

ENVIRONMENTAL ADVOCATES
ATTORNEYS AT LAW

February 20, 2008

Tam Doduc, Chair and Members
California State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
Sacramento, CA 95814
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Re: Comment Letter--NPDES Compliance Schedule Policy

Dear State Water Resources Control Board:

This letter constitutes comments by several public interest environmental organizations (collectively, "the Coalition"¹) on the State Water Resources Control Board ("State Board")'s Draft Policy for Compliance Schedules in National Pollutant Discharge Elimination System Permits ("the Draft Policy") issued for public comment on December 11, 2007.

The Citizens commend the State Board for reviewing California's current patchwork of compliance schedules policies.² These policies vary widely, leading to confusion for permit

¹ The Citizen Groups are California Coastkeeper Alliance, San Francisco Baykeeper, Humboldt Baykeeper, Ecological Rights Foundation, Heal the Bay, Natural Resources Defense Council, Environmental Advocates, and Lawyers for Clean Water.

² These policies are scattered in various Water Quality Standards ("WQS") provisions: the EPA-promulgated California Toxics Rule ("CTR"), the State Board Policy for

writers, regulated dischargers, public interest organizations, and other members of the public. More significantly, they also have led to a significant number of illegal actions by permit writers to extend the dates for dischargers to comply with water quality-based effluent limitations ("WQBELs") and thus to delay the dates for achieving the State's basic standards for clean water -- Water Quality Standards (WQS). Indeed, an audit report issued by U.S. EPA last October concluded that the Regional Boards had failed to comply with federal law in issuing compliance schedules *in every single NPDES permitting action reviewed by EPA's random audit.*³ Furthermore, in a recent decision reversing Regional Board 2's issuance of compliance schedules to the East Bay Municipal Utility District's wet weather facilities, the State Board pointedly observed that, "The compliance schedules in the EBMUD permit are specious, at best."⁴

The State Board must curb the use and abuse of compliance schedules fostered by the current confusing web of state policies by adopting a single, consistent policy that complies with both state and federal laws. However, as described in the Citizens' detailed comments set forth in Attachment 1 to this letter, the Draft Policy needs additional work to meet his goal.

The Coalition has three central comments:

- (1) The federal Clean Water Act (CWA) requires that WQBELs be *immediately effective and enforceable*, and so does not allow permit writers to issue compliance schedules that delay the effective date of WQBELs. Attachment 1 provides detailed support for this clear directive. The State Board Staff Report references an administrative (not court) decision, *In the Matter of Star-Kist Caribe*, that concluded that compliance schedules can delay the effective date of a WQBEL so long as the WQBEL is derived from a WQS set after 1977. However, this decision conflicts not only with the plain meaning of the CWA, but also with its applicable legislative history and relevant federal court case law -- all of which trump this administrative decision.
- (2) Dischargers that cannot immediately comply with WQBELs are in violation of the CWA, a point that cannot be contravened with administrative policies. The Staff

Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California ("SIP") and the Basin Plans for Regions 1, 2, 4, 5, 8, and 9. (Note: the Basin Plans for Regions 3, 6 and 7 lack compliance schedule authorization provisions).

³ EPA issued this report, the California Permit Quality Review Report to the State Board on October 31, 2007. A copy of this report is attached as Attachment 3.

⁴ In the Matter of Own Motion Review of East Bay Municipal Utility District Wet Weather Permit at page 25 (Order No. R2-2005-0047 [NPDES No. CA0038440]) and Time Schedule Order (Order No. R2-2005-0048).

Report supports delaying the effective date of WQBELs via compliance schedules because: "The issuance of an enforcement order *may engender a negative perception of the discharger*, which may be unwarranted under the circumstances."⁵ Protecting dischargers' reputations is not a legitimate role for the State or Regional Boards. Protecting water quality is. The CWA does not allow the state to artificially inflate public perception of violators. It does, however, allow the state to develop a policy that tailors enforcement as needed and ensures swift compliance. For example, the Regional Boards could issue administrative enforcement orders/Time Schedule Orders that give the dischargers a reasonable schedule for implementing the actions needed to comply with WQBELs. Additional options for providing time to comply *consistent with the Clean Water Act* are discussed more fully in Attachment 1.

- (3) If the State Board is inclined to continue its past practice of allowing compliance schedules to delay WQBELs (which is unlawful), the new policy must be sufficiently narrowly framed to avoid past, proven abuses of such compliance schedules. Attachment 1 provides a detailed discussion of the abuses found by the EPA audit report and the *EBMUD* decision. Decisive State Board action giving firm guidance to the Regional Boards on proper issuance of compliance schedules is obviously needed when the U.S. EPA has found a *100% failure rate* in a random check of Regional Boards' use of compliance schedules, and the State Board has found that Regional Board 2 is issuing "specious" compliance schedules after being forced to take up the issue on its own motion.

In light of these comments, the Coalition requests that the Draft Policy either be rejected in light of the illegality of compliance schedules, or at a minimum be amended as set forth in the attached red-lined document (Attachment 2). Among other changes, we ask that the following key changes be made:

- (1) The new Policy shall supersede all existing compliance schedule policies to create one uniform statewide policy;
- (2) Compliance schedules can only delay the effective date of WQBELs for five years from the date of NPDES permit issuance or five years from the date the WQS upon which the WQBEL is based is issued, whichever comes first;
- (3) A new interpretation of an existing WQS cannot serve as the basis for a compliance schedule;

⁵ Staff Report at 2 (emphasis added).

- (4) A "new discharger" should not include a discharger which commenced operation after mere reinterpretation of an existing WQS, rather than after adoption of a new WQS;
- (5) The Policy should comply with recent EPA guidance limiting when dischargers are eligible for compliance schedules;
- (6) Compliance schedules must include specific measures that will bring the dischargers into compliance with their WQBELs; and
- (7) Compliance schedules cannot be issued simply to allow more time to develop TMDLs, site specific objectives, or use attainability analyses.

* * *

Again, we appreciate the State Board's interest in taking steps to curb the abuses that it and U.S. EPA has found in Regional Board use of long compliance schedules that preclude potentially necessary enforcement actions against polluters. The Draft Policy includes some important measures which will help curb this abuse, but the Draft Policy needs to be amended and clarified as described in the enclosed attachments⁶ to ensure that this abuse is halted.

Thank you for consideration of our comments.

Sincerely,

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⁶ As noted, Attachment 2 is a redline markup which sets forth our requested changes to the Draft Policy. Attachment 1 explains the detailed rationale for these changes.

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**ATTACHMENT 1:
THE COALITION'S DETAILED COMMENTS
ON THE DRAFT COMPLIANCE SCHEDULE POLICY**

This Attachment 1 provides more detailed comments from the Coalition on the State Water Resources Control Board ("State Board")'s Draft Policy for Compliance Schedules in National Pollutant Discharge Elimination System Permits ("the Draft Policy") issued for public comment on December 11, 2007.

The Citizens commend the State Board for undertaking the much needed task of reviewing the inconsistent approach toward compliance schedules reflected in current State policy. Compliance schedule authorization provisions in California's patchwork of Water Quality Standards ("WQS") appear in the EPA-promulgated California Toxics Rule ("CTR"),¹ the State Board Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California ("SIP")² and the Basin Plans for Regions 1, 2, 4, 5, 8, and 9 (The Basin Plans for Regions 3, 6 and 7 lack compliance schedule authorization provisions). These provisions vary widely, leading to confusion for permit writers, regulated dischargers, public interest organizations and other members of the public in understanding applicable policy and inconsistent treatment of similarly situated dischargers.

As reflected in past comments to the State Board on this issue, the State or Regional Boards may not properly grant compliance schedules that delay the effective date of WQS-based effluent limitations required by CWA section 301(b)(1)(C) ("WQBELs"). Congress intended compliance schedules to consist *only* of specific mandates to dischargers to implement remedial measures, i.e., an enforceable sequence of actions or operations leading to compliance with WQBELs, *without* abrogating or delaying a discharger's obligations to comply with WQBELs. Issuance of WQBEL-delaying compliance schedules would re-write the CWA and ignore Congress' clear dictates. The Draft Policy should be revised to make it clear that WQBELs are enforceable from the date of permit issuance. Any compliance schedules issued by the State or Regional Boards must be limited to specifying the remedial actions that a permittee must take to comply with these WQBELs, within the time frame of the permit.

If the State Board nonetheless rejects the Coalition's position and adopts a new policy which allows compliance schedules to delay the effective date of WQBELs, the Draft Policy should be strengthened and clarified in several key respects to preclude the current abuse of compliance schedules as illustrated by the U.S. Environmental Protection Agency ("EPA")'s California Permit Quality Review Report ("EPA PQR Report" or "PQR Report") issued to the State Board on October 31, 2007 (Attachment 3). In the PQR Report, EPA randomly reviewed twelve NPDES permits issued by Regional Boards Regions 2, 4 and 5 that contained compliance schedules delaying the effective date of WQBELs. EPA concluded that *none of the compliance*

¹ The CTR is set forth at 40 C.F.R. § 131.38.

² The SIP was enacted by State Board Resolution No. 2000-015 (March 2, 2000) and State Board Resolution No. 2005-0019 (February 24, 2005).

schedules was properly issued. Decisive State Board action giving firm guidance to the Regional Boards on proper issuance of compliance-schedules is obviously needed when the U.S. EPA has found a 100% failure rate in proper compliance schedule issuance in a random check of Regional Board permit decisions.

These points are discussed in more detail below.

I. *The State Board Should Specify that Compliance Schedules May Not Delay the Effective Date of WQBELs.*

A. *Compliance Schedules Should Only Require Measures To Comply with WQBELs, Not Delay Their Effective Date.*

As set out below, compliance schedules should only require measures to comply with WQBELs and may not include provision delaying the effective date of WQBELs. The Clean Water Act (CWA) creates a mandatory July 1, 1977 deadline for enforceable WQBELs that has long since passed. This deadline applies to all WQBELs, even those derived from WQS adopted after that date. The decision by the EPA Environmental Appeals Board, *In the Matter of: Star-Kist Caribe, Inc.*, 2 E.A.D. 758, 1989 EPA App. LEXIS 38 (March 8, 1989) ("*Star-Kist Caribe*") does not properly authorize delaying WQBELs past that date, and no other rationale offered by the State Board staff provides justification for delaying the effective date of WQBELs.

1. *The CWA Unequivocally Establishes a Firm Deadline for Complying with WQBELs.*

The CWA unequivocally mandates that:

there shall be achieved . . . *not later than July 1, 1977*, any more stringent limitations necessary to meet water quality standards . . . established pursuant to any State law . . . or required to implement any applicable water quality standard established pursuant to this chapter.

CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (emphasis added).

Numerous courts have held that neither the EPA nor the states have the authority to extend the deadlines for compliance established by Congress in CWA section 301(b)(1). See *State Water Control Board v. Train*, 559 F.2d 921, 924-25 (4th Cir. 1977) ("Section 301(b)(1)'s effluent limitations are, on their face, unconditional."); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976), *cert. denied sub nom. Bethlehem Steel Corp. v. Quarles*, 430 U.S. 975 (1977) ("Although we are sympathetic to the plight of Bethlehem and similarly situated dischargers, examination of the terms of the statute, the legislative history of [the Clean Water Act] and the case law has convinced us that July 1, 1977 was intended by Congress to be a rigid

guidepost").

This deadline applies equally to technology-based effluent limitations and WQBELs. See *Dioxin/Organochlorine Ctr. v. Rasmussen*, 1993 WL 484888 at *3 (W.D. Wash. 1993), *aff'd sub nom. Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517 (9th Cir. 1995) ("The Act required the adoption by the EPA of 'any more stringent limitation, including those necessary to meet water quality standards,' by July 1, 1977.") (citation omitted); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312, (9th Cir. 1992) (CWA section 301(b)(1)(C) "requires achievement of the described limitations 'not later than July 1, 1977.'" (citation omitted). Any discharger not in compliance with a WQBEL after July 1, 1977 violates this clear Congressional mandate. See *Save Our Bays and Beaches v. City & County of Honolulu*, 904 F. Supp. 1098, 1122-23 (D. Haw. 1994).

Congress provided no blanket authority in the CWA for extensions of this July 1, 1977 deadline, but it did provide authority for the states to foreshorten the deadline. CWA section 303(f) provides that:

[n]othing in this section [303(f)] shall be construed to affect any effluent limitations or schedule of compliance required by any State to be implemented prior to the dates set forth in section [301(b)(1) and 301(b)(2)] of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

33 U.S.C. § 1313(f) (emphasis added). Because the statute contains explicit authority to expedite CWA section 301(b)(1)(C)'s compliance deadline but not to extend it, the State Board and Regional Boards may not issue compliance schedules which extend the deadline to comply with WQBELs past 1977.

2. *The July 1, 1977 Deadline Applies Even Where WQS Are Established after that Date.*

CWA section 301(b)(1)(C)'s July 1, 1977 deadline for achieving WQBELs applies equally even if the WQS used to set the WQBELs are established after July 1, 1977. As noted, CWA section 301(b)(1)(C) requires the achievement of "more stringent limitations necessary to meet water quality standards . . . established pursuant to any State law . . . or required to implement any applicable water quality standard established pursuant to this chapter." 33 U.S.C. § 1311(b)(1)(C). Congress understood that new WQS would be established after July 1, 1977; indeed, Congress mandated this by requiring states to review and revise their WQS every three years. See 33 U.S.C. § 1313(c). Yet Congress drew no distinction between WQBELs designed to meet WQS established before July 1977 and WQBELs designed to meet WQS established after that date.

Prior to July 1, 1977, therefore, a discharger could be allowed some time to comply with an otherwise applicable WQBEL. After July 1, 1977, however, dischargers have been required to WQBELs without any further delay--including those necessary to meet WQS established after July 1, 1977.

3. Congress Has Authorized Limited Extensions of the July 1, 1977 Deadline for Achieving WQBELs for Specific Purposes, Precluding Exceptions for Other Purposes.

In amendments to the CWA amendments in 1977, Congress provided limited extensions of the July 1, 1977 deadline for achieving WQBELs. In CWA section 301(i), Congress provided that "publicly-owned treatment works" ("POTWs") that must undertake new construction to achieve WQBELs, and need federal funding to complete the construction, could be granted an extension of the deadline for achieving WQBELs that may be "in no event later than July 1, 1988." 33 U.S.C. § 1311(i)(1). Congress provided for the same limited extension for industrial dischargers that discharge into a POTW that received an extension under CWA section 301(i)(1). 33 U.S.C. § 1311(i)(2).

The fact that Congress explicitly authorized certain extensions of CWA section 301(b)(1)(C)'s deadline indicates that it did not intend to allow others which it did not explicitly authorize. *See United States v. Homestake Mining Co.*, 595 F.2d 421, 427-28 (8th Cir. 1979).

4. Compliance Schedules May Be Issued Only To Facilitate, Not To Avoid, Achievement of WQBELs by the CWA's July 1977 Deadline.

Relevant CWA provisions make clear that compliance schedules properly consist *only* of requirements to implement actions that will bring dischargers into compliance with WQBELs by the CWA's July 1, 1977 deadline, not extend that deadline.

The CWA requires that states establish "schedules of compliance" as part of their "continuing planning process" required by CWA section 303(e), 33 U.S.C. § 1313(e). Under this continuing planning process, states are supposed to adopt and, as needed, update their plans for attaining WQS. 33 U.S.C. § 1313(e). States must include in their continuing process plans "adequate implementation [of the plans], including schedules of compliance, for revised or new water quality standards." CWA § 303(e)(3)(F), 33 U.S.C. § 1313(e)(3)(F). The CWA's definition of "effluent limitation" also indicates that such limitations can include "schedules of compliance." CWA § 502(11); 33 U.S.C. § 1362(11). The CWA definition of "schedules of compliance," however, indicates that such schedules are supposed to do no more than mandate specific measures that will lead to eventual attainment of WQS, not to delay the effective dates of WQBELs. CWA section 502(17) defines a "schedule of compliance" as:

a schedule of remedial measures including an enforceable sequence of actions or

operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

33 U.S.C. § 1362(17). The CWA's legislative history underscores that Congress intended the plain facial meaning of this definition, i.e., that a compliance schedule properly consists *only* of requirements to implement specific measures to facilitate compliance with WQBELs, not to delay the effective date of WQBELs:

[a] definition of effluent limitations has been included so that control requirements are not met by narrative statements of obligation, but rather are specific requirements of specificity as to the quantities, rates, and concentration of physical, chemical, biological and other constituents discharged from point sources. It is also made clear that the term effluent limitation includes schedules and time tables of compliance. *The Committee has added a definition of schedules and time-tables of compliance so that it is clear that enforcement of effluent limitations is not withheld until the final date required for achievement.*

S. Rep. No. 92-414, at 77, reprinted in 1972 U.S.C.C.A.N. 3668 (Oct. 28, 1971) (emphasis added). Thus, Congress authorized compliance schedules, not to allow extensions of the July 1, 1977 effective date for WQBELs, but only to facilitate their achievement.

In *United States Steel Corp. v. Train*, an NPDES permittee argued that CWA section 301(b)(1)(C) allows the July 1, 1977 deadline to be met simply by beginning action on a schedule of compliance that eventually would result in achieving WQBELs. 556 F.2d 822, 855 (7th Cir. 1977). The Court of Appeals disagreed:

[w]e reject this contorted reading of the statute. We recognize that the definition of 'effluent limitation' includes 'schedules of compliance,' section [1362(11)], which are themselves defined as 'schedules . . . of actions or operations leading to compliance' with limitations imposed under the Act. Section [502(17)]. It is clear to us, however, that section 301(b)(1) requires point sources to achieve the effluent limitations based on BPT or state law, not merely to be in the process of achieving them, by July 1, 1977.

Id. Thus, the statute itself, its legislative history, and interpretive case law all agree: compliance schedules cannot extend the CWA's July 1, 1977 deadline for achieving WQBELs, but only may facilitate compliance with WQBELs.

5. *The Star-Kist Caribe Decision Does Not Provide Proper Basis for WQBEL-Delaying Compliance Schedules.*

The Staff Report contends that *Star-Kist Caribe* provides adequate legal support for authorizing compliance schedule provisions that delay the effective date of WQBELs. Staff

Report at 2. While the *Star-Kist Caribe* decision stated in *dicta*³ that the effective date of WQBELs that are based on WQS adopted after July 1, 1977 could be delayed by compliance schedules if a State's WQS included a provision authorizing such compliance schedules, staff ignores that the decision stated this in purely conclusory form, with no supporting legal analysis based on CWA statutory language, legislative history or applicable case law. As the discussion in section I.A.4. above indicates, CWA statutory language, legislative history and applicable case law all indicates that Congress did not intend compliance schedules to include provision to delay the effective date of WQBELs past July 1, 1977.

In fact, the *Star-Kist Caribe* decision's assertion that a State's WQS could include a provision authorizing compliance schedules directly contradicts the CWA's provisions governing WQS. CWA section 303(c)(2)(A) makes it clear that WQS include *only*: (1) designated/beneficial uses of water, and (2) the water quality criteria/water quality objectives⁴ needed to attain such uses. 33 U.S.C. § 1313(c)(2)(A). A provision authorizing compliance schedules to delay the effective date of WQBELs is obviously neither a designated use (i.e., a list of the uses to which a water is put), nor a water quality criteria (i.e., a specification of the water quality needed to attain those uses). Furthermore, it would be self-contradictory for WQSs to establish a water's designated uses and the water quality criteria needed to attain those designated beneficial uses and then to further provide that WQBELs, for a time, need not limit pollutant discharges to the levels needed to attain these designated uses and related water quality criteria. Such WQSs would be both simultaneously setting and partially de-setting (at least temporarily) designated uses and water quality criteria. In other words, such WQSs would, in effect, be providing simultaneously that designated uses and water quality criteria must be met *and* need not be met, for a time.

Thus, there is no legal or logical basis for adopting WQS provisions that in turn authorize compliance schedules to delay the effective date of WQBELs.

³ Whether compliance schedules may delay WQBELs when WQS include provisions authorizing such delay was not an issue actually presented to the Environmental Appeals Board in *Star-Kist Caribe*. Thus, the Environmental Appeals Board's passing observation that this was permissible is mere *dicta* and should not have been treated as binding legal precedent. *E.g.*, *Union Pac. R. Co. v. Mason City & Fort Dodge R. Co.*, 199 U.S. 160, 166 (1905).

⁴ CWA section 303(c)(2)(A) uses the terms "designated uses" and "water quality criteria." Under California state law, "designated uses" are referred to as "beneficial uses" and water quality criteria as "water quality objectives." *See, e.g.*, 65 Fed. Reg. 31682, 31684 (May 18, 2000).

6. States May Not Issue NPDES Permits Containing Effluent Limitations That Are Less Stringent than Those Required by the CWA.

Finally, a compliance schedule that extends the deadline for complying with WQBELs beyond CWA section 301(b)(1)(C)'s July 1, 1977 statutory deadline for meeting WQBELs would amount to a less stringent effluent limit than required by the CWA. States are explicitly prohibited from establishing or enforcing effluent limitations in NPDES permits that are less stringent than those required by the CWA. See 33 U.S.C. § 1370; Cal. Water Code §§ 13372, 13377. This provides yet another point of support for the conclusion that the clear language of the CWA, bolstered by the legislative history and case law, establishes unambiguously that the State Board and Regional Boards cannot issue compliance schedules extending the deadline for complying with WQBELs beyond CWA section 301(b)(1)(C)'s July 1, 1977 deadline.

B. The CTR Now Precludes Delaying the Effective Date of any WQBEL Derived from the CTR.

Even if the State and Regional Boards could delay the effective date of some WQBELs, the State and Regional Boards cannot delay the effective date of any WQBELs that are derived from the CTR. 40 C.F.R. section 131.38(e)(3) formerly purported to authorize compliance schedules delaying the effective date of WQBELs derived from the CTR. Pursuant to 40 C.F.R. section 131.38(e)(8), however, this compliance schedule authorization expressly expired on May 18, 2005, depriving the State Board and Regional Boards with any authority to issue compliance schedules delaying the effective date of such WQBELs. Indeed, the EPA Federal Register Preamble accompanying the CTR stated as much, noting, "EPA has chosen to promulgate the rule with a sunset provision which states that the authorizing compliance schedule provision will cease or sunset on May 18, 2005." 65 Fed. Reg. 31682, 31704 (May 18, 2000).

