CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

Response to Written Comments
Item No. 8

NPDES Permit Reissuance
for
East Bay Dischargers Authority (EBDA), City of Hayward, City of San Leandro, Oro Loma Sanitary District, Castro Valley Sanitary District, Union Sanitary District Livermore-Amador Valley Water Management Agency

The Regional Water Board received timely written comments from the following:

- East Bay Dischargers Authority (EBDA), dated July 12, 2006
- U.S. Environmental Protection Agency (USEPA), dated July 12, 2006
- Bay Area Clean Water Agencies (BACWA), dated July 12, 2006
- San Francisco Baykeeper, dated July 12, 2006
- Alameda County Flood Control and Water Conservation District (Zone 7), dated July 12, 2006

This Response to Comments begins with the comments (in *italics*) quoted where possible, or paraphrased for brevity. Regional Water Board staff responses follow each comment.

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EBDA Comment 1: *EBDA has submitted minor edits on June 26, 2006 via email.*

Response: Comments noted. The revised T.O. reflects these changes.

EBDA Comment 2: *EBDA believes the facility permitted flow is for average dry weather design flow, instead of the peak wet weather flow.*

Response: We have made the suggested change to the Fact Sheet and made other related changes to description of flows as requested by the Discharger. Phil Isorena of the State Water Board confirmed that the "permitted flow" in the Fact Sheet should reflect the design flow that each Regional Water Board designates for permit fee purposes. At this time, the fee based flow is the average dry weather design flow.

EBDA Comment 3: *It is unreasonable to require permittees to conduct a reasonable potential analysis every year as required in Provision C.2.a. That requirement in the provision should be deleted.*

Response: We revised the Tentative Order as suggested. The Discharger, however, will still need to analyze effluent data periodically, and if any increase trend is noted, it shall take actions as required by this provision.

EBDA Comment 4: *Significant changes to the pollution prevention language from previous permits need to better reflect actual conditions, and be revised back to previously agreed-upon language. Additionally, specific copper pollution prevention requirements for two of EBDA's member agencies are inappropriate and unnecessary considering 1) decreasing trends in influent concentrations at these plants, 2) $90 Million in plant upgrades over the next few years to improve treatment efficiencies, and 3) effluent concentrations that are already below proposed copper limits.*

Response: We have made all the changes suggested to Provision C.2.a., and 2.b. For C.2.c., we have incorporated just the first change that was consistent with the SIP 2.4.5 (first paragraph number 2), which is the basis for C.2.c. The other suggested changes for C.2.c. are not consistent with the SIP.

For C.2.d., we have incorporated all the suggested changes except the change that requires the Executive Officer to trigger a Pollution Minimization Program (PMP), because this is inconsistent with the SIP. This part of revised C.2.d. reads:

> "d. If triggered by the reasons in c. above, the Discharger's PMP shall …."

EBDA Comment 5: *Provision C.4 requires the Discharger to submit a cyanide/mercury attainability analysis if the mercury TMDL or cyanide SSO is not adopted by the Board before the compliance schedules end in 2010. EBDA does not think it should be held accountable for the Regional Water Board's inaction.*

Response: We have not made the revisions suggested by EBDA. Regional Water Board staff is committed to completing the mercury TMDL and cyanide SSO in a timely fashion. However, it is EBDA's ultimate responsibility to comply with effluent limits lawfully established in accordance with applicable criteria and regulations. The submittal in question will help the Regional Water Board evaluate permittees' feasibility of complying with the more stringent effluent limits if SSOs/TMDL are not in place before the compliance schedules end. It will also trigger permittees to actively seek solutions and to improve performance to meet the more stringent effluent limits.

EBDA Comment 6: *"EBDA believes that is it inappropriate to include any provisions related to compliance determination in a permit. Compliance determination criteria should be included in the State Water Board Enforcement Policy. Therefore, EBDA requests that Section VII. Compliance Determination be deleted in its entirety. If the Regional Water Board opts not to delete Section VI in its entirety, then EBDA recommends the use of alternative language as noted below. The alternative language was used in Region 9 and was developed by that Region's legal counsel. Neither the State*

Water Board nor EPA objected to this alternative language. The language is contained in Order No. R9-2006-002."

Response: Please see response to BACWA Comment 12.

EBDA Comment 7: *EBDA requests revisions to allow the use of pH adjustment for chronic toxicity testing. It claims that it has conducted a toxicity identification evaluation (TIE) study and the study shows that ammonia is the cause of the observed toxicity. In addition, EBDA submitted a water quality modeling on the receiving water ammonia levels, which shows the unionized ammonia in the receiving water is always below the Basin Plan receiving water objective of 0.025 mg/L.*

Response: We concur, and have made revisions to the Tentative Order's Monitoring and Reporting Program (MRP, Attachment E) B.1 at page E-10, and inserted the basis for this determination into the Fact Sheet (Attachment F) at VI.B page F-50. While we are concurring with this change based on the additional information submitted, similar changes based on voluminous and highly technical information are best addressed while the Tentative Order is being developed for public review and comment. As such, EBDA and other permittees are encouraged to submit <u>all</u> supporting documents with their applications for permit reissuance.

EBDA Comment 8: *EBDA believes that TSS is good enough for blending sampling and BOD is not needed as an indicator of compliance.*

Response: We have not made the requested change, but made a different change instead. BOD, or CBOD, is an effluent limit in the permit. Blending is approved only when there is compliance with all effluent limits. Sampling for BOD, or CBOD, is therefore necessary to demonstrate compliance with the limit. Upon further consideration of this issue, it is apparent that the proposed language modifying the bypass/blending monitoring requirement from Part A of the SMP (Attachment G of the Tentative Order) is inappropriate and impractical. First, blending is conditionally allowed based on compliance with limits, and only actual monitoring can conclusively show compliance with limits. Second, as pointed out by EBDA, sample holding times preclude storing samples for certain parameters while waiting for results from the indicator parameters (TSS/BOD). Finally, both BACWA (BACWA Comment 13), and USEPA (USEPA Comment 11), expressed some confusion concerning this and other Part A modifications. Therefore, the blending/bypass monitoring is restored to the original Part A C.2.h. which reads:

> "When any type of bypass occurs, composite samples shall be collected on a daily basis for all constituents at all affected discharge points which have effluent limits for the duration of the bypass."

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USEPA Comment 1: *"The bypass language contained in the second paragraph of discharge prohibition III.C. inappropriately allows bypasses in the form of wet weather blending at the treatment plant. The permit must be changed to make the blending (bypasses) subject to 40 CFR 122.41(m)(4). Please see the attached detailed comments on compliance, blending, collection systems, and wet weather for specific suggestions. Please consider the attached comments in addition to this letter as EPA's formal comment submittal."*

Response: See response to USEPA Comment 6.

USEPA Comment 2: *The permit includes limits for copper and alternative limits based on a proposed, but not yet adopted, site-specific objective (SSO). The new limits are less stringent than the existing permit's interim limit. The new limits are higher, in part, because they are based on a site-specific water effects ratio (WER) instead of the more conservative CTR default WER.*

USEPA is not opposed to the using of a WER to calculate permit limits. However, copper loading to the Bay has been a significant problem historically, and scientific evidence supports a more stringent approach. EPA's 1994 WER Guidance states that recalculation of water quality criteria should be performed prior to WER development. In this case, the water quality criteria have been recalculated as part of the effort to develop an SSO, but these criteria have not yet been adopted.

Regional Water Board staff can remedy this problem by using a more conservative WER. USEPA guidance presents several scenarios in which the most conservative WERs should be selected. For this permit, a WER should be selected such that it results in permit limits at least as conservative as those that would be proposed if the SSO were already adopted.

