California. CASA's letter also contains several comments detailing additional reasons why the compliance schedules contained in the EBMUD permit are legally authorized and appropriate and should not be disturbed. EBMUD hereby incorporates CASA's comments by reference.

[13] One of the projects – relating to the diversion of stormwater to the main treatment plant (when there is excess treatment capacity) to reduce pollutant loadings to the Bay – enjoys a high level of support from water quality regulators and NGOs.

explanation with regard to the need for the reports and shall identify the evidence that supports requiring that person to provide the reports.

Moreover, the existing self-monitoring program is being supplemented by additional sampling required under the TSO, and that additional sampling – unlike the Draft Order's proposal – was the result of lengthy analysis and discussions among numerous stakeholders. The Draft Order's proposal regarding sampling for DO and sulfides is contrary to standard practice at POTWs and would represent a significant policy change without the benefit of a proper policy-making process. The same is true of the Draft Order's proposed influent monitoring and coliform sampling. Finally, the sampling frequency and other minutiae of the monitoring program are the type of micro-level details that are not prescribed by statute or regulation and that are normally left to the best professional judgment of the RWQCB. For all of these reasons, Conclusion Nos. 21-25 in the Draft Order should be rejected.

4. EBMUD does not object to the Draft Order's proposed change to the permit's standard conditions. DO, p.33.

IV. Process Matters.

A. Procedural Due Process

The Draft Order, and the manner in which it has been created and is being considered, violates EBMUD's procedural due process rights and basic notions of fairness.

1. Separation of Functions

SWRCB adjudicative proceedings are conducted in accordance with California Code of Regulations, title 23, sections 648-649.9 and 760, which incorporate most of chapter 4.5 of the Administrative Procedure Act (Government Code section 11400 *et seq.*) (APA).

In particular, the Board must abide by the Administrative Adjudication Bill of Rights (Govt. Code §§ 11425.10-11425.60). The purpose of this bill of rights is to protect one of the most fundamental due process rights in an adjudicative hearing: the right to a fair hearing before a neutral and impartial decisionmaker. *Quintero v. City of Santa Ana*, 114 Cal. App. 4th 810, 812 (2003).

A key component of this right is the separation of administrative functions: The adequate separation of administrative functions is an element of procedural due process guaranteed by the U.S. Constitution. See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975). The Government Code incorporates this protection as well: "The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency." § 11425.10. The constitutional test is not actual bias: "due process in an administrative hearing ... demands an *appearance* of fairness and the absence of even a

probability of outside influence on the adjudication." *Nightlife Partners, Ltd. v. City of Beverly Hills.*, 108 Cal. App. 4th 81, 90 (2003). The agency has the burden of proving that it has adequately provided for separation of administrative functions. *Quintero*, 114 Cal. App. 4th at 813; *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 1586-87 (1992).

Although an agency's office of counsel may act as both an advocate and the legal adviser to the decision-maker in a proceeding, (a) the same individual may not play both roles and (b) the agency must show the adviser is screened from inappropriate contact with the advocate. *Quintero*, 114 Cal. App. 4th at 813; *Howitt*, 3 Cal. App. 4th at 1579; *Nightlife Partners*, 108 Cal. App. 4th at 84-85, 94.

Here, it appears that both Mr. Michael Lauffer and Ms. Sheila Vassey in the SWRCB's Office of Chief Counsel (OCC) are acting both as (1) the lawyers developing the arguments against the RWQCB's actions and (2) the lawyers advising the SWRCB on how it should decide this adjudicative proceeding. It appears – and it is the appearance that matters – highly unlikely that these attorneys will find their own arguments unpersuasive.[14] There is no discernible separation of functions. SWRCB staff have not provided assurances, as required, that no single individual is performing dual roles and that there is adequate screening between individuals within the OCC.

2. Ex Parte Communications

The prohibition on *ex parte* communications is another crucial element to procedural due process. This prohibition is incorporated into the California APA and is applicable to this proceeding. Govt. Code §§ 11430.10 *et seq.* The ban on *ex parte* communications expressly encompasses communications between the adjudicative hearing officer and counsel that "served as an investigator, prosecutor, or advocate in the proceeding." Govt. Code §§ 11430.10, 11430.30(a).

As noted above, an agency's office of counsel may act in dual roles in an adjudicative proceeding only if it demonstrates that the adviser is adequately screened from any *ex parte* communications with the advocate. *Quintero,* 114 Cal. App. 4th at 813. The California Supreme Court recently stated: "the APA sets out a clear rule: an agency prosecutor cannot secretly communicate with the agency decision maker or the decision maker's advisor about the substance of the case prior to issuance of a final decision." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control*

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[14] Professor Asimow described the problem as follows: "An adversary is committed intellectually and psychologically to a particular outcome. This commitment is likely to produce a will to win which may cause the adversary to perceive the issues through a lens that distorts perception. Adversaries are unlikely to adjudicate the case (or advise an adjudicator) by rejecting their own arguments as unpersuasive, since this would concede that their time had been wasted and their judgment faulty. Thus, there is a reasonably high probability that adjudication or advice from such persons will be biased, or at least so it would seem to outside parties to the dispute." Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1165-66 (1992).

In this regard, to the extent the Draft Order is fait accompli, it also violates the prohibition against prejudgment of the facts by the decisionmaker. See *Perlman v. Shasta Joint Junior College Dist.*, 9 Cal. App. 3d 873, 883 (1970).

Appeals Bd., 40 Cal. 4th 1, 10 (2006). "This rule enforces two important procedural precepts. First, it promotes neutral decisionmaking by requiring a limited internal separation of functions. Procedural fairness does not mandate the dissolution of unitary agencies, but it does require some internal separation between advocates and decision makers to preserve neutrality. [citing *Howitt* and *Nightlife Partners*] Second, the rule preserves record exclusivity. 'The decision of the agency head should be based on the record and not on off-the-record discussions from which the parties are excluded.'" (internal citations partially omitted). *Id.* at 10-11.

The Draft Order is the product of SWRCB staff (including OCC attorneys) acting in investigatory, prosecutorial, and advocacy roles. The Draft Order – and conversations with OCC attorneys – suggest that the advocates are communicating directly and indirectly with the decision-makers. Even if that were not so, there is no evidence that screening procedures are in place to prevent inappropriate *ex parte* communications between the advocates and the decision-makers' attorneys.

3. Improper Amendment to the Basin Plan

The Draft Order directs the RWQCB to amend the Basin Plan to remove the current provisions governing the WWFs and overflow structures and insert replacement provisions requiring secondary treatment.[15] DO, p. 16-18. These Basin Plan provisions were approved by the SWRCB and USEPA long ago and have been implemented by the RWQCB in several generations of permits issued to EBMUD and other utilities.

The Draft Order's directive would illegally and unwisely (a) short-circuit the procedural requirements for amending the Basin Plan and (b) prejudge the amendment process. For example, the scientific bases for the proposed amendments have not been subjected to an independent, external peer review, as required by Health and Safety Code section 57004. Further, the law requires public hearings and compliance with the California Environmental Quality Act, all of which would be illegally frustrated if the outcome were a foregone conclusion. Water Code § 13244; 40 CFR Part 25; 22 CCR §15251(g). The legally correct and appropriate method for examining and potentially revising these provisions is the normal triennial Basin Plan review process, not this adjudication concerning one discharger's permit.

4. Improper Promulgation of New Rules, Policies and/or Guidelines

The Draft Order makes sweeping changes in water-quality regulation affecting the entire State of California, including, without limitation, changes regarding secondary treatment and compliance schedules. EBMUD's permit is not the proper vehicle for shifting the entire regulatory landscape. The SWRCB should use the APA's quasi-legislative procedures before making such enactments, and has not done so here.

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[15] For convenient reference, the relevant provisions from the Basin Plan are attached as Appendix A to this comment letter.

5. *"Own Motion" Review*

This proceeding is also procedurally defective because a motion to review this matter was neither made nor passed by the SWRCB. Water Code section 13320 permits the SWRCB to review a RWQCB action "on its own motion." But there is no record in any of the SWRCB's minutes that such an "own motion" was ever brought or passed by a majority vote. There are plenty of examples of meeting minutes that demonstrate that an "own motion" was made and passed by the SWRCB.[16] Therefore, this proceeding is unauthorized.

B. Administrative Record

The administrative record (AR), as currently designated, is incomplete and must be augmented before the SWRCB can properly pass judgment on the permit and TSO. In particular, the AR must include, at a minimum:

- The administrative records relating to all of EBMUD's wet weather permits;
- The administrative records relating to all Basin Plan provisions relating to EBMUD's WWFs and overflow structures;
- All documents relating to issues where the Draft Order finds fault with the RWQCB, the permit or the TSO on the ground that there is a lack of evidence in the AR to support any conclusion or other act or omission by the RWQCB;
- All documents relating to the basis for the current permitting approach, including, without limitation:
  - All documents relating to the East Bay Wet Weather Program and East Bay I/I Study;
  - The EBMUD Wet Weather Facilities Plan Update, Final Report (May 28, 1985) [See DO, p. 4, n. 22];
  - The RWQCB's June 3, 1986 letter to USEPA;
  - USEPA's June 18, 1986 reply;
  - The April 1988 Wet Weather Facilities Operating and Control Plan [See DO, p. 31];
  - USEPA's February 16, 2005 letter to EBMUD; and
  - The 2005 EBMUD WWF Settlement Agreement with the NGOs.

These documents formed the basis for the RWQCB's decisions addressed in the Draft Order. Many of the issues raised by the Draft Order were not raised in the RWQCB administrative proceeding below. Hence, when SWRCB staff asked the RWQCB to provide an AR, there was no way – not knowing what issues the Draft Order would eventually take up – for the RWQCB to identify what documents would relate to

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[16] See Minutes from Aug. 19, 1999; Jan. 23, 2002; Mar. 21, 2002; Mar. 19, 2003; and July 16, 2003. There are also examples of Water Quality Orders expressly granting an own motion to review a matter. See, e.g., WQ Orders 2002-0003 and 91-12.

those issues. As a result, the AR "improperly excluded" the above documents and must be augmented to correct this error. 23 CCR § 2050.6.

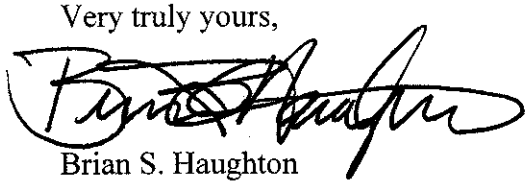
Put differently, the above documents were part of "the record before the regional board," and therefore must be part of "the evidence before the state board" in this proceeding. Water Code § 13320(b). If the SWRCB adopts the Draft Order without considering this additional evidence, it would be acting improperly and committing reversible error.

EBMUD further requests under 23 CCR section 2050.6(b) that the SWRCB conduct a separate evidentiary hearing to consider relevant testimony and other evidence. In general, EBMUD should be allowed to present additional evidence regarding the above documents and any other relevant documents that EBMUD was unable to identify prior to submitting this letter because of the SWRCB staff's refusal to grant EBMUD's requested extension of time to respond to the Draft Order.

V. Conclusion

For the foregoing reasons, the Draft Order should be withdrawn, and the permit and TSO should not be disturbed.

Very truly yours,



Brian S. Haughton

Encs: (1) Appendix A (Basin Plan Excerpts)
(2) USEPA's February 16, 2005 letter to EBMUD
(3) The 2005 EBMUD WWF Settlement Agreement with the NGOs.

Appendix A: San Francisco Bay 2005 Basin Plan Excerpts

4.9 WET WEATHER OVERFLOWS

During periods of heavy rainfall, large pulses of water enter sewerage systems. When these pulses exceed the collection, treatment, or disposal capacity of a sewerage system, overflows occur. This is especially problematic for sewer systems that combine both sanitary sewage and stormwater (Combined Sewer Systems or CSS), such as the City and County of San Francisco's system (discussed under the municipal discharger section). All other municipalities in the region operate two distinct sewer systems. Wet weather is also problematic for separate systems because more water infiltrates the pipes leading to treatment plants. This problem is commonly referred to as inflow/infiltration (I/I). In either case, pulses of water during wet weather may cause untreated or partially treated wastewater to be discharged directly to surface water bodies.

Wet weather overflows of wastewater affect three types of beneficial uses: water contact recreation, non-contact water recreation, and shellfish harvesting. The water quality characteristics that can adversely affect these beneficial uses are pathogens, oxygen-demanding pollutants, suspended and settleable solids, nutrients, toxics, and floatable matter.

4.9.1 FEDERAL COMBINED SEWER OVERFLOW CONTROL POLICY

On April 11, 1994, the U.S. EPA adopted the Combined Sewer Overflow (CSO) Control Policy (50 FR 18688). This policy establishes a consistent national approach for controlling discharges from CSOs to the nation's water. Using the NPDES permit program, the policy initiates a two-phased process with higher priority given to more environmentally sensitive areas. During the first phase, the permittee is required to implement the following 9 Minimum Controls. These constitute the technology-based requirements of the Clean Water Act as applied to combined sewer facilities (best conventional treatment (BCT) and best available treatment (BAT)). These minimum controls can reduce CSOs and their effects on receiving water quality:

(1) Conduct proper operation and regular maintenance programs for the CSS and the CSO outfalls;
(2) Maximize use of the collection system for storage;
(3) Review and modify pretreatment programs to ensure that CSO impacts are minimized;
(4) Maximize flow to the POTW for treatment;
(5) Prohibit CSOs during dry weather;
(6) Control solids and floatable materials in CSOs;
(7) Develop and implement pollution prevention programs that focus on contaminant reduction activities;
(8) Notify the public; and

4.9.1 FEDERAL COMBINED SEWER OVERFLOW CONTROL POLICY (continued)

(9) Monitor to effectively characterize CSO impacts and the efficacy of CSO controls.

Compliance with the minimum controls shall be as soon as practicable, but no later than January 1, 1997. The permittee is also required to initiate development of a long-term control plan to select CSO controls, based on consideration of the permittee's financial capability.

The second phase of the process involves implementation of the long-term control plan developed in the first phase. Such implementation must provide for the attainment of water quality objectives and may result in additional site-specific technology-based controls, as well as water quality-based performance standards that are established based on best professional judgement. While numeric water quality-based effluent limits are not readily established due to unpredictability of a storm event and the general lack of data, the CSO Control Policy requires immediate compliance with water quality standards expressed in the form of a narrative limitation.

The Water Board intends to implement the federal CSO Control Policy for the combined sewer overflows from the City and County of San Francisco. The City and County of San Francisco has substantially completed implementation of the long-term CSO control plan (and is thereby exempted requirements to prepare a long-term control plan).

Additionally, the following is the Water Board's recommended approach to control the seasonal degradation of water quality that results from all wet weather overflows of wastewater, including POTWs with either combined and separate sewer systems,(emphasis added) and industrial wastewater facilities. The overflow from San Francisco's combined sewer system is addressed by the CSO Control Policy described above.

4.9.2 CONCEPTUAL APPROACH

The recommended approach to controlling wet weather overflows of wastewater that contains particular characteristics of concern to beneficial uses is a combination of designated alternative levels of maintenance (i.e., combination of treatment levels and beneficial use protection categories) and guidance for the design of overflow discharge structures. The Water Board is not endorsing any specific control measures, but is presenting a conceptual framework that allows for the evaluation of costs and benefits. This framework can be used as guidance in adopting specific control measures. As with all of its programs, the Water Board will implement this conceptual approach consistent with the national goal of "...water quality which provides for the protection and

4.9.2 CONCEPTUAL APPROACH (continued)

propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."

Maintenance and associated treatment and overflow requirements are detailed in Table 4-8 [sic—now Table 4-6]. The following requirements should be met for all overflows:

(a) Outfalls achieve an initial dilution of 10:1;

(b) Overflows receive treatment to remove large visible floatable material and to protect the outfall system; and

(c) Overflow locations be removed from dead-end sloughs and channels, and from close proximity to beaches and marinas.

Exceptions to (a) and (c) will be considered where an inordinate burden would be placed on the discharger relative to beneficial uses protected, and when an equivalent level of environmental protection can be achieved by alternative means, such as an alternative discharge site, a higher level of treatment, and/or improved treatment reliability.

The conceptual approach described above will be used by the Water Board in evaluating wet weather discharge conditions where polluted stormwater or process wastewater bypasses any treatment unit or units that are used in the normal treatment of the waste stream. Evaluation of such discharges must include identification of:

- Actual capacities of the collection system, each treatment unit, and the disposal system;
- Flow return period probabilities for the specific facility location;
- Cost of providing complete storage or treatment capacity and disposal capacity for flow return periods of 1, 5, and 20 years;
- Quality of the polluted stormwater and process wastewater for flow return periods of 1, 5, and 20, years; and
- Beneficial uses that may be affected by such discharges.

Appendix A: San Francisco Bay 2005 Basin Plan Excerpts (cont.)

Table 4-6: Controlling Wet-weather Overflows

Levels of Water Quality Protection	Appropriate Level of Treatment
A. Complete protection for areas where the aquatic environment should be free of any identifiable risk from the discharge of untreated waste (i.e., shellfish beds for year-round harvesting).	Secondary treatment up to 20-year recurrence interval; above 20-year overflows allowed.
B. Areas that do not need complete year-round protection, such as shellfish beds for dry-weather harvesting, public beaches, and other water contact areas.	Secondary treatment for all flows up to two-year recurrence interval; primary treatment up to 20-year recurrence interval; above 20-year overflows allowed.
C. Areas where water quality or aquatic productivity may be limited due to the pollution effects of a dense human population or other urban activities that are largely uncontrollable. Such areas may include some shipyards and harbors.	Secondary treatment to half-year recurrence interval; primary treatment to five-year recurrence interval; above five-year overflows allowed.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

PPOE

Dennis Diemer
General Manager
E.B.M.U.D.
375 Eleventh Street
Oakland, CA 94607

Dear Mr. Diemer:

Thank you for your letter of January 28, 2005, concerning renewal of the East Bay Municipal Utility District (EBMUD) National Pollutant Discharge Elimination System (NPDES) permit for wet-weather treatment facilities. You requested that EPA reconsider the position we have expressed regarding permit renewal for these facilities.

Fortunately, based on recent updates from EBMUD and the San Francisco Bay Regional Water Quality Control Board, it appears the interested parties will reach a consensus EPA can support regarding the steps EBMUD will pursue over the next permit term. If EBMUD, the Regional Board, and citizen groups can reach agreement regarding permit renewal, EPA is confident this will represent an important advance in reducing the flows of partially-treated sewage to the San Francisco Bay, and improving water quality in the Bay.

As always, if we can be of assistance, please call me at (415) 972-3572. We look forward to continuing to work with EBMUD.

Sincerely yours,

Alexis Strauss
Alexis Strauss 16 February 2005
Director, Water Division

2005 EBMUD WWF SETTLEMENT AGREEMENT

This 2005 EBMUD WWF SETTLEMENT AGREEMENT ("Agreement") is made between Our Children's Earth Foundation, Baykeeper and Ecological Rights Foundation ("Groups"), on one hand, and East Bay Municipal Utility District ("EBMUD"), on the other hand. Groups and EBMUD are collectively referred to as the "Parties," and each of them is singularly referred to as a "Party."

Recitals

A. EBMUD has applied to the San Francisco Bay Regional Water Quality Control Board ("RWQCB") for the reissuance of National Pollutant Discharge Elimination System ("NPDES") permit no. CA0038440 (the "Permit") for EBMUD's wet-weather facilities ("WWFs") known as Pt. Isabel, San Antonio Creek and Oakport.

B. A true copy of the RWQCB's current tentative order reissuing the Permit is attached hereto as **Exhibit A**.

C. Contemporaneously with its issuance of the Permit, the RWQCB plans to issue a Time Schedule Order ("TSO") calling for several studies designed to determine whether – and, if so, what – additional measures (beyond those called for in the Permit) are needed to satisfy Clean Water Act ("CWA") and California Water Code requirements for protection of San Francisco Bay.

D. A true copy of the RWQCB's current tentative TSO is attached hereto as **Exhibit B**.

E. One of the Groups filed suit against the RWQCB and the State Water Resources Control Board ("SWRCB") in connection with the issuance of the Permit: *Our Children's Earth*

Foundation v. SWRCB and RWQCB, Alameda County Superior Court No. CPF-05-504863 (the "Lawsuit").

F. The Groups wish to have notice of – and opportunity to comment on – the (1) workplans for the studies contemplated by the TSO and (2) reports generated as a result of the studies.

G. The Groups contend – and EBMUD denies – that the CWA requires the Permit to include (1) effluent limitations based on EPA's secondary treatment regulation (40 C.F.R. §133.102) and (2) immediately effective water quality standard-based effluent limitations ("WQBELs") pursuant to CWA section 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B), rather than a compliance schedule and interim performance-based effluent limitations.

H. Without making any admissions as to the legal or factual merits of any of the respective contentions made by the Parties, the Parties enter into this Agreement to avoid the expense and uncertainty of administrative and judicial litigation regarding the Permit and the TSO.

In consideration of the foregoing and the following, the Parties agree as follows:

Agreement

1. Approval of Permit and TSO.

a. Appeal of Permit.

The Groups may appeal the issuance of the Permit or the TSO to the State Water Resources Control Board to preserve their rights should other entities not party to this agreement appeal the Permit. If no other parties appeal, the Groups shall dismiss their Permit appeal within ten days of receiving information confirming that no party has filed an appeal within the time allowed for such appeals.

b. No Admissions.

The Groups' entry into and performance of this Agreement shall not constitute an admission that (1) secondary treatment and WQBELs are not required or (2) EBMUD's compliance with this Agreement constitutes compliance with any applicable law. EBMUD's entry into and performance of this Agreement shall not constitute an admission that (1) secondary treatment and WQBELs are required or (2) EBMUD's non-compliance with this Agreement constitutes non-compliance with any applicable law.

2. Studies.

EBMUD shall perform the studies – and prepare the pre-study workplans and post-study reports ("Deliverables") – required by the TSO according to the schedule specified in the TSO. If any of the studies specified in the tentative TSO attached hereto as **Exhibit B** are not included in the final TSO approved by the RWQCB, EBMUD shall perform such studies – and prepare the Deliverables – according to the schedule specified in **Exhibit B**.

3. Pollutant Reduction Measures.

EBMUD shall implement pollutant reduction measures, including potential mass offsets, consistent with the findings of the studies and beyond what the current system achieves today. The pollutant reduction measures are those required by the Water Board in the next permit as a result of the studies after that permit becomes final (i.e., all legal avenues for challenging that permit have been exhausted).

4. The Groups' Notice and Opportunity to Comment.

EBMUD shall provide the Groups with copies of (1) all Deliverables at the same time as EBMUD provides them to the RWQCB and (2) RWQCB-modified Deliverables promptly after EBMUD receives them from the RWQCB.

a. Parties' Approvals.

The Groups shall be deemed to have approved a Deliverable if they either (1) expressly approve it, (2) do not provide EBMUD and the RWQCB with proposed revisions within 30 days of the Groups' receipt or (3) do not invoke Dispute Resolution (see below) within 30 days of the Groups' receipt of EBMUD-objections to (a) Groups-proposed revisions or (b) an RWQCB-modified Deliverable. EBMUD shall be deemed to have approved Groups-proposed revisions or RWQCB-modified Deliverables if it either (1) expressly approves them, (2) does not provide the Groups and the RWQCB with objections within 30 days of EBMUD's receipt.

b. Dispute Resolution.

The Groups may invoke Dispute Resolution (within the time limit provided above) by providing EBMUD with a written request to meet and confer. Upon EBMUD's receipt of a timely request, the Parties shall meet and confer in person or by telephone within 7 days – or such longer period to which the Parties agree (the "Meet and Confer Period") – in an attempt to resolve the issue framed in the request. If and only if the Parties fail to meet and confer or the meet and confer does not resolve the issue within the Meet and Confer Period, the Groups may invoke binding arbitration by providing written notice to EBMUD and the Arbitrator (see below) within 30 days of the expiration of the Meet and Confer Period. The Groups shall be deemed to have approved the subject Deliverable if they do not invoke arbitration within this 30-day period. The "Arbitrator" shall be the first available person from the following list: Steven Weissman, 180 Brookside Drive, Berkeley, California 94705 [Fax: (510) 717-2422; Email: sawblue@umich.edu; Phone: 510.834.6600]; Stephen McKae, Wendel, Rosen, Black & Dean LLP, 1111 Broadway, 24th Floor, Oakland, CA 94607, P.O. Box 2047, Oakland, CA 94604-2047 [Fax: 510.588.4891; E-mail: SMcKae@wendel.com]. If neither of these arbitrators is

available to hold the arbitration hearing within 60 days, the Parties shall use their best efforts to choose a mutually agreeable arbitrator who is available as soon as possible.

The notice invoking arbitration shall include the proposed date and location of the arbitration hearing. The arbitrator shall have final authority to set the date and location of the arbitration hearing. Each Party shall provide its arbitration brief to the other Party and the Arbitrator 21 days prior to the hearing and each party may file a rebuttal brief within ten days prior to the hearing. The arbitrator shall take all measures reasonable and appropriate to expedite the hearing and may, in his or her discretion, take direct testimony in the form of written affidavit with examination of witnesses limited to cross-examination. Where the Deliverable is a pre-study workplan, the Arbitrator shall determine whether the workplan is materially inconsistent with the TSO (or **Exhibit B** if the study in question is not included in the final TSO approved by the RWQCB) [the "workplan consistency determination"]. Where the Deliverable is a post-study report, the Arbitrator shall determine whether the work performed (as reflected in the report) was materially inconsistent with the pre-study workplan [the "report consistency determination"]. The Groups shall bear the burden of proof as to these determinations. If the Arbitrator determines the Deliverable is materially inconsistent with the TSO (or **Exhibit B**) or the pre-study workplan, as the case may be, the Groups shall be deemed the prevailing Party in the arbitration, and the Arbitrator shall order [the "inconsistency removal order"] EBMUD to take such action as is needed to remove the material inconsistency, except that the Arbitrator shall not order EBMUD to take any action that would violate or breach any legal obligation imposed on EBMUD by statute, regulation, regulatory order, court order, permit or other provision of public law or any contract entered into prior to this Agreement. Otherwise, EBMUD shall be deemed the prevailing Party, and the Deliverable shall be deemed approved by

the Groups. The Arbitrator shall award [the "attorneys fees and costs award"] the prevailing party in the arbitration reasonable attorneys fees and costs in accord with the standard for such awards established pursuant to Clean Water Act section 505(d), 33 U.S.C. § 1365(d), except that EBMUD shall pay the Arbitrator's fee regardless of who prevails in the Arbitration. The Arbitrator shall have no jurisdiction to do anything other than (1) make the workplan consistency determination, (2) make the report consistency determination, (3) issue an inconsistency removal order, if warranted and (4) issue an attorneys fees and costs award, if warranted. The Arbitrator's order shall be enforceable in court as an element of this contract and as provided by law.

5. Progress Reporting.

EBMUD shall provide the Groups with quarterly progress reports – on January 31, April 30, July 31 and October 31 of each year until the last Deliverable due date – describing EBMUD's actions taken to implement the Requirements of this Settlement Agreement.

6. Interim Environmental Enhancement Projects.

EBMUD shall perform the Environmental Enhancement Projects required by the Permit according to the schedule provided in the Permit.

7. Citizen Participation Funding.

If the RWQCB issues the Permit and TSO without Substantial Alteration from the forms attached hereto in **Exhibits A and B**, and if the Permit and TSO so issued Become Final without Substantial Alteration, EBMUD shall pay the Groups the sum of $150,000 within 30 days of the date when the Permit and TSO Become Final. The payment shall be made by check made payable to Our Children's Earth Foundation and shall be sent via certified mail, return receipt

requested, to the following address: Charlene Schacter, Our Children's Earth Foundation, 100 First St., Suite 100-367, San Francisco, CA 94105.

The Permit and TSO shall be deemed to Become Final without Substantial Alteration on the date when all legal remedies for alteration of the Permit and TSO have expired (the "Remedy Deadline") without Substantial Modification. For example, if the RWQCB issues the Permit and TSO without Substantial Alteration and no third party person or entity appeals to the SWRCB within the 30-day appeal period provided by California Water Code section 13320(a) and the Groups dismiss any pending appeal before the SWRCB, then the Permit and TSO shall be deemed to Become Final without Substantial Alteration. A modification shall be deemed a "Substantial Alteration" if EBMUD provides written notice to the Groups within 30 days of the Remedy Deadline certifying under penalty of perjury that the modification increases EBMUD's cost of compliance or makes compliance unachievable. A modification shall be deemed not to be a Substantial Alteration if EBMUD does not provide such notice.

8. Dismissal With Prejudice.

If the RWQCB issues the Permit and TSO without Substantial Alteration from the forms attached hereto in Exhibits A and B, and if the Permit and TSO so issued Become Final without Substantial Alteration, the Groups shall cause the Lawsuit to be dismissed with prejudice within 30 days of the date when the Permit and TSO Become Final, provided that the RWQCB waives any claim for costs or fees in such Lawsuit.

9. Force Majeure.

EBMUD's obligation to comply with this Agreement shall be deferred to the extent and for the duration that the delay in compliance is caused by an event or circumstances beyond the reasonable control of EBMUD or any entity controlled by EBMUD, including its contractors,

and that could not have been reasonably foreseen and prevented by the exercise of due diligence by EBMUD. If any event or circumstance occurs which causes or may cause a delay in EBMUD's compliance with this Agreement and EBMUD seeks relief under this paragraph, EBMUD shall provide written notice to the Groups as soon as reasonably practicable.

10. Record Retention.

During the life of this Agreement, EBMUD shall preserve at least one legible copy of all non-privileged records and documents, including computer-stored information, in its possession that relate to its performance of its obligations under this Agreement. Within ninety days of the conclusion of this document retention period, the Groups shall notify EBMUD of any copies Petitioners would like. Thereafter, EBMUD shall be free to keep or destroy documents in any manner allowed by law.

11. Termination.

The Parties' obligations under this Agreement shall terminate on the earlier of (1) the date any Substantial Alteration is made to the Permit or the TSO or (2) the date the last due Deliverable is deemed approved by the Groups. Notwithstanding the foregoing, EBMUD's obligations under the Record Retention paragraph shall not terminate until 90 days after the earlier of the two dates specified in the preceding sentence.

12. Miscellaneous.

a. Each individual executing this Agreement on behalf of a Party warrants that she or he is duly authorized to do so and that such execution is binding upon the Party.

b. This Agreement shall be interpreted according to California law.

c. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Photocopies and facsimiles of counterparts shall be binding and admissible as originals.

d. This Agreement shall not become effective until and unless each and every Party has executed the signature page of the Agreement. Any notice provided under this Agreement shall be provided by e-mail, telephone and first class mail as follows:

If to Groups:

CHRISTOPHER SPROUL
Environmental Advocates
5135 Anza Street
San Francisco, California 94121
Telephone: (415) 533-3376
E-mail: csproul@enviroadvocates.com

If toEBMUD:

David Williams, Director of Wastewater
EBMUD
P.O. Box 24055, Mail Slot 702
Oakland, CA 94623-1055
Telephone: (510) 287-1496
E-mail: dwilliam@ebmud.com

e. Each of the Parties represents and warrants that, in connection with the negotiation and execution of this Agreement, it has been represented by independent counsel of its own choosing, that is has not relied upon the advice or counsel of any other Party's independent counsel in the negotiation or drafting of this Agreement, that it has executed this Agreement after receiving advice of its independent counsel, that its representative has read and understands the provisions and terms of this Agreement, and that it has had an adequate opportunity to conduct an independent investigation of all the facts and circumstances with respect to all matters that are the subject of this Agreement.

f. Each Party represents and warrants that it is entering this Agreement of its own free will and not subject to any coercion, duress, or similar stress. No inducement, promise, or agreement not herein expressed has been made to or by the Parties.

g. This Agreement constitutes the entire understanding of the Parties and supersedes all prior contemporaneous agreements, discussions, or representations, oral or written, with respect to the subject matter hereof.

h. Counsel for the represented Parties have negotiated, read, and approved as to form the language of this Agreement, the language of which shall be construed in its entirety according to its fair meaning and not strictly for or against any of the Parties.

i. The Parties acknowledge and agree that the payments provided for in paragraph 7 shall be deemed to compensate the Groups in full for any costs or attorneys fees they have incurred in the lawsuit and in administrative pursuit of a challenge to the currently pending reissuance of the Permit and that they otherwise may have been entitled to. The Parties further agree that, except as otherwise provided herein, each of them will bear their own attorneys' fees, costs, and expenses arising out of and/or connected with the lawsuit and the currently pending reissuance of the Permit. The Parties further agree that paragraph 4 shall be the sole basis for award of attorneys' fees and costs for Arbitration under this Agreement, but that all Parties reserve whatever rights they may have at law to recovery of fees and costs in any subsequent litigation to secure enforcement of any Arbitration decision.

j. In the event that any provision of this Agreement is determined by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall not be affected thereby and shall remain in full force and effect.

k. Neither this Agreement, nor any provisions hereof, may be changed, waived, or terminated orally, but only by a written instrument, signed by the Party against whom enforcement of the change, waiver, discharge, or termination is sought.

l. Whenever in this Agreement one of the Parties hereto is named or referenced, the legal representatives, successors, and permitted assigns of such Party shall be included and all covenants and agreements contained in this Agreement by or on behalf of any of the Parties

hereto shall bind and inure to the benefit of their respective successors and permitted assigns, whether so expressed or not.

m. This Agreement is made without respect to number or gender, and as such, any reference to a party hereto by any pronoun shall include the singular, the plural, the masculine, and the feminine.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates indicated below.

East Bay Municipal Utility District

By: David R. Williams

Date: 9/21/05

Name: DAVID R. WILLIAMS

Title: DIR. OF WASTEWATER

Approved as to Form:
Office of General Counsel

Our Children's Earth Foundation

By: Christopher Sproul

Date: Sept. 21, 2005

Name: Christopher Sproul

Title: Attorney for Our Children's Earth Foundation

Baykeeper

By: Sejal Choksi

Date: 9/21/05

Name: Sejal

Title: Baykeeper

Ecological Rights Foundation

By: Christopher Sproul

Date: Sept. 21, 2005

Name: Christopher Sproul

Title: Attorney for Ecological Rights Foundation