



May 16, 2016

Ryan Mallory-Jones
Attorney
Office of Chief Counsel
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Subject: SWRCB/OCC File A-2455 (A thru M); Petitions of City of Alameda, et al., (Waste Discharge Requirements Order No. R2-2015-0049 [NPDES Permit CAS612008], Municipal Regional Stormwater NPDES Permit for Municipalities within the Counties of Alameda, Contra Costa, Santa Clara, and San Mateo, the Cities of Fairfield, Suisun City and Vallejo, and Vallejo Sanitation and Flood Control District) San Francisco Bay Regional Water Quality Control Board

Dear Mr. Mallory-Jones:

The Contra Costa Clean Water Program (CCCWP) appreciates the opportunity to respond to the Petition filed by the San Francisco Baykeeper (Baykeeper) challenging the San Francisco Regional Water Quality Control Board's (San Francisco Regional Board) adoption of a Municipal Regional Stormwater NPDES Permit for Municipalities within the Counties of Alameda, Contra Costa, Santa Clara, and San Mateo, the Cities of Fairfield, Suisun City and Vallejo, and Vallejo Sanitation and Flood Control District) (the Bay Area Permit, or the Permit). CCCWP submits this response on behalf of the twenty-one public agencies comprising CCCWP, which include the nineteen incorporated cities and towns, unincorporated Contra Costa County, and the Contra Costa County Flood Control and Water Conservation District (Permittees), all of whose municipal separate storm sewer system discharges are covered by the Bay Area Permit.

In summary, CCCWP responds to Baykeeper's allegations that certain requirements in the Bay Area Permit violate federal anti-backsliding requirements, are inconsistent with State Water Board Order WQ 2015-0075, and fail to include monitoring requirements that assure compliance with permit limitations. CCCWP disagrees with such allegations and encourages the State Water Board to reject these claims. CCCWP also provides specific comments regarding how the trash monitoring requirements in the Bay Area Permit are consistent with the Statewide Trash

Amendments,¹ which were approved by the Office of Administrative Law, United States Environmental Protection Agency (EPA) after adoption of the Bay Area Permit.

I. **Compliance Provisions in the Bay Area Permit Do Not Violate Federal Anti-Backsliding Provisions**

Baykeeper's Petition alleges that adoption of the compliance provisions at provision C.1, et seq., in the Bay Area Permit violates federal anti-backsliding provisions. CCCWP disagrees with these arguments, and notes that the State Water Board has already clearly rejected this exact position in State Water Board Order WQ 2015-0075.² Discharge prohibitions and receiving water limits (RWLs) clearly are not "effluent limitations" falling under the antibacksliding provisions of section 402(o) of the Clean Water Act. (33 U.S.C. § 1342(o)). Nor are they "standards" or "conditions" within the meaning of the United States Environmental Protection Agency's (EPA) regulations in title 40 of the Code of Federal Regulations section 122.44(l).³ CCCWP agrees with, adopts and refers the State Water Board to the detailed legal analysis on this subject in the response to Baykeeper's Petition submitted in this proceeding by the California Stormwater Quality Association (CASQA), dated May 2, 2016.

Order WQ 2015-0075 found that regardless of the application or inapplicability of the regulatory anti-backsliding provisions, exceptions to the anti-backsliding requirements applied in that case. Although exceptions to the antibacksliding provisions of USEPA's regulations would also apply in relation to the Bay Area Permit, if the compliance provisions fell within the regulations at all, CCCWP joins CASQA in requesting that the State Water Board clearly confirm its position that such compliance provisions are not subject to the antibacksliding provisions of section 402(o) of the Clean Water Act and title 40 section 122.44(l) of the Code of Federal Regulations in the first instance. CCCWP requests the State Water Board make such a finding in response to the Baykeeper petition so that this issue can be resolved.

¹ State Board Resolution No. 2015-0019, Final Trash Provisions of the Water Quality Control Plan for the Ocean Waters of California to Control Trash and Part 1 Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays and Estuaries of California (Statewide Trash Amendments).

² *In the Matter of Review of Order No. R5-2012-0175, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except from Long Beach* (Order WQ 2015-0075).