Response: We calculated the proposed limits correctly in accordance with the CTR and Basin Plan. The proposed limits are based on water quality objectives (WQOs), which are a function of water effects ratios (WERs). WERs account for how local water conditions attenuate the potential toxic effects of a pollutant. When site-specific information is unavailable, a default WER of 1.0 is used. However, site-specific studies for copper in San Francisco Bay are recently available; they were completed in conjunction with the development of copper SSOs. The new information supports a WER of 2.4, which substantially increases the copper WQOs and the permit limits. This increase is justified, however, based on the available data; USEPA's default WER is unnecessarily stringent in this case.

USEPA asks that we choose a different WER. Its sole purpose appears to be to seek copper WQOs and permit limits that match those that would result from adoption of the copper SSOs. However, doing so would arbitrarily set aside the scientific basis for the WER to implement SSOs that have not yet been adopted. Manipulating the scientifically

derived WER in this manner would mean essentially adopting the SSOs in advance of Basin Plan amendment adoption. Although USEPA guidance may present some scenarios that call for the most conservative WERs, substituting unadopted SSOs for adopted WQOs is not among these scenarios.

USEPA's 1994 WER Guidance states that permit limits can be based on site-specific WERs. It also includes a "Recalculation Procedure" for incorporating local species data into water quality criteria. The guidance states, "If both the Recalculation Procedure and the WER procedure are used, the Recalculation Procedure must be performed first." This guidance does not apply to this permit because it refers to the development of SSOs and because we are not using both procedures. Figure 1 on page 16 of USEPA's 1994 WER Guidance shows a pathway for deriving permit limits that accounts for site-specific WERs without including recalculation. (A Recalculation Procedure is underway for the copper SSOs.)

USEPA notes that copper in San Francisco Bay has long been a significant problem; however, the rationale for considering copper a problem has been based primarily on the assumed WER of 1.0. USEPA does not present other scientific evidence to support a more stringent approach. Use of a site-specific WER, as proposed, to calculate WQOs and permit limits is consistent with CTR and Basin Plan requirements.

USEPA's primary concern appears to be that limits based on the CTR may be less stringent than limits based on the SSOs. We also prefer the draft SSOs over the CTR, but we need to be consistent with *adopted* regulations. We are working diligently to bring the copper SSOs to the Board for consideration this winter, and our hope is that the State Water Board, Office of Administrative Law, and USEPA will approve the SSOs thereafter with minimal delay. The discharger community also supports the SSOs and continues to provide technical and administrative support for the effort.

USEPA Comment 3: *USEPA requests more evidence and receiving water monitoring to support that the current fecal coliform effluent limits in the proposed permit are protective of the beneficial uses of the receiving water.*

Response: We believe the proposed fecal coliform limit is protective, and have added a provision to the Tentative Order, at VI.C.2.f, requiring a study during the term of this permit to continue to verify that the limit is protective during worst case conditions. Our believe that the limit is protective is based on receiving water monitoring data collected starting as far back as 1986 through 2006, at four stations ranging from 0.15 km to 2.9 km away from the outfall. We have added a description of these data at page F-24. Samples were collected 4 times each year, once each season, for total coliform (488 samples), fecal coliform (348 samples), and enterococci (160 samples). These data show that the bacteria concentrations in the receiving water are in compliance with Basin Plan objectives and with USEPA criteria for enterococci. There was just 1, out of 348 fecal coliform samples, that shows a possible exceedance of the 90th percentile fecal coliform objective in the winter of 1998, which was an El Nino year. (Since that objective is based

on at least 5 samples spaced over a 30-day period, we cannot say conclusively that there was actual exceedance or compliance with the objective.) USEPA orally expressed the concern that these data are not conclusive because they may not represent worst case conditions. Therefore, the proposed study is required to be conducted during worst case conditions to verify that beneficial uses are protected through compliance with applicable objectives and criteria.

USEPA Comment 4: *"Section VI.C.2.c. of the draft permit gives a conditional approval of an increase in permitted average dry weather flows from 100.7 MGD to 119.1 MGD. Because the anti-degradation analysis was not available as an attachment to this draft, we were unable to comment on its adequacy. At a minimum, however, the Regional Board should ensure that all EBDA member agencies are treating flows at secondary, and that any necessary plant upgrades are completed prior to final approval of the increase. Additionally, as a condition of the allowed increase, we recommend that the Regional Board require EBDA to submit a yearly loadings summary for constituents of concern such as copper. With an increase in flow and the addition of the brine line, we believe it is important to understand how loadings to the Bay increase over time. Copper is of particular concern due to the relaxed limits contained in this permit, as well as the increased discharge to the system allowed by Regional Board's approval in 2005 of an increase in the Oro Loma/Castro Valley Sanitary District's local limits (see F-5)."*

Response: We do not believe changes are necessary because the Tentative Order already requires what the measures USEPA suggests should be required. As a condition of approval, the Tentative Order (VI.C.2.c) requires completion of proposed treatment plant improvements. It also requires stress testing to demonstrate the reliable performance of the units to achieve secondary treatment levels. Annual pollutant loads for all monitored pollutants are also available through the Electronic Discharge Reporting System because EBDA reports data electronically. Finally, the Tentative Order freezes local limits for copper at current levels (see VI.C.6.a.iv). Concerning the availability of the antidegradation analysis, it was made available when requested. It is not feasible to attach all such supporting data, reports, and studies to the Tentative Order. The Fact Sheet at IV.A.3 summarizes the antidegradation analysis. In short, the proposed flow increases comply with antidegradation policies because modeling results show that there will be no discernable effects.

USEPA Comment 5: *Change Prohibition II.A. to delete the word "treated" so that it is clear that discharges of raw sewage from the collection system are prohibited.*

Response: We have added a prohibition that addresses USEPA's concern. The new prohibition is consistent with State Water Resources Control Board Order No. 2006-0003-DWQ, Statewide General Waste Discharge Requirements for Sanitary Sewer Systems. It reads as follows:

> "Any sanitary sewer overflow that results in a discharge of untreated or partially treated wastewater to waters of the United States is prohibited."

USEPA Comment 6: *USEPA requires that the permit be changed to make the blending (bypasses) subject to 40 CFR 122.41(m)(4). USEPA acknowledges that the Water Board may approve an anticipated bypass at the Discharger's facility if the provisions of 40 CFR 122.41(m)(4)(i)(A), (B) and (C) are met (the bypass is unavoidable, there were no feasible alternatives, and the discharger submits proper notice), and requires that the permit include the specific conditions under which the bypass would be approved, including specific minimum wet weather flow rates.*

Response: We changed the second paragraph of prohibition III.B and sections IV.A.2. of the Fact Sheet, and added Provision VI.C.6.d to the revised T.O., which we believe addresses USEPA's concerns:

> "Blended wastewater is biologically treated wastewater blended with wastewater that has been diverted around biological treatment units or advanced treatment units. Such discharges are approved (1) when Oro Loma Sanitary District or City of San Leandro Water Pollution Control Plants' peak wet weather influent flow volumes exceed the capacity of the secondary treatment unit(s) of 35 MG and 15 MG, respectively, (2) when the discharge complies with the effluent and receiving water limitations contained in this Order, and (3) provided these Dischargers satisfy Provision VI.C.6.d. Furthermore, these Dischargers shall operate their facilities as designed and in accordance with the Operation & Maintenance Manual developed for their respective facility. This means that they shall optimize storage and use of equalization units, and shall fully utilize the biological treatment units and advanced treatment units, if applicable. These Dischargers shall report incidents of the anticipated blended effluent discharges in routine monitoring reports, and shall conduct monitoring of this discharge as specified in the attached MRP (**Attachment E**)."