The State Board staff may contend that the EPA Federal Register Preamble has effectively extended this compliance schedule authority when the Preamble observed, "[I]f the State Board adopts, and 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." *Id.* It is true that the State Board subsequently adopted its SIP and that the SIP provides for WQBEL-delaying compliance schedules without imposing a May 18, 2005 cutoff. EPA, however, has not acted to stay 40 C.F.R. section 131.38(e)(8) by the only means it can lawfully do so: notice and comment rulemaking that amends 40 C.F.R. section 131.38(e)(8). Without such a rulemaking, 40 C.F.R. section 131.38(e)(8) remains the law, and it unequivocally ends authorization to issue compliance schedules for CTR-based effluent limitations after May 18, 2000, regardless of state action to the contrary. See *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006).

C. *Adverse Environmental Consequences of Compliance Schedules Delaying WQBELs.*

As part of compliance schedules, Regional Boards typically set so-called "interim performance-based limits," which ironically have often lasted the entire life of the permit, that are calculated to allow pollutant discharges as high as the polluter has ever discharged, plus an added margin of safety for the discharger, to ensure that the polluter has no risk of violating its permit. Such compliance schedules have repeatedly allowed dischargers to legally spew high concentrations of toxic pollutants such as dioxins, mercury, copper, lead, nickel, selenium, PCBs, and pesticides into waters that the State of California officially lists as having impaired water quality for those very same pollutants. Compliance schedules allow dischargers lawfully to dump toxic pollutants to impaired waters for years at levels higher than those that Regional Boards calculate will cause or contribute to those waters' impairment.

The Coalition sent several Public Records Act (PRA) requests to the Regional Boards in attempt to gauge the extent of Regional Board issuance of compliance schedules to date. As became clear from the response to our PRA requests, none of the Regional Boards are comprehensively tracking how many compliance schedules they have issued nor assessing in any fashion the cumulative impact of such compliance schedules on the waters in their jurisdiction. Response to our PRA requests has been grudging, disorganized, and incomplete, but we have done our best to develop our own partial database from these responses of how many compliance schedules have been issued in California to date. Sadly and ironically, our citizen database represents *the only information* that any of the Regional Boards or the State Board has on the cumulative issuance of compliance schedules statewide.

Our database indicates that the Regional Boards are making very widespread use of the compliance schedule device, at least signaling that the adverse impact on environmental protection potentially posed by compliance schedules is substantial. As our database represents, *the majority* of the dischargers issued compliance schedules discharge to impaired waters listed on the State's CWA section 303(d) list. Thus, many compliance schedules are legalizing discharges which are adding to the pollution woes of waters that the State officially recognizes to be impaired. Moreover, issuing compliance schedules allowing pollutant loading at levels expected to cause or contribute to WQS exceedance, is a recipe for *adding more waters to the list of impaired waters and thus the State's burden to develop TMDLs*. The State's current CWA section 303(d) list identifies nearly two thousand instances in which state waters are excessively polluted by given pollutants and thus targeted for TMDL development. Recent trends would indicate that this list is likely to continue to grow. At current pace of TMDL adoption, it will take the State and Regional Boards numerous decades to adopt TMDLs for all pollutants impairing all state waters even if more waters are not added to the State's 303(d) list. Accordingly, the State Board should be very hesitant to continue an approach likely to add to the number of impaired waters in California.

The Coalition could cite to many examples of compliance schedules sanctioning environmentally harmful discharges: oil refineries allowed to discharge dioxins, selenium, and heavy metals to San Francisco Bay for years on end at levels expected to contribute to the Bay's well-documented impairment for those pollutants, municipalities allowed to discharge mercury into San Francisco Bay at similarly excessive levels, geothermal plants allowed to discharge high levels of arsenic to waters impaired for arsenic, and so forth. One of the most egregious, however, is the Central Valley Regional Board's approval of a compliance schedule for Empire Mine State Park ("Empire Mine") in NPDES Permit No. CA0085171. Rather than set effluent limitations necessary to ensure attainment of WQS, the Empire Mine Permit sets limits on the discharge of several toxic pollutants that are astonishingly higher. The Permit's limit on the discharge of cadmium is 60,000 times an appropriate WQBEL, on mercury 18,000 times higher, on thallium 12,000 times higher, on lead almost 1200 times higher, on zinc 460 times higher, on copper 12 times higher, on chromium 9 times higher, and on nickel 5 times higher. The Permit reflects a conclusion utterly discordant with the CWA, that discharging hazardous waste to a waterway so dangerous that the public needs to be fenced out of the area for its own good constitutes full interim compliance with the CWA, a statute which declares its purpose to be "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The State Board should question how this compliance schedule approach can seriously be called regulatory oversight--Regional Boards using public funds to draft purely superfluous effluent limits set equal to the highest level of pollutant discharge a polluter could ever reasonably be expected to have for years to come. This is analogous to paying the CHP to figure out how fast the fastest automobile in the state is likely to drive, so as to know what speed limit to set. Such an approach undermines environmental protection, the mission of the State Board and Regional Boards, and the public's confidence that the State Board and Regional Board are working to serve this mission.

D. Staff's Rationale for Compliance Schedules Is Improper.

State Board staff, like the Regional Boards,⁵ offer three reasons for granting compliance schedules which delay the effective, enforceable date of WQBELs: (1) insulating dischargers from CWA citizen suits, (2) insulating dischargers from mandatory minimum penalties (MMPs), and (3) avoiding a negative perception of the discharger as a CWA violator. Draft Staff Report, Proposed Statewide Policy on Compliance Schedules in National Pollutant Discharge Elimination System Permits ("Staff Report") at 2. Though the Staff Report does not say so, such compliance schedules also insulate dischargers from enforcement by the EPA. None of these purposes are legitimate or lawful, however, and all directly prevent the State and Regional Boards from achieving their mandate of ensuring fishable, swimmable waters -- by 1983.

⁵ *E.g.*, San Diego Regional Board, Resolution No. R9-2005-0238 (findings 7, 8).

By blocking EPA and citizens groups from lawfully seeking court enforceable orders directing dischargers to comply with clean water laws, such compliance schedules rob EPA and citizens of the oversight tool and stakeholder status that Congress intended for them to have:

“Congress’ clear intention . . . [was] that citizen plaintiffs are not to be treated as ‘nuisances or troublemakers’ but rather as ‘welcomed participants in the vindication of environmental interests.’”

Proffitt v. Municipal Auth. of the Borough of Morrisville, 716 F. Supp. 837, 844 (E.D. Pa. 1989) (quoting *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976); see also *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d at 1525 (9th Cir. underscoring that citizen suits perform important public function); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1136 (11th Cir. 1990) (“citizen suits are an important supplement to government enforcement of the Clean Water Act, given that the government has only limited resources to bring to its own enforcement actions.”); *Save Our Bays & Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1125 (D. Haw. 1994).

State Board endorsement of WQBEL-delaying compliance schedules would send the message that when a discharger's compliance with WQBELs is somehow troublesome for them, the proper response is to allow that discharger to continue to pollute and violate standards until the discharger feels it is no longer so troublesome. This, however, is flatly contrary to Congress’ intent in enacting the CWA. Congress mandated that WQBELs must be set at a level necessary to ensure WQS attainment regardless of economic and technological restraints. *Ackels v. EPA* 7 F.3d 862, 865-66 (9th Cir. 1993); *Defenders of Wildlife v. Browner* 191 F.3d 1159, 1163 (9th Cir. 1999); *Oklahoma v. EPA*, 908 F.2d 595, 597-98 (10th Cir. 1990); *rev’d on other grounds Arkansas v. Oklahoma*, 503 US 91 (1992); *accord In the Matter of: NPDES for City of Fayetteville*, 1988 EPA App. LEXIS 35, *13; 2 E.A.D. 594 (June 28, 1988) (“The meaning of [the CWA] is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility”). Congress further mandated a strict deadline, long since passed, for achieving WQBELs designed to assure attainment with WQS: July 1, 1977. 33 U.S.C. § 1311(b)(1)(C).

As the U.S. Supreme Court has observed, Congress foresaw and accepted that implementing the sweeping policies of the CWA would impose economic hardship, including the closing of some plants:

Prior to the passage of the [Clean Water] Act, Congress had before it a report jointly prepared by EPA, the Commerce Department, and the Council on Environmental Quality on the impact of the pollution control measures on industry. That report estimated that there would be 200 to 300 plant closings caused by the first set of pollution limitations. Comments in the Senate debate were explicit: ‘There is no doubt that we will suffer some disruptions in our economy because of these efforts; many marginal plants may be

forced to close.”

EPA v. National Crushed Stone, 449 U.S. 64, 80 (1980). As another federal court has observed, “The CWA is strong medicine” *Texas Municipal Power Agency*, 836 F.2d at 1488. Congress further intended that any lack of currently available pollution control technology was not to slow attainment of CWA goals of clean water. As the D.C. Circuit explained, Congress intended the Act to be “technology-forcing,” i.e., to force the development of new treatment methods:

[T]he most salient characteristic of [the CWA] statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology-forcing. . . . The essential purpose of this series of progressively more demanding . . . standards was not only to stimulate but to press development of new, more efficient and effective technologies.

NRDC v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987); *see also NRDC v. Train*, 510 F.2d 692, 695-97 (D.C. Cir. 1974).

The Regional Boards also have typically justified WQBEL-delaying compliance schedules as a means to promote discharger compliance. *E.g.*, San Diego Regional Board, Resolution No. R9-2005-0238 (finding 7). This specious reasoning is equivalent to the California Highway Patrol announcing that doubling the speed limit is an effective way to promote compliance with the speeding laws. Making a law more lax certainly makes it easier to comply with, but hardly advances the purposes of that law.

E. The Proper Response to WQBEL Non-Compliance

As noted above, State Board staff justify WQBEL-delaying compliance schedules as needed to insulate dischargers from enforcement. As also noted, this violates the CWA’s clear dictates. It also fails to appreciate that existing law safeguards dischargers from draconian sanctions when the latter are incapable of immediate compliance. Under existing law, courts, EPA and the State and Regional Board all retain considerable discretion to ensure that the enforcement remedies for violations of WQBELs always remain fair, reasonable and appropriate.⁶

⁶ While compliance with the CWA’s dictates should always be seen as mandatory, this does not mean that *in an enforcement action* a court or agency cannot direct that compliance will happen over time. Courts *always* have flexibility to give dischargers reasonable time periods to comply as a fair balancing of the equities dictates, and the remedies in enforcement actions consistently reflect such balancing. *E.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 317-318 (1982) (“Congress did not anticipate that all discharges would be immediately enjoined. . . . Rather, enforcement actions typically result, by consent or otherwise, in a remedial order setting

While existing legal safeguards should be seen as sufficient to prevent undue sanctions on dischargers that cannot immediately comply with their WQBELs, the State Board could include in the Draft Policy permitting and enforcement provisions that further underscore such safeguards to help ensure that the enforcement response to violation of WQBELs is appropriate. The policy could provide that when immediate compliance with WQBELs is not feasible:

- (1) The Regional Boards should issue administrative enforcement orders/Time Schedule Orders (TSO) that give the dischargers a reasonable schedule for implementing the actions needed to comply with WQBELs.⁷
- (2) In addition to issuing TSOs, Regional Boards could include conditions in the dischargers' NPDES permits mandating that the discharger implement the specific needed compliance measures in accord with an appropriate schedule, but without also delaying the effective date of a relevant WQBEL (EPA has often taken this approach in issuing NPDES permits).
- (3) As part of the Draft Policy or a separate civil penalty policy, that reducing any penalties that otherwise might be assessed against the discharger should be considered when the discharger justifiably needs a TSO and added time to comply with WQBELs.

Finally, in situations where curtailing pollution would require closing of a facility that would result in "substantial and widespread economic and social impact," the State has some discretion to relax its WQS if justified by a rigorous "use attainability analysis" (UAA), a "structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, an economic factors." 40 C.F.R. §§ 131.3(g), 131.10(g). Only when the rigorous analysis in a UAA demonstrates that the benefits of protecting water resources are clearly outweighed by the cost can WQS be relaxed, and only then with after public notice, comment, and hearing opportunity. 40 C.F.R. § 131.10(e). Issuing WQBEL-delaying compliance schedules is an end-run around the UAA process.

out a detailed schedule of compliance designed to cure the identified violation of the Act.""). Thus, the key issue is not whether dischargers should be given reasonable time to come into compliance with WQBELs, but instead whether Regional Board permitting staff should be the sole determiners of what is a feasible time schedule for complying with WQS, cutting State and Regional Board enforcement staff, EPA enforcement staff, citizen suit enforcers and the courts out of the process. The Coalition strongly disagrees with this proposition.

⁷ The State Board's guidance should be clear, however, and ensure that Regional Boards only issue TSOs when dischargers truly need more time to implement identified measures that will bring them into compliance with WQBELs.

II. Documented Regional Board Abuse in Issuing Compliance Schedules

Even if compliance schedules could properly delay the effective date of WQBELs in limited circumstances as indicated in EPA's *Star-Kist Caribe* decision, many of the Regional Boards, particularly Regional Board 2, have been systematically abusing compliance schedules. These Regional Boards have been using compliance schedules not as a tool to give dischargers temporary insulation from CWA liability while bringing them into compliance with WQBELs by dates certain, but instead have illegitimately been using compliance schedules simply to excuse dischargers from having to take the steps needed to meet WQBELs during the lifetime of their NPDES permits, thus effectively re-writing CWA section 301(b)(1)(C). This Regional Board abuse is well documented in both the EPA PQR Report and the State Board's May 1, 2007 decision, *In the Matter of Own Motion Review of East Bay Municipal Utility District Wet Weather Permit* (Order No. R2-2005-0047 [NPDES No. CA0038440]) and Time Schedule Order (Order No. R2-2005-0048) ("EBMUD Decision").

While to fully comply with the CWA, the Draft Policy should preclude compliance schedules from delaying WQBELs, the State Board should at a minimum ensure that its new policy stops the Regional Boards' unlawful and abusive issuance of compliance schedules, such as that illustrated by the PQR Report and the EBMUD decision. As discussed in Section III below, the Draft Policy includes some measures which will help curb this abuse, but the Draft Policy needs to be amended and clarified in several key respects to ensure that this abuse is halted.

A. EPA's Audit of Regional Board Compliance Schedule Issuance

Concerned about Regional Board abuse of compliance schedules, some of the Coalition brought a federal court action against EPA seeking to set aside EPA's approval of the compliance schedule provisions of the SIP, thus precluding WQBEL-delaying compliance schedules for WQBELs based on the CTR. In a compromise settlement, EPA agreed to audit the Regional Boards' issuance of compliance schedules. In this audit, EPA reviewed randomly selected NPDES permits issued by Regional Boards Regions 2, 4 and 5 which contained compliance schedules delaying the effective date of WQBELs to determine:

- (a) whether the permit and/or administrative record justifies the compliance schedule "as appropriate" as required by 40 C.F.R. §122.47(a);
- (b) whether the permit and/or administrative record justifies whether the compliance schedule requires compliance with the final water quality-based effluent limitation as soon as possible, as required by 40 C.F.R. § 122.47(a)(1);
- (c) whether, as part of the compliance schedule, the permit contains enforceable interim requirements and dates for their achievement as required by 40 C.F.R. §

122.47(a)(3) and section 502(17) of the CWA, 33 U.S.C. § 1362(17);

- (d) whether the permit contains an appropriate final effluent limitation as required by section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. §§ 122.2 (definition of "schedule of compliance"), 122.44(d)(1)(vii); and
- (e) whether the compliance schedule inappropriately includes time solely to develop a Total Maximum Daily Load, site specific objective/criterion, and/or a Use Attainability Analysis and therefore is not consistent with sections 301(b)(1)(C) and 502(17) of the CWA, 33 U.S.C. §§ 1311(b)(1)(C) and 1362(17) and 40 C.F.R. §§ 122.2 (definition of "schedule of compliance") and 122.47.

EPA's PQR Report documents the results of EPA's audit, which involved EPA review of 59 separate compliance schedule provisions in the following twelve NPDES permits:

Regional Board 2

City of Petaluma WPCP, NPDES Permit No. CA0037810
City of American Canyon WWT&RF, NPDES Permit No. CA0038768
Rodeo Sanitary District, NPDES Permit No. CA0037826
U.S. Navy Naval Support Activity Treasure Island WWTP/DOD, NPDES Permit No. CA0110116
Rhodia-Martinez Plant, NPDES Permit No. CA0006165
Tesoro Refining & Marketing Co. Golden Eagle Refinery, NPDES Permit No. CA0004961

Regional Board 4

Los Angeles County Sanitation District Pomona WWRP, NPDES Permit No. CA0053619
Los Angeles County Sanitation District San Jose Creek WWRP, NPDES Permit No. CA0053911
Metropolitan Water District of Southern California, Rio Hondo Power Plant, NPDES Permit No. CA0059633

Regional Board 5

City of Live Oak WWTP, NPDES Permit No. CA0079022
Olivehurst PUD, NPDES Permit No. CA0077836
Placer County Facility Services Placer County SMD No. 1, NPDES Permit No. CA0079316

In performing this audit, EPA followed a May 10, 2007 guidance memorandum from James Hanlon, the Director of EPA's Office of Wastewater Management to Alexis Strauss, the EPA Region 9 Water Division Director ("the Hanlon Memo") (Attachment 4). EPA concluded in the PQR Report that *not a single one of these 59 compliance schedules was properly issued*:

None of the twelve permits reviewed, or their supporting administrative records, adequately explained why any of the compliance schedules in those permits was

‘appropriate’” within the meaning of EPA’s compliance schedule regulation, 40 C.F.R. § 122.47(a).

PQR Report at 2-3. EPA identified five specific problems with the Regional Boards’ issuance of compliance schedules:

1. Failure To Limit Compliance Schedules to Dischargers that Cannot Immediately Comply with WQBELs. The Hanlon Memo noted that to grant a compliance schedule, the permitting agency has to find, with adequate administrative record support, that the discharger cannot immediately comply with the WQBEL. In the PQR Report, EPA noted that the Regional Boards granted many of the compliance schedules solely because the permittee’s discharge monitoring report (DMR) effluent data showed that the discharger had in the past discharged pollutant levels exceeding the WQBEL—an inadequate basis for determining that it would necessarily be infeasible for the discharger to comply with the WQBEL in the future.

2. Failure to Limit Compliance Schedule Duration to As Short As Is Possible for Dischargers to Comply with WQBELs. The Hanlon Memo noted that compliance schedules must require compliance with the final WQBELs “as soon as possible.” In the PQR Report, EPA noted that “None of the twelve permits and/or administrative records reviewed contained a specific finding that their compliance schedules required compliance with the final WQBEL ‘as soon as possible.’ Nor did any of them contain an adequate justification for the specific length of the compliance schedule.” PQR Report at 3. As EPA pointed out, the Regional Boards instead in all but one permit apparently had simply automatically and without analysis set the compliance schedules to last the maximum length permitted under the SIP or Basin Plan provision authorizing compliance schedules. *Id.*

3. Failure to Include Specific Measures in Compliance Schedules that Will Lead to Compliance with WQBELs By the End of the Compliance Schedule. The Hanlon Memo noted that to grant a compliance schedule, the permitting agency has to find, with adequate administrative record support, that the compliance schedule will lead to compliance with a WQBEL by the end of the compliance schedule. In the PQR Report, EPA noted that in none of the permitting actions reviewed did the Regional Boards produce administrative records supporting a conclusion that the compliance schedule provisions mandated by the permits would bring the permittees into compliance with WQBELs by the end of the compliance schedules. PQR Report at 4. While the permits include interim permit limits and typically included some mandate to take steps to reduce pollutant discharge, the Regional Boards failed to conduct any documented analysis that these measures would bring the permittees into compliance with their WQBELs. Indeed, most of the “compliance” measures mandated by the permits would almost certainly not bring the permittees into compliance with WQBELs. As the EPA PQR Report pointed out, the interim limits in the permits typically were set at the discharger’s current performance (i.e., at a level of discharge exceeding the WQBEL)—surely by itself a measure that would do nothing to bring the dischargers into compliance. *Id.* As the PQR Report further

pointed out, many of the permits only required the dischargers to implement Pollution Minimization Plans (PMPs) that simply continued implementation of generic pollutant minimization or pretreatment measures that had also been specified in prior permits—and that had thus obviously been inadequate to bring the dischargers into compliance given that the dischargers were still seeking compliance schedules. *Id.*

4. Failure to Include Final Numeric WQBELs that Will Take Effect at the End of the Compliance Schedule. The Hanlon Memo noted that any NPDES permit with a compliance schedule must include enforceable a final WQBEL in the permit, even if the date for enforcement of that WQBEL is after the permit's expiration date. In the PQR Report, EPA noted that of the 59 compliance schedules it reviewed in its audit, 19 of them failed to include such a final enforceable WQBEL.

5. Improperly Granting Compliance Schedules To Allow for TMDL or SSO Development. The Hanlon Memo noted that it is not "appropriate," hence not lawful under EPA's compliance schedule regulation set forth at 40 C.F.R. § 122.47(a), to issue a compliance schedule based solely on the time needed to develop a Total Maximum Daily Load (TMDL), Site Specific Objective (SSO) or Use Attainability Analysis (UAA). In the PQR Report, EPA noted that all six of the Regional Board 2 permits it reviewed impermissibly granted one or more compliance schedules solely to allow time to develop a TMDL or SSO.