³ Baykeeper's confusion on this issue may stem in part from their fundamental error in identifying the source of a permitting agency's legal authority to address strict compliance with water quality standards. As explained by the State Water Board in Order WQ 2015-0075, the law is well established on the subject of addressing water quality standard compliance in MS4 NPDES permits. While MS4s are required to reduce pollutants in the discharge to the maximum extent practicable (MEP), the water quality-based effluent limitations in section 301(b)(1)(C) of the Clean Water Act (CWA) do not apply to MS4 permits. (Order WQ 2015-0075, pp. 10-11.) Rather, the permitting agency has the discretion, if they choose to exercise it, to impose requirements to meet WQS. (33 U.S.C. § 1342(p); *Defenders of Wildlife* at p. 1159.) With that discretion comes the discretion of which tools they choose to use to address WQS's (if at all) and the timetables on which they choose to use them. The State Water Board has further acknowledged that it has flexibility under the Porter-Cologne Water Quality Control Act (Porter-Cologne) to "decline to require strict compliance with water quality standards for MS4 discharges." (Order WQ 2015-0075, p.11.) The compliance language at provision C.1 of the Bay Area Permit is a clear example of the application of Water Board discretion in its approach to compliance with water quality standards under the CWA and Porter-Cologne.

II. The Compliance Provisions in the Bay Area Permit Cited in Baykeeper's Petition Are Consistent with Order WQ 2015-0075.

A. The Petition's allegations regarding compliance with Order WQ 2015-0075 are broad, brief and unsupported.

Baykeeper alleges that the compliance provisions at issue in the Bay Area Permit fail to meet the principles established in Order WQ 2015-0075, asserting,

"Here, the 2015 Permit contains nothing even remotely close to the rigor, accountability, or transparency in the WMP/EWMP approach of the Los Angeles MS4 permit. The 2015 Permit provides *no* objective criteria, specifications, or guidance, and requires *no* validation, peer-reviewed acceptable modeling methods, or minimum data requirements, *nor does it appear to even consider such requirements necessary.*"

(Baykeeper Petition, p. 14, lines 17-21 (emphasis supplied).) Despite this broad allegation, the only permit provisions called out in Baykeeper's Petition are (1) specific reasonable assurance analysis requirements in the context of reductions of mercury and PCBs achievable by 2040 through the implementation of green infrastructure projects (Sections C.11.c.iii, C.12.c.iii), and (2) the trash load reduction requirements of Provision C.10.

Allegations relating to mercury and PCBs: Baykeeper describes the mercury and PCB-related reasonable assurance provisions as "the only language in the 2015 Permit remotely related to the WMP/EWMP process." (Baykeeper Petition p. 14, lines 23-25). The Petition then complains that "the Regional Board provides almost no detail or technical guidance to Permittees with regard to how to conduct such modeling," and that "[f]urthermore, despite the fact that Permittees are not required to submit an RAA until the end of the permit term, the 2015 Permit excuses compliance with Discharge Prohibitions and Receiving Water Limitations throughout the 5-year term of the Permit simply for engaging in the process. ..." (*Id.*, p. 15, lines 17-22.)

The Baykeeper Petition fails to place the PCB and mercury-related reasonable assurance requirements in context. These requirements are just one aspect of the required actions Permittees must take with respect to these pollutants.⁴ All of the PCB

⁴ Provision C.11 provides six pages of detailed requirements for the reduction of mercury loads in Permittee discharges. (Bay Area Permit, pp. 107-112). The Fact Sheet discussion explains findings from available data that mercury load reductions must largely come from green infrastructure treatment control, in addition to existing collection and recycling of mercury containing devices. It further supports the basis for calculating load reductions for control measures to be implemented during the permit term, which must demonstrate specific load reductions by June 30, 2020. (See, Permit Fact Sheet, pp. A 107-A 110.)

Provision C.12 provides ten full pages specifying PCB control requirements. It provides a technically sound load reduction accounting method, based on information gained during pilot testing performed in the previous permit term allowing permittees to focus implementation on measures where benefits are most likely to accrue and report on loads reduced by those measures. (See Permit pp. 113-122; Permit Fact Sheet, p. A-111.)

and mercury control provisions, taken as a whole, are designed to implement TMDLs for those constituents.