We replaced section IV.A.2 of the Fact Sheet with the following:

> **"Prohibition III.B. (No bypasses of untreated wastewater, except under the conditions at 40 CFR 122.41(m)(4)(i)(A), (B) and (C)):** This prohibition is based on 40 CFR 122.41(m)(4). This prohibition grants bypass of peak wet weather flows above 35 MGD (Oro Loma Sanitary District) and 15 MGD (City of San Leandro) that are recombined with secondary treatment flows and discharged at the combined outfall 001**,** which met the conditions at 40 CFR 122.41(m)(4)(i)(A)-(C).
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> **"Background**
> During significant storm events, these high volumes can overwhelm certain parts of the wastewater treatment process and may cause damage or failure of the system. Operators of wastewater treatment plants must manage these high flows to both ensure the continued operation of the treatment process and to

prevent backups and overflows of raw wastewater in basements or on city streets. USEPA recognized that peak wet weather flow diversions around secondary treatment units at POTW treatment plants serving separate sanitary sewer conveyance systems may be necessary in some circumstances.

"In December 2005, USEPA invited public comment on its proposed Peak Wet Weather Policy that provides interpretation that 40 CFR 122.41(m) applies to wet weather diversions that are recombined with flow from the secondary treatment, and guidance by which its NPDES permit may be approved by the Regional Water Board. This policy requires that dischargers must still meet all the requirements of NPDES permits, and encourages municipalities to make investments in ongoing maintenance and capital improvements to improve their system's long-term performance.

"Criteria of 40 CFR 122.41(m)(4)(i)(A)-(C)
USEPA's Peak Wet Weather policy states that "If the criteria of 40 CFR 122.41(m)(4)(i)(A)-(C) are met, the Regional Water Board can approve peak wet weather diversions that are recombined with flow from the secondary treatment. The criteria of 40 CFR 122.41(m)(4)(i) (Federal Standard Provisions, Attachment D) are (A) bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; (B) there were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime; and (C) the Discharger submitted notice to the Regional Water Board as required under Federal Standard Provision – Permit Compliance I.G.5.

"(A) bypass was unavoidable to prevent loss of life, personal injury, or severe property damage. The Federal Standard Provisions define severe property damage as "substantial physical damage to property, damage to the treatment facilities, which causes them to become inoperable, or substantial and permanent loss of natural resources that can reasonably be expected to occur in the absence of a bypass." Both Oro Loma Sanitary District and City of San Leandro divert wastewater around secondary treatment units for peak wet weather flows above 35 MGD and 15 MGD (bypasses), respectively, to avoid damage to their treatment facility. This Order requires these Dischargers to evaluate all feasible alternatives to such bypasses.

"(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. Oro Loma Sanitary District initiated a program (Capacity Restoration Project) to fully treat wastewater flows up to 50 MGD, and is currently developing a program to accommodate peak wet weather flows up to 106 MG. City of San Leandro's Capital Improvement Program projected to increase wet weather capacity to 22 MGD and to end bypasses by 2011. This Order requires both Dischargers to submit

the analysis with an implementation schedule satisfactory to the Executive Officer.

"(C) The Discharger submitted notice to the Regional Water Board as required under Federal Standard Provision – Permit Compliance I.G.5. This criterion is satisfied by the Regional Water Board's public hearing regarding, and adoption of, this Order."

We added provision VI.C.6.d. to the revised Tentative Order as follows.

"Provision VI.C.6.d
No Feasible Alternatives Analysis and Implementation Schedule
If Oro Loma Sanitary District and City of San Leandro seek to employ peak wet weather diversions around secondary treatment units at their respective facility, within 30 days of the effective date of this Order, they must satisfy 40 CFR 122.41(m)(4)(i)(A)-(C) by submitting an utility analysis and schedule to implement a program to reduce wet weather flows to the maximum extent practicable. These Dischargers should follow the analysis process set forth in Part 1 of USEPA's Peak Wet Weather Policy's No Feasible Alternatives Analysis Process (available on the website *http://cfpub.epa.gov/npdes/wetweather.cfm*), and at a minimum, the utility analysis must include changes at the facility, timing of ongoing projects or construction, and inflow/infiltration reduction schedules. Following Executive Officer approval of the utility analysis and implementation schedule, this provision shall be considered satisfied."

USEPA Comment 7: *"To be consistent with other permits adopted by the Board, we suggest adding a prohibition against discharges that create a nuisance."*

Response: This change is not necessary because the Regional Water Board's Standard Provisons (Attachment G to the Tentative Order) requires this at Section A.

USEPA Comment 8: *"Section IV., Table 4 - Delete footnote (1)(a) ('Compliance with these limitations is intended…") The permittees are obligated to pursue whatever means necessary to comply with the effluent limits…."*

Response: We revised the Tentative Order as suggested, and the remainder of the footnote re-lettered accordingly.

USEPA Comment 9: *USEPA points out that there are several locations in the permit where it must be made clear that the NPDES permitted facility includes both member agencies' treatment plants, and their collection systems. Therefore, US EPA requests that the following describe the permitted facility as treatment plants and collection*

systems: (a) cover sheet, name of facility, (b) Paragraph I, Table 1, name of facility, (c) facility description, and (d) Fact Sheet, facility description.

Response: We revised the Tentative Order to include the information as suggested.

USEPA Comment 10: *USEPA requests that the Water Board delete the following sentence in Provision VI.C.6.c: "Compliance with these requirements will also satisfy the federal NPDES requirements specified in this Order." This is because USEPA believes such a blanket statement is inappropriate without knowing the context of specific compliance issues.*

Response: We deleted the above sentence from the Tentative Order, and replaced it with the following: "While the Discharger must comply with both the General Waste Discharge Requirements for Collection System Agencies (General Collection System WDR) and this Order, the General Collection System WDR more clearly and specifically stipulates requirements for operation and maintenance and for reporting and mitigating sanitary sewer overflows. Implementation of the General Collection System WDR requirements for proper operation and maintenance and mitigation of spills will satisfy the corresponding federal NPDES requirements specified in this Order. Following reporting requirements in the General Collection System WDR will satisfy NPDES reporting requirements for sewage spills." The purpose of including this revision is to avoid inconsistencies between requirements in General Collection System WDR, and the Tentative Order. Such inconsistencies cause confusion which complicates enforcement. At this time, all NPDES Permits for POTWs currently include federally required standard conditions, three of which apply to collection systems. These are (1) Duty to mitigate discharges (40 CFR 122.41(d)); (2) Requirement to properly operate and maintain facilities (40 CFR 122.41(e)); and (3) Requirement to report noncompliance (40 CFR 122.41(l)(6) and (7)). As outlined below, we believe that that these three conditions are more clearly and fully regulated by the General Collection System WDR for most agencies. In future permits where warranted, we may choose to impose additional specifications in the permit, or as part of an enforcement order, for that problem agency. This targeted strategy is preferable to leaving the requirements vague, duplicative, and confusing for all agencies.

1) Duty to mitigate discharges. The General Collection System WDR addresses the duty to mitigate discharges more clearly and specifically than the Tentative Order. This is because in regards to sanitary sewer overflows, the Tentative Order is vague in requiring "reasonable steps" to prevent sanitary sewer overflows. Whereas, the General Collection System WDR more specifically requires (a) Sanitary Sewer Management Plans to address how the Discharger will mitigate sanitary sewer overflows should they occur, (b) all feasible steps to prevent untreated wastewater from reaching waters of the State (i.e., blocking storm drains), and (c) specific steps that must be undertaken should a sanitary sewer overflow occur (e.g., vacuum recovery, interception and rerouting of untreated or partially treated wastewater, and system modifications to prevent another

overflow at the same location). As such, compliance with the General Collection System WDR is equivalent to those required by the Tentative Order.

