Bay Area Clean Water Agencies

Leading the Way to Protect Our Bay

A Joint Powers Public Agency

P.O. Box 24055, MS 702

Oakland, California 94623

July 12, 2006

VIA EMAIL AND FACSIMILE (510) 622-2460

Mr. Bruce Wolfe, Executive Director
San Francisco Bay Regional Water Quality Control Board
1515 Clay St. Suite 1400
Oakland, CA 94612

RE: Comments on the Tentative Order reissuing EBDA's NPDES Permit

Dear Mr. Wolfe:

The Bay Area Clean Water Agencies (BACWA) appreciate the opportunity to comment on the Tentative Orders for East Bay Dischargers Authority, Dublin San Ramon Services District ("DSRSD"), and City of Livermore, collectively called ("EBDA") herein, as well as make comments on policy issues related to the State's permit template and the Regional Water Board's permitting policies. BACWA members own and operate publicly-owned treatment works (POTWs) that discharge to San Francisco Bay and its tributaries. Collectively, BACWA's members serve over 5 million people in the nine-county Bay Area, treating all domestic, commercial and a significant amount of industrial wastewater. BACWA was formed to develop a region-wide understanding of the watershed protection and enhancement needs through reliance on sound technical, scientific, environmental and economic information and to ensure that this understanding leads to long-term stewardship of the San Francisco Bay Estuary. BACWA member agencies are public agencies, governed by elected officials and managed by professionals who are dedicated to protecting our water environment and the public health.

BACWA hopes that the following comments will result in changes being made to the tentative order prior to issuance of the final NPDES permit for EBDA. Further, in order to avoid repetition, but to preserve these arguments, BACWA supports and incorporates by reference the comments made by EBDA in its comment letters.

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, BACWA requests that the language contained in the permit should track the CWC language.

Request: The Regional Water Board should add "chapter 3," which would make this section read: "This action to adopt an NPDES permit is exempt from the provisions of Chapter 3 of the California Environmental Quality Act . . ."

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 40 CFR Part 133 ~~and Best Professional Judgment (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)(stating POTWS to have effluent limitations based on secondary treatment) and (a)(2)(i)(B)(stating for dischargers other than POTWs, effluent limits can be based on BPJ, but must be complied with by March 31, 1989). 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.

Request: Remove the phrase, which says: "and Best Professional Judgment (BPJ) in accordance with 40 CFR §125.3."

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

Request: Remove the word "proposed" from before the phrase "state criteria."

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).

Request: Remove the first and last sentences of Para. M.

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 adopt an NPDES permit and prescribe Waste Discharge Requirements for the discharge and has provided them with an opportunity to submit their written comments and recommendations."

Request: Make the requested change to the text of this section.

Page 15, Para. IV.7. Mercury Mass Limits. BACWA incorporates by reference earlier legal arguments made in BACWA petitions for review of Bay Area permits adopted from 2000 through 2003 (e.g., Petition for Review of Contra Costa County Sanitation District's Permit, Appeal No. OCC A-1399(a)), 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 that 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.

Page 16, Para. V.B. Groundwater Limitations; Page D-10, Para. VII.A. Non-Municipal Facilities. Unnecessary Headings. Since this permit does not regulate groundwater or non-municipal facilities, these headings and paragraphs should be removed as unnecessary.

Request: Remove Paragraph Headings V.B., Attachment D, Para. VII.A. as unnecessary.

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.

Request: BACWA requests that the Regional Water Board include the non-duplicative regional standard provisions out of the 1993 document within the permit instead of incorporating the entire 1993 document that contains many repetitive and duplicative requirements with those found in Attachment D.

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.

Request: Include necessity and burden analysis for all special studies, technical reports and additional monitoring, pursuant to Water Code requirements.

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 Programs (PMP) notwithstanding the ruling in 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. *See* Water Code §13263.3(k) ("a regional board . . . <u>may not include a pollution prevention plan in an waste discharge requirements or other permit issued by that agency</u>"); Order No. 2001-06 at 38-40 and 60, para. 9 (March 7, 2001)("The Regional Board <u>cannot require in a permit</u> that a discharger implement a pollution prevention plan.")(all emphasis added).

Under the Tosco decision, the State Board made no differentiation between PPPs and PMPs. *See* Order No. 2001-06 at 39 ("the Board treats a waste minimization plan the same as if it were labeled a pollution prevention plan."). The state law proscription against including PPPs in permits was to ensure that the contents of PPPs are not subject to citizen suits under the Clean Water Act. *Id.* In that case, the Board found that state law, at Water Code §13263.3, did not prevent a requirement in a permit to <u>prepare</u> a PPP/PMP. *Id.* at 40. However, a requirement to

implement the plan was inconsistent with the process set forth in section 13263.3 because the Regional Water Board can only require a discharger to comply with the PPP "after providing an opportunity for comment at a public proceeding with regard to that plan." *Id. citing* Water Code §13263.3(e).

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.

Request: To remedy this problem, BACWA asks that the following sentence be added to Para. VI.C.3.a):

> ***"…. None of the Pollutant Minimization Programs mentioned herein are incorporated by reference into this permit."***

Pages 21-22. 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. In addition, most of the proposed language instructs the Regional Water Board staff (e.g., "a violation will be flagged"), not the permit holder regulated by this permit.

Furthermore, 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. The Compliance Determination language proposed herein is policy language never adopted by statute or as a regulation. This policy language improperly prejudges where an exceedance equates to an instance of non-compliance or a "violation" and how many days of non-compliance will be found. 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 determination language applicable to all permits is inappropriate.