The State Water Board's principles laid out in WQ 2015-0075 provide that such TMDL requirements in an MS4 permit, including implementation of control measures designed to achieve interim WQBELs and other TMDL-specific limitations, should constitute compliance with receiving water limitations. (See WQ 2015-0075 pp. 18, 41 and 46, and p. 77, item 12). Any asserted lack of specificity in the modeling guidance for reasonable assurance analyses for PCBs and mercury would not "disqualify" the TMDL-related provisions C.11 and C.12 from satisfying receiving water limitations and prohibitions.

Allegations relating to trash load reductions: Baykeeper simply and briefly asserts the trash load reduction provisions should not be acceptable alternative compliance provisions because they provide "a *subjective, ad-hoc process with none of the technical rigor or objective standards of the WMP/WEMP* [sic] approach, and no opportunity for public review or comment on whether Permittees are actually achieving the required trash load reductions." (Baykeeper Petition p. 16, lines 3-8 (emphasis supplied).) Beyond asserting trash monitoring is insufficient in the permit, the Petition supplies no specific analysis as to how Provision C.10 fails to satisfy the principles in Order WQ 2015-0075.

B. Rigor and Accountability and Transparency within the Bay Area Permit Alternative Compliance Path, reviewed on their own Merits, Satisfy the Guiding Principles of WQ 2015-0075.

Baykeeper's comparison of isolated portions of the Bay Area Permit to the WMP/EWMP approach in the Los Angeles MS4 Permit misconstrues the fundamental precedential holdings of Order WQ 2015-0075. Order WQ 2015-0075 does not require that other Regional Boards justify variations from the WMP/EWMP model. Rather, it expresses the State Water Board's expectation that each regional board will follow a few listed guiding principles, unless it makes a showing that *application of a given principle* is not appropriate for region-specific or permit-specific reasons. (Order WQ 2015-0075, pp. 51-52, 78.) The San Francisco Regional Board found its approach did follow the guiding principles, and thus had no need to explain variations from them. (See Permit Fact Sheet, pp. A-25 - A-26.)

The San Francisco Regional Board has equal authority, and indeed the responsibility, to apply its permitting discretion, using its independent judgment and considering all the information and expertise it possesses. Issuance of the Bay Area Permit was the product of a lengthy public process on the appropriate provisions for that permit; participants had no involvement in the public process that developed the terms of the Los Angeles County MS4 Permit.

The Los Angeles County MS4 Permit approach does differ significantly from that chosen by the San Francisco Regional Board. As the State Water Board noted in WQ 2015-0075, "The WMP/EWMP provisions of the [Los Angeles MS4 Permit] are *guidelines for development of a subsequent program* with more specificity to be approved by the Los Angeles Water Board or its Executive Officer." (p. 33, fn 95 (emphasis supplied). As a result, the State Water Board found it significant that the

public would have opportunities to review and comment on each WMP/EWMP. (*Id.*, pp. 37, 52.)

In contrast, the San Francisco Regional Board chose to include prescriptive, detailed requirements in Provisions C.2 through C.16 regarding the measures designed to achieve compliance with the receiving water limitations and prohibitions, and how those would be accounted for, monitored and reported. Although some planning functions were afforded to the MS4 permittees, those were narrower in scope and more specifically defined in the Bay Area Permit.

Accountability and transparency is provided for throughout the Permit, and specifically as to PCBs, mercury and trash controls, by requirements for calculation of load reductions and specific reporting on adoption, maintenance and results of pollution control management practices. In addition, the Permit contains detailed requirements for municipal operations, new development and redevelopment, industrial and commercial site controls, illicit discharge detection and elimination, construction site control and public information and outreach, spanning in full sixty-three pages. The Bay Area permit has provided for public review and comment on all of these requirements designed to meet the permit's effluent limits and receiving water limits and prohibitions, i.e. to control pollutants to the Maximum Extent Practicable, implement TMDLs and address pollutants that have potential to cause or contribute to exceedance of water quality standards in area waters.

Given the detailed prescriptive requirements in the Permit, Baykeeper's assertion that public review and comment is needed for one isolated element, within extensive PCB and mercury control commitments, is entirely out of context. Development of modeling protocols for reasonable assurance analysis of a limited scope near the end of the permit term reasonably can be overseen by the Regional Board. It will be the subject of reports available for public review, as well as use in the next permit cycle subject to additional public participation.

Baykeeper's other allegation as to inadequate public review and comment, or "transparency," concerns determinations whether Permittees have achieved required trash load reductions. There is no legal requirement or State Water Board policy that public review and comment be provided in agency review of compliance with permit requirements.