2) Requirement to properly operate and maintain facilities. Again, the General Collection System WDR addresses operation and maintenance more clearly and specifically than the Tentative Order. This is because the General Collection System WDR includes a requirement similar to the Tentative Order on properly maintaining collection systems, and provides more details on how the Discharger must document compliance with this requirement. Specifics required by the General Collection System WDR include requirements that the Discharger (a) "allocate adequate resources for the operation, maintenance, and repair of its sanitary sewer system," and (b) "provide adequate capacity to convey base flows and peak flows, including flows related to wet weather events." As such, compliance with the General Collection System WDR is equivalent to those required by the Tentative Order.

3) Requirement to Report Noncompliance. The General Collection System WDR includes more specifics than the Tentative Order on how reporting must be conducted. Additionally, these two documents are inconsistent in their reporting requirements. Since the General Collection System WDR is more specific to collection systems, we believe that it is appropriate to reference this document instead of the Tentative Order to avoid confusion that could result in duplicative reporting, or underreporting. For example, if there is a sewage spill of 1,000 gallons, the General Collection System WDR requires that the Discharger report online as soon as possible, but no later than 3 business days after the Discharger becomes aware of the spill. This requirement is different than the Tentative Order, which requires that the Discharger orally report any noncompliance within 24 hours, and provides a written submission within 5 days. By requiring compliance with both, a Discharger must orally report to the Water Board within 24 hours, report that same spill online within 3 days, and followup with a written report, again of the same spill, within 5 days. Already limited Regional Water Board resources would be diverted towards tracking and filing these duplicative reports instead of towards enforcing the spills. Equally plausible is a discharger who makes the Tentative Order's 24-hour report, interpreting that to also satisfy the General Collection System WDR's "as soon as possible" requirement, thus neglecting to report to the statewide electronic system. Since the Discharger must already provide the Office of Emergency Services with 24-hour notification for spills greater than 1,000 gallons, and the General Collection System WDR requires online reporting for sanitary sewer overflows, the oral notification, and written submission requirements in the Tentative Order are effectively satisfied. In our view, it is much clearer to have one set of reporting requirements for sanitary sewer overflows, and that the requirements in the General Collection System WDR are the most appropriate.

USEPA Comment 11: *"We agree with the requirements of MRP paragraph IX.2.h.i which require monitoring of blended discharges. …We recommend that the Board clarify the sentence stipulating that 'if CBOD or TSS values exceed the weekly average effluent limits….'"*

Response: Instead of clarifying this requirement, we have decided to restore the blending/bypass monitoring requirement from the original Part A, C.2.h., which would make USEPA's suggested clarification unnecessary. This section C.2.h reads:

> "When any type of bypass occurs, composite samples shall be collected on a daily basis for all constituents at all affected discharge points which have effluent limits for the duration of the bypass."

A technical reason for this change is discussed in response to EBDA Comment 8. Another reason for this revision is that BACWA (BACWA Comment 13) also expressed some confusion concerning this and other Part A modifications.

USEPA Comment 12: *"We recommend either deleting the second sentence of footnote [b] on page E-2 of the monitoring and reporting program, or changing the sentence to read, "The discharger may only use alternative methods if the method has an ML of 2 ng/L or less, and approval is obtained from the Executive Officer prior to conducting the monitoring." At this time, method 1631 is the standard for monitoring mercury, and it is unclear why any discharger would not wish to use that method. At a minimum, an alternative method should be reviewed and approved in advance by the Executive Officer. This change should also be made to footnote [10] on page E-6."*

Response: We revised the Tentative Order by inserting the language suggested except that the ML is specified as 0.5 ng/l instead of 2 ng/l. The revisions reflected in footnote [b] on page E-2, Table E-1 (Test Methods and Minimum Levels for Pollutants with Reasonable Potential) of the Monitoring and Reporting Program (MRP, Attachment E), and Table E-4 (Schedule of Sampling, Measurement, and Analysis). The revised ML is also reflected in IV.4, Footnote (7) to Table 4.

In looking at this issue more closely, it is clear that USEPA Method 1631 (EPA-821-R-01-024, March 2001) specifies a minimum level of quantification (or ML) at 0.5 ng/L. The method detection limit (MDL; 40 CFR 136, Appendix B) was determined to be 0.2 ng/L, when no interferences are present.

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BACWA Comment 1: *"BACWA supports and incorporates by reference the comments made by EBDA in its comment letters."*

Response: Comment noted. Please see our responses to EBDA's comments, above.

BACWA Comment 2: *"Page 6, Para. E. and Page F-16, III.B., CEQA Compliance. California Water Code (CWC) section 13389 limits the CEQA NPDES permit exemption*

to chapter three of CEQA. Accordingly…the Regional Water Board should add 'chapter 3'…[to] this section…."

Response: We agree that the CWC limits the exemption to chapter 3 of CEQA, but revising the Tentative Order is not necessary. The paragraphs at issue are template language developed by the State Water Board, and though lacking in that one minor detail, are not incorrect. Moreover, the suggested addition of "chapter 3" does not contribute substantively to the permit requirements. If BACWA believes this change is important, we invite BACWA to bring this issue up with the State Water Board as it continues to revise and refine permit template language so that such minor refinements could be more efficiently and effectively incorporated into future permits statewide.

BACWA Comment 3: *"Page 6, Para. F., Technology-Based Limits. The tentative order states that 'this Order includes technology-based effluent limitations based on Secondary Treatment Standards at 40CFR part 133 ~~and Best Professional Judgement (BPJ) in accordance with 40 CFR §125.3.~~' The stricken part of this sentence should be removed as the imposition of effluent limits using BPJ is no longer allowed under the regulations cited as those limits were required to be imposed prior to 1989 and only apply to industrial dischargers. See 40 C.F.R. §125.3(a)(1) …and (a)(2)(i)(B)…. Even if BPJ limits were authorized under the cited section, the Regional Water Board has not complied with 40 C.F.R. §125.3(d), which requires the consideration of certain factors before BPJ limits are imposed."*

Response: We have made the change requested as the EBDA Tentative Order does not specify technology limits based on BPJ in accordance with 40CFR125.3. However, we disagree with BACWA's interpretation that 40CFR BPJ limits must be imposed prior to 1989. 40 CFR states that "compliance is required…in no case later than March 31, 1989," (emphasis added) not imposition of those limits.

BACWA Comment 4: "*Page 6, Para. G., Water Quality-based Effluent Limitation. This section should remove the reference to 'proposed state criteria' as proposed state criteria may not be used under state law, because to use 'propose' state criteria before formally adopted would be considered underground rulemaking."*

Response: We have not made the change requested because we believe BACWA's contention is incorrect. 40CFR122.44(d)(1)(vi) clearly states, "where a State has not established a water quality criterion …. such a criterion may be derived using a proposed State criterion…." Additionally, the language at issue is template language developed by the State Water Board, and BACWA has provided no convincing reason to change it.