B. State Board EBMUD Decision

In the EBMUD Decision, the State Board found that Regional Board 2 had committed numerous errors in including six compliance schedules in EBMUD's NPDES permit for its wet weather discharge sewage facilities, pointedly observing, "The compliance schedules in the EBMUD permit are specious, at best." EBMUD Decision at 25. The State Board found four main errors by Regional Board 2: (1) none of the compliance schedules had a specified end date at which point the compliance schedule would expire and appropriate WQBELs would come into effect, (2) the EBMUD Permit failed to contain final enforceable numeric WQBELs for the six pollutants in issue that would eventually come into effect, (3) the compliance schedules failed to include an enforceable sequence of actions or operations that would bring EBMUD into compliance with WQBELs, and (4) some of the compliance schedules could not lawfully have been issued at all under the CWA, SIP, and Basin Plan because the WQS from which the WQBELs were derived were not newly adopted or newly revised—a requisite for granting compliance schedules—or because the WQBELs were derived from the National Toxics Rule (NTR), which does not allow for compliance schedules.

Notably, Baykeeper brought the State Board's Draft EBMUD Order to Regional Board

2's attention in commenting on other draft NPDES permits to be issued by Regional Board 2.⁸ As the attached excerpts from the transcript from the Regional Board hearing on these draft permits (Attachment 5) reflects, Regional Board 2 was unrepentant in adherence to the errors reflected in its EBMUD permit decision.

During this hearing, Regional Board 2 staff advised the Regional Board:

[A]lthough the State Water Board recently released, a little bit over a week ago, a draft order on the East Bay MUD wet weather permit, that some could interpret to be in conflict with our interpretations of [past State Board decisions governing NPDES permitting], we emphasize that the State Water Board draft order is a draft. Unlike in other permit reviews, because the State Water Board took East Bay MUD up on its own motion, State Board Staff developed its draft order without the benefit of arguments from all sides. We have reevaluated our interpretation [of permitting requirements] in light of State Water Board's draft order and maintain that our interpretation is still reasonable and consistent with [past State Board permitting decisions].

Attachment 5 at 12, lines 6-18.

Baykeeper raised the Draft Order during the hearing to emphasize the importance of considering the State Board's perspective in new permitting decisions. One Board member responded to Baykeeper's observation by saying that the Draft Order "doesn't really affect my thinking at all." Attachment 5 at 31, lines 11-15. Another Board member discussed at length the possibility of imposing limits on air emissions of dioxin in lieu of an appropriate WQBEL for dioxin, prompting yet another Board member to criticize imposing the WQBEL for dioxin mandated by the CWA thusly:

If we're setting up any agency of government or the private sector to fail, is that not a violation of our own obligations? If they cannot possibly succeed [in complying with their permit limits], what are we doing? I just wonder what the rationale is to justify putting out -- putting out a permit that requires them to do something that they can't do.

Attachment 5 at 35, lines 2-12.

Several NPDES permits issued by Regional Board 2 since Regional Board 2 issued the EBMUD Permit have continued to include improper compliance schedule provisions similar to those rejected by the State Board in the EBMUD Decision. Other Regional Boards have also issued similarly objectionable compliance schedule provisions. San Francisco Baykeeper,

⁸ The permits in issue were for the South Bayside System Authority and Central Marin Sanitation Agency.

Communities for a Better Environment and other groups have appealed some of these permit decisions to the State Board.⁹ Thus, the Regional Boards persist in their apparent belief that their "obligation" is to ensure that regulated dischargers receive NPDES permits they can readily comply with, rather than NPDES permits that have the effluent limitations mandated by Congress and that protect beneficial uses of waters. Regional Board 2, and other Regional Boards, continue to issue compliance schedules designed not to require dischargers to implement the measures that will bring them into compliance with WQBELs, but simply to insulate the dischargers from liability for failure to meet WQBELs—thus effectively re-writing the CWA not to require compliance with effluent limitations designed to ensure attainment of WQS.

III. *Even if the State Board Allows Compliance Schedules To Delay WQBELs, the State Board Draft Policy Should Be Amended To Preclude Compliance Schedule Abuse.*

If the State Board disagrees with the above comments and decides to issue a new compliance schedule policy that allows delay in the effective date of WQBELs, the State Board should at least ensure it is sufficiently detailed and prescriptive such that the Regional Boards halt their present abuse of compliance schedules identified in the EPA PQR Report and the EBMUD Decision. The Policy should ensure that compliance schedules are not used simply to shield dischargers from CWA liability while failing to bring timely compliance with WQBELs.

The Staff Report states the aim of the Draft Policy as follows:

"The proposed policy would authorize the Water Boards to grant compliance schedules in NPDES permits in accordance with the policy, where appropriate and justified. This authorization is not a commitment to automatically grant a compliance schedule to every individual discharger that applies for or even qualifies for a compliance schedule."

Draft Report at 61-62. While the Coalition commends staff's recognition that compliance schedules must not be automatically granted, but must instead be narrowly issued to only to dischargers that meet the policy's terms, the Draft Policy is not adequate in this regard.

The Coalition has edited the Draft Policy with revisions which will provide for the requisite detail and prescription; the Citizens' proposed revised compliance schedule policy is attached as Attachment 2. If the State Board is to adopt a compliance schedule policy that allows for WQBEL-delaying compliance schedules, the State Board should amend the Draft Policy as

⁹ Baykeeper, CBE and/or San Luis Obispo Coastkeeper have appealed NPDES permits issued by Regional Board 2 to sewage treatment plants owned and operated by Pinole, South Bayside System Authority, and Central Marin Sanitation District and to C&H Sugar Co. facility and the Shell Martinez oil refinery, an NPDES permit issued by Regional Board 5 to Empire Mine and an NPDES permit issued by Regional Board 4 to the California Men's Colony. The groups have requested the State Board to hold these appeals in abeyance for the time being.

suggested by the Coalition in Attachment 2. Our suggested revisions to the Draft Policy and our rationale for these revisions are discussed below.

A. Proper Scope of the Draft Policy

The Coalition agrees with the Staff Report that the current lack of a cohesive statewide compliance schedule policy has created serious problems. Staff Report at 39. We agree that the resulting regulatory patchwork is complicated for stakeholders to understand and for regulators to apply, and that the State Board should remedy this with a consistent statewide policy. *See id.* We agree with the Staff Report's recommendation that the final new policy should supersede compliance schedule provisions in all regional and statewide plans and policies. We further agree with the Staff Report's recommendation that the final new policy should not provide for a new provision superseding the SIP's provision that compliance schedules cannot delay the effective date of WQBELs past May 18, 2010. We otherwise disagree, however, that the final new policy should not address issuance of compliance schedules for WQBELs derived from the CTR or effective TMDLs. It would provide better guidance to all stakeholders if there was but a single umbrella statewide compliance schedule policy. Thus, the new policy should include specific provisions governing the issuance of compliance schedules for WQBELs derived from the CTR and/or TMDLs.

With respect to the CTR, the new policy should provide that no WQBEL-delaying compliance schedules are now permissible, as 40 C.F.R. section 131.38(e)(8) expressly provides that any compliance schedule authorization for CTR-derived WQBELs expired on May 18, 2005. If the State Board rejects this position, however, the new policy should provide, in accord with the SIP, that any compliance schedule for CTR-derived WQBELs must end on May 18, 2010.

For any WQBEL derived from a TMDL, there is no reason, in the Coalition's view, not to simply treat the TMDL as the equivalent of a new WQS—and to then apply the same rules for setting compliance schedules apply to WQBELs derived from that TMDL as would apply to setting compliance schedules based on a new WQS (e.g., compliance schedules can last no more than five years from the date the TMDL was adopted, etc.).

B. Duration of Compliance Schedules and Deadlines for Complying with WQS

One of the chief Regional Board abuses of compliance schedules discussed in section II above has been to fail to establish fixed dates for the compliance schedules to end and WQBELs to become effective. To curb this abuse and as recommended by the Staff Report, the State Board's final compliance schedule policy should include a maximum duration that compliance schedules may delay the effective date of WQBELs. *See Staff Report at 46-48.*

The Staff Report recommends that compliance schedules be set at a maximum length of five years from the date of permit issuance, with the possibility of one five year extension where

the discharger has met all the conditions of its NPDES permit including interim milestones, but unforeseen circumstances beyond the control of the permittee have arisen that preclude compliance with final WQBELs. *Id.* The Staff Report further recommends, however, that in no case could a compliance schedule last more than ten years from the date that a WQS was issued, revised, or "newly interpreted." *Id.* at 58-60.

The Coalition agrees with the Staff Reports' recommendations that compliance schedules should not be allowed to last longer than a specified number of years from the date of permit issuance or from the date that WQS are adopted (note: as discussed in section III.C. below, the Coalition advocates that compliance schedules only be allowed to extend for a certain number of years following the date that WQS are adopted, not merely reinterpreted). We disagree with the Staff Report's suggested time frames, however, as unduly lenient. As the Staff Report points out, EPA generally has directed that five years should be the maximum time that a discharger should be given to come into compliance with WQBELs. *Id.* at 45. Given the adverse environmental consequences of delaying the effective date of WQBELs, and the preclusion of citizen and agency enforcement options perpetrated by WQBEL-delaying compliance schedules, such compliance schedules should be strictly limited to no more than five years from the date of NPDES permit issuance or five years from the date a WQS is issued, whichever comes first. After a WQS is issued, all dischargers to waters covered by the WQS in issue are effectively put on notice of what their final WQBELs will be once their permits are renewed given that WQBELs must be derived from the WQS. Five years is more than long enough to give dischargers to comply with new WQS.

C. Qualifying Permit Limitations: Newly Issued vs. Newly Interpreted WQS

The Staff Report points out that *Star-Kist Caribe* held that compliance schedules cannot delay the effective date of WQBELs derived from WQS adopted prior to July 1, 1977. Staff Report at 56. The Staff Report recommends, however, that WQBEL-delaying compliance schedules be allowable not only for WQBELs based on new WQS adopted post-July 1977, but even WQS adopted prior to that date that are "newly interpreted" after July 1977. Staff Report at 58-60. The Coalition urges the State Board to specify that WQBEL-delaying compliance schedules be allowable *only* to allow time to comply with WQS adopted post-1977 (and, as noted above, for no more than five years after those WQS are adopted). One, even *Star-Kist Caribe*, the sole underpinning for the legality of WQBEL-delaying compliance schedules, holds that compliance schedules cannot delay the effective date of WQBELs based on WQS adopted prior to July 1, 1977. A new interpretation of a WQS adopted prior to July 1, 1977 *does not change the fact that the WQS was duly adopted prior to July 1, 1977*. If the new interpretation is legally valid, it merely states what the law has always been and thus cannot be deemed, in effect, to constitute the adoption of a post-July 1977 WQS. Two, limiting WQBEL-delaying compliance schedules to a specified time after *adoption* of a new WQS establishes a firm, objective test for when such compliance schedules are allowable that will preclude the sort of abuse of compliance schedules identified by the State Board in the EBMUD Decision. As this decision pointed out,

Regional Board 2 had erroneously found that EBMUD was entitled to a compliance schedule because adoption of the SIP constituted a new interpretation of the CTR. EBMUD Decision at 29. The EBMUD Permit is not an isolated instance, but instead reflects Regional Board 2's standard approach to issuing compliance schedules for CTR-based WQBELs. Regional Board 2 has often adopted highly dubious, pro-discharger interpretations of what constitutes a "new interpretation" of existing WQS. To reign in such abuses, a firm objective test of when dischargers are eligible for compliance schedules is critical.

D. New and Existing Discharger Eligibility for Compliance Schedules

The Coalition agrees with the Staff Report's recommendation that the final new compliance schedule policy specify that new dischargers not be eligible for WQBEL-delaying compliance schedules and further define what constitutes a new and existing discharger. *See* Staff Report at 54-56. The Coalition agrees with the Staff Report's recommendation for how to define new and existing discharger except for one aspect of this definition: that a new discharger should exclude facilities the construction of which commenced after a "new interpretation" of a WQS that serves as the source for a WQBEL. The Coalition urges that new dischargers should include *only* those facilities the construction of which commenced after the *adoption* of the applicable WQS. For the same reasons as discussed in section III.C. above, the mere new interpretation of an existing WQS *should not* trigger eligibility for WQBEL-delaying compliance schedules.

E. Application to Prohibitions

The Coalition agrees with the Staff Report's recommendation that the final new compliance schedule policy specify that WQBEL-delaying compliance schedules are not applicable to NPDES permit conditions implementing prohibitions in applicable Basin Plans or other WQS. *See* Staff Report at 61. As the Staff Report points out, most current compliance schedule authorizing provisions in Regional Board Basin Plans *do not* allow such compliance schedules and the State Board should not backslide to create more polluter-generous compliance schedule provisions than currently exist. *Id.* As the Staff Report also points out, to the extent that current prohibitions in Basin Plans are seen as unduly stringent, the proper response is to amend them, following the rigorous public participation procedures for such amendments, rather than create compliance schedule loopholes for ignoring their dictates.

F. Discharger Showing Requirements for Compliance Schedule Eligibility

The Coalition agrees with the Staff Report's recommendation that the final new compliance schedule policy specify detailed criteria that a discharger must meet to be eligible for WQBEL-delaying compliance schedules. *See* Staff Report at 66-67. The Coalition urges the State Board, however, that the Draft Policy is insufficiently detailed and prescriptive in this respect. As both the EPA PQR Report and the State Board's EBMUD Decision underscore, the

Regional Boards have been routinely issuing WQBEL-delaying compliance schedules when the dischargers in issue *have failed to demonstrate eligibility* for such compliance schedules under existing compliance schedule authorizing provisions in the SIP or Basin Plans. To curb this abuse and instead ensure that Regional Boards only issue compliance schedules to dischargers who are properly eligible for them, detailed and prescriptive guidance from the State Board is paramount.

Notably absent from the Draft Policy are some of the directions on discharger eligibility for WQBEL-delaying compliance schedules outlined in the EPA Hanlon Memo, which as noted, formed the basis for EPA's critical review of Regional Board compliance schedule issuance. To correct this deficiency and otherwise ensure that the Regional Boards are careful and rigorous in issuing compliance schedules, the Citizens urge the State Board to amend paragraph 3 of the Draft Policy to add additional provisions that will ensure that Regional Boards only issue compliance schedules when clear evidence in the administrative record shows:

- (1) The discharger cannot immediately comply with the WQBEL upon the effective date of its NPDES permit given the specific technical and/or financial obstacles to immediate compliance. The Regional Board must not presume that immediate compliance is not possible simply based on the discharger having historically discharged pollutant levels that exceed the WQBEL. Instead, the Regional Board must make particularized findings, adequately supported by the administrative record, concerning the measures that would be required for the discharger to come into compliance with the WQBEL and why immediate implementation of these measures is not technically or financially possible;¹⁰
- (2) The discharger can and will comply with the WQBEL at the end of the compliance schedule requested, i.e., the discharger has a planned course of remedial action to come into compliance with the WQBEL and reasonably needs additional time to design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to implement this planned course of remedial action;¹¹
- (3) The compliance schedule has been limited to the shortest possible time for the discharger to implement its planned course of remedial action for complying with its WQBEL. Regional Boards must not simply presume that a compliance schedule should

¹⁰ The Hanlon memo underscores that under CWA section 502(17) and EPA regulations at 40 C.F.R. sections 122.2 and 122.44(d)(1)(vii)(A), a compliance schedule must lead to compliance with WQBELs by the end of the compliance schedule. See Hanlon Memo, ¶ 7.

¹¹ The Hanlon memo underscores that under CWA section 502(17) and EPA regulations at 40 C.F.R. sections 122.2 and 122.44(d)(1)(vii)(A), a compliance schedule must lead to compliance with WQBELs by the end of the compliance schedule via an enforceable sequence of remedial actions. See Hanlon Memo, ¶¶ 2, 5.

be set equal to the maximum time allowable by the State Board's policy. Instead, Regional Boards must make particularized findings, adequately supported by the administrative record, as to the shortest time in which the discharger could implement its planned course of remedial action;¹²

(4) Issuance of a compliance schedule is "appropriate" within the meaning of 40 C.F.R. section 122.47(a) taking into account the following factors: (i) how much time the discharger has already had to meet a comparable WQBEL under a prior permit; (ii) the extent to which the discharger has made good faith efforts to comply with its prior NPDES permit, including but not limited to a comparable WQBEL; (iii) whether there is any need for time-consuming modifications to the discharger's existing treatment facilities, operations or measures to meet the WQBEL or whether the discharger could instead better use its existing treatment facilities, operations or other measures to meet the WQBEL; and (iv) whether allowing the discharger to discharge pollutants above its WQBEL for the length of the compliance schedule will cause substantial environmental harm.¹³ In addition, the policy should specify that the Regional Boards should find that compliance schedules are not appropriate if any of the following is true: (i) the discharger has already had significant time to meet a comparable WQBEL under a prior permit; (ii) the discharger has not made good faith efforts to comply with its prior NPDES permit, including but not limited to a comparable WQBEL; (iii) the discharger has made little showing of need for time-consuming modifications to the discharger's existing treatment facilities, operations or measures to meet the WQBEL; and (iv) allowing the discharger to discharge pollutants above its WQBEL for the length of the compliance schedule will cause substantial environmental harm, as is presumptively the case if the discharge would be of a pollutant to water already listed as impaired for that pollutant on the California CWA section 303(d) List.

(5) The compliance schedule requires the discharger, by (a) specified date(s), to limit its interim pollutant discharge until final compliance is attained to the lowest level possible for the discharger (possibly including a series of staggered reductions in pollutant

¹² The Hanlon memo underscores that EPA regulations at 40 C.F.R. sections 122.47(a) mandate that a compliance schedule must require compliance with a WQBEL "as soon as possible" and that the permitting agency should not simply presume that compliance schedules should be set for as long as legally allowable under the WQS provision authorizing such schedules. See Hanlon Memo, ¶¶ 6, 9.

¹³ The Hanlon memo underscores that EPA regulations at 40 C.F.R. section 122.47(a) mandate that compliance schedules can only be issued if "appropriate" and that at least the first three of these factors should be considered in analysis of whether a compliance schedule is appropriate. See Hanlon Memo, ¶¶ 6, 8.

discharge level).¹⁴ The Regional Boards should not simply presume that the discharger cannot reduce its pollutant discharge below its current performance until the end of the compliance schedule and should not simply presume that the same interim effluent limit should be set for the duration of the compliance schedule period. Instead, the Regional Board should make particularized findings, with adequate administrative record support, as to what are the most stringent interim effluent limits that the discharger could meet during the compliance schedule as the discharger meets interim milestones for implementing its planned course of remedial action.

G. *Substantive Content of Compliance Schedules in Permits*

The Coalition agrees with the Staff Report's recommendation that the final new compliance schedule policy specify that compliance schedules in NPDES permits must include interim requirements and dates for their achievement. *See* Staff Report at 67-70. We believe, however, that the Staff Report's recommendations in this respect should be strengthened and clarified in certain respects to ensure that compliance schedules comply with the requirements in the CWA and EPA regulations that compliance schedules consist of a series of interim measures which will culminate in discharger compliance. Specifically, we urge the State Board to amend paragraph 6 of the Draft Policy to specify (1), that any compliance schedule should mandate a specific schedule for implementing the actions that comprise the discharger's planned course of remedial action for complying with its WQBEL, and, (2), if a compliance schedule exceeds one year, interim numeric effluent limits must be included that are set equal to the most stringent level that the discharger can meet (and not merely the level of current performance, unless the administrative record supports that this is the most stringent level that the discharger can meet).¹⁵ As written, the Draft Policy is insufficiently clear that compliance schedule provisions in NPDES permits must not only include interim effluent limits, but must require specific remedial measures that will bring the discharger into compliance with its WQBEL. The Draft Policy is further insufficiently clear that setting interim effluent limits equal to a discharger's current performance is not permissible if the discharger can feasibly meet more stringent interim limits.

¹⁴ The Hanlon memo underscores that EPA regulations at 40 C.F.R. section 122.47(a)(3) mandate that compliance schedules longer than one year must set forth interim requirements and dates for their achievement. *See* Hanlon Memo, ¶ 1.

¹⁵ Except that if the most stringent level that the discharger can meet is more lenient than the comparable effluent limitation in the discharger's prior permit, the Regional Board must set the WQBEL at the level set in the prior permit except as authorized by CWA anti-backsliding requirements. *See* Staff Report at 68-69.

H. *Prohibition on WQBEL-delaying compliance schedules Simply To Develop a TMDL, SSO, or UAA.*

As noted in Section II above, the EPA PQR Report criticized Regional Board 2 for improperly issuing WQBEL-delaying compliance schedules simply to allow for time to develop TMDLs and/or an SSO. As the Hanlon Memo underscores, it is not appropriate to grant compliance schedules on this basis—or to allow time to complete a UAA, either. Hanlon Memo, ¶ 11. Indeed, as the Staff Report underscores, EPA disapproved the provision of the SIP that authorized compliance schedules to allow for time to develop TMDLs. Staff Report at 10. To ensure that the Regional Boards do not in the future unlawfully issue compliance schedules to allow for time to develop TMDLs, SSOs, or UAAs, the Draft Policy should be amended to expressly forbid the issuance of compliance schedules on this basis.

Conclusion

The State Board should adopt a new compliance schedule policy that follows the mandates of the CWA and that disallows delay in the effective date of WQBELs. Alternatively, if the State Board is inclined to adopt such a policy, the State Board should at least amend the Draft Policy as suggested by the Coalition in Attachment 2. These amendments will ensure that WQBEL-delaying compliance schedules are issued only in accord with EPA's *Star-Kist Caribe* decision and EPA regulations and further ensure that the Regional Boards halt their abuse of compliance schedules to simply shield dischargers from CWA liability while not bringing them into compliance with the CWA. Thank you for consideration of our comments.