Baykeeper essentially argues that the Bay Area Permit did not meet the rigor and accountability components of guiding principle 7 in Order WQ 2015-0075 because it does not have the same requirements as the LA MS4 permit. Again, this is not an appropriate basis for challenge to the Bay Area Permit's program. Order WQ 2015-0075 requires transparency, verification of assumptions, and implementation of adaptive management, all of which are present in the Bay Area Permit alternative compliance approach. (Order WQ 2015-0075, p. 52.) The pollutant-specific provisions contain "concrete milestones and deadlines and reporting requirements that provide rigor and accountability." (Permit Fact Sheet, p. A-26.) Further, transparency is achieved because all reports, plans, and other required submittals "will be made available to all interested parties and input and feedback [] will be considered." (*Id.*) As a result, the San Francisco Regional Board reasonably found the Bay Area Permit's requirements

consistent with the principles in Order WQ 2015-0075. (See Bay Area Permit, pp. A 25 - A 26.)

III. The Bay Area Permit Monitoring Requirements are not Deficient.

The Baykeeper petition alleges that the Bay Area Permit does not include adequate receiving water monitoring provisions to determine compliance with permit terms or to yield data that are representative of the monitoring activity. In particular, Baykeeper argues that monitoring for mercury, PCBs, pesticides and trash is insufficient to determine compliance with Discharge Prohibitions and RWLs.

The Alameda Superior Court recently ruled on California Coastkeeper Alliance's challenge to the State Water Board's Industrial Stormwater General Permit, State Water Board Order WQ 2014-0057.⁵ The Court found that the Clean Water Act affords EPA considerable discretion in regulating monitoring within NPDES permits, noting:

"[I]n the context of issuing NPDES permits and collecting records and reports, Congress required EPA to impose "data and information collection" and "reporting" requirements only 'as [the EPA] deems appropriate' and was required to require records and reports only 'as [the EPA] may reasonably require.'"

(CCKA, p. 20 (quoting language in Clean Water Act sections 308 (a) and 402(a)(2) (33 U.S.C. §§ 1318(a), 1342(a)(2)).)

Monitoring is not limited to sampling of water and sediment and other water quality indicators, but includes inspections and recordkeeping, including identifying and reporting the adoption and maintenance of control measures, and evaluation of their effectiveness and, in many cases, calculation of associated load reductions. In its final decision on the CCKA case, the Court noted that measurement of compliance by any appropriate or reasonable means can satisfy EPA's regulations designed to "assure compliance with permit limitations."⁶ 40 CFR §§ 122.44(i)(1), 122.48(b). While conditions in a permit are to "assure compliance" with permit limitations, the Court noted that the phrase "assure compliance" means conditions "designed to monitor compliance effectively," not strictly insure compliance with every permit term.⁷

The Bay Area Permit contains detailed requirements for four types of water body monitoring:

San Francisco Estuary Receiving Water Monitoring (C.8.c) – The Bay Area Permit requires Permittees to participate in the San Francisco Estuary Regional Monitoring Program (RMP), which monitors waters in each Permittee's jurisdiction and gathers data on pollutants discussed in the Permit. This major

⁵ *California Coastkeeper Alliance v. State Water Resources Control Board*, Alameda County Superior Court, Case No. RG14724505, Statement of Decision (July 10, 2015) ("CCKA").

⁶ CCKA case, p. 21.

⁷ *Id.* ("The court holds that use of the phrase 'assure compliance' in the regulations does not mean that any permit issued under the regulations must have monitoring requirements that will ensure strict compliance with the permit limitations. The court holds that the monitoring conditions must be designed to monitor compliance effectively and as implemented must monitor compliance effectively.").

monitoring program was mandated by the San Francisco Regional Board, and produces coordinated and high quality data that can assist in evaluating impacts of stormwater discharges.

Creek Status Monitoring (C.8.d) – 8 pages describing specific parameters and frequency of monitoring required using biological assessment, water chemistry sampling and temperature monitoring, as well as pathogen indicator monitoring.

Pesticides and Toxicity Monitoring (C.8.g) – 4 pages of specific testing for toxicity in water and sediment and toxic pollutant monitoring.

Pollutants of Concern Monitoring (C.8.f) – 4 pages describing monitoring for more than thirteen parameters, including the required frequency, test methods, and how five priority pollutant management information needs are to be addressed by each form of testing. This detailed monitoring scheme addresses PCBs and mercury as well as other key constituents and parameters.

The San Francisco Regional Board has designed, and deemed appropriate for the Permit, a combination of monitoring, recordkeeping, and inspection requirements related to the required Permittee actions it expects will control discharges as necessary to meet applicable permit limitations.

The larger regulatory context and available monitoring information from other programs is properly also taken into consideration by the San Francisco Regional Board. Extensive, coordinated monitoring programs in San Francisco Bay and area watersheds provides information about the health of receiving waters and local creeks, informing the measures required in the Bay Area Permit to protect water quality. Such information is not only available, but is to be discussed by Permittees in their reports evaluating ongoing conditions and what changes to pollution controls may be needed. (See, e.g., Permit Provision C.8.c.)

In the *CCKA* case, the Court specifically acknowledged the relevance of such supplementary monitoring information within the greater regulatory framework of the State, when evaluating the adequacy of the Industrial General Permit's monitoring requirements. The Court noted,

"if the Board determined that it had access to adequate data about receiving waters through other sources [*record citation omitted*] and that it would not be efficient or effective to require dischargers to collect data about receiving waters, then the Board could have reasonably decided that it was not appropriate to require dischargers to monitoring receiving waterways directly."⁸

The San Francisco Regional Board appropriately chose an integrated approach considering the availability of regional monitoring and extensive, carefully targeted monitoring designed to address permit compliance and progress in water quality improvement in both discharges and receiving waters.

⁸ *CCKA* case, p. 30-31.

CCCWP's remaining comments address Baykeeper's allegations concerning monitoring focus on the Bay Area Permit's monitoring requirements as they relate to trash, pesticides, Mercury and PCBs, and general allegations that the permit contains inadequate outfall monitoring.

A. Trash Monitoring Requirements

Baykeeper argues that the Bay Area Permit affords Permittees too much time to develop trash-related receiving water monitoring tools and protocols (requiring a "final report by July 1, 2020"), which will be developed without input from the San Francisco Regional Board and/or public. (Baykeeper Petition, p. 16, lines 3-7, p. 18, lines 1-5.) Baykeeper also contends that the Bay Area Permit monitoring provisions for trash are inconsistent with the Statewide Trash Amendments monitoring and reporting requirements. (*Id.*, p. 18, fn 8.) CCCWP urges that the State Water Board reject these claims.

The Bay Area Permit incorporates a robust trash load reduction program that provides compliance with the Discharge Prohibitions and RWLs. The Bay Area Permit includes visual on-land trash assessments to validate trash load reduction program effectiveness, and is consistent with the Statewide Trash Amendments, which does not require receiving water monitoring. (See, Permit Fact Sheet p. A 87 (finding Provisions C.10 consistent with Statewide Trash Amendments)).

Provision C.1 provides for the alternative compliance path for Prohibitions relating to trash and related Receiving Water Limits, as follows:

. . . Compliance with Provisions C.9 through C.12 and C.14 of this Order, which prescribe requirements and schedules for Permittees identified therein to manage their discharges that may cause or contribute to violations of water quality standards (WQS) for pesticides, trash, mercury, polychlorinated biphenyls (PCBs), and bacteria, shall constitute compliance during the term of this Order with Receiving Water Limitations B.1 and B.2 for the pollutants and the receiving waters identified in the provisions. Compliance with Provision C.10, which prescribes requirements and schedules for Permittees to manage their discharges of trash, shall also constitute compliance with Discharge Prohibitions A.1 and A.2 during the term of this Order for discharges of trash. (Bay Area Permit, p. 6.)

This is consistent with the Statewide Trash Amendments, which specify that, "Dischargers with NPDES permits that contain specific requirements for the control of trash that are consistent with these Trash Provisions shall be determined to be in compliance with this prohibition if the dischargers are in full compliance with such requirements." (Statewide Trash Amendments, App.D, III.L.2.a, p. D-3; App. E, IV.A.2a, p. E-2.)

Even without any trash receiving water monitoring, trash-related monitoring requirements in the permit provide effective monitoring of compliance with permit trash load reduction requirements and support the alternative compliance path satisfying Prohibitions and Receiving Water Limits under Provision C.1. The trash load reduction

program in the Bay Area Permit includes provisions to demonstrate attainment of the requirements through specified accounting methods and visual assessments that evaluate the amount of trash generated within the management area, and demonstrate trash reductions required in the permit. Using on-land accounting and assessments is directly linked to implementation of management practices and focuses implementation on areas where trash is generated and most likely to be discharged to receiving waters.