BACWA Comment 5: *"Page 8, Para. M. Stringency of Requirements for Individual Pollutants. BACWA takes issue with the first and last sentences of this paragraph and asks that they be removed as legal conclusions not supported by evidence in the record.*

There are many instances where the permit requirements are more stringent, including mass limits for mercury in addition to concentration limits, numeric effluent limits, and daily or instantaneous limits, none of which are required by federal law and, therefore, are more stringent. Thus, this paragraph must be amended to remove the conclusion that the requirements are not more stringent than federal law, which was included in the permit template in response to the California Supreme Court ruling in City of Burbank, et al v. SWRCB, 35 Cal. 4th 613 (2005).”

Response: We have not made the change requested because we believe BACWA's contention is incorrect for the reasons listed in paragraph M and in the Fact Sheet (Attachment F of the Tentative Order). For example, on the issue of mercury mass limits in addition to concentration limits, the State Implementation Policy (SIP) and Basin Plan provide the basis for imposition of those requirements. The SIP became effective on April 28, 2000, for mercury, which was an objective from the Basin Plan approved by USEPA on May 29, 2000. The State Water Board's Office of Chief Counsel has opined that any water quality objectives and beneficial uses approved by USEPA before May 30, 2000, are applicable water quality standards for the purposes of the Clean Water Act. Therefore, the mass and concentration limits for mercury are no more stringent than required by the federal CWA, and the statements in paragraph M are correct and need not be deleted.

BACWA Comment 6: *“Page 9, Para. R. Notification of Interested Parties. Language should be added, so that this section reads: ‘The Regional Water Board has notified the Discharger and interested agencies and persons of its intent to <u>adopt an NPDES permit and</u> prescribe Waste Discharge Requirements for the discharge and has provided them with an opportunity to submit their written comments and recommendations.”*

Response: The paragraph at issue is template language developed by the State Water Board. Though it lacks the one minor detail suggested by BACWA, the language is not incorrect. Moreover, the suggested addition does not contribute substantively to the permit requirements. If BACWA believes this change is important, we invite BACWA to bring this issue up with the State Water Board as it continues to revise and refine permit template language so that such minor refinements could be more efficiently and effectively incorporated into future permits statewide.

BACWA Comment 7: *“Page 15, Para. IV.7. Mercury Mass Limits. BACWA incorporates by reference earlier legal arguments made in BACWA petitions for review of the Bay Area permits adopted from 2000 through 2003…, in order to preserve BACWA's legal rights to challenge the mercury mass limits should the mercury TMDL not be timely adopted or should it be adopted in a manner different than currently proposed. BACWA intends to withdraw this comment or any legal action taken to enforce this comment once an acceptable mercury TMDL has been timely adopted and implemented.”*

Response: Comment noted. We further note that the State Water Board has upheld the Regional Water Board's imposition of mercury mass limits on all four occasions when it reviewed this issue. Specifically, the State Water Board upheld mercury mass limits in its decisions on the permits for Tosco (WQ 2001-06), Napa (WQ 2001-16), Chevron (WQ 2002-0011), and East Bay Municipal Utility District (WQ 2002-0012).

BACWA Comment 8: "*Page 16, Para. V.B. Groundwater Limiations; Page D-10, Para. VII.A. Non-Minicipal Facilities. Unnecessary Headings. Since this permit does not regulate groundwater or non-municipal facilities, these headings and paragraphs should be removed as unncessagy."*

Response: We are not making the changes requested because they are not necessary. We have clearly indicated in the Tentative Order that they do not apply, and these headings do not detract from the permit requirements that do apply. These headings are part of the State Water Board's permit template headings. State Water Board staff instructed us to indicate when sections do not apply rather than to delete the headings because deleting headings causes problems with the table of contents and introduces other document formatting problems that are time consuming to fix.

BACWA Comment 9: "*Page 17, Para. VI.A.2. Regional Standard Provisions. Many of the requirements in the Regional standard provisions duplicate the federal standard provisions. By including both, the permittee becomes subject for two separate permit violations for the same action. Such duplicative requirements should be avoided."*

Response: We agree. VI.A.2 has been revised to state,

> "2. Regional Water Board Standard Provisions. The Discharger shall comply with all applicable items of the Standard Provisions and Reporting Requirements for NPDES Surface Water Discharge Permits, August 1993 (Standard Provisions, Attachment G). Where provisions or reporting requirements specified in this Order are different from equivalent or related provisions or reporting requirements given in the Standard Provisions, the specifications of this Order shall apply. Duplicative requirements in the federal Standard Provisions in VI.A.1.2, above (Attachment D) and the regional Standard Provisions (Attachment G) are not separate requirements such that violation of a duplicative requirement constitutes two separate violations."

BACWA Comment 10: *"Page 18, Para. VI.C.2. Special Studies, Technical Reports and Additional Monitoring. This section should reference that the requirements of CWC sections 13225(c) and 13267(b) were met in relation to requirements for additional monitoring and reporting, and the Fact Sheet must include evidence of the need for these studies and the burden analysis required by law."*

Response: We have revised the Fact Sheet of the Tentative Order as requested. Paragraph P on page 9 of the Tentative Order states the basis for the monitoring and reporting requirements is CWC §13267 and 13383. As required by 13267, but not 13383, the Regional Water Board "shall provide the person with a written explanation with regard to the need for the reports…." The Fact Sheet discussion for provision VI.C.2 has been revised to state,

"2. Special Studies and Additional Monitoring Requirements

a. Effluent Characterization Study. This Order does not include effluent limitations for the selected constituents addressed in the August 6, 2001 Letter that do not demonstrate Reasonable Potential, but this provision requires the Discharger to continue monitoring for these pollutants as described in the August 6, 2001 Letter and as specified in the MRP of this Order. If concentrations of these constituents increase significantly, the Discharger will be required to investigate the source of the increases and establish remedial measures, if the increases result in reasonable potential to cause or contribute to an excursion above the applicable WQO/WQC. This provision is based on the Basin Plan and the SIP 1.2 and 1.3. Furthermore, this information requirement is authorized by CWC section 13267 and 13383. Continued effluent characterization is necessary to track any change to the quality of the discharge to 1) ensure that the limitations in this Order are protective in that all parameters that warrant limits are limited, and 2) provide a basis for establishing effluent limitations and requirement in the next NPDES permit reissuance. The Discharger is clearly responsible for providing the information. The frequency of monitoring is not onerous, and is reasonable and affordable for the relative size of the Discharger.

b. Ambient Background Receiving Water Study. This provision is based on the Basin Plan, the SIP, and the August 6, 2001 Letter for priority pollutant monitoring. As indicated in the permit, this requirement may be met by participating in the collaborative BACWA study. This information requirement is authorized by CWC section 13267 and 13383. Continued ambient background monitoring is necessary to track any changes in the quality of the receiving water so as to provide an up-to-date basis for establishing effluent limitations and requirements in the next NPDES permit reissuance. The Discharger is clearly responsible for providing this information. The frequency of monitoring is not onerous, and is reasonable and affordable for the relative size of the Discharger particularly since the Discharger has and will continue to participate in a cost sharing collaborative effort with other dischargers.

c. Permitted Treatment Plant Flows: The permitted average dry weather flow capacity of the treatment plant identified in Prohibition III.C. of this Order may be increased to 119.1 mgd by written approval from the

Executive Officer, in accordance with the conditions outlined. This information requirement is authorized by CWC section 13267 and 13383 to ensure that after construction the plants are functioning as designed to meet applicable treatment standards and effluent limits. Such studies are common practice and are reasonable and affordable for the relative size of the Discharger.

d. Optional Mass Offset: This option is provided to encourage the Discharger to further implement aggressive reduction of mass loads to San Pablo Bay.

e. Status Report on 303(d)-Listed Pollutants, Site-Specific Objective and TMDL: This Order grants maximum compliance schedules based on the Basin Plan for cyanide and dioxin-TEQ because of work on a TMDL and SSO. It is appropriate for the Discharger to annually report on and track its efforts to support the TMDL and SSO. This report is authorized by SIP 2.2.1 and is necessary to comply with it. SIP 2.2.1 requires that the Regional Water Board establish interim requirements and dates, and that there be no more than one year between interim dates. Additionally, this requirement is authorized pursuant to CWC 13267 and 13383. The information required is minimal relative to the range of studies that could be required as a condition of being granted a compliance schedule. However, this minimal requirement is appropriate at this time because of ongoing region-wide efforts on TMDLs and SSOs supported by the Discharger that will result in appropriately protective objectives and allocations for the pollutants in question."