This prejudgment of the number of permit violations is improper particularly when it is contrary to adopted state law. The Mandatory Minimum Penalties (MMP) statute 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. *See* Water Code §13385(i); State Water Resources Control Board, *Water Quality Enforcement Policy* at 22(Feb. 19, 2002); *see also* SWRCB SB709 Questions & Answers Document at 15, Q.39 (April 17, 2001)(if "the discharger has violated a monthly average effluent limitation, the Regional Water Board should consider that one violation."). Further, the date of the sample generally only indicates a violation on the date of the data collection and other evidence is required to demonstrate that violations occurred on more than one day. *See* SWRCB SB709 Questions & Answers Document at 13, Q.35 (April 17, 2001). For these reasons, compliance determination language is more appropriately included in regional or statewide policy documents, instead of individual permits. *See e.g.,* SIP at 2.4.5.

Finally, determination of more than one violation per day, as is suggested with the language in the sections related to instantaneous maximum and minimum effluent limitations is inconsistent with state and federal law. The Water Code dictates penalties "for each day in which the violation occurs," and the CWA discusses penalties "per day for each violation." Water Code §13385(c)(1); 33 U.S.C. §1319(d). Thus, multiple violations each day are not authorized. For the above stated reasons, 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 to the Regional Water Board, which was used in another region and not objected to by the State Water Board or USEPA.[1] BACWA would accept the following language in lieu of the currently proposed permit template language, as was recently used in Order No. R9-2006-002:

"VII. Compliance Monitoring ~~Determination~~

A. Average Monthly Effluent Limitation (AMEL).

The Dischargers shall determine the average monthly effluent value (AMEV) for a given parameter by calculating the arithmetic average of all daily effluent values (DEVs) for each parameter within each calendar month. The AMEV calculation for a given calendar month shall not include DEVs from any other calendar month. If only a single DEV is obtained for a parameter during a calendar month, that DEV shall be considered the AMEV for that parameter for that calendar month. The AMEV shall be attributed to each day of the calendar month for determination of compliance with the Average Monthly Effluent Limitation (AMEL) for a given parameter for that given calendar month. For any calendar month during which no DEV is obtained, the AMEV cannot be determined for that calendar month.

B. Average Weekly Effluent Limitation (AWEL).

The Dischargers shall determine the average weekly effluent value (AWEV) for a given parameter by calculating the arithmetic average of all daily effluent values (DEVs) for each parameter within each calendar week (Sunday through Saturday). The AWEV calculation for a given calendar week shall not include DEVs from any other calendar week. If only a single DEV is obtained for a parameter during a calendar week, that DEV shall be considered the AWEV for that parameter for that calendar week. The AWEV shall be attributed to each day of the calendar week for determination of compliance with the Average Weekly Effluent Limitation (AWEL) for a given parameter for that given

[1] If this Region will not waver from the current Permit Template language, then the Permit Template becomes an underground regulation that has not been formally promulgated. The State Water Board staff and counsel have indicated that the Permit Template is merely a template and is *guidance only*. Regional Water Boards may alter the language and the language of this portion of the template has been altered in other regions.

calendar week. For any calendar week during which no DEV is obtained, the AWEV cannot be determined for that calendar week.

C. Maximum Daily Effluent Limitation (MDEL).

The Dischargers shall determine the daily effluent value (DEV) for a given parameter from the results of a flow-weighted 24-hour composite sample collected during a calendar day for purposes of sampling. Upon approval by the Regional Water Board, the Dischargers may also determine the DEV for a given parameter from the arithmetic mean of results from one or more flow-weighted grab samples taken over the course of one calendar day or a 24-hour period that reasonably represents the calendar day. The DEV shall not include results from any sample outside of the 24-hour period that represents the calendar day. The DEV shall be attributed to the calendar day for determination of compliance with the Maximum Daily Effluent Limit (MDEL) for a given parameter for that given calendar day. For any calendar day during which a 24-hour flow-weighted composite sample, or flow-weighted grab samples in lieu of a 24-hour composite sample, are not obtained, a DEV cannot be determined for that calendar day.

D. Instantaneous Minimum Effluent Limitation.

The Dischargers shall determine the instantaneous effluent value (IEV) for a given parameter from the results of any grab sample. The IEV for a given grab sample shall not include IEVs from any other grab sample. An IEV shall be attributed to each separate grab sample result for determination of compliance with the Instantaneous Minimum Effluent Limitation for a given parameter.

E. Instantaneous Maximum Effluent Limitation.

The Discharger shall determine the instantaneous effluent value (IEV) for a given parameter from the results of any grab sample. The IEV for a given grab sample shall not include IEVs from any other grab sample. An IEV shall be attributed to each separate grab sample result for determination of compliance with the Instantaneous Maximum Effluent Limitation for a given parameter.

Request: Strike the proposed Compliance Determination language, or alternatively, replace the proposed language with the Compliance Monitoring language specified above.

Pages E-14 to E-19, Para. IX. Modifications to Part A of Self-Monitoring Program. The requirements as proposed, namely incorporating an attached document (Attachment G) and then proposing changes to that attached document, are confusing, vague, and ambiguous.

Request: 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.

Page F-36-37, Dilution Credits. BACWA would like to see a broader analysis in all permits related to dilution and not an automatic, 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 and authorizes consideration of other things such as the discharger's demonstration of an aggressive pretreatment and source control program in place that includes the following:

- Completion of a source identification study;
- Development and implementation of a source reduction plan; and
- Commitment of resources to fully implement the source control and reduction plan.

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.

BACWA appreciates the Regional Water Board's close attention to the comments made herein, and representatives of BACWA would be more than happy to meet with you to discuss our comments and concerns in more detail if necessary.

Respectfully submitted,

Michele Pla
BACWA, Executive Director

cc: Phil Isorena, SWRCB