The Bay Area Permit also requires detailed and prescriptive visual assessments, trash hot spot assessments and full trash capture system operation and maintenance requirements. All of the foregoing accounting methods, visual assessments and monitoring and reporting required in the Bay Area Permit meet legal requirements for effective monitoring within NPDES permits.

The existing Bay Area Permit provisions go even further, requiring also that Permittees develop a plan and protocols to evaluate receiving water monitoring or surrogates for receiving water monitoring. CCCWP does not generally support the permit requirement for Permittees to develop protocols for and conduct receiving water monitoring for trash. Other monitoring in the permit is appropriately linked to effective compliance with permit trash reductions, is based on existing knowledge and experience, and already requires substantial effort and expense. Where it has been implemented, receiving water monitoring for trash has been costly and has not been helpful for identifying trash sources, or in determining the effectiveness of trash control measures.⁹

The Statewide Trash Amendments do not require receiving water monitoring, but rather require demonstrations that control measures are effective in removing the same amount of trash as a full capture treatment system (Full Capture System Equivalency), and include optional questions to be considered when developing the monitoring program and reporting on the results. The Response to Public Comments on the Draft Staff Report, Including the Draft Substitute Environmental Documentation and Draft Trash Amendments (Response to Comments) for the Statewide Trash Amendments, expressly acknowledged that "*receiving water monitoring is not a required component with monitoring for Track 2 or Caltrans to provide flexibility to permittees to development a strategy to demonstrate the effectiveness of trash controls and compliance with full capture system equivalency.*" (Statewide Trash Amendments, App. F, p. F-36, Comments No. 73.9 (emphasis supplied).)

The Response to Comments explained the monitoring and reporting approach should provide flexibility to demonstrate compliance with the prohibition of discharge for trash, balancing the need for consistency and flexibility through standardized objectives in the monitoring program. (*Id.*, p. F-21, Comment No. 4.6.) As demonstrated by these statements, receiving water monitoring is not required for consistency with the Statewide Trash Amendments and for compliance for trash load reduction programs. Therefore, the State Water Board should reject Baykeeper Petition's assertion that trash monitoring requirements are inadequate, and its related criticism as to the timing and

⁹ If the Water Boards or particular permittees wish to explore the nature, validity and usefulness of development of any new protocols, these efforts should be determined separately, outside of requirements posed on municipal permittees in an NPDES permit enforceable under the CWA.

public review of Permittee development of receiving water monitoring tools and protocols.¹⁰

B. Pesticide Toxicity Control Monitoring

In the Bay Area Permit Fact Sheet, the San Francisco Regional Board found that monitoring requirements for pesticides and toxicity yield sufficient data to determine compliance with Discharge Prohibitions and RWLs, and that information provided by monitoring would be sufficiently representative of monitored activity. (See Permit Fact Sheet pp. A 71-A 73 (discussion of permit monitoring approach yielding representative data.)

The Bay Area Permit includes significant and robust requirements for pesticide toxicity control monitoring, which collectively help to assure compliance with TMDL-based permit requirements and Discharge Prohibitions and Receiving Water Limits. Provision C.9 contains requirements to implement the TMDL for pesticide-related toxicity in urban creeks. It requires, for example, that Bay Area Permittees certify implementation of their Integrated Pest Management (IPM) policy or ordinance, report IPM tactics and strategy, report municipal application training information, report IPM-certified contractor compliance with IPM policies, report public outreach activities, report participation in relevant pesticide regulatory process activities, and report evaluation of their assessment of IPM effort effectiveness and improvements made.

Provision C.8.g requires pesticide and toxicity monitoring in urban creeks, which includes both water column and sediment testing in dry weather, and pesticide and toxicity monitoring in wet weather. There are also requirements for follow up monitoring if any pesticide related pollutant is present at a concentration that exceeds the water quality objective in the Basin Plan. The extensive reporting requirements described above and representative water column and sediment testing satisfy all legal requirements for monitoring in an MS4 permit relating to pesticides and toxicity.

C. Mercury and PCB Monitoring

The Bay Area Permit also includes robust monitoring and reporting requirements relating to mercury and PCBs that collectively implement TMDLs and thus assure compliance with the Discharge Prohibitions and RWLs. Provision C.11 contains requirements to implement the San Francisco Bay mercury TMDL wasteload allocations and the TMDL wasteload allocations for mercury in Guadalupe River Watershed. (Permit Fact Sheet, p. A 83). Provision C.12 contains requirements to implement the San Francisco Bay PCBs TMDL. (Permit Fact Sheet, p. A 83). The Fact Sheet explains the Regional Board's overall strategy for addressing sediment-bound pollutants

¹⁰ In addition, the Bay Area Permit provides only a year and a half to develop costly monitoring plans, and a schedule for development and testing with monitoring at representative sites starting within three months thereafter. The receiving water monitoring questions posed within the Bay Area Permit will be challenging to answer given current knowledge regarding limited effectiveness of such monitoring efforts. The time to develop the plan is likely too short.

of concern including mercury and PCBs. The permit focus is on implementation of the most effective control measures as informed by past pilot testing and ongoing analysis.

In addition to the representative mercury and PCBs monitoring requirements of Provision C.8.f., which articulates the requirements for pollutants of concern monitoring, the Bay Area Permit requires annual reporting for achievement of mercury and PCBs TMDL allocations; mercury and PCBs load reduction progress reporting; reporting of methodologies and assessment of mercury and PCBs load reductions from stormwater; mercury and PCBs green infrastructure reporting; reporting of information on mercury and PCBs risk reduction programs; reporting requirements for PCBs containing building materials; monitoring requirements for PCBs used in caulks/sealants in storm drains or roadways; and PCBs fate and transport study reporting.

The pollutant of concern monitoring in Provision C.8.f. is intended to assess inputs of pollutants of concern to the Bay from local tributaries and urban runoff. (Permit Fact Sheet pp. A 78 - A 79). It will also provide information to support TMDL implementation, assess progress towards achieving wasteload allocations for TMDLs, and help in resolving uncertainties in loading estimates and impairments. (*Id.*) Thus, collectively, the reporting and investigatory types of actions required in the Bay Area Permit, and the monitoring in Provision C.8.f., will yield data that is representative and will assure compliance with the relevant permit conditions.

D. Outfall Monitoring

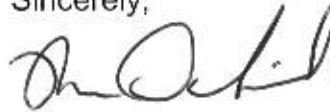
As explained above, CCCWP disagrees with Baykeeper's basic premise that the legality of MS4 permits and their monitoring provisions should be determined based on a comparison to other MS4 permits. Each permit approach includes a combination of BMPs and prohibitions along with monitoring, sampling, and reporting requirements that must be unique in determining compliance.

In adopting the Bay Area Permit, the San Francisco Regional Board rejected the use of extensive outfall monitoring because, based on their best professional judgment, it would not provide the appropriate information to measure progress towards meeting TMDL wasteload allocations or measure pollutant of concern mass loadings to the Bay. Rather, the San Francisco Water Board found that the monitoring program as set forth in Provision C.8.f. would better provide the necessary information to determine compliance with the Bay Area permit provisions, which do not include end-of-pipe limits.

The monitoring program in the Bay Area Permit will measure the effect of discharges from multiple outfalls over multiple storm events in the receiving waters as compared to simply measuring the impact of one outfall during one limited storm event. It is carefully designed to use the rich context provided by the Bay Area's unique regional and watershed monitoring programs. Thus, overall, while the Bay Area monitoring program may be different, it is not flawed, and it certainly meets legal requirements for effective monitoring in NPDES permits.

In summary, we urge the State Water Board to deny the Baykeeper petition in its entirety. Thank you for the opportunity to comment on this petition. Should you have any questions, please contact me at (925) 313-2392 or Tom.Dalziel@pw.cccounty.us.

Sincerely,



Thomas Dalziel
Program Manager
Contra Costa Clean Water Program

cc:

Bruce Wolfe, SFBRWQCB Executive Officer
Tom Mumley, SFBRWQCB Assistant Executive Officer
Keith Lichten, SFBRWQCB, Chief, Watershed Management Division
Geoff Brosseau, BASMAA, Executive Director
Jolan Longway, CCCWP, Management Committee Chair
Sharon L. Anderson, Contra Costa County Counsel

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