BACWA Comment 11: *"Pages 20-22, Para. VI.C.3. Pollutant Minimization Program. Words such as 'conduct,' 'implement,' and 'implementation' are used in this section of the tentative permit related to Pollutant Minimization (PMP) notwithstanding the ruling in the SWRCB's precedential order in the Tosco Avon Refinery case, Order No. 2001-06, to the contrary. Under that case, the Regional Water Board was held to lack the authority to require incorporation of or 'implementation' of a PMP or Pollution Prevention Plan (PPP) in a state-issued permit. … Under the Tosco decision, the State Board made no differentiation between PPPs and PMPs. …Water Code §13263.3, did not prevent a requirement in a permit to prepare a PPP/PMP. …However, a requirement to implement the plan was inconsistent with … 13263.3…. The only way to avoid this inconsistency with the law is for the permit to not include words such as implement or conduct or for the permit to expressly state that for any PPP or PMP, the permit does not incorporate this plan by reference into the permit."*

Response: We disagree with BACWA's contentions. The Pollutant Minimization Program (PMP) required by Provision VI.C.3 of the Tentative Order is different than the Pollutant Prevention Plan (PPP) authorized by CWC section 13263.3, and is also different from the PMP required in the Tosco permit and the associated State Water

Board Order WQ 2001-06. In order to be a PPP within the ambit of CWC section 13263.3, it must be authorized under that section and meet the requirements of what a PPP must contain. The PMP is neither authorized under section 13263.3, nor does it satisfy the required elements for what a PPP must include under subsection (d)(3). Instead, the PMP in the EBDA Tentative Order is authorized under SIP 2.2.1 and 2.4.5 (see Fact Sheet at F-52). Both SIP 2.2.1 and 2.4.5 provide the Regional Water Board with the authority to require a PMP as defined in the SIP. For pollutants with compliance schedules, SIP 2.2.1 states that the Regional Water Board "may also impose interim requirement to control the pollutant, such as pollutant minimization and source control measures." When there is evidence that a pollutant is above an effluent limit, SIP 2.4.5 states, "Dischargers shall be required to conduct a Pollutant Minimization Program …."

In any case, we note a typographical error in the Fact Sheet at page F-52, which we have fixed as follows:

> " 3. **Pollutant Minimization Program**
>
> This provision is based on Chapter 4 of the Basin Plan and Section 2.4.5 of the SIP. Furthermore, for mercury and cyanide implementation of pollution minimization is based on Section 2.2.1 of the SIP because compliance schedules are granted…."

BACWA Comment 12: "*Compliance Determination. The permit should not contain any provisions relating to how compliance will be determined as that is a larger policy issue that should be dealt with through amendments to the State's Enforcement Policy. …The proposed language prejudges violations and the number of violations, which should not be done without the benefit of a hearing where evidence can be presented and weighed. …[it] is policy language never adopted by statute or as a regulations. … Even an EPA comment letter on another template permit found such language prejudging an outcome to be inappropriate. See Comment letter from USEPA Region IX on Proposed Permit for Fallbrook Public Utility District (Aug. 3, 2005) ('determinations about whether a discharge violates the Clean Water Act and/or a permit are appropriately made on a case by case basis.') Thus, blanket compliance determinations language applicable to all permits is inappropriate.*

This prejudgment of the number of permit violations is improper particularly when it is contrary to … Mandatory Minimum Penalties (MMP) statute [which] does not find every exceedance to be a 'violation' and does not find 31 or 7 'violations' from 31 or 7 days of exceedances, but merely one violation. … BACWA requests the Compliance Determination language be stricken from all permits and adopted instead as an amendment to the State's Enforcement Policy. In the interim, however, until changes to the enforcement Policy can be made, BACWA submits the following draft language … which was used in another region and not objected to by the State Board or USEPA. …" Footnote to comment: "If this Region will not waver from the current Permit Template language, then the Permit Template becomes an underground regulation … ."

Response: We have revised this section by inserting new language that addresses the concern regarding inconsistency with the MMP statute, that reduces redundancy, and that makes it more consistent with the SIP related to the use of medians and reporting levels. Additionally, a definition for RL has been added to Attachment A of the Tentative Order to make the section complete. We have not made the other changes suggested. A violation of an average monthly limit is allowed to be deemed a violation of each of the days of that month. Atlantic States Legal Foundation, Inc. v. Tyson Foods, 897 F.2d 1128 (1990).

In regard to BACWA's reference to USEPA's August 3, 2005, letter in support of its contention, we note that USEPA's quote is taken out of context. USEPA's statement was in relation to the San Diego Regional Water Board's proposal to exempt violations of discharges to land from the Clean Water Act. It was not in relation to the compliance determination language in the permit template. Though our proposed revised language is now more consistent with updated language provided as guidance by the State Water Board, consistency is not the sole reason for proposing it in the Tentative Order, but rather we believe it accurately and more clearly state how compliance will be determined as compared to the language suggested by BACWA.

The revised VII. language reads:

> "Compliance with the effluent limitations contained in section IV of this Order will be determined as specified below:
>
> "**A. General.**
>
> Compliance with effluent limitations for priority pollutants shall be determined using sample reporting protocols defined in the MRP and Attachment A of this Order. For purposes of reporting and administrative enforcement by the Regional and State Water Boards, the Discharger shall be deemed out of compliance with effluent limitations if the concentration of the priority pollutant in the monitoring sample is greater than the effluent limitation and greater than or equal to the reporting level (RL).
>
> "**B. Multiple Sample Data.**
>
> When determining compliance with an AMEL, AWEL, or MDEL for priority pollutants and more than one sample result is available, the Discharger shall compute the arithmetic mean unless the data set contains one or more reported determinations of "Detected, but Not Quantified" (DNQ) or "Not Detected" (ND). In those cases, the Discharger shall compute the median in place of the arithmetic mean in accordance with the following procedure:
>
> 1. The data set shall be ranked from low to high, ranking the reported ND determinations lowest, DNQ determinations next, followed by quantified values (if any). The order of the individual ND or DNQ determinations is

unimportant.

2. The median value of the data set shall be determined. If the data set has an odd number of data points, then the median is the middle value. If the data set has an even number of data points, then the median is the average of the two values around the middle unless one or both of the points are ND or DNQ, in which case the median value shall be the lower of the two data points where DNQ is lower than a value and ND is lower than DNQ.

"C. Average Monthly Effluent Limitation (AMEL)

If the average (or when applicable, the median determined by subsection B above for multiple sample data) of daily discharges over a calendar month exceeds the AMEL for a given parameter, this will represent a single violation, though the Discharger will be considered out of compliance for each day of that month for that parameter (e.g., resulting in 31 days of non-compliance in a 31-day month). If only a single sample is taken during the calendar month and the analytical result for that sample exceeds the AMEL, the Discharger will be considered out of compliance for that calendar month. The Discharger will only be considered out of compliance for days when the discharge occurs. For any one calendar month during which no sample (daily discharge) is taken, no compliance determination can be made for that calendar month.

"D. Average Weekly Effluent Limitation (AWEL)

If the average (or when applicable, the median determined by subsection B above for multiple sample data) of daily discharges over a calendar week exceeds the AWEL for a given parameter, this will represent a single violation, though the Discharger will be considered out of compliance for each day of that week for that parameter, resulting in 7 days of non-compliance. If only a single sample is taken during the calendar week and the analytical result for that sample exceeds the AWEL, the Discharger will be considered out of compliance for that calendar week. The Discharger will only be considered out of compliance for days when the discharge occurs. For any one calendar week during which no sample (daily discharge) is taken, no compliance determination can be made for that calendar week.

"E. Maximum Daily Effluent Limitation (MDEL)

If a daily discharge (or when applicable, the median determined by subsection B above for multiple sample data of a daily discharge) exceeds the MDEL for a given parameter, the Discharger will be considered out of compliance for that parameter for that 1 day only within the reporting period. For any 1 day during which no sample is taken, no compliance determination can be made for that day.

"F. Instantaneous Minimum Effluent Limitation

If the analytical result of a single grab sample is lower than the instantaneous minimum effluent limitation for a parameter, the Discharger will be considered out of compliance for that parameter for that single sample. Non-compliance for

each sample will be considered separately (e.g., the results of two grab samples taken within a calendar day that both are lower than the instantaneous minimum effluent limitation would result in two instances of non-compliance with the instantaneous minimum effluent limitation).

"**G. Instantaneous Maximum Effluent Limitation**

If the analytical result of a single grab sample is higher than the instantaneous maximum effluent limitation for a parameter, the Discharger will be considered out of compliance for that parameter for that single sample. Non-compliance for each sample will be considered separately (e.g., the results of two grab samples taken within a calendar day that both exceed the instantaneous maximum effluent limitation would result in two instances of non-compliance with the instantaneous maximum effluent limitation)."

Additionally, a definition for RL is added to Attachment A of the Tentative Order. This definition reads:

"**Reporting Level (RL)** is the ML (and its associated analytical method) chosen by the Discharger for reporting and compliance determination from the MLs included in this Order. The MLs included in this Order correspond to approved analytical methods for reporting a sample result that are selected by the Regional Water Board either from Appendix 4 of the SIP in accordance with section 2.4.2 of the SIP or established in accordance with section 2.4.3 of the SIP. The ML is based on the proper application of method-based analytical procedures for sample preparation and the absence of any matrix interferences. Other factors may be applied to the ML depending on the specific sample preparation steps employed. For example, the treatment typically applied in cases where there are matrix-effects is to dilute the sample or sample aliquot by a factor of ten. In such cases, this additional factor must be applied to the ML in the computation of the RL."

BACWA Comment 13: *"Pages E-14 to E-19, Para. IX Modifications to Part A of Self-Monitoring Program. The requires as proposed, namely incorporating an attached document (Attachment G) and then proposing changes to that attached document, are confusing, vague, and ambiguous. Instead of inserting these requirements as proposed, the Regional Water Board should amend the requirements of the attachment as desired and either have a new amended attachment, or incorporate the complete amended requirements into the permit."*

Response: We agree that this is somewhat confusing, and have removed all but two of the most relevant additions related to Self-Monitoring Reports. These involve invalidating measurements, and reporting data in electronic format. The suggestion to revise Part A is a good one. Earlier this year, we did initiate a process to revise Part A, but abandoned that effort in response to USEPA's direction to focus resources on permit reissuances. We hope to restart this effort after permit backlogs are reduced in a couple of years.

BACWA Comment 14: *"Page F-36, Dilution Credits. BACWA would like to see a broader analysis in all permits related to dilution and not an automotive, conservative reliance on 10:1 dilution. The Fact Sheet artificially constrains the permitted discharge levels to an Basin Plan artifact of 10:1 dilution even though evidence in the record indicates that Discharge Point 001 receives a minimum initial dilution of greater than 10:1 at all times and up to 45:1. The Regional Water Board was informed in the SWRCB's precedential order, No. 2002-0012, that it should not mechanically apply with previous 10:1 dilution contained in the Basin Plan without undertaking the required analysis under the SIP and without consideration of actual dilution found in studies.*

Reliance upon the Basin Plan's previous 10:1 dilution limitation is no longer required since the Basin Plan has been amended. Now the Basin Plan grants shallow water dischargers dilution pursuant to the SIP….

The Regional Water Board should also consider the discharger's demonstration of compliance with water quality objectives, in accordance with the SIP. As such, greater dilution should be allowed along with continued monitoring to assure that objectives are being met in the receiving water, or if needed, a study as set forth in the Basin Plan to authorize continued use of the larger dilution credit.

Request: Provide adequate analysis in all permits for limiting dilution to the standard 10:1 particularly where greater dilution is demonstrated through modeling or studies or where the discharger can demonstrate an aggressive source control program."

Response: The Fact Sheet of the Tentative Order has been revised to add details of the factors we considered for limiting the Discharger's dilution credit to 10:1.

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NOTE: SF Baykeeper provides summaries of its main points in the introduction to its comment letter with details in separate sections that follow. The responses below address only the detailed comments to avoid duplication.

SF Baykeeper Comment 1: "*The Compliance Schedule and Interim Limits in the Permit are Inconsistent with Federal Law.… CTR section (e)(3) states: 'Where an existing discharger reasonably believes that it will be infeasible to promptly comply with a new or more restrictive [water quality based effluent limitation ('WQBEL')] based on the water quality criteria set forth in this section, the discharger may request approval from the permit issuing authority for a schedule of compliance. 40 C.F.R. 131.38(e)(3). … Section (e)(8) of the CTR states: 'The provisions in this paragraph (e), Schedules of compliance, shall expire on May 18, 2005. 40 C.F.R. 131.38(e)(8)…. "*

Response: We have not made changes in response to this comment, because the Tentative Order proposes compliance schedules that are lawfully granted. The Tentative Order specifies schedules for mercury, cyanide, and heptachlor. As noted in the Fact

Sheet to the Tentative Order, mercury is based on a Basin Plan objective and cyanide is based on a National Toxics Rule criteria. The compliance schedules for these pollutants are based on the Basin Plan's compliance schedule provision in Chapter 4. Only heptachlor is based on criteria from the CTR. The compliance schedule for heptachlor is based on the compliance schedule provisions of the SIP as approved by USEPA, not the CTR. The preamble of the CTR (31704) states,

> "… EPA has chosen to promulgate the rule with a sunset provision…. However, if the State Board adopts, and the EPA approves, a statewide authorizing compliance schedule provision significantly prior to May 18, 2005, EPA will act to stay the authorizing compliance schedule provision in today's rule."

The USEPA approved the compliance schedule provisions of the SIP on May 18, 2000, with the effect that CTR section (e) was stayed and no longer in effect. SIP 2.1 allows that the schedule of compliance be up to 5 years from the date of permit reissuance, but in no case exceed 10 years from the effective date of the SIP. The effective date of the SIP for CTR criteria is the date of the USEPA approval letter, May 18, 2000. Thus, the compliance schedule for heptachlor may extend up to May 18, 2010, because no compliance schedule for heptachlor was previously granted for this discharger. The proposed compliance schedule for heptachlor in EBDA's draft permit is April 28, 2010, which is within the allowable timeframes of SIP 2.1.

SF Baykeeper Comment 2: *The proposed compliance schedules and interim effluent limitations for mercury, cyanide, and heptachlor are inconsistent with the CTR. "Not only do the durations for the concentration limits in the proposed EBDA Permit differ from the durations set forth in the CTR, rendering comparison rather difficult, but the concentrations set forth in the interim limits allow for situations in which the permittee may freely exceed the CTR levels while remaining within the interim effluent limits of the proposed EBDA Permit. For example, the maximum monthly concentration for heptachlor is under the interim limits is inconsistent with and potentially less stringent than the limitation set forth in the CTR. The Proposed EBDA Permit's interim limits allow the permittees to discharge Heptachlor within a monthly average of .01 ug/L, even though the CTR require that there be no greater than a .0038 ug/L Criterion Continuous Concentration (CCC) in any 4-day period and no greater than a .52 ug/L Criterion Maximum Concentration (CMC) at any time. …These interim effluent limitations therefore provide potential for numerous exceedances of the CTR during the 4-year period that the interim limitations would be in effect; thus, the proposed EBDA Permit's interim limitations are inconsistent with the CTR [and NTR for cyanide] and the Clean Water Act.*

Further, section 40 C.F.R. 131.38(e)(8) of the CTR expressly states that all of the provisions in section (e), including the provisions allowing for compliance schedules and interim effluent limitations, shall expire on May 18, 2005. Because the Regional Water Board is now proposing these compliance schedules and interim limitations for a 2006

permit renewal date, the proposed compliance schedules and interim effluent limitations under the proposed EBDA Permit are unlawful."

Response: We have not made changes in response to this comment, because the Tentative Order proposes interim limits and compliance schedules that are consistent with the SIP and the Basin Plan and are lawfully granted. SF Baykeeper raises two main issues in this comment: 1) the interim limits may not be protective of water quality criteria, and 2) the CTR's compliance schedule provision expired in 2005 and would not apply to this 2006 permit action.

On the first issue concerning the protectiveness of interim limits, "water quality based effluent limits" are designed to be protective of water quality criteria, not interim limits. SIP 2.2.1 requires that interim limits be based on current facility performance or on existing permit limits. It does not require interim limits to be based on water quality criteria or objectives. The Fact Sheet to the Tentative Order explains the basis for the interim limits for each of the three pollutants at issue, and each is consistent with the SIP. Thus, comparison of the interim limits' concentrations and duration to the criteria and objectives are in appropriate. On the second issue, please see our response to SF Baykeeper Comment 1.

SF Baykeeper Comment 3: *"Section 2.1 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California ("State Implementation Plan" or "SIP") states:*

> *In no case… shall a compliance schedule for [dischargers of CTR-listed pollutants] exceed, from the effective date of this Policy: (a) 10 years to establish and comply with CTR criterion-based effluent limitations.*

Because the effective date of the SIP was in 2000, the SIP requires that no compliance schedule shall extend past 2010. As explained in Section I [SF Baykeeper Comment 1] above, the CTR provides that it is illegal to issue a permit that contains compliance schedules or interim effluent limitations after May 18, 2005, 40 C.F.R. 131.38(e)(8), and that compliance schedules and interim effluent limitations may last no longer than five years, 40 C.F.R. 131.38(e)(6). Thus, the SIP can be interpreted to be consistent with the CTR. The last five-year compliance schedule could begin in 2005 and end in 2010, consistent with the provisions of both the SIP and the CTR. However, the Regional Board staff's application of the SIP to the EBDA Permit is inconsistent with the CTR. Pursuant to 40 C.F.R. 131.38(e)(8) of the CTR, no permit containing compliance schedules or interim effluent limitations may be issued after May 18, 2005. Therefore, the proposed compliance schedules and interim effluent limitations must be dropped from the EBDA Permit."

Response: We have not made changes in response to this comment, because the Tentative Order proposes compliance schedules that are consistent with the SIP and Basin Plan and are lawfully granted. This comment is essentially the same as SF

Baykeeper Comment 1, so please refer to our response to that comment as it relates to the authority of compliance schedules for CTR pollutants in permits issued after 2005.

SF Baykeeper Comment 4: *While permit compliance schedules are now prohibited, the Regional Water Board staff may recommend a Time Schedule Order pursuant to section 13300, with a timeline similar to that contained in the proposed permit compliance schedule.*

Response: Because we disagree that compliance schedules in permits are prohibited, it is inappropriate to recommend a Time Schedule Order for this permit.

SF Baykeeper Comment 5: *"Blending provisions are inconsistent with Federal Law…."*

Response: See response to USEPA's Comment 6 above.

SF Baykeeper Comment 6: *"Minimum Levels are used for agency enforcement discretion only, not compliance determinations." "[The] permit must include clear language setting out the specific use and limits of MLs and their role in the permit."*

Response: We have inserted new language into the Tentative Order at VII.A that addresses SF Baykeeper's comment. Please see response to BACWA Comment 12 for the specific language inserted.

SF Baykeeper Comment 7: "*Baykeeper requests that the Water Board incorporate the elements of the General Collection System WDR into individual NPDES Permits. This is because Baykeeper believes that the General Collection System WDR may conflict with, or at least make confusing the requirements of the individual NPDES Permit.*

Response: We are denying this request. This is because the Discharger is already required to enroll in the General Collection System WDR, so incorporating these requirements in the NPDES Permit would be duplicative. Additionally, in adopting the General Collection System WDR, the State Water Board made a choice to establish the requirements as State Waste Discharge Requirements not as an NPDES Permit. The reason was that not all sanitary sewer overflows will result in discharges to surface water, leading to violations of the Clean Water Act. Furthermore, the State Water Board indicated that even though collection systems have the potential to overflow to surface waters this is not grounds for including such requirements under a NPDES Permit. This is because the United States Court of Appeals for the 2nd Circuit called into question the states' and USEPA's ability to regulate discharges that are only "potential" under a NPDES Permit. For these same reasons, we believe it is appropriate to not incorporate the elements of the General Collection System WDR into individual NPDES Permits.

However, we do agree that it is important and beneficial to avoid conflict and confusion. As such, in responding to Comment 10 from USEPA, we clarified areas where the General Collection System WDR overlaps with requirements in the Tentative Order.

This will promote consistency with the State Water Board General Collection System WDR, and will be consistent with the State Water Board's intent for the General Collection System WDR to "be the primary regulatory mechanism for sanitary sewer systems statewide." We agree with this approach because the General Collection System WDR will facilitate consistency by (a) ensuring there is a unified statewide approach for developing sanitary sewer management plans, (b) establishing consistent requirements for reporting and tracking sanitary sewer overflows, and (c) promoting consistent enforcement for violations.

SF Baykeeper Comment 8: *Baykeeper indicates that the permit does not address sanitary sewer overflow reporting, does not incorporate or reference the monitoring requirements of the General Collection System WDR, and may perpetuate the confused and inconsistent SSO reporting that has plagued efforts to evaluate collection system performance in California.*

Response: The General Collection System WDR includes requirements for sanitary sewer overflow reporting, and the Discharger will be covered by these requirements. As pointed out in our response to Comment 7 from SF Baykeeper, the General Collection System WDR should facilitate consistency that will enable the State and Regional Water Boards and the public to better evaluate collection system performance in California. In our view, individual NPDES Permits should not reiterate what is already required by the General Collection System WDR.

****

Zone 7 Comment 1: *"Since the three draft permit (EBDA, Livermore, and DSRSE) allows Zone 7 to comply with the Master Water Recycling Permit and implement the SMP (Salt Master Plan) by allowing the discharge of GW RO (groundwater reverse osmosis) concentrate through the regional waste water system and the NPDES permit, Zone 7 strongly supports the three permits."*

Response: Comment noted. We appreciate the support.