Attachment 2

The Coalition's Proposed Revisions to:
DRAFT STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2008-
POLICY FOR COMPLIANCE SCHEDULES IN
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS

WHEREAS:

1. The State Water Resources Control Board (State Water Board) is designated as the state water pollution control agency for all purposes under the federal Clean Water Act.
2. Under section 303(c) of the Clean Water Act, the states are primarily responsible for establishing water quality standards.
3. Under section 301(b)(1)(C) of the Clean Water Act, not later than July 1, 1977, National Pollutant Discharge Elimination System (NPDES) permits must include effluent limits as stringent as necessary to achieve water quality standards.
4. For new or revised water quality standards adopted after July 1, 1977, the states can include compliance schedules in NPDES permits to achieve effluent limitations implementing the new or revised standards when the applicable water quality standards or the states' implementing regulations authorize compliance schedules.
- ~~5. For water quality standards adopted on or before July 1, 1977, the states can include compliance schedules in NPDES permits if the states are authorized to include compliance schedules in permits and if the states have adopted a new interpretation of the pre-July 1, 1977 standard.~~
6. The State Water Board recognizes that a compliance schedule may be appropriate, in some cases, when a discharger must design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with permit limitations implementing new, or revised, or newly interpreted water quality standards.
7. The State Water Board has adopted compliance schedule provisions for California Toxics Rule (CTR) criteria, and six Regional Water Quality Control Boards (Regional Water Boards) have adopted NPDES compliance schedule authorizations in their water quality control plans (Basin Plans). -The compliance schedule authorizations vary in their coverage, authorized length, and other provisions.
8. The State Water Board has identified a need for uniform provisions authorizing compliance schedules and for statewide consistency in the implementation of these provisions in the state's NPDES permit program. -Failure to address this need will perpetuate the inefficient

use of discharger, interested party, and Water Board resources, which has resulted from the lack of clear policy guidance on the appropriate use of compliance schedules.

9. It is the intent of the State Water Board that compliance schedules for NDPES permits only be granted when the discharger must design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with permit limitations implementing new, or revised, or newly interpreted water quality standards, and that any schedules be granted for the minimum amount of time necessary to achieve compliance. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load (TMDL), Site Specific Objective (SSO), or Use Attainability Analysis (UAA) is not appropriate, however. Development of TMDLs, SSOs, or UAAs are not actions that a discharger needs to take to come into compliance with NPDES effluent limitations but instead are actions by regulatory agencies.
10. Water Code section 13140 provides that the State Water Board shall formulate and adopt state policy for water quality control.
11. The State Water Board issued the draft Policy and Staff Report, including an environmental checklist, for public comment on [insert date].
12. The State Water Board, in compliance with California Water Code section 13147, held a public hearing in Sacramento, California, on March 18, 2008 on the draft Policy and Staff Report and carefully considered all testimony and comments received.
13. The State Water Board finds that adoption of the Policy will not have any significant or potentially significant effects on the environment and, therefore, no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment.

THEREFORE BE IT RESOLVED THAT:

1. **Definitions.** The following definitions apply to this Policy:
 - a. "Compliance schedule" means a schedule of remedial measures, including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitations, prohibition, or standard.
 - b. "Existing discharger" means any discharger who is not a new discharger. An existing discharger includes an increasing discharger (i.e., an owner or operator of an existing facility with treatment systems in place for its current discharge that is or will be expanding, upgrading, or modifying its existing permitted discharge after a new, or

~~revised, or newly interpreted~~ water quality standard becomes applicable).

- c. "New discharger" means the owner or operator of any building, structure, facility, or installation from which there is or may be a "discharge of pollutants" (as defined in 40 C.F.R. § 122.2) to surface waters of the United States, the construction of which commences after a new; or revised; or newly interpreted water quality standard becomes applicable.
- d. "New; or revised; or newly interpreted water quality standard" means a water quality standard that is adopted; or revised; or newly interpreted after the effective date of this Policy, except that the following dates shall apply instead of the effective date of this Policy in the Regions specified below:
 - i. North Coast: February 27, 2006
 - ii. San Francisco Bay: November 13, 1995
 - iii. Los Angeles: February 18, 2004
 - iv. Central Valley: September 25, 1995
 - v. Santa Ana: July 15, 2002
 - vi. San Diego: [November 9, 2005, if USEPA approves the San Diego Water Board's compliance schedule provisions, or the effective date of this Policy]

~~e. "Newly interpreted water~~ Water quality standard" further means a narrative water quality objective that, when interpreted during NPDES permit development (using appropriate scientific information and consistent with state and federal law) to determine the permit limitations necessary to implement the objective, results in a numeric permit limitation more stringent than the limit in the prior NPDES permit issued to the discharger. Total Maximum Daily Load adopted after July 1, 1977.

- f. "Permit limitation" means a water quality-based effluent limitation (WQBEL). A permit limitation also includes a receiving water limitation.
- g. "Single permitting action" is an action in which a Regional Water Board incorporates all the requirements to implement a total maximum daily load (TMDL), developed pursuant to Clean Water Act section 303(d), in one NPDES permit.
- h. "Water Board(s)" means either the State Water Board or a Regional Water Board, or

both.

2. **Scope and Applicability.** This Policy shall apply to all NPDES permits adopted by the Water Boards that must comply with Clean Water Act section 301(b)(1)(C) and that are modified or reissued after the effective date of the Policy. This Policy authorizes a Water Board to include a compliance schedule in a permit for an existing discharger to implement a new; or revised; or newly interpreted water quality standard where the Water Board determines that the discharger must design and construct¹ facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with a permit limitation specified to implement the standard. Compliance schedules, however, are not authorized under the following circumstances:
- a. Compliance schedules are not authorized in permits for new dischargers.
 - b. Compliance schedules are not authorized for permit limitations implementing criteria promulgated for California in the National Toxics Rule, as amended (40 C.F.R. §131.36, revised as of July 1, 2005).
 - c. Compliance schedules are not authorized under this Policy for permit limitations implementing existing criteria promulgated in the CTR, as amended (40 C.F.R. section 131.38, revised as of July 1, 2005). ~~Compliance schedules for existing CTR criteria are authorized only under the SIP.~~ However, this Compliance Schedule Policy authorizes compliance schedules for permit limitations implementing CTR criteria that are revised by the United States Environmental Protection Agency after the effective date of this Policy if EPA amends 40 C.F.R.
- ~~—dsection 131. —Compliance38(e)(8) to authorize such compliance schedules for permit limitations implementing a water quality objective that is identical to a CTR criterion and that was adopted after promulgation of the CTR may not extend beyond May 18, 2010.~~
- e. Compliance schedules are not authorized for permit limitations implementing new; or revised; or newly interpreted water quality standards that are less stringent than water quality standards previously in effect.
 - f. Compliance schedules to allow time to develop a Total Maximum Daily Load, Site Specific Objective, or Use Attainability Analysis are not authorized.

¹ Construction includes related activities such as the purchase of property needed for the construction, performance of the environmental studies and reviews, identification of social and environmental mitigation, and purchase and installation of necessary equipment.

3. ~~Application~~ **Application/Eligibility Requirements.** ~~A discharger who seeks a~~ To issue a WQBEL-delaying compliance schedule, the Water Board must find, with adequate administrative record support, the following:
- a. that the discharger cannot immediately comply with the WQBEL upon the effective date of its NPDES permit given the specific technical and/or financial obstacles to immediate compliance. The Water Board must not presume that immediate compliance is not possible simply based on the discharger having historically discharged pollutant levels that exceed the WQBEL. Instead, the Water Board must make particularized findings, adequately supported by the administrative record, concerning the measures that would be required for the discharger to come into compliance with the WQBEL and why immediate implementation of these measures is not technically or financially possible;²
 - b. that the discharger can and will comply with the WQBEL at the end of the compliance schedule ~~must demonstrate to the satisfaction of the Water Board requested, i.e., that the discharger needs~~ has a planned course of remedial action to come into compliance with the WQBEL and reasonably needs additional time to design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to implement this planned course of remedial action;³
 - c. what is the shortest possible time for the discharger to implement its planned course of remedial action for complying with its WQBEL. The Water Board must not simply presume that a compliance schedule should be set equal to the maximum time allowable by this Policy. Instead, the Water Board must make particularized findings, adequately supported by the administrative record, as to the shortest time in which the discharger could implement its planned course of remedial action;⁴

² The Hanlon memo underscores that under CWA section 502(17) and EPA regulations at 40 C.F.R. sections 122.2 and 122.44(d)(1)(vii)(A), a compliance schedule must lead to compliance with WQBELs by the end of the compliance schedule. See Hanlon Memo, ¶ 7.

³ The Hanlon memo underscores that under CWA section 502(17) and EPA regulations at 40 C.F.R. sections 122.2 and 122.44(d)(1)(vii)(A), a compliance schedule must lead to compliance with WQBELs by the end of the compliance schedule via an enforceable sequence of remedial actions. See Hanlon Memo, ¶¶ 2, 5.

⁴ The Hanlon memo underscores that EPA regulations at 40 C.F.R. sections 122.47(a) mandate that a compliance schedule must require compliance with a WQBEL "as soon as possible" and that the permitting agency should not simply presume that compliance schedules should be set for as long as legally allowable under the WQS provision authorizing such

d. that issuance of a compliance schedule is "appropriate" within the meaning of 40 C.F.R. section 122.47(a) taking into account the following factors: (i) how much time the discharger has already had to meet a comparable WQBEL under a prior permit; (ii) the extent to which the discharger has made good faith efforts to comply with a permit limitation specified to implement a new, revised, or newly interpreted water quality standard. In addition, its prior NPDES permit, including but not limited to a comparable WQBEL; (iii) whether there is any need for time-consuming modifications to the discharger's existing treatment facilities, operations or measures to meet the WQBEL or whether the discharger must provide the following documentation:

~~a. Diligent efforts have been made to quantify pollutant levels in the discharge and the source could instead better use its existing treatment facilities, operations or other measures to meet the WQBEL; and (iv) whether allowing the discharger to discharge pollutants above its WQBEL for the length of the compliance schedule will cause substantial environmental harm.⁵ In considering these factors, the Water Board should find that compliance schedules are not appropriate if any of the following is true: (i) the discharger has already had significant time to meet a comparable WQBEL under a prior permit; (ii) the discharger has not made good faith efforts to comply with its prior NPDES permit, including but not limited to a comparable WQBEL; (iii) the discharger has made little showing of need for time-consuming modifications to the discharger's existing treatment facilities, operations or measures to meet the WQBEL; and (iv) allowing the discharger to discharge pollutants above its WQBEL for the length of the compliance schedule will cause substantial environmental harm, as is presumptively the case if the discharge would be of a pollutant to water already listed as impaired for that pollutant on the California CWA section 303(d) List;~~

e. what is the concentration and mass level of the discharger's discharge of the pollutant in the waste stream, and the results of those efforts;

~~b. Source control efforts are currently underway or completed, including compliance with any pollution prevention programs that have been established;~~

~~c. A proposed schedule for additional source control measures or waste treatment;~~

schedules. See Hanlon Memo, ¶¶ 6, 9.

⁵ The Hanlon memo underscores that EPA regulations at 40 C.F.R. section 122.47(a) mandate that compliance schedules can only be issued if "appropriate" and that at least the first three of these factors should be considered in analysis of whether a compliance schedule is appropriate. See Hanlon Memo, ¶¶ 6, 8.

- ~~d. Data demonstrating current issue given current operations and treatment facility performance to compare against existing permit effluent limits, as necessary to determine which is the more stringent interim permit effluent limit to apply if a schedule of compliance is granted.~~
- ~~e. The highest discharge quality that can reasonably be achieved, what is the level of this pollutant discharge that the discharger can attain as interim discharge levels until final compliance is attained;~~
- ~~f. The proposed, and the dates by which the discharger can meet these interim levels.⁶ The Water Board should not simply presume that the discharger cannot reduce its pollutant discharge below its current performance until the end of the compliance schedule is as short as possible, given the type of facilities being constructed or programs being implemented, and industry experience with the time typically required to construct similar facilities or implement similar programs, and~~
- ~~g. Additional information and analyses to be determined by the Regional Water Board on a case-by-case basis.~~

and should not simply presume that the same interim effluent limit should be set for the duration of the compliance schedule period. Instead, the Water Board should make particularized findings, with adequate administrative record support, as to what are the most stringent interim effluent limits (possibly including a series of staggered reductions in pollutant discharge level) that the discharger could meet during the compliance schedule as the discharger meets interim milestones for implementing its planned course of remedial action.

4. **Review of Application.** The Water Board is responsible for thoroughly evaluating the information submitted by the discharger in its application and, in particular, for ensuring that the discharger has adequately demonstrated the need for time to design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with a permit limitation specified to implement a new, or revised, or newly interpreted water quality standard.
5. **Maximum Compliance Schedule Length and Conditions for Renewal of Compliance Schedules.** If the Water Board determines that an existing discharger has met the

⁶ The Hanlon memo underscores that EPA regulations at 40 C.F.R. section 122.47(a)(3) mandate that compliance schedules longer than one year must set forth interim requirements and dates for their achievement. See Hanlon Memo, ¶ 1.

application requirements for a compliance schedule, then the Water Board has the discretion to include an appropriate schedule in the permit.

a. Any compliance schedule must require compliance as soon as possible (and must be set to expire on the date that the Water Board finds compliance will be possible), taking into account the amount of time reasonably required for the discharger to design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with a permit limitation specified to implement a new, or revised, or newly interpreted water quality standard.

b. The duration of the compliance schedule may not exceed five years or the life of the permit, whichever is less, except as provided in paragraphs (c.) and (d.) below; provided, however, that in no event can a compliance schedule exceed ten five years from the date of adoption, or revision, or new interpretation of the applicable water quality standard, except as provided in paragraph (d.) below.

~~c. The Water Board may allow a compliance schedule to be extended beyond the first permit term in which the schedule was authorized, for no more than one additional permit term, only if the discharger demonstrates to the satisfaction of the Water Board the conditions described below. In no event may a compliance schedule exceed ten years from the date of adoption, revision, or new interpretation of the applicable water quality standard.~~

~~i. The discharger has met all the conditions of the existing compliance schedules, including all interim milestones.~~

~~ii. Unforeseen circumstances, beyond the control of the discharger, have arisen that preclude or significantly delay construction of the facilities or implementation of the programs expected to result in compliance with the final permit limitation, even though the interim milestones have been met. Unforeseen circumstances include, but are not limited to, a natural disaster for which contingency planning was not required in the permit, failure of a new treatment system to function as anticipated, or a court ruling arising from a third-party lawsuit.~~

~~d. A Water Board may establish a compliance schedule that exceeds ten years in a permit that either: (1) is a single permitting action, as defined in this Policy, or (2) has a permit limitation that implements or is consistent with the waste load allocations specified in a TMDL that is established through a Basin Plan amendment, provided that the TMDL implementation plan contains a compliance schedule or implementation schedule. Notwithstanding i.e. above, a Water Board may include a compliance schedule in an~~

~~implementation plan for a TMDL that is established to achieve either a numeric or narrative objective in a water quality standard.~~

- ~~i. The TMDL implementation plan shall include a maximum length for compliance schedules for attaining water quality based effluent limitations based on the assumptions of waste load allocations in the TMDLs.~~
- ~~ii. The compliance schedule in the permit must be as short as possible. The compliance schedule in the permit cannot, under any circumstances, exceed the maximum length for compliance schedules or implementation schedules contained in the TMDL implementation plan.~~

6. Interim Permit Requirements and Dates.

- a. If the Water Board authorizes a compliance schedule in the permit, the Water Board shall include interim requirements and dates for their achievement, including the implementation of the planned course of remedial action that a discharger will implement to come into compliance with its permit limitation, and dates (including interim milestones for remedial actions whenever a compliance schedule exceeds one year) for the achievement of interim requirements.
- b. If the compliance schedule exceeds one year, the Water Board shall establish interim numeric limitations for the pollutant in the permit, and may also impose interim requirements to control the pollutant, such as pollutant minimization and source control measures. Numeric interim limitations for the pollutant must be based on current treatment facility performance the Water Board's findings as to what is the most stringent interim effluent limit(s) that the discharger can meet or on existing permit limitations, whichever is more stringent. If the existing permit limitations are more stringent, and the discharger is not in compliance with those limitations, the noncompliance under the existing permit must be addressed through appropriate enforcement action before the permit can be reissued, unless the anti-backsliding provisions in Clean Water Act section 402(o) are met.
- c. There shall be no more than one year between interim dates. The interim requirements shall state that the discharger must notify the Water Board, in writing, no later than 14 days following each interim date, of its compliance or noncompliance with the interim requirements.

- 7. **Final Permit Limitation Requirements.** The entire compliance schedule, including interim requirements and final permit limitations, shall be included as enforceable terms of the permit, whether or not the final compliance date is within the permit term.

8. **Permit Findings:** The permit shall include appropriate findings that the compliance schedule is necessary and appropriate, as provided in paragraphs 3 and 4, and that the schedule requires compliance as soon as possible, as provided in paragraph 5. The permit fact sheet shall adequately describe the basis for these findings.
9. **Over-Riding Considerations.** Nothing in this Policy shall prevent a Water Board from requiring immediate compliance with permit limitations if a Board finds that immediate protection of beneficial uses of waters of the United States or California is in the best interest of the people of the state. However, in such an event, the Water Board shall make a finding stating the beneficial uses and specific interests of the people of the state that are being protected or promoted.
10. **Supersession.** This Policy supersedes all existing provisions authorizing compliance schedules in Basin Plans, ~~except for existing compliance schedule provisions in TMDL implementation plans that are in effect as of the effective date of this Policy.~~
California water quality standards.

1 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
2 OAKLAND, CALIFORNIA
3
4
5
6
7

8 JANUARY 22, 2007

9 EXCERPT OF PROCEEDINGS: ITEMS 9 & 10

10 SOUTH BAYSIDE SYSTEM AUTHORITY, WASTE WATER TREATMENT PLANT
11 AND ITS CONVEYANCE SYSTEM, REDWOOD CITY, SAN MATEO COUNTY;

12
13 CENTRAL MARIN SANITATION AGENCY, WASTE WATER TREATMENT PLANT
14 AND ITS FORE MAIN, SAN RAFAEL, MARIN COUNTY;

15
16
17 LOCATION:

18 1515 CLAY STREET, SUITE 1400
19 OAKLAND, CALIFORNIA
20
21
22

23
24 Transcription By:
HOUSE OF SCRIBES
Stockton, California
25 (209) 478-8017

P R O C E E D I N G S

1
2
3 **CHAIRMAN MULLER:** Moving on now, we're going to
4 jump back up to --

5
6 **MR. WOLFE:** Back to Number 9.

7
8 **CHAIRMAN MULLER:** Number 9. Thank you. What's
9 the lengths of these presentations so -- just give
10 everybody an idea.

11 **MR. WOLFE:** Many of the issues are common.
12 We're going to do our best to address those common
13 issues during the first presentation on the South
14 Bayside Authority. So I estimate the first one will be
15 longer than the subsequent ones. By and large the
16 Staff presentations are in the five to seven0minute
17 range, so we will work from there.

18 **CHAIRMAN MULLER:** And all of our speaker cards
19 are kind of 9, 10, and 11 also so --

20
21 **MR. WOLFE:** Right.

22
23 **CHAIRMAN MULLER:** -- Michele and Monica, they
24 know where they're coming from on all of the items, I'm
25 sure.

1 **MR. WOLFE:** And as we get into comments by the
2 public and the agencies, I'd recommend that speakers
3 indicate whether their comments are specific only to
4 one or whether they are consistent with all three,
5 because our intent here is for -- because the
6 presentation on Item 9 does address issues that are
7 also on 10 and 11, to have the record incorporate --
8 the record for Items 10 and 11 incorporate comments and
9 presentation made on Item 9. With that Item 9 is the
10 reissuance of the NPDS permit for the South Bayside
11 System Authority and I'd like John Madigan to make the
12 presentation. He'll be speaking from this side while
13 his trusty assistant, Robert, handles the slide.

14 **CHAIRMAN MULLER:** Go ahead, please.

15 **MR. MADIGAN:** Good afternoon, Chairman Muller
16 and Board Members. I'm John Madigan, a staff engineer
17 at our NPDS based water division. This tentative order
18 reissues the NPDS permit for South Bayside System
19 Authority, otherwise known as SBSA. Their NPDS permit
20 was last issued in January of 2001.

21 **CHAIRMAN MULLER:** Speak up a little bit,
22 please, John.

23 **MR. MADIGAN:** Okay.
24
25

1 **CHAIRMAN MULLER:** Yeah, maybe just pull that up
2 a little bit. [Indiscernible]

3
4 **MR. MADIGAN:** Is that better?

5
6 **CHAIRMAN MULLER:** Try to -- yeah, speak up.
7 Yes, please.

8
9 **MR. MADIGAN:** Okay. SBSA's wastewater treatment
10 plant provides advanced secondary treatment for
11 wastewater collected from the cities of Belmont, San
12 Carlos, Redwood City, Woodside, and also parts of
13 unincorporated San Mateo County. The treatment plant's
14 design capacity is about 30 million gallons a day. The
15 treatment plant also produces a quarter million gallons
16 a day of recycled water, which is used by the city of
17 Redwood City for landscape irrigation. SBSA plans to
18 expand its capacity to recycle wastewater to 2.5
19 million gallons a day by mid 2007.

20 The approximate locations of the treatment
21 plant and outfall diffuser are shown on this slide.
22 Treated wastewater is discharged through San Francisco
23 Bay through a deep water diffuser located about 1 ¼
24 miles offshore and about 2 1/3 miles south east of the
25 main span of the San Mateo Bridge. The treatment
plants -- treatment units rather, at the SBSA plant are
stacked, that is the plant has two levels. So not all

1 of the treatment units are shown on this slide,
2 however, most of the [indiscernible] are. Well
3 wastewater flows in through the influent lift station
4 that Robert's helpfully pointing out up there, then
5 through primary treatment, which is not visible, to
6 secondary treatment, which, as shown in the figure,
7 includes fixed form reactors, variation basins, and
8 secondary qualifiers.

9 Most of the wastewater is also filtered by the
10 dual media filters prior to discharge in order to
11 remove any remaining particles. Okay, we got four
12 comment letters on this tentative order. One came from
13 SBSA, one came from the SEPA, one from Bay Area Clean
14 Water Agencies or BACWA, and one from Baykeeper. And
15 the major issue raised by SBSA and BACWA was the limit
16 for dioxins. The major issue raised by EPA and by
17 Baykeeper was the component schedules for cyanide and
18 for dioxins. I'm going to discuss the dioxins then at
19 first, followed by the compliance schedules for cyanide
20 and dioxin.

21 Okay. Dioxins. The term dioxins refers to a
22 specific chemical called dioxin and a family of about
23 210 related compounds. Dioxins share the
24 characteristics of being ubiquitous in the environment
25 and toxic at very low levels. I'm going to have to
refer to the distinction between the two again, so for

1 clarity I will call the specific chemical dioxin proper
2 and I will call the whole group of them dioxins. The
3 main source of dioxins in San Francisco Bay is air
4 deposition, both current and historic. Dioxins are
5 deposited on the land and some of the deposition washes
6 into the bay in stream water runoff, which exposes
7 aquatic organisms like fish, and anybody who eats the
8 fish, to dioxins. Some of the deposition will stick to
9 plants that are eaten by animals like cows, which are
10 in turn eaten by people. The main sources of dioxins
11 flowing into the SBSA plant are [indiscernible] water
12 and human waste.

13 People become a source of dioxins due to
14 sanitary because of our diet. We ingest it in meat and
15 dairy and then excrete it, on average, seven years
16 later. The source of dioxins in [indiscernible] water
17 could be from skin that we slough off on a daily basis.
18 Also, there are some studies that suggest dioxins could
19 be a contaminate in some clothing dyes from overseas or
20 a byproduct of leaching in the wash.

21 In 1999 the EPA placed dioxins on the 303D list
22 of pollutants that impair San Francisco Bay. They did
23 so because of evidence that dioxins have accumulated in
24 the tissues of fish in the bay. Dioxins are present in
25 SBSA's discharge at low levels and SBSA has had a
compliance schedule for dioxins since the last permit

1 reissuance, because dioxins in their discharge have
2 reason to potential to violate water quality standards.

3
4 Okay. So it's worth discussing briefly why and
5 how we develop the limit for dioxins. First, we look
6 at the basin plan narrative bioaccumulation water
7 quality objective. The EPA has found that, as I
8 mentioned a moment ago, dioxins are accumulated in fish
9 tissues in San Francisco Bay, therefore, we know that
10 the narrative objective is not being met. Because SBSA
11 discharges to the Bay and dioxins are present when they
12 are discharged, their discharge has reasonable
13 potential to cause or contribute to a violation of the
14 narrative objective. Federal regulations, therefore,
15 mandate that we set a limit. In order to do so we used
16 the available science on dioxins to calculate a limit
17 based on a sum of the relative toxicity of each dioxin
18 compound. The result is a translation of the narrative
19 bioaccumulation objective into a numeric limit for
20 dioxins.

21 Okay. SBSA and BACWA had several comments on
22 the dioxins limit and I will try to summarize the most
23 important ones. First, they commented that the dioxins
24 limit has no technical legal basis, because there is no
25 water quality objective for all dioxins, only ones
specifically for dioxin proper. And that dioxin proper
has not been detected in the bay or in SBSA's

1 discharge. SBSA and BACWA also commented that the
2 limit violates federal law because it is not based on a
3 TMDL, and because the basin plan does not establish a
4 specific procedure for translating a narrative
5 objective into a numeric limit. Finally, SBSA and
6 BACWA commented that the dioxins limit violates state
7 law because we have, in effect, created a new water
8 quality objective, and we have not gone through the
9 correct legal and procedural process that the law
10 requires to do so. This would include analysis of the
11 economic impact of a new water quality objective as
12 well as analysis of other social factors.

13 Excuse me. So these are our responses. First,
14 on the technical and legal basis for the dioxins limit,
15 we based the limit on the existing bioaccumulation
16 narrative objective in the basin plan. As I mentioned
17 before, we know that this narrative objective is
18 violated by dioxins. We also based the limit on
19 dioxins detected in the Bay in SBSA's discharge and in
20 fish tissues that threaten human health if those fish
21 are consumed. SBSA and BACWA are correct that dioxin
22 proper has not been found in their discharge, however,
23 it has been detected in the Bay and in fish tissue, and
24 in any case the narrative objective reasonably applies
25 to all of the other toxic dioxins.

1 Second, we think the dioxins limit complies
2 with federal law. The law requires limits for
3 pollutants that have a reasonable potential to cause or
4 contribute to an exceedance, whether those limits are
5 based on a TMDL or not. And the basin plan states in
6 Chapter 4 that narrative objectives will be translated
7 into numerical limits by best professional judgment.
8 In doing so we have properly relied on and followed the
9 federal regulations on establishing effluent limits
10 from narrative water quality objectives.

11 Third, on state law, we disagree with SBSA and
12 BACWA that the dioxins limit establishes a new water
13 quality objective. As I mentioned previously the water
14 quality objective we are looking at is the basin plan
15 narrative objective. Economic and other social factors
16 were considered when that objective was established.
17 In addition, the dioxins limit is no more stringent
18 than the federal standard for dioxin proper, therefore,
19 new economic analysis is not required.

20 Compliance schedules. Regarding compliance
21 schedules, the EPA commented that compliance schedules
22 must include an enforceable series of actions intended
23 to lead to compliance, and commented that compliance
24 schedule provisions that relate to TMDL development
25 were disallowed. We responded to their concerns by
reorganizing the limit to more clearly identify --

1 excuse me, more clearly identify the required
2 compliance schedule tasks and deadlines in one
3 provision rather than in several provisions, and by
4 removing provisions relating to TMDL development.
5 Based on communication with the EPA, we think these
6 revisions have addressed their concerns.

7
8 Okay. Baykeeper also had several comments on
9 compliance schedules and, again, I will try to
10 summarize them in order to get the most important
11 points. Baykeeper commented that the compliance
12 schedules for cyanide and dioxins are illegal. First
13 of all, because permits issued after May 2005 cannot
14 contain compliance schedules for dioxin based on the
15 provisions of the California Toxics Rule. And
16 secondly, because the basin plan does not authorize
17 compliance schedules for cyanide or dioxin since the
18 water quality objectives for these pollutants are not
19 new

20 Baykeeper also commented that our compliance
21 schedules lack enforceable requirements intended to
22 lead to compliance. This was similar to the EPA's
23 comment, which as I described in the last slide, we've
24 responded to by including more clearly the specific
25 tasks and deadlines in one section of the permit.

1 Finally, Baykeeper, commented that the draft
2 data does not demonstrate that it is not feasible for
3 SBSA to comply with the cyanide and dioxin limits
4 immediately. In Baykeeper's view we have relied solely
5 on the results of SBSA's past monitoring and have not
6 analyzed additional measures that SBSA could take. The
7 dioxin compliance schedule is a continuation of the
8 compliance schedule granted in the last permit, which
9 was the same approach we used in the Tosco permit,
10 which was upheld by the State Board in Tosco order.

11 With respect to the cyanide compliance
12 schedule, that is also a continuation from the last
13 permit and we believe it is proper under the basin
14 plant's compliance schedule authorization, although the
15 State Board has recently, in the draft letter, taken a
16 different position.

17 As to immediate compliance, we believe SBSA
18 cannot comply immediately, because the plant is well
19 run and meets stringent limits for most pollutants as
20 it is. Dioxin sources, as previously discussed, are
21 not in SBSA's control. Cyanide sources have already
22 been significantly reduced by a pretreatment program
23 and even so, SBSA's discharge record shows that it
24 cannot comply immediately.
25

1 The nature and sources of these pollutants,
2 especially dioxins, make the limits difficult to meet.
3 Meeting them will require time, therefore, the approach
4 that is most likely to succeed is to provide SBSA with
5 the maximum time schedule and flexibility to come into
6 compliance, while also requiring tasks and deadlines
7 that must be met. Finally, although the State Water
8 Board recently released, a little bit over a week ago,
9 a draft order on the East Bay MUD wet weather permit,
10 that some could interpret to be in conflict with our
11 interpretations of the Tosco order, we emphasize that
12 the State Water Board draft order is a draft. Unlike
13 in other permit reviews, because the State Water Board
14 took East Bay MUD up on its own motion, State Board
15 Staff developed its draft order without the benefit of
16 arguments from all sides. We have reevaluated our
17 interpretation in light of State Water Board's draft
18 order and maintain that our interpretation is still
19 reasonable and consistent with the Tosco order and its
20 associated rulings.

21 So to close, we believe we have made reasonable
22 revisions to the tentative order and have addressed the
23 issues brought to our attention to the best of our
24 ability. Thank you.

25 **MR. CHILD:** I would first like to thank both
John and [indiscernible] for their excellent work

1 they've done. We've had several challenges as we've
2 gone through this process and they've worked very hard
3 in a very confident and professional manner to reach
4 agreement on most of the issues, and I sincerely
5 appreciate their efforts. Unfortunately despite our
6 mutual efforts to resolve all of the issues, as I stand
7 here today I must say that SBSA is not able to support
8 adoption of this permit. The reason for this position
9 is the proposed limits on and for dioxin equivalents.
10 I am the person who has requested we make this comment.
11 I am the first of three agencies that will speak to
12 this issue today. All three of our proposed permits
13 before you have dioxin limits in them and I think you
14 will hear comments on this from all three of this as we
15 go through the process today.

16 We really have a significant and fundamental
17 disagreement with the practice of adopting the proposed
18 numeric effluent limits for dioxin equivalents based on
19 the narrative and the best professional judgment to
20 translate that narrative into a numerical limit. We
21 believe the plan should provide greater flexibility
22 than we see in this permit, and we also believe the
23 approach is an unsatisfactory method for setting
24 numeric limits. This practice is particularly
25 troubling in that it leads to effluent limits that we
know we cannot achieve currently. We have no clear
path to achieving these limits. This language I'm

1 going to quote from the fact sheet of the proposed
2 permit, and I quote, "The Regional Board recognizes
3 that the primary source of dioxins and pherins in the
4 Bay area is A, emissions from combustion sources." The
5 second quote, "The main source of dioxins and pherins
6 in the domestic waste stream is beyond the dischargers
7 control."

8
9 Dioxins are a group of chemicals that are
10 widespread throughout the environment. With the
11 control of industrial services 80 percent of dioxins
12 released to the environment in the United States in
13 2004 originated from forest fires and backyard trash
14 burning. In the Bay area, [indiscernible] exhaust and
15 residential wood burning are acknowledged to be the
16 main sources of dioxins. These sources are not within
17 the control of any publicly owned treatment works in
18 the state of California.

19 I'd like to make it clear that SBSA -- we are
20 very supportive of a regional approach to work on the
21 issue of dioxins, coming up with ways to prevent
22 dioxins equivalents in fish, and we're willing to work
23 with your staff and others on a TMDL for dioxin
24 equivalents in the San Francisco Bay. We are also
25 willing to participate in regional activities that
could evaluate and further understand dioxin

1 equivalents and how we can do pollution prevention and
2 effective resource management.

3
4 We ask today, however, that you do not adopt
5 the proposed permit as written and either modify the
6 permit to eliminate dioxin equivalents or direct staff
7 to work with us to craft language that is mutually
8 agreeable to us. I thank you for your time and look
9 forward to your consideration on this matter.

10 **CHAIRMAN MULLER:** Thank you. Comments?
11 Questions? Margaret?

12
13
14 **MS. BRUCE:** Yes, actually I did -- sorry --
15 I'm sorry to call you back. Just a quick question on
16 that small fraction of the dioxin equivalent loading
17 that goes through the treatment works, if I understand
18 correctly from the staff report and from the fact
19 sheet, dioxins and their congeners are hydrophilic and
20 particlphilic. They like to hang on [indiscernible]
21 with particles. So if your system removes those solid
22 particles, how effective is that process? Is there --
23 I mean obviously you're saying you would have some
24 technical challenges with meeting the discharge limits,
25 but how do you understand the technical process by
which you would already go through the process to
remove those things?

1 **MR. CHILD:** Well, I think the main thing where
2 you're talking about where it attaches to solids, and I
3 have some staff members up here so if I get on the
4 wrong track I'll have to ask them to correct me, but
5 the main thing is the removal of suspended and
6 inseditable solids. At our treatment plant our
7 influent suspended solids, what's coming into the
8 plant, runs in the area of 200 milligrams per liter.
9 Our permit limit is 8. Our permit limit is 8 and our
10 annual average is 2. So we're removing virtually 99
11 percent of the solids. And also, another thing to
12 consider is we're really transferring those solids over
13 to the biosolids that we have to dispose of somewhere
14 else. So where that ends up -- I don't know if any
15 studies have been done to really look at that today, a
16 whole different can of worms. But, yes, I think
17 obviously I'm not sure if I treatment plant can be run
18 any better on a day to day basis to remove these. It
19 really is a matter of they're coming in and we don't
20 know of any technology right now that would allow us to
21 remove them better.

22 **MS. BRUCE:** Do you have a sense of what it
23 would take in your watershed to go upstream in terms of
24 pollution prevention activities to ameliorate what you
25 receive?

1 **MR. CHILD:** I really don't. it's generally
2 considered to be something like doing water for laundry
3 and that's -- it's such a vast thing from everybody and
4 as someone said, it's in all of our systems, they're
5 you know short of --

6 **MS. BRUCE:** Seven years from now if you changed
7 everything it would be something different.
8

9 **MR. CHILD:** Exactly. Short of turning off the
10 sewer systems, I really don't know how you could
11 prevent anything any more dioxins than there already
12 are. The industrial guides have pretty much been taken
13 care of. This is really, like I said, laundry grey
14 water and just natural human excretion.

15 **CHAIRMAN MULLER:** It's not my granddaughter,
16 [indiscernible].
17

18 **MS. BRUCE:** She's not seven yet.
19

20 **CHAIRMAN MULLER:** Oh, that's right.
21

22 **MR. CHILD:** Any other questions?
23

24 **MS. BRUCE:** Possibly later, but thank you.
25 That's really helpful. Appreciate it.

1 **MR. CHILD:** Okay. Thank you.

2
3 **CHAIRMAN MULLER:** Baykeepers, please. Ms.
4 Isaacs.

5
6 **MS. ISAACS:** Good afternoon, Chairman and
7 members of the board. My name is Jodene Isaacs. I'm
8 an attorney with a firm of environmental advocates and
9 I'm going to be submitting these comments on behalf of
10 our client, Baykeeper. And if it's acceptable these
11 comments actually address -- because they're
12 overlapping they address both the South Bayside and
13 Central Marin so --

14 **CHAIRMAN MULLER:** Thank you, yes, you have 9
15 and 10 on here so we'll call it for both.

16
17 **MS. ISAACS:** Okay. Well, thank you again for
18 the opportunity to comment. And as you know, Baykeeper
19 has already provided you with extensive written
20 comments, and I'm not going to repeat those, but we
21 appreciate the Staff's response. However there are a
22 few points that I wanted to emphasize. Baykeeper has
23 appeared before you on many other occasions to express
24 our concerns about recurring problems in the NPDS
25 permits being issued by Region 2. And in particular,
excuse me, we are and remain concerned that the permits
contain compliant schedules for toxic pollutants that

1 are not allowed by law. And that they, including the
2 Central Marin permit, inappropriately authorized
3 untreated wet weather discharges in the form of blended
4 wastewater. We are also troubled by the permit's
5 inclusion of bacteria limits that are inconsistent with
6 the basin plan and the allowance of unilateral
7 modification to permit conditions by the executive
8 officer. Excuse me.

9 We would also like to point out that most of
10 these issues, as mentioned by Staff, were recently
11 addressed by the draft State Board decision, remanding
12 East Bay MUD wet weather facilities permit that this
13 Board issued in 2005, and the State Board's draft
14 decision points out many flaws in the permit decision
15 methodology that Baykeeper, again, has repeatedly
16 objected to in the past and that we have complained
17 about with respect to the current comments on both the
18 South Bayside and the Central Marin permits. Once it
19 becomes final, the State Board's decisions would become
20 binding precedent that would not allow the Regional
21 Board to adopt, as written, many of the conditions in
22 the Bayside [indiscernible] as currently written.

23 Excuse me.

24 For example, the State Board decision would
25 invalidate the compliance schedules in these permits
for mercury and cyanide. It would also require the
modification of limits for bacteria, toxicity and

1 ammonia, and it will also necessitate changes in the
2 permit language relating to the bypasses and the
3 executive officer approval. So for these reasons, we
4 hope you adopt the methodology that's been presented in
5 the State Board drafted decision, and we urge you to
6 disapprove these permits and require that they be
7 revised to comport with federal NPDS regulations.

8 We also ask that you carefully consider any
9 permitting process the steps needed to ensure that
10 wastewater agencies not only comply with federal law,
11 but also work towards improved treatment. As a result
12 of [indiscernible] on the infrastructure and inadequate
13 capacity, discharges of raw sewage in the Bay area are
14 all too frequent. The Central Marin permit, for
15 instance, has, and continues to allow, the agency to
16 rely on wet weather flow diversions as a long-term
17 management approach as explicitly stated by US EPA only
18 aggressive efforts by NPDS permitting authorities and
19 POTWs will solve these problems.

20 So, again, we thank you for the opportunity to
21 comment on these permits.

22
23 **CHAIRMAN MULLER:** Thank you. And that was for
24 9 and 10, correct?

25 **MS. ISAACS:** Correct. Thank you.

1
2 **CHAIRMAN MULLER:** Thank you. Michele Pla,
3 please and then Monica Oakley.

4
5 **MS. PLA:** Good afternoon, Chairman Muller and
6 Board Members. My name is Michele Pla. I'm the
7 executive director of the Bay Area Clean Water
8 Agencies, and as you know the Bay Area Clean Water
9 Agencies is a public joint powers authority of all the
10 clean water agencies in the San Francisco Bay area. We
11 have 54 members. My members work everyday of the year,
12 every minute of the day, treating domestic, and
13 industrial, and commercial wastewater to protect the
14 San Francisco Bay. That is their job and that is what
they do.

15 I was here last January, sitting in this room
16 and I too heard the charge, the scolding, and the
17 challenge that was issued to this Board to get permits
18 written and to get them out the door, and I have to say
19 that I believe your staff has been very impressive in
20 their response to that. And that BACWA too has geared
21 up substantially over the last year to work with your
22 staff and to make sure these permits are getting
23 issued. We've had a staff -- we had a very large
24 workshop in June and we've had very consistent meetings
25 within our membership to make sure that they could get
these permits together with your staff.

1 I have two -- I did, as you know, respond on
2 behalf of my membership to the SBSA permit, and I
3 really appreciate the responses that we've got from the
4 staff on all of our issues, but I have two issues that
5 remain. The first issue is the inclusion of the
6 numerical effluent limit, which was a translation from
7 the narrative limit for dioxin in the permit. We
8 objected to this five years ago when it was included.
9 We appealed those permits and we still object today.

10 The second issue we continue to have is the
11 requirement for the individual dischargers to have a
12 plan by July 2009 to comply with the final 303D listed
13 permits. And I want to address both of these because
14 they are actually quite related. And you have heard
15 very well from Mr. Childs about dioxin, and we do
16 understand that it is an uncontrollable substance.
17 And, as I said, we did appeal this in the last permit
18 rounds and we continue to disagree that this narrative
19 standard has to be translated to a numerical standard.

20 We find dioxins everywhere. We think that the
21 -- we understand fully, based on the response to
22 comments, why Staff did what they did, but it points
23 out to us in the BACWA community that we think the
24 water quality program is broken. Your staff has stated
25 that this is an uncontrollable substance. We believe
that, in fact, based on the question that we got from

1 Ms. Bruce, someone whispered in my ear when you asked
2 that question. The only way we could probably get
3 dioxin out of our waste stream is to stop all the
4 people in the Bay area from eating beef, because that's
5 how it's getting into our bodies and that's how it's
6 getting into the waste stream that the POTWs handle.

7
8 So we understand why this is happening and
9 we're being driven by this process, this process that
10 started last, you know, that you were scolded on that
11 started last January, the process to meet these
12 schedules, the process to follow these rules and how
13 they all fit together. But what's going on here is
14 that we will now have final numerical effluent limits
15 for an uncontrollable substance in our permits. If we
16 cannot meet this limit we will be subject to citizen
17 lawsuits and MMPs. This process is not working. So I
18 want to -- I think that we're all really smart people
19 in this room. We have a lot of ways that we can take a
20 look at how to do this. We have a TMDL program and I -
21 - BACWA feels very very challenged by this and I would
22 like to issue that challenge to all of us to find a way
23 to solve this issue, rather than putting numerical
24 effluent limits in a permit, which we cannot meet and
25 we'd have no way of meeting.

24
25 The second issue that I have for you is the
July 2009 requirement. And, again, this is related to

1 dioxin, but it's related to the other TMDLs. I fully,
2 again, understand and really actually appreciate why
3 the staff has put this in here. They are complying
4 with the EPA requirements and questions on the
5 compliance schedule, but what this limit has -- or what
6 this statement that says, "By July 2009 if the
7 pollution prevention and source controls that you put
8 in place to try to come into compliance with mercury,
9 cyanide, copper, dioxin, if they haven't shown you
10 anything then you've got to come up with a plan on how
11 to get there by 2010. Well, again, my sense is that
12 we're all working on this, and yet in this permit with
13 this language, the individual POTW is put at risk so --
14 and I have talked to Staff about this. So, again, I
15 understand why that language is there. I appreciate
16 that, but I would've preferred to have seen some
17 additional language in there that talked about how all
18 of us are engaged in a process across this region to
19 get these TMDLs done, to get these site specific
20 objectives accomplished. It is all of our problems.
21 We're finding that now, the way this language is, it's
22 only shown to be a problem for the clean water agency.
23 So I appreciate the ability -- the opportunity to make
24 these comments to you. I will have similar comments
25 for SPS -- excuse me, for CMSA and Central San. I have
additional comments on those as well, and I'm available
for questions and thank you again.

1 **CHAIRMAN MULLER:** Thank you, Michelle. If not,
2 we'll go onto Monica, please. And you have down 9 and
3 10, is that correct?

4
5 **MS. OAKLEY:** Right, I'll just be talking on 9,
6 but it's applicable to 10.

7 **CHAIRMAN MULLER:** Then you'll come back for 10?

8
9 **MS. OAKLEY:** No, well these -- my name is
10 Monica Oakley, let me just explain, and I'm here to --
11 on behalf of the Central Marin Sanitation Agency, and
12 I'm going to be talking on Agenda Item 9 right now.
13 These comments are applicable to 10 and CMSA will be
14 commenting on 10, which is their permit, but they've
15 asked me to comment on 9, because we were instructed
16 that the dioxin issue would really be discussed on
17 Agenda Item 9 and that we should get up and talk if we
18 wanted to address that so that's why I'm here.

19 **CHAIRMAN MULLER:** We have your card.

20
21 **MS. OAKLEY:** Okay. Great. So as you know,
22 CMSA also has a dioxin TEQ limit in their proposed
23 permit and while their limit does not come into effect
24 until after the permit term, which is different from
25 SBSA and Central San, they're still very concerned
about this limit, because they cannot meet it, just

1 like the others. Municipal wastewater treatment plants
2 are not a significant source of dioxin TEQ, the TEQ is
3 the toxicity equivalent quotient, otherwise known as
4 equivalence. And there is no feasible control to
5 measurably reduce the dioxin TEQ so we can't even
6 determine if we're reducing it. Municipal wastewater
7 treatment plants are not designed in the first place to
8 remove dioxin, and so that's also part of the concern.
9 And for these reasons, CMSA requests that the final
10 limit for dioxin TEQ be removed from all three permits.

11 And I would -- I -- I -- I also just wanted to
12 confirm that Michelle's comments were also applicable
13 to Agenda Item Number 10 for the CMSA permit. Okay.
14 So, okay. Thanks.

15
16 **CHAIRMAN MULLER:** Thank you, Monica. So that's
17 all I have on 9 and 9½ and 10. So -- so we'll go
18 forward. Getting a little [indiscernible], but we'll
19 go ahead and ask Staff questions. And we need a little
20 help on this, Board Members and Staff. This dioxin
21 thing we've been beating around for quite a while I
22 believe and we've heard all different stories about it
23 and where it comes from and how it comes from, and, you
24 know, during my Tosco days it was the refineries and
25 today it's the -- the beef and so where it's all coming
from I hope we find out and if we can really reduce it
at the POTW level, which is something I think we have

1 to look at very closely so -- We'll start down at the
2 end here. So we'll go with Clifford, you want to work
3 your way down.

4
5 **MR. WALDECK:** I don't really have any questions.

6
7 **CHAIRMAN MULLER:** Okay.

8
9 **MR. WALDECK:** So I just have some comments to
10 make, but I'll wait until we're done with questions,
11 and my comments might be made by somebody else.

12 **CHAIRMAN MULLER:** Terry, please?

13
14 **MS. YOUNG:** Yes, I wanted to perhaps ask the
15 Staff to elaborate on what you see as the options for
16 creating or obtaining offsets?

17
18 **MS. TANG:** I think there are opportunities for
19 offsets in dioxins and that's probably my only -- I
20 think -- solution for the POTWs. In terms of Chairman
21 Muller's original question about where it's all coming
22 from, it's actually refineries and POTWs are relatively
23 in the same position. They're dealing with very minute
24 dioxin concentrations in their discharge that they
25 really can't control without advanced treatment. With
advanced treatment like ultra filtration or even
reverse osmosis although with reverse osmosis you

1 always have the brine to deal with, you know, you can
2 comply or compliance in terms of non-detects.

3
4 Where all these discharges are currently at are
5 -- we're -- we're finding levels that could be of
6 concern. They are actually at levels that are below
7 what is called the minimum level, which is where
8 laboratories can say with confidence, "You are at this
9 concentration." So when they're in this gray area
10 where they're below minimum levels they're actually --
11 we would not actually take enforcement action against
12 these dischargers.

13 So their option could be to measure these
14 estimated values that suggest that they are above the
15 limit. We do not take enforcement action and they kind
16 of just, kind of coast along the way, until perhaps,
17 the analytical technology improves or they can help
18 and, you know, work with us to develop mass offset
19 policy. I think either this morning or the EO Report
20 there was some discussion about the State Board
21 releasing a draft to mass offset policy for mercury,
22 and the Delta and the Bay, because that was one of the
23 directives of the State Board in our mercury TMDL.
24 And, you know, the concepts presented in that mass
25 offset policy has a lot of transfer to dioxins, because
these are chemicals that are -- there are a lot of
sources of it, it's out there in the environment. It's

1 in fish tissue and so, like I say, there's a lot of
2 potential.

3
4 We identify that storm water is a huge source
5 in the Bay area, a lot more than the point source
6 wastewater discharges that we regulate. There is
7 opportunities and we're actually exploring some
8 opportunities with the East Bay Municipal Utility
9 District as part of their wet weather permit that the
10 Board adopted in 2005 to study the feasibility and the
11 effectiveness, the efficacy of guiding some first flush
12 storm water or, you know, some dry weather storm water to
13 a municipal treatment plant when they have capacity,
14 and treat that water. And a lot of that is in the
15 solids, that solids will drop out and, you know, I
16 think we -- it could be something that is definitely
17 measurable and accountable for in a mass offset
18 program.

18 **CHAIRMAN MULLER:** Clifford, and then I'll come
19 to Margaret.

20
21 **MR. WALDECK:** Let's say that the ambient level
22 for dioxin is one. Now that the ambient -- well no
23 matter it's the air or water, where is -- I mean is our
24 permit at -- for these POTWs is it .9? Is it at 1.1 or
25 -- I'm just trying to get my arms around it, because
I'd like to see it around the ambient level plus a

1 really tight amount, you know? Whereas I don't want to
2 see the ambient level minus a certain amount, but --
3 but, you know, because, you know, you basically -- I
4 mean they're not worried about the -- the POTWS are not
5 worried about us finding them in as much as they're
6 worried about getting sued by private organizations and
7 whatever's out there if they're not hitting the dioxin
8 goal. So I just wondered if you could comment on those
9 two?

10 **MS. TANG:** The limit that we're setting on --
11 or that we're proposing to set on these three permits
12 is below the ambient. If you look at on the fact sheet
13 in the tables, it presents what is the background
14 concentration that we're finding in the Bay and the
15 water and the limit is below that concentration. It's
16 also much -- it's also much lower than storm water
17 runoff as well. So it's -- you know -- what do you
18 consider as ambient, those are -- and

19 **MR. WALDECK:** Oh, so ambient isn't a solid I
20 mean --

21
22 **MS. TANG:** No, no.

23
24 **MR. WALDECK:** Okay. Yeah, because it just --
25

1 **MS. TANG:** But that's just indicative of why
2 the EPA listed the Bay as being impaired, right?

3
4 **MR. WALDECK:** Because -- because we're down to
5 the same sort of conversation we always have, you know?
6 You have the POTWs saying your -- it's too strong and
7 then, you know, and then you have the environmental
8 community coming out saying it's not strong enough. So
9 I really look towards Staff guidance so we can move
10 forward in a reasonable way kind of knowing whatever we
11 do will probably get appealed to the state. And one
12 other comment is, you know, they talked about the draft
13 thing the state came out with, well frankly I've never
14 seen that. I'm just made aware of it and, you know,
15 that just -- that -- that doesn't really affect my
16 thinking at all. I'm just speaking for myself.

17 **CHAIRMAN MULLER:** Thank you. Margaret?

18 **MS. BRUCE:** I have a question. You -- you
19 alluded to the opportunity to do something about
20 offsets or to look for other ways of, you know,
21 swapping those sorts of emissions. Understanding that
22 dioxins are from inefficient combustion of whatever,
23 whether it's wood or diesel, do we have any sense of
24 the quantification of -- let's just say because
25 diesel's probably easier to measure than a wood fire.
How much dioxin or dioxins are generated from the

1 combustion of a gallon of -- or 100 gallons of diesel
2 in an old school bus or in an old garbage truck or in
3 an old semi, and if there were ways of encouraging, in
4 a collaborative effort, the exchange of the kind of
5 fuel that's burned or the exchange of the equipment
6 that is burning that fuel or a catalyzed converter you
7 can put particular traps or converters on old diesel
8 equipment so that you reduce the emissions from
9 existing older equipment that was the equivalent, plus
10 a little bit, of what would be discharged by the POTWs
11 or by storm water or by any other regulated source so
12 that we remove it from it's -- at as close to the
13 source as possible. And I'm thinking there may be some
14 really nice convergences of opportunity in this right
15 now. The Governor's just released his executive order
16 that says we'd like to go forward with a low carbon
17 fuel standard. There's AB32 and all of its
18 implementation about let's reduce our carbon footprint.
19 There's a clean diesel rule, low sulfur diesel fuel
20 going into effect. There are encouraging signs for
21 people who want to use biodiesel. The air district has
22 many stringent requirements on backup diesel
23 generators. There are new technologies for catalytic
24 converters to be put on diesel equipment -- and so
25 perhaps the POTWs, all of them collectively in the
region, can then do some outreach to the Bay area air
quality management district for diesel generator
retrofits. That may be a more cost effective

1 application of their resources or with the Air
2 Resources Board and the Carl Moyer program that they
3 run to help retrofit older equipment to reduce
4 emissions, again, not just, you know, for the diesel
5 particulate issue, but also for a lower carbon
6 footprint. Can we take this out of the contentious
7 realm of setting up the POTWS and the waste discharge
8 folks to not be able to succeed, because I feel very
9 strongly that that's a bad thing to do, and create
10 another mechanism for them to be successful in reducing
11 dioxin emission to the environment? I am much more
12 concerned about success there than about whether or not
13 they met the .00004 or if they were at .00005. I
14 really don't care. I want the dioxin to go away.

15 **MS. TANG:** You know there -- people spend their
16 entire career, some people, you know, on dioxins.
17 There are emission estimates for many of these air
18 sources. Another big air source in the Bay area is
19 wood burning, you know, fire places, which the POTWS
20 can also collaborate with the -- the air. I don't
21 think that Bay Air Quality Management District deals
22 with those types of sources, but --

23 **MS. BRUCE:** Yes, they do. They have a very
24 aggressive, "Don't Light Tonight" program that deals
25 with the particulate PM10 PM2.5 emissions and nox
emissions from wood burning fire -- wood burning

1 stoves. And that would be a great opportunity to
2 collaborate. There are also catalytic devices you can
3 affix to a wood burning stove so that you can make it
4 burn a little cleaner. Or you can just tell people,
5 "Take out your wood stove and put in a natural gas
6 heater." So --

7
8 **CHAIRMAN MULLER:** Do I detect a little weakness
9 in your support for this permit?

10 **MS. BRUCE:** How to put this? I am profoundly
11 concerned that we not set our wastewater discharge
12 agencies up to fail. I want to set them up to succeed.
13 Success, in my estimation, is get the dioxin out of the
14 environment. It's going to end up in the water
15 eventually. It's the universal solvent. So how do we
16 get it out of the environment in the most cost
17 effective, expeditious, efficient, measurable way?

18 **CHAIRMAN MULLER:** Any other comments down this
19 way? Mr. Peacock?

20
21 **MR. PEACOCK:** I tend -- I tend to agree with
22 what Margaret just said.

23
24 **CHAIRMAN MULLER:** Bring your mike in, please.
25 Right there, yeah.

1 **MR. PEACOCK:** I said I tend to agree with one
2 aspect of what Margaret just said. If we're setting up
3 any agency of government or the private sector to fail,
4 is that not a violation of our own obligations? That
5 doesn't make a whole lot of sense. If they cannot
6 possibly succeed, what are we doing? And if we're
7 setting them up to fail so that we have the authority
8 to go find them when they don't have an available
9 technology to fix it, and then it also subjects them to
10 lawsuits from the general public. I just wonder what
11 the rationale is to justify putting out -- putting out a
12 permit that requires them to do something that they
13 can't do.

14 **CHAIRMAN MULLER:** Please comment staff, please?

15 **MR. WOLFE:** The basic requirement is that this
16 is a requirement through the Clean Water Act, that as
17 we address each of these pollutants we need to
18 ultimately, for water quality based effluent limits,
19 come to a final limit. And as we -- we've talked about
20 the issues that have been brought up relative to both
21 the dioxin limit and the compliance schedules for
22 dioxins, cyanide, mercury, we definitely are put in the
23 hard position of at one point being told we shouldn't
24 have any compliance limit or schedules, because the
25 limits should be final right now.

1 Or when we do have compliance limits that we
2 shouldn't, excuse me, compliance schedules that we
3 shouldn't have limits. And so for the permitting
4 process we're trying to come up to an approach that is
5 a legally based permit, but then we fully recognize
6 that we do need to be working with the discharger
7 community on how we address this or, as Margaret says,
8 we need to be working on a broader sense cross-media to
9 be looking at the multimedia benefits by addressing
10 this and that -- that -- I've always been -- been big
11 at looking how do we get most bang for the buck. And
12 so certainly there -- there need to be options to
13 consider things like offsets, to consider complimentary
14 programs. To a certain degree we are including the
15 mention of offset programs in here, even though we
16 don't have any in place. In the past we really hadn't
17 even put that out there as a possibility, because this
18 is, again, something new that many many parties are
19 nervous about, how offsets would work, whether they
20 would be abusive and whether the environment really
21 would be protected if we had those in place. But I
22 think we're definitely finding that through these
23 constituents, dioxins, cyanide, and the others, that
24 our measured at very low levels that by and large, as
25 it's been noted, the only real way to -- to not have
them in wastewater is to not discharge wastewater, not
have any wastewater at all. That we do need to look
how do we address this both legally and technically.

1
2 The permit, that's our -- our attempt to,
3 initially through the permit, be legal. Then through
4 the -- the majors that are spelled out through the
5 compliance schedule to try to address the technical
6 opportunities. Building a new treatment plant is not
7 the solution. We recognize that, and so we need to
8 find other solutions. On the other hand, we feel we
9 can't necessarily say that these are not subject to
10 compliance schedules and final limits, because legally
11 they are. So that's -- that's where we need then to
12 get passed that and move forward towards what is the
13 ultimate solution, how can we move forward bit by bit
14 as we are trying to do through all of our efforts.

15 **CHAIRMAN MULLER:** Well, with that said, I mean
16 in the last five years we've been very consistent with
17 these permits, is that correct? Each -- each permit is
18 on its own regards and --

19 **MR. WOLFE:** That's -- right. That's -- that's
20 one issue that has come up somewhat on both sides of
21 the fence, as it were. That as BACWA noted that there
22 was an appeal filed last time this permit was up. We
23 respect that they'll -- they'll file an appeal this
24 time through. At the same time, we're -- we're hearing
25 from State Board that -- that to a certain degree we
should not have adopted or even considered compliance

1 schedules, yet we're trying to be consistent. I would
2 say the difference from last permit cycle to this
3 somewhat driven by EPA's comments is really rather than
4 have the compliance schedule that sort of says, "Okay,
5 here's today. The compliance schedule is way out there
6 a ways, and we'll sort of deal with it when we're way
7 out there." Now we're within one permit cycle of sort
8 of that quote unquote way out there date so we really
9 need to address this now.

10 Some of them such as cyanide and mercury we're
11 addressing through TMDL site specific objectives. We
12 don't feel that a TMDL for dioxin can accomplish much,
13 because as everybody's noting, looking at it purely
14 from a water or an influent basis there's not
15 necessarily so much we can do. We need to take the
16 broader approach and that's -- that's going to be the
17 challenge to -- to make sure we can all work together
18 on that broader approach.

19 **MR. WALDECK:** John?

20
21 **CHAIRMAN MULLER:** Yes, Clifford?

22
23 **MR. WALDECK:** To get -- so going back on US
24 EPA's comment, was US EPA -- they were okay with our --
25 with our dioxin level we came in with?

1 **MS. TANG:** Yes, they are and actually it was in
2 large part due to EPA's comments five-six years ago on
3 the refineries that we developed the strategy that we
4 have on regulating dioxins in the bay.

5
6 **MR. WALDECK:** And so you've checked with them
7 and they're consistent? Because they didn't come and
8 speak -- I mean didn't chime in at all here so --

9 **MR. WOLFE:** Well, the -- the compliance
10 schedule issue is something that -- that's at issue
11 nationally and -- and I think they -- they don't want
12 to sort of delve into that too significantly. But as I
13 eluded to the point they had -- had made was that
14 really we should not have a compliance schedule without
15 some level of milestones. We should not just say,
16 "Okay, we're issuing the permit today, sometime out
17 there comply." And not have some sort of steps how
18 we're going to get there. Now as -- as the dischargers
19 are saying they don't feel they'll ever get there and
20 so the issue is what do we do?

21 The -- the reference was to the -- the July
22 2009 date where we say, "If it doesn't look like
23 there's another regulatory strategy or another approach
24 that's going to get you to that final limit, you need
25 to come up with a plan." That essentially gives us two
and a half years to all work together to say okay,

1 let's not wake up on July 1st, 2009 and say we have no
2 way to do this. And so that's really the challenge.

3
4 **CHAIRMAN MULLER:** Margaret?

5
6 **MS. BRUCE:** Is it a legal requirement that the
7 compliance schedule be specific to wastewater
8 discharges or can it be specific to the equivalent
9 amount of dioxin removed from the environment?

10 **MR. WOLFE:** Well I would say that's in to how
11 do you attain the final limit and whether an offset
12 policy or something like that might allow you to say
13 you effectively attained it. In other words, right now
14 what we have in here basically says yes, at the end of
15 the compliance schedule you are required to attain your
16 -- comply with the final limit, but that's --

17 **MS. BRUCE:** That's the water [indiscernible].
18

19 **MR. WOLFE:** -- that's what we're throwing out
20 here as one of the strategies between now and then is
21 to consider is there an offset approach that might say
22 in lieu of meeting or complying with that limit at that
23 point what are the equivalents?
24
25

1 **MS. BRUCE:** I see the two representatives from
2 US EPA laughing at me so maybe I'm on a totally wrong
3 track.

4
5 **MR. WOLFE:** So -- but let me reiterate at this
6 point we've -- we've mentioned an offset policy, but
7 we're not there and we know that it -- it is something
8 that will be difficult to get to. We think that --
9 that what State Board is doing to consider a mercury
10 offset policy is a first step to try to evaluate the
11 issues. This is something that actually came out of
12 our mercury TMDL. We had initially said we may take
13 that on and then they said, well mercury is also an
14 issue throughout central valley, throughout the
15 foothills, the State Board will take them on. From a
16 resources perspective I'm pleased they are, but I'm not
17 confident that they'll have something in place in the
18 time that -- that we may need it.

19 **CHAIRMAN MULLER:** Legal staff, did you have a
20 comment or are you comfortable in the direction? We're
21 kind of all over the board on this Number 10 here.

22 **MS. WON:** With respect to Ms. Bruce's question
23 on compliance schedules, I mean, you know, Michelle
24 eluded to the fact that the system is broken. I mean
25 it's really -- I mean it's -- I think what she's
eluding to the fact that it is the prescriptive nature

1 of the Clean Water Act, you know? The compliance
2 schedule it's very, you know, pollutant specific,
3 discharger specific, and then with respect to this
4 issue of requiring limits when the discharger can't
5 comply, setting the, you know, discharge up for fail.
6 It's not something that we, of course, want to do, but,
7 you know, given the prescriptive nature of the Clean
8 Water Act and how, you know, what all the calculations
9 are, you know, we kind of have no choice but put these
10 limits in there and, you know, put a very specific kind
11 of compliance schedule, not the kind, you know,
12 innovative kind that you are proposing.

13 **MR. WOLFE:** Well, I -- I think from my
14 perspective me personally I mean I don't think there's
15 one of us up here that wouldn't think that, you know,
16 why are we doing this at times. But I -- I feel that I
17 have no choice. I'm being mandated to do this and
18 that's why I have to be leaning to vote in support of
19 the -- the permit. Naturally we all have our personal
20 feelings on how we would get around this wastewater
21 dioxin issue, but we don't have a control for that I
22 don't think.

23 **MR. ELIAHU:** Mr. Chair?

24 **CHAIRMAN MULLER:** Yes?
25

1 **MR. ELIAHU:** Do I understand that in two and a
2 half years if they cannot comply there is no penalty?

3
4 **MR. WOLFE:** The requirement there is --

5
6 **MR. ELIAHU:** From you?

7
8 **MR. WOLFE:** There is a table in the -- the
9 tentative order for this one it's on Page 19 of the --
10 the tentative order for SBSA. And you'll note that
11 Task Number 3 says, "In the event that source control
12 measures are insufficient for meeting the final water
13 quality based effluent limitations for cyanide and
14 dioxin TEQs the discharger shall submit a schedule for
15 implementation of additional actions to reduce the
16 concentrations of these pollutants." And so that's --
17 that's the challenge between today and July 1, 2009,
18 that everyone is essentially saying source control
19 measures are not going to be anywhere close to be able
20 to allow us to meet these, predominately for dioxins,
21 because we have -- do have a process underway for
22 addressing cyanide. But should there be -- we get to
23 July 1, 2009, we are requiring them to give us a
24 schedule of implementation of additional actions.

25 Now we're not specifying what those additional
actions necessarily are, nor are we saying exactly how
they're implemented or the schedule, but the schedule

1 then needs to point to full compliance, which would be
2 required in SBSA's case by July 31st, 2012.

3
4 **MR. ELIAHU:** So in writing this you also have
5 doubts that they cannot attain that limitation?

6
7 **MR. WOLFE:** Clearly.

8
9 **MR. ELIAHU:** [Indiscernible] And you are
10 putting it there because you have to.

11 **MR. WOLFE:** Yes, and I think we also want to
12 make sure that we do what we can to not be February 1st,
13 2012 to say we've known this for years that we were
14 going to be in violation, but sorry, you're in
15 violation and -- and see if we can address that. But
16 nonetheless this, I think, is really going to be the
17 permitting challenge for us over the coming permit
18 cycle, is how do we address the very small pollutants
19 where it may be inefficient or unable to reach what
20 science or other aspects say should be that final
21 limit, when the Clean Water Act says you need final
22 limit.

23 **CHAIRMAN MULLER:** At this time I take staff
24 recommendations, please. Terry?

1 **MS. YOUNG:** I was going to ask another follow-
2 up question on the -- follow-up question on the
3 offsets. I understand that it would be very straight
4 forward to create offsets for a mass emissions limit.
5 I can also understand that it would be relatively
6 straightforward to create offsets for a monthly
7 average, although that's a little bit more difficult if
8 the discharges in mass loading really is seasonal.
9 It's hard for me to understand intuitively how you
10 would create an offset system if there was a one for
11 one type of offset system for a maximum daily limit.
12 Does the -- is -- is there anything legally that would
13 prevent one from creating an offset system that -- that
14 would allow you to still discharge on a daily basis
15 more than what the daily limit says but -- but still
16 get credit for your offsets? I'm not sure if I --

17 **MS. TANG:** Yes, I think because dioxin is a
18 bioaccumulative pollutant we could probably justify
19 that the offset be more appropriate in a mass basis.
20 And particularly if -- if we're, you know, instead of
21 diesel engines, we're looking at a storm water offset,
22 storm water only flows during the wet -- wet season.

23 **MS. YOUNG:** I'm clear that we could justify it
24 on the science. I don't know whether we would get hung
25 up on the law though. I -- that -- I guess that was my

1 question is that there -- is there some reason that
2 would preclude us from doing that?

3
4 **MS. WON:** I don't think there's a whole lot of
5 problems with this whole offset policy or admission of
6 offsets so I mean this is, you know, very grey area
7 [indiscernible].

8 **MS. TANG:** I have one final comment. There's -
9 -

10
11 **CHAIRMAN MULLER:** Yes, I'd like to bring this
12 to some conclusion.

13
14 **MS. TANG:** Sure.

15
16 **CHAIRMAN MULLER:** I read the paper today here.

17 **MS. TANG:** Just to throw more salt on the wound
18 on those who oppose the dioxin limit, we recognize --
19 because of the East Bay MUD draft order we realize that
20 in this particular order -- we had in previous permits
21 for some reason it was calculative, the compliance
22 schedule for dioxin was calculated to be more than 10
23 years, which is what is maximum allowable under our
24 basin plan. So really a 10 year schedule from when it
25 was first set to the end is actually January 1st, 2011,
not January 2012. So for -- I'd like to introduce that

1 as a -- include that in our recommendation to amend the
2 permit to reflect a compliance schedule for dioxin that
3 is 10 years long from when it first started with the
4 previous permit.

5
6 **CHAIRMAN MULLER:** Do we all understand where we
7 are at the moment here? Legal?

8
9 **MS. DICKEY:** I'm wondering if you could
10 indicate what parts of the permit would be modified?

11 **MS. TANG:** In the permit requirements it would
12 be under Table -- on page -- starting on Page 11, Table
13 6C, Dioxin TEQ, there's a Footnote 6, which then if you
14 turn over the page to Page 12, Final Limits for Dioxin
15 TEQ Will Take Effect -- so it will read January 1st,
16 2011 rather than January 31st, 2012. And then in the
17 provision section, Page 19, there's no table number,
18 but it's the table on that page, Task 6, the compliance
19 schedule that lies in there would also read January 1st,
20 2011. And then we would make appropriate changes to
21 the fact sheet to make it consistent with this.

22 **MR. WOLFE:** And to me this -- while this
23 obviously is a surprise, I'm sure, to the discharger
24 and all that this does keep us consistent on that 10
25 year requirement. But really the big date where we
need to be getting the approach -- the long term

1 approach spelled out is July 1st, 2009. It's not the
2 2011 or 2012 date. So it's really trying to say, okay,
3 what do we expect to see in July of 2009 and how do we
4 move forward between that date and any time for a final
5 limit, because as I say, this -- and as the commenters
6 say, this is not only South Bayside, it's essentially
7 all of our dischargers.

8 **MR. WALDECK:** I'd like to move the staff
9 recommendation.

10
11 **MR. WOLFE:** Well, actually I think that might -
12 -

13
14 **CHAIRMAN MULLER:** We didn't get one yet.

15
16 **MR. WOLFE:** -- I thought Margaret had a comment
17 or question, but --

18
19 **MS. BRUCE:** Real quickly, if I may, how long
20 would it take to develop an offset and perhaps a
21 multimedia offset policy and set of guidelines for that
22 implementation? Could that be achieved before the
23 compliance schedule expired?

24 **MR. WALDECK:** Get the Air Board to pay for it.
25 They've got all the --

1 **MR. WOLFE:** Well, I would say that's -- that's
2 the challenge, because as you say, I think the staff
3 feels the same way. We don't want to necessarily be
4 putting or setting someone up to fail. And I
5 personally do dislike the situation where we may be
6 driven to do something legally that may not A be
7 practical, B it's not clear what the water quality
8 benefits are. But that being said that we really are
9 forced to ensure that are permits are legally sound and
10 so then the challenge comes, if we have a permit in
11 place, trying to address that issue. If it appears
12 we've set somebody up to be in noncompliance, we should
13 also be stepping up to the table to work with them to
14 ensure that we're doing all we can to address that.

15 And one of those options obviously is an offset
16 policy that would address, especially for dioxin, the
17 multimedia benefits. More commonly we talk on many of
18 these about just within water, how can we address it.
19 That's certainly easier, but we should be thinking
20 outside the box on this one especially.

21 **CHAIRMAN MULLER:** Okay, right. In this
22 morning's paper on global warming with the energy, and
23 business, and government environmental people together
24 there's a great quote from a vice president -- a senior
25 fellow of the energy research, Thomas Tanton that says
-- kind of can go with what we've been working on here

1 today. "Something less bad is better than something
2 really bad."

3

4 **MR. WOLFE:** Well, that's true and I guess even
5 in --

6

7 **CHAIRMAN MULLER:** That's a quote.

8

9 **MR. WOLFE:** -- in context to that I'm
10 personally quite pleased that it does appear here in
11 the Bay area, that over the passed few months the
12 appreciation of the impact from climate change, the
13 understanding of that has drastically ramped up. I
14 think the Bay area can be a leader, and I think that
15 this agency should be definitely correctly involved in
16 that process, because there are so many things that are
17 water quality related when you start talking about air
18 quality and climate change. And so we recognize that.

19

20 **CHAIRMAN MULLER:** And I think we do have to
21 move on or we could -- we've been down this road a lot
22 lately on these permits and the POTWs -- it's not like
23 they're the enemy. Without a doubt I want to, you
24 know, from my personal perspective this is -- they are
25 a very valuable resource in our whole life, daily life,
and so I still say, you know, I have to go by what I'm
being mandated to push towards and so I'll ask for
staff recommendations.

1 **MR. WOLFE:** Right, well my staff
2 recommendation would adoption of the tentative order
3 for the South Bay System Authority's NPDS permit with
4 the modification to the final limit compliance date, as
5 Lila said, to July, excuse me, January 1, 2011.

6 **CHAIRMAN MULLER:** You heard the recommendation,
7 Board Members?
8

9 **MR. WALDECK:** I'd like to move staff
10 recommendation, if we could have -- I'd like to be part
11 of the motion to have staff begin to look at offset,
12 the whole world of offsets. I don't know how to say
13 that in the -- to add this to the motion, because that
14 is something. We're going to have to look at creative
15 and collaborative ways to move forward on this and
16 we've had -- we've always been talking about
17 collaborative meetings between the Air Board and us,
18 and now were kind of creating somewhat of a crisis
19 moment to create that collaboration, whether it is
20 through offsets, you know, so I don't know if I want to
21 use the word offsets, but, you know, look at creative
22 ways to achieve these goals.

23 **MR. WOLFE:** I'm -- without having that in the
24 motion, I'm willing to report back to you on efforts
25 we're going to be taking to do that, because to a
certain degree we've already set this in motion. We've

1 already adopted over the past year a number of permits
2 that already have this same situation set up in place
3 and so it's clear that, again, we have that July 1st,
4 2009 date in the permits to try to demonstrate that
5 progress needs to be made, but obviously the question
6 comes up progress towards what. And so we need to be
7 addressing --

8 **MR. WALDECK:** Well, that's why on this vote
9 here, this is why it's important on this vote here. I
10 mean we could just say go with staff recommendation and
11 it's like oh, the Board just went with staff
12 recommendation, but I want this vote to be something
13 that can, you know, that can kind of sets into motion
14 something that, you know, that could get the ball
15 rolling on certain things, because if something's, you
16 know, if my homework assignment's not due 'til 2009,
17 you know, January 1st, 2009, I'm cramming on December
18 31st, 2008. So I want to make sure that I'm not in that
19 world and if our Board's been down the dioxin path
20 before, I can argue both sides very well.

21 Shut up and go away or, you know -- but I'm
22 just looking for something, and I'll ask my fellow
23 board members here, I don't want to use the word
24 offset, but --

1 **MS. BRUCE:** Commensurate reductions?
2

3 **MR. WALDECK:** Commensurate -- just some
4 language there that shows that the people in this board
5 here that are kind of -- are not nay sayers or rubber
6 stampers, but forward thinking people, because
7 especially I mean, I won't put words in Margaret's
8 mouth. I mean Margaret's immersed in this stuff all
9 day long. I mean that's what her job is. I mean I get
10 involved in stuff like --

11 **MS. BRUCE:** That would explain a few things.
12

13 **MR. WOLFE:** It's your laundry.
14

15 **CHAIRMAN MULLER:** I understand where you're
16 coming from Board Member, but I think we should caution
17 ourselves, personally, on inserting offset into a
18 permit at this [indiscernible]. I mean we could be
19 opening up a pretty big can of worms.

20 **MR. WOLFE:** I would welcome some language --
21 some language that at least is strong enough, not
22 necessarily to say offset to tie our hands, but, for
23 instance, as I noted earlier that next month I'll be up
24 speaking to the State Board about what are our issues
25 for 2007, and I wouldn't mind being able to tell State
Board that my board has set it as a priority that we

1 look at how we address this compliance issue in a
2 fashion that recognizes the need to consider multimedia
3 benefits of reductions that are also beneficial to air,
4 climate change, and water, multimedia benefits.

5
6 **CHAIRMAN MULLER:** Does that work for you,
7 Clifford?

8 **MR. WALDECK:** Yes, I'd --

9
10 **MS. BRUCE:** I would actually like something a
11 little bit more explicit in terms of the Board staff's
12 work plan and a commitment to working with regional
13 agencies all around the Bay area region, an air
14 resources board, the Bay Area Air Quality Management,
15 in every municipality, looking at how to reduce inputs
16 to the environment, whatever media, by storm water, by
17 air deposition, by wood burning, whatever so that we
18 have a collaborative process moving forward in parallel
19 with the compliance schedules that are laid out in
20 these permits. So that when these two trains running
21 on parallel tracks get to 2011 there's a solution and
22 not a cliff to fall off for the wastewater discharge
23 agencies, that we have measurable reduced dioxin inputs
24 to our environment and we have resources and tools
25 imbedded in our municipalities, in our regional
districts, in our regional agencies for collaborating
on all kinds of multimedia issues. That's what I, you

1 know, the State's not leading on this. Fed EPA isn't
2 leading on this. So we have to step into the void.

3
4 **MR. WOLFE:** It's a serious void, but I agree
5 that it's something that we need to step into.

6
7 **MR. WALDECK:** Multimedia collaboration. Take
8 the lead in multimedia collaboration.

9
10 **MR. CHAIRMAN:** Yeah, I think you have to
11 realize too that I mean we are in limited resources.
12 Again, I don't think there's one of us that --

13 **MR. WALDECK:** No, if you come up with the right
14 collaboration there's money available for it, you know,
15 and so -- I mean there --

16
17 **CHAIRMAN MULLER:** Well, I don't know -- do we
18 have an amendment to the staff's recommendation at this
19 time?

20 **MR. WOLFE:** Well, I guess he was trying to
21 frame his motion and --

22
23 **CHAIRMAN MULLER:** I know it was -- Mr. Peacock?

24
25 **MR. PEACOCK:** Mr. Chairman, maybe the easy way
to do it is just to act on each one of these permits

1 and then have a motion by the full board encouraging
2 the staff to follow these separate and apart from any
3 of these permits. And that's probably a good
4 procedural directive or suggestion or recommendation to
5 the staff.

6
7 **CHAIRMAN MULLER:** Right, and not attached at
8 the moment.

9 **MR. PEACOCK:** Not attached and then it just cuts
10 through all the ice and keeps moving.

11
12 **CHAIRMAN MULLER:** Thank you for that.

13
14 **MR. WOLFE:** As long as our attorneys would --

15
16 **CHAIRMAN MULLER:** Yes, D.D.?

17 **MS. DICKEY:** I want to just suggest in response
18 to Mr. Peacock's --

19
20 **CHAIRMAN MULLER:** Speak loudly, please, because
21 they're going to want to hear this.

22
23 **MS. DICKEY:** In response to Mr. Peacock's
24 suggestion, in terms of a motion to be adopted by the
25 Board, we would need to separately agendaize that so we
could do that next month, but perhaps we could

1 accomplish the spirit of what you're suggesting by the
2 Board expressing its collective wishes in this regard
3 without actually voting on a motion. And you could
4 certainly do that this month without separately
5 agendizing it. So either of those things would work.

6
7 **MR. PEACOCK:** May I start by saying I wish you
8 would do what we've just been talking about.

9
10 **CHAIRMAN MULLER:** The boys have it. Sandy,
11 were you all right or did you have more advice there?
12 Okay. Who wanted to be chair this year? So we're
13 going to go back to this permit. We have a staff
14 recommendation. We are giving --

15 **MR. WOLFE:** With one amendment.

16
17 **CHAIRMAN MULLER:** -- with one amendment, and
18 we are giving the staff our --

19 **MR. WOLFE:** Direction.

20
21 **CHAIRMAN MULLER:** -- enthusiastic wholehearted
22 interest in this direction of looking at the --

23
24 **MR. WALDECK:** Multimedia collaboration.
25

1 **CHAIRMAN MULLER:** -- multimedia collaboration
2 Margaret offset program.

3
4 **MR. WOLFE:** Well, there's the Carl Moyer
5 program, we can have the Margaret Bruce program.

6
7 **CHAIRMAN MULLER:** So we have that as a motion.
8 You made that motion?

9 **MR. PEACOCK:** Second.

10
11 **CHAIRMAN MULLER:** And we have a second. Is
12 there -- hopefully not further discussion, if not, I
13 don't mean to take this lightly, because this is very
14 serious work. The POTW's done a heck of a lot of work
15 on it. Staff, you've done a tremendous amount of work
16 on it. This is -- and all of the other involved
17 parties, I mean really and truly. Every time we go
18 through this permit I'm amazed at how much work
19 everybody puts into it so it's no joke. I mean I try
20 to make a little humor up here at times, but sometimes
21 it gets away on me. So I mean to be serious about this
22 so roll call vote, please.

23 [Roll Call]

24
25 **CHAIRMAN MULLER:** So ordered on Item 9. Now we
get to go through this again.

1
2 **MR. WOLFE:** Item 10 --

3
4 **CHAIRMAN MULLER:** And I will say South Bay you
5 better stay for your buddies.

6
7 **MR. WOLFE:** Yes, Item 10 is the Central Marin
8 Sanitation Agency reissuance of their NPDS permit, but
9 by and large we are trying to, and I'm sure you agree,
10 we'll, as much as possible, rely on what you have just
11 discussed over the last hour and a half for the issue
12 of final dioxin limits and compliance schedule. So
13 with that I will state that for Item 10 the record will
14 incorporate the presentations and all of the comments
15 and all of your deliberations into the record for Item
16 10. With that I'd like to ask Vince Christian to make
17 the staff presentation for Central Marin.

18 **MR. CHRISTIAN:** Good morning or afternoon.
19 Thank you, Mr. Chairman and Board. My name is Vince
20 Christian and I'm the case handler for the Central
21 Marin Sanitation Agency. I will briefly describe the
22 facility and cover the issue of blending, which is
23 related to this draft permit. As with the SBSA permit
24 John just spoke about, compliance schedule and dioxin
25 limit issues were raised by interested parties. The
comments on these issues were very similar to the
comments on the SBSA permit, and our responses were

1 consistent with those on the SBSA permit. Therefore
2 I'm not going to cover those issues, but instead I will
3 focus on the wet weather blending, which is a unique
4 issue to the Central Marin permit on this agenda.

5
6 The plant is located on the west side of the
7 Richmond San Rafael Bridge just north of San Quinton.
8 Central Marin Sanitation Agencies serves the city of
9 San Raphael and the surrounding area. They have very
10 little industry in their service area so most of the
11 effluent is from residential use. Central Marin owns
12 the treatment plant, but they don't own the collection
13 systems that discharge to it. These are owned by four
14 independent agencies not governed by Central Marin
15 Sanitation Agency. This is an important point related
16 to the issue of blending as I will explain later.

17 The treatment plant has a capacity of 3 million
18 gallons per day. Dry weather flows do not exceed this
19 capacity. And under normal conditions the plant works
20 very well, however, in wet weather the rain leaks into
21 the sanitary sewer collection system and this
22 dramatically increases flow to the treatment plant.
23 This is known as inflow and infiltration. This problem
24 can cause flow rates to exceed the treatment capacity
25 of the plant. These conditions occur about 30 days per
year.

1 When this happens measures must be taken to
2 maximize the treatment effectiveness. Central Marin
3 uses a procedure known as blending or bypassing which I
4 will describe in this next slide. This shows the
5 treatment process under wet weather conditions when
6 infiltration is high. In this example the influent to
7 the plant is 50 million gallons per day, however, the
8 treatment capacity of the secondary clarifiers is only
9 30 million gallons per day so not all the flow can go
10 to secondary treatment. Flow is split after primary
11 treatment with 30 million gallons per day going to
12 secondary treatment and 20 million gallons per day
13 diverted around it. There's the storage pond that
14 holds 3 million gallons. The pond can hold water until
15 the flow rates subside and capacity becomes available
16 in the secondary treatment units thereby reducing
17 blending. However the pond is relatively small and
18 would fill up in about three hours in this scenario.

19 Once the pond is full flow bypasses secondary
20 treatment and is then recombined or blended with the
21 flow from the secondary clarifiers prior to
22 disinfection and discharged to the bay. It's important
23 to note that all effluent limitations must be met
24 during blending events. We've received comments from
25 Central Marin, US EPA, Baykeeper, and verbal comments
from BACWA or the Bay Area Clean Water Agencies. We've
resolved many of these comments, but I want to bring to

1 your attention the main issues that were raised by all
2 or most of the parties. As mentioned earlier comments
3 on compliance schedules and dioxin limits were very
4 similar to the comments on the SBSA permit and our
5 responses were consistent to those on the SBSA permit.
6 I will therefore skip those issues and only discuss
7 blending. Consistent with its comments on the recent
8 permits, EPA requested that the discharger perform an
9 analysis showing that there are no feasible
10 alternatives to blending before blending can be
11 permitted.

12 Central Marin has done this and has proposed
13 specific measures to reduce blending. Central Marin
14 has proposed these measures to produce blending during
15 this permit cycle. Central Marin estimates that the
16 cost of these improvements is about \$60 million, and
17 they estimate that the measures will reduce blending by
18 about 50 percent.

19 EPA, BACWA, Baykeeper -- and Baykeeper
20 commented on the blending issue. We believe that we
21 have satisfied EPA's concerns by revising the tentative
22 permit to include a schedule for major milestones to
23 implement Central Marin's proposed improvement projects
24 and to study options for working with its collection
25 system agencies to reduce inflow and infiltration. We
understand that BACWA disagrees with APA's position

1 that an enforceable schedule is required. We believe
2 that a schedule is necessary to assure that the
3 improvement projects are completed in a timely manner.
4 Central Marin has committed substantial resources to
5 blending during this permit term and they will be
6 required to analyze the feasibility of further
7 reduction measures for the next permit term. For that
8 reason we believe that the measures proposed in this
9 permit will provide the maximum benefit to water
10 quality and, therefore, should be adopted. Thank you.

11 **CHAIRMAN MULLER:** Thank you. Any questions
12 from staff otherwise we'll move on to the general
13 manager of Central Marin, please. Jason Dow, please?
14 Followed by Monica and Michelle. You okay, Monica?
15 Thank you. Then Michelle.

16
17 **MR. DOW:** Good afternoon, Chairman Muller and
18 members of the Board. My name is Jason Dow, General
19 Manager of the Central Marin Sanitation Agency. It's a
20 pleasure to be here today. This is our first Regional
21 Water Board meeting for my staff and myself, and it's
22 great to be here. And I'm here to give you a little
23 background of CMSA and some of the exciting things
24 we've done over the last few years, but more
25 importantly to express appreciation to the committed
staff of the Water Board for moving the permit forward
for the last six to eight months, that's Ms. Lila Tang,

1 Mr. Vince Christian, and Mr. Robert Schlipf. This is
2 our first permit reissuance for myself and staff, and
3 they were very patient with us and helped us through
4 the process and we found it to be very educational and
5 enlightening and we really appreciate their support
6 through the whole thing.

7
8 CMSA strives to be a high performance utility.
9 Over the last several years we've really embraced the
10 concept of continuous improvement and we're very
11 excited that we've seen that becoming engrained into
12 the organizational culture at the agency, which is
13 quite a bit different than several years ago. Our
14 agency, and our staff, and our board are committed to
15 protecting the environment. We're committed to being
16 environmental stewards. We're committed to protecting
17 the environment. And equally important, we're
18 committed to producing the highest quality effluent and
19 highest quality biosolids that our current facility can
20 produce.

21 And these commitments and efforts have been
22 recognized by peer groups and state and national
23 associations over the last year. The National
24 Association of Clean Water Agencies has issued CMSA the
25 Gold Peak Performance Award for NPDS permit exceedances
for 2005 calendar year. The California Water
Environment Association, the CWEA, has recognized CMSA

1 as having a statewide plan of the year for 2005 and
2 also the statewide safety program of the year. And
3 also the local section of the CWEA, the Redwood Empire
4 section, has recognized many of our staff and the
5 organization with other awards.

6
7 This makes the staff real proud and it really
8 just solidifies our commitment to the environment and
9 doing great work at the agency. One of the main
10 environmental initiatives that we've undertaken over
11 the last several years is what Mr. Christian was
12 referencing was our wet weather improvement project.
13 That started out with trying to understand the
14 relationships between different rainfall events and how
15 that effects the infiltration inflow into the sanitary
16 sewer system of our member agencies, and how that
17 translates to different influent flows at the plant for
18 different rain events. We spent a couple years on
19 this, worked with a lot of consultants, got some really
20 good information. With that information we worked with
21 our member agencies to collaborate on developing
22 regional solutions to help them reduce [indiscernible]
23 system. We've also developed standard operating
24 procedures for our plant, emergency contingency plans,
25 and also communication protocols to best manage these
significant wet weather flows that come into the plant.

1 Our average dry weather flow is about 8 million
2 gallons per day. On that December 31st, 2005 storm we
3 hit 115 million gallons per day, a 15 times increase in
4 our flow. And luckily because of these protocols and
5 our fine staff they were able to -- we met our permit
6 limits, you know, for the year, and the month, and the
7 week, and everything was fine. But it just reinforced
8 another project that we're initiating, which was the
9 wet weather improvement project where we're looking at
10 ways to manage the flow from hydraulic and treatment
11 prospective, and all of those various improvements that
12 Mr. Christian mentioned, is integrated into that
13 program. Right now we're at about the 75 percent
14 design level. The final design should be completed by
15 the summer. Construction will start at the end of the
16 calendar year. And when the construction's finished
17 and the new plant comes on line, we'll be able to
18 process all of these significant flows and a little bit
19 more for larger storm events for our member agencies,
20 and maintain the high quality effluent to meet all of
21 our NPDS permit requirements and exceed those.

22 So we're very excited about that. We're able
23 to solve a regional situation at the plant and protect
24 the public health and the environment. And regarding
25 the permit, the -- as I mentioned, the permit process,
we thought was -- went real smooth. We believe
generally our permit is fair. There is a lot of

1 additional provisions and some changes to some
2 requirements in the permit that I commend Lila and her
3 staff that they fully communicated to our staff what
4 those changes were and the justification for those
5 changes. We understand those and we can comply with
6 everything in the permit, except for the dioxin limit.
7 And we echo the comments by our colleagues and peers at
8 SBSA, and also what Michelle Pla said with BACWA, is
9 that CMSA cannot meet the dioxin limit now and we don't
10 foresee being able to meet it in the future.

11 And we're concerned with everyone else that
12 these dioxin limits placed into the permits of
13 wastewater treatment agencies is troubling, because the
14 wastewater treatment agencies aren't designed to remove
15 dioxin, and wastewater treatment agencies aren't a
16 significant source of dioxin as we talked about for the
17 last hour or so. Anyways, with that I just want to say
18 it's a pleasure addressing the Board and thanks, again,
19 very much to the Staff and for consideration of
20 adopting our permit.

21 **CHAIRMAN MULLER:** Great, congratulations on
22 all of your fine work. I was waiting patiently for the
23 hammer to fall what it was all about here. We had a
24 sense it was that dioxin [indiscernible]. Michelle,
25 please, with BACWA.

1 **MS. PLA:** Good afternoon, Chairman Muller. My
2 name is Michelle Pla and I'm the chair -- I'm the
3 executive director of the Bay Area Clean Water
4 Agencies. And I have to apologize, because I believe
5 that BACWA submitted written comments, and I didn't
6 realize until today when I got here and was looking at
7 the response to comments that they never got here. So
8 I'm going to have to take a few minutes and go over
9 some of our comments so that they are in the record.

10 So the first comment I'd like to make is about
11 copper. The -- we commented in our written comments
12 and we have a similar comment in our Central San
13 comments, that we disagree with the conclusion that the
14 staff has drawn that they could not use a water effects
15 ratio in developing the effluent -- numerical effluent
16 limit for CMSA on copper. And I won't spend anymore
17 time on that since I know we've been here a long time
18 today.

19 Secondly, I want to -- I do want to talk a
20 little bit about dioxins really quickly. I very much
21 appreciate the discussion that we just had, that the
22 Board just had, about looking for creative ways of
23 dealing with this issue. When I raised the issue also
24 of the July 2009 deadline in my previous comments, they
25 weren't only about dioxin, they were also about
mercury, copper, nickel, cyanide. So all of those and

1 dioxin, all of those have to be addressed in some
2 creative way we have to be finished by -- if not known
3 exactly how we're going to be finished by July 2009,
4 and it would basically have to be finished very quickly
5 thereafter. And so I really appreciate the discussion
6 here, because that was really what I was hoping we
7 would have is an agreement that we're all going to work
8 together, be very aggressive, in a regional way and get
9 this -- get done what we need to get done so we're not
10 left leaving the clean water agencies out there being
11 responsible for things that are regional issues. So I
12 thank you very much.

13 As far as offsets, I really appreciate the
14 comment that Board Member Young made on the maximum
15 daily. I agree with you. We don't know how we could
16 set up an offset program on anything that has a
17 concentration limit as opposed to mass limits. And the
18 dioxin limit and some of these other limits are
19 concentration limits, not mass limits. So I'm not sure
20 how we would ever do that. We are looking at the
21 offset policy that's being developed by the State Board
22 on mercury. We are not very pleased with it at this
23 point. We have some time between now and February 15th
24 to develop some comments on it, and we will definitely
25 be working on it with your staff and sharing that. But
at this point I don't think the State's really going
down the right track on that mercury offset program.

1 My last comment is about blending. Your staff
2 member was correct in that we continue to disagree
3 respectfully with your staff and with EPA about the
4 need for putting compliance with the no feasible
5 alternative plan for the blending program into the
6 permit. And this is quite a complex issue. Blending
7 has been quite a topic of discussion for the last --
8 for the last about four years, certainly since the last
9 permits were developed. This blending practice is a
10 practice that is done by about 40 percent of the clean
11 water agencies nationally. So it's not unusual for
12 CMSA or for some other BACWA members to blend. In
13 fact, blending is something that's done in order to
14 prevent sanitary sewer overflows and in order to
15 prevent bypasses directly into the San Francisco Bay or
16 into some receiving water. So it's a practice that
17 nobody wants stopped per se, but we have to make sure
18 it's consistent with the requirements of 40CFR
19 122.41M4IA-C. So we believe that it is correct that a
20 plan has to be developed in order to determine how you
21 can reduce your blending, but we do not agree with
22 EPA's requirement that a compliance schedule has to be
23 in the permit for implementation of that plan. Now
24 CMSA has agreed to that and that's fine, but we're
25 hoping that as other permits come up in this region for
agencies that are blending that we work through that
process, because they're not all going to be in the
position that CMSA is in. They have, as you heard from

1 Mr. Dow, been working on their wet weather program for
2 some time. Not all of our agencies have been doing
3 that. We all know we need to do it. And so that was
4 my comment on that. So thank you.

5
6 **CHAIRMAN MULLER:** Thank you, again. And that
7 is in the record. Any other questions or comments on
8 this particular Item 10, Central Marin? I have no more
9 cards on 10. We go to 11 I have cards.

10 **MR. WOLFE:** Okay.

11
12 **CHAIRMAN MULLER:** So we'll take staff's
13 recommendation.

14
15 **MR. WOLFE:** Initially, let me note that, and
16 thank you Board Member Young for pointing it out, we do
17 have a supplemental, because the dioxin final limits
18 did not get into the table. So we've included those.
19 We did note in putting those in yesterday afternoon to
20 prepare the supplemental that on Table 7 -- is it
21 somewhere, and Table F12 that the final limits for
22 dioxin TEQ got flopped, that the 1.4E to the minus 8
23 and the 2.8E to the minus 8 should be switched, that
24 the 1.4E to the minus 8 is for average monthly limit
25 and the 2.8E to the minus 8 is maximum daily limit.
Probably at this time of the day I might cynically say

1 that maybe it doesn't make so much different, but
2 pragmatically we will make that change.

3
4 **CHAIRMAN MULLER:** That change.

5
6 **MR. WOLFE:** So -- and we should also
7 incorporate, we noted that we're being pushed to use
8 templates on the first page, the template. We need to
9 then include in Table 3 on the template the dates there
10 would be the adoption date would be today, the
11 effective date would be March 31st, excuse me, April 1st,
12 2007. And the expiration date would be March 31st,
13 2012. Also, I just do wish to note that there is a
14 difference here between this permit and SBSA's because
15 we did not have a compliance schedule for dioxin
16 before. In this case Central Marin will get the full
17 10 years in their compliance schedule for dioxin TEQ.
18 That explains why on Page 17 their final date is April
19 1st, 2017 and for dioxin at Task 3, the July 1st, 2009
20 we've been throwing around here in our discussion for
21 dioxin we're setting that as April 1st, 2011.
22 Nonetheless that doesn't, as they've duly noted, really
23 remove the expediency for us to address these issues
24 and, as Michelle Pla noted, that this is not a dioxin
25 only issue, that the July 2009 does include in these
permits mercury and cyanide, and it can be other
constituents as well and other permits.

1 So with that I'd recommend adoption of the
2 permit with the supplemental -- as amended in the
3 supplemental and with the dates on Page 1 included.

4
5 **CHAIRMAN MULLER:** Understood.

6
7 **MR. ELIAHU:** Move for approval.

8
9 **MR. PEACOCK:** Second.

10 **CHAIRMAN MULLER:** Moved and seconded. Any
11 further discussion? Roll call vote, please, Mary?

12
13 [Roll Call]

14
15 **CHAIRMAN MULLER:** Aye, so ordered with the five
16 of us.

17 [END OF TESTIMONY ON ITEMS 9 AND 10.]
18
19
20
21
22
23
24
25



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

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Dear Ms. Rice, Egoscue, Creedon, and Mr. Wolfe:

To satisfy a commitment we made in a settlement agreement with Baykeeper, Humboldt Baykeeper, Ecological Rights Foundation, and Communities for a Better Environment, the Environmental Protection Agency reviewed twelve randomly chosen National Pollutant Discharge Elimination System (NPDES) permits issued by Regional Boards 2, 4 and 5, focusing solely on provisions in those permits regarding schedules of compliance to achieve water quality-based effluent limitations.

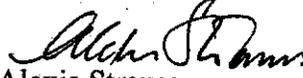
In the settlement agreement, EPA agreed to provide a written report setting forth the results of its review, and to make that report available to the plaintiffs, State Board, all Regional Boards, and any other interested persons upon request. A copy of that report is attached to this letter.

We recommend changes to strengthen compliance schedules included in California NPDES permits issued by the Regional Boards. Specifically, permits, and/or the

administrative records for the permits, need to include explanations why compliance schedules are "appropriate" and how they provide for achieving compliance with the permits' final effluent limitations "as soon as possible," as required by EPA regulations at 40 CFR § 122.47. We are encouraged that the State Board has made significant progress in standardizing the State's approach to issuing compliance schedules in NDPES permits in drafting a Statewide compliance schedule-authorizing policy that may be released for public comment in the near future. Additionally, we appreciate the State Board's oversight efforts in this area and look forward to the benefits such oversight is likely to bring. Through these and similar efforts by the State and Regional Boards, which EPA will make every effort to support, we are confident that the use of compliance schedules and the inclusion of appropriate supporting material in future California NPDES permits and fact sheets can be fully consistent with the requirements of the Clean Water Act and EPA's regulations.

We look forward to working with you on these matters. If you have any questions regarding this report, please call me at (415) 972-3572 or Doug Eberhardt at (415) 972-3420, or refer legal staff to Suzette Leith at (415) 972-3884.

Sincerely yours,


Alexis Strauss *31 Oct. 2007*
Director, Water Division

cc:

M. Lauffer, SWRCB

Executive Officers, RWQCB 1, 3, 6-9

Christopher Sproul, Environmental Advocates

Enclosure: California Permit Quality Review for Compliance Schedules

California Permit Quality Review Report on Compliance Schedules

October 31, 2007



U.S. Environmental Protection Agency
Region IX

in cooperation with Office of Water

CALIFORNIA PERMIT QUALITY REVIEW REPORT ON COMPLIANCE SCHEDULES

October 31, 2007

I. Introduction

Pursuant to the terms of a settlement agreement, dated June 7, 2007, between EPA and Baykeeper, Humboldt Baykeeper, Ecological Rights Foundation, and Communities for a Better Environment (collectively referred to as "Plaintiffs"), EPA reviewed a random selection of twelve (12) permits issued by Regional Board 2, Regional Board 4 and Regional Board 5 in the State of California. These permits were all issued between 2004 and February 28, 2007, and each included at least one compliance schedule. The random selection of these permits occurred on July 16, 2007, before interested parties (including a representative of the Plaintiffs). EPA reviewed each of these permits and addressed in writing the five issues specified in the settlement agreement. The results of this review are set forth below.

A. Settlement Agreement

According to the terms of the settlement agreement, EPA agreed to "address in writing the following issues as to each compliance schedule in each permit" as part of a permit review:

- (a) whether the permit and/or administrative record justifies the compliance schedule "as appropriate" as required by 40 C.F.R. §122.47(a);
- (b) whether the permit and/or administrative record justifies whether the compliance schedule requires compliance with the final water quality-based effluent limitation as soon as possible, as required by 40 C.F.R. § 122.47(a)(1);
- (c) whether, as part of the compliance schedule, the permit contains enforceable interim requirements and dates for their achievement as required by 40 C.F.R. § 122.47(a)(3) and section 502(17) of the CWA, 33 U.S.C. § 1362(17);
- (d) whether the permit contains an appropriate final effluent limitation as required by section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. §§ 122.2 (definition of "schedule of compliance"), 122.44(d)(1)(vii); and
- (e) whether the compliance schedule inappropriately includes time solely to develop a Total Maximum Daily Load, site specific objective/criterion, and/or a Use Attainability Analysis and therefore is not consistent with sections 301(b)(1)(C) and 502(17) of the CWA, 33 U.S.C. §§ 1311(b)(1)(C) and 1362(17) and 40 C.F.R. §§ 122.2 (definition of "schedule of compliance") and 122.47.

Additionally, EPA agreed to prepare a written report setting forth the results of the permit review and to make such report available by September 30, 2007 to the Plaintiffs, the State Board, all Regional Boards and any other interested persons upon request. Plaintiffs subsequently agreed to an extension of this deadline until October 31, 2007.

B. Permits Reviewed

- **EPA reviewed 6 permits and each of their compliance schedules in Regional Board 2** (San Francisco Bay Region): City of Petaluma; City of American Canyon; Rodeo Sanitary District; US Navy Naval Support Activity Treasure Island; Rhodia-Martinez Plant; Tesoro Refining & Marketing Company, Golden Eagle Refinery.
- **EPA reviewed 3 permits and each of their compliance schedules in Regional Board 4** (Los Angeles Region): Los Angeles County Sanitation Districts, Pomona WWRP; Los Angeles County Sanitation Districts, San Jose Creek WWRP; Metropolitan Water District of Southern California, Rio Hondo Power Plant.
- **EPA reviewed 3 permits and each of their compliance schedules in Regional Board 5** (Central Valley Region): City of Live Oak; Olivehurst PUD; Placer County Facility Services, Placer County SMD No 1.

II. Results of the California Permit Review

Pursuant to the settlement agreement, EPA reviewed each of the compliance schedules in each of the twelve randomly selected permits and addressed the five issues identified in subsections (a) to (e) below. The twelve permits contained a total of 59 individual parameter-specific compliance schedules, covering 23 different pollutants.¹ EPA's permit review was further informed by the relevant provisions of the Clean Water Act, EPA regulations, and the Memorandum from the Director of the Office of Wastewater Management (OWM) to the Director of EPA Region 9's Water Division, dated May 10, 2007, attached to this document.

(a) Permit and/or administrative record justifies the compliance schedule "as appropriate" as required by 40 C.F.R. § 122.47(a).

None of the twelve permits reviewed, or their supporting administrative records, adequately explained why any of the compliance schedules in those permits was "appropriate." Absent an adequate discussion of the "appropriateness" of the compliance

¹ Some of the permits issued by Regional Board 2 included in the permit findings a determination that there was reasonable potential for the discharge of dioxin TEQ to cause or contribute to an excursion above the water quality standard, but did not include either a final or interim effluent limit for this parameter. Accordingly, it appears that the discharger in each of these cases was given a de facto compliance schedule without an applicable interim or final water quality-based effluent limit. These de facto compliance schedules are reflected in the total number of parameter specific compliance schedules identified in this paragraph.

schedules in light of the factors identified in Paragraphs 6, 7 and 8 of the May 10, 2007 memorandum, or any other potentially relevant factors, EPA is unable to conclude that any of the reviewed compliance schedules was "appropriate" at the time of issuance.

As best as EPA could determine, many of the compliance schedules were granted based solely on an analysis of effluent data showing past performance above the limits calculated for the new permit. While EPA agrees that past performance can be a relevant factor in determining whether a compliance schedule is "appropriate," it is not necessarily the only relevant factor. Without an analysis of other relevant factors, e.g., whether there is a need for modifications to treatment facilities, operations, or other measures to meet the new WQBEL, EPA does not have an adequate basis in these permit records to conclude that such compliance schedules are "appropriate."

For some of the permits, EPA's analysis of the administrative records indicated that a compliance schedule was not "appropriate," even though there may have been some past exceedences of the WQBELs calculated for the new permit. In those permits, the record contained information indicating that the facility had already implemented controls sufficient to achieve the new or revised WQBEL, as well as effluent data indicating that, at the time of permit issuance, the permittee was able to discharge at or below the final limits calculated for the new permit. Compliance schedules are intended to provide a discharger the time it needs to take the necessary steps to construct additional treatment systems or implement other changes so that it can meet a new or more stringent WQBEL. When such steps have already occurred such that the discharger at the time of permit issuance is able to meet the new or revised WQBEL, a compliance schedule is not appropriate.

(b) Permit and/or administrative record justifies whether the compliance schedule requires compliance with the final water quality-based effluent limitation "as soon as possible," as required by 40 CFR § 122.47(a)(1).

None of the twelve permits and/or administrative records reviewed contained a specific finding that their compliance schedules required compliance with the final WQBEL "as soon as possible." Nor did any of them contain an adequate justification for the specific length of the compliance schedule. As best as EPA could determine, in all but one of the twelve permits, the compliance schedules were set at the maximum length permitted under the applicable compliance schedule authorizing provision, without documentation in the permit and/or administrative record demonstrating that this length of time was "as soon as possible." Without such documentation, EPA was unable to determine for these permits whether the schedules chosen were "as soon as possible," or whether the maximum length available under the State's authorizing provision was simply applied as a default. Although one permit included a compliance schedule of two years duration that was shorter than the maximum allowed by the authorizing provision, EPA was unable to determine whether this was "as soon as possible" given the absence of a supporting justification in the permit and/or administrative record.

Additionally, as discussed above, some of the permit records contained effluent data indicating that, at the time of permit issuance, the permittee was able to discharge at or below the final limits calculated for the new permit. In each of those cases, a compliance schedule was neither "appropriate" (as discussed above) nor established to provide for compliance with the final effluent limitation "as soon as possible."

(c) As part of the compliance schedule, the permit contains enforceable interim requirements and dates for their achievement as required by 40 CFR 122.47(a)(3) and section 502(17) of the CWA, 33 USC § 1362(17).

The CWA and its implementing regulations define a compliance schedule as an "enforceable sequence of actions or operations leading to compliance with an effluent limitation...." EPA regulations at 40 CFR § 122.47(b)(3) require any compliance schedule longer than a year to "set forth interim requirements and the dates for their achievement." The regulation includes a note giving examples of interim requirements such as (a) submit a construction grant application, (b) let a construction contract, (c) commence construction, or (d) complete construction of required facilities.

Most of the compliance schedules reviewed included interim steps of some type. For example, nearly all of the compliance schedules included requirements for annual or semi-annual reports, and most of the permits included other tasks such as the performance of studies and/or the development and implementation of Pollution Minimization Plans (PMPs). In addition, most of the permits contained enforceable interim numeric effluent limitations effective during the compliance schedule's term. Interim numeric limits, while highly desirable, were often established in these permits at a level currently being achieved by the discharger at time of permit issuance. EPA was unable to conclude that the mere inclusion of such interim limits in these permits, without more explanation in the record than provided here, would lead to compliance with the final WQBEL. Similarly, while the inclusion of PMPs in a compliance schedule is appropriate and desirable, the inclusion of PMPs by itself does not necessarily lead to the achievement of final limits. For example, the PMPs in some of the permits reviewed appeared to contemplate simply the continued implementation of generic pollutant minimization or pretreatment measures that had been specified in prior permits, without any accompanying demonstration that there was a sequence of actions intended to achieve compliance with the WQBEL in the new permit. Moreover, the stated goal of the Pollutant Minimization Plans in certain permits was merely to "reduce" loadings of pollutants; it was unclear whether such plans, when implemented, would likely attain the WQBEL.

Among the permits reviewed, a frequent practice was to require the permittee to conduct studies designed to evaluate the sources of the pollutants, develop a source control plan or treatment measures necessary to achieve the WQBELs, and (in some permits) implement the measures developed in the plan. At one end of the spectrum, some compliance schedules reviewed by EPA had a clear sequence of steps with the final step being compliance with a final WQBEL, had specific enforceable dates for each step, and included implementation of the measures identified in the studies as one or more of the interim steps. At the other end of the spectrum, some of the permits appeared to

contain only the continued implementation of generic pollutant minimization measures carried over from the prior permit, in addition to numeric interim limits, with no explanation of how these measures would lead to compliance with the final WQBEL. Some permits included a clear sequence of steps, but did not include dates for the steps. Others required development of a plan to achieve the WQBELs, but did not include a step requiring implementation of the plan. Whether the interim requirements include construction, treatment process, operating process, or pollution prevention milestones, or simply relate to the development and implementation of a plan, the permit findings or fact sheet should demonstrate that such steps constitute an enforceable "sequence" of actions "leading to compliance" with the final WQBEL. The permits and administrative records reviewed generally did not contain such a demonstration; hence, EPA was unable to determine whether the interim steps would lead to compliance with the final WQBEL, as required by EPA's regulations and section 501(17) of the CWA.

(d) Permit contains an appropriate final effluent limitation as required by section 301(b)(1)(C) of the CWA.

EPA reviewed all twelve permits to determine whether the compliance schedule contained final water quality based effluent limits for the parameters covered in the compliance schedule.²

Of the 59 compliance schedules reviewed, 40 included numeric final water quality based effluent limitations in