3/6/07 BdMtg Item 5
EBMUD
Deadline: 2/20/07 5pm

CALIFORNIA
COASTKEEPER.
ALLIANCE
A Statewide Voice for Our Waters

Tam Doduc, Chair and Board
State Water Resources Control Board
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Attn: Ms. Song Her, Clerk to the Board

20 February 2007

Re: Comments on Draft State Water Board Order, "In the Matter of Own Motion Review of EBMUD Wet Weather Permit (Order No. R2-2005-0047 [NPDES No. CA0038440]) and Time Schedule Order (Order No. R2-2005-0048), SWRCB/OCC File A-1771

Dear Chair Doduc and Members of the Board:

On behalf of the California Coastkeeper Alliance ("CCKA"), thank you for the opportunity to comment on the above-described Draft Order, which has significant statewide implications. CCKA strongly supports staff's rigorous, *sua sponte* review of the EBMUD permit's and Time Schedule Order's compliance with the federal Clean Water Act and state Porter-Cologne Water Quality Control Act. CCKA concurs with every element of the Draft Order, other than the Draft Order's findings and direction with respect to compliance schedules, as described below. In particular:

1) Wet weather facilities and overflow structures are Publicly Owned Treatment Works ("POTWs") under the Clean Water Act ("CWA");
2) Wet weather facilities and overflow structures therefore must comply with the secondary treatment requirements of the CWA;
3) Reasonable Potential Analyses must be conducted for discharges from wet weather facilities and overflow structures;
4) Basin Plan limits that purport to waive the secondary treatment requirements of the CWA are illegal, must be eliminated where they exist in Basin Plans, and cannot form the basis of effluent limits in NPDES permits;
5) Water Quality Based Effluent Limits ("WQBELs") for wet weather facilities and overflow structures must ensure compliance with CTR, NTR, and Basin Plan limits; and

6) Self-monitoring programs need to be sufficiently frequent and comprehensive to assess compliance with permit limits and assess facility performance, through fully representative data.

With respect to compliance schedules, the Draft Order appropriately rejects the compliance schedules as applied by the San Francisco RWQCB, which violate the requirements of the State Implementation Plan ("SIP") and the U.S. EPA and effectively evade imposition of WQBELs on the wet weather facilities and overflow structures until at least 2010. However, the Draft Order improperly endorses compliance schedules for new or more stringent limits in NPDES permits. Any compliance schedules extending beyond 1977 are inconsistent with the requirements of the CWA. Thus, we ask that the Draft Order be amended to articulate this point, to order the San Francisco Regional Water Quality Control Board ("SF RWQCB") to eliminate all compliance schedules from the EBMUD permit, and to require issuance of Time Schedule Orders ("TSOs") for parameters for which the SF RWQCB finds immediate compliance infeasible.

San Francisco Baykeeper has provided detailed comments dated February 20, 2007 on the Draft Order's Conclusions Nos. 5 though 26, concerning adoption of compliance schedules, setting WQBELs based on sound reasonable potential analyses, amending permit conditions by unilateral Regional Board Executive Officer action, and proper adherence to standard NPDES permit conditions. Rather than repeat those comments, CCKA incorporates by reference San Francisco Baykeeper's comment letter, and limit the comments below to the issues described above in this comment letter as numbers 1, 2 and 3.

The Draft Order appropriately and comprehensively rejects the rationales offered by the SF RWQCB to allow discharges of raw or partially treated sewage from the EBMUD wet weather facilities and overflow structures directly to San Francisco Bay. In its efforts to accommodate the discharger, the SF RWQCB failed to meet the requirements of state and federal law and protect the beneficial uses identified in the EBMUD permit. Approval of the Draft Order as written, with the corrections outlined herein with respect to compliance schedules, is critical to halting a pattern of permits statewide that do not meet the minimum requirements of the Clean Water Act and state law.

The Draft Order Correctly Finds that the EBMUD Wet Weather Facilities and Overflow Structures are POTWs and Must Meet CWA Requirements for POTWs

CCKA agrees with the Draft Order's finding that the EBMUD wet weather facilities and overflow structures are POTWs for purposes of the Clean Water Act, and that therefore any effluent limits for those wet weather facilities and overflow structures must comply with the secondary treatment and all other requirements of the CWA. Similarly, CCKA agrees with the Draft Order that the EBMUD permit must clearly prohibit untreated waste discharges from the five overflow structures. The SF RWQCB's arguments to the contrary are specious on their face. As noted in the Draft Order, Oakland has had a separate storm water system for decades. The discharges from the EBMUD overflow structures are caused by infiltration and inflow into the collection system—a problem common to poorly maintained, separate sewage conveyance

systems. The collection systems discharging to EBMUD's system are not combined sewage systems, and EBMUD is not entitled to the exceptions to full secondary treatment provided to combined systems.

The SF RWQCB's characterization of the EBMUD overflow structures as part of a combined system were a effort to exempt those discharges from the requirements of the Clean Water Act based on the expense of compliance to the discharger. This too is illegal, and is inconsistent with the basic premise of the Clean Water Act—a technology-forcing statute that both Congress and the Courts have called "strong medicine" to clean up the Nation's waters.[1] The SF RWQCB's effort to exempt the overflow structures from the requirements of the CWA is especially blatant given EPA's clear 2001 reversal of its previous opinion calling discharges from the structures CSOs.[2]

This issue is of particular significance statewide. For example, in 1998, Santa Monica Baykeeper filed a Clean Water Act lawsuit against the City of Los Angeles for raw sewage spills during rain events; one of the key issues in the subsequent six years of litigation was wet weather overflows generally, and inflow/infiltration in particular. The City claimed that it was "impossible" to build capacity in the collection system to prevent spills during rain events typical in Southern California. This argument was proven false after the City implemented an aggressive pipe capacity improvement, repair and replacement, and infiltration and inflow program for the collection system as part of a Consent Decree, and reduced sewage spills 70% – including during a record rainfall year. Similarly, following enforcement by San Diego Baykeeper and collection system improvements subject to Court oversight, the City of San Diego reduced spills by over half.

The original EBMUD permit endorsed a program that precisely reversed the requirements of the CWA. Rather than eliminating the causes of EBMUD capacity limitations and resulting sewage spills—collection system failures—as was done in Los Angeles and San Diego, the SF RWQCB instead attempted to permit discharges of raw and partially treated sewage into San Francisco Bay. In fact, overflow structures were built into the system based on SF RWQCB permitting, literally putting the illegal discharges into concrete. If the State Board's Order does not hold wet weather related spills or discharges to the same standard as all collections systems throughout the Nation, other collection system owners and operators will use similar justifications for wet weather sewage discharges to avoid costly collection system improvements, and will effectively self-exempt their systems from the CWA.

Finally, CCKA agrees with the finding of the Draft Order that, because the wet weather facilities and overflow structures are POTWs for purposes of the CWA, the EBMUD Permit

[1] As a federal court recently observed, the CWA forbids administrative agencies from taking into account "cost considerations or an assessment of the desirability of reducing adverse environmental impacts in light of the cost of doing so [when setting effluent limitations]. The statute . . . precludes cost-benefit analysis because Congress itself defined the basic relationship between costs and benefits." *Riverkeeper, Inc., et al. v. EPA*, 2007 WL 184658 (2nd Cir. 2007) (Jan. 25, 2007).

[2] *See* Letter from Alexis Strauss, Director, Water Division, U.S. EPA to Bruce Wolfe, Executive Officer, SF RWQCB (Sept. 7, 2004).

must conduct Reasonable Potential Analyses for discharges from the overflow structures, and must impose Water Quality Based Effluent Limitations sufficient to ensure compliance with the CTR, NTR and Basin Plan limits. Discharges of effluent other than in compliance with the secondary treatment requirement and Water Quality Standards must be prohibited by the EBMUD permit.

Conclusions

There is a paramount need for the State Board to exercise effective oversight of all the Regional Boards; the Draft Order appropriately exercises such oversight. Accordingly, and for the reasons stated herein and incorporated by reference, CCKA urges the State Board to adopt all elements and directives of the Draft Order as put forward by staff, with the exception of the sections endorsing compliance schedules. We request that the State Board modify the sections approving compliance schedules, and reject compliance schedules as inconsistent with the requirements of the CWA.

By adopting the Draft Order with the suggested amendments, the State Board will be sending a positive and needed signal that it will ensure all Regional Water Boards implement the letter and intent of federal and state water quality law when issuing and enforcing discharge permits.

Thank you for your attention to these comments. If you have any questions, please do not hesitate to call.

Sincerely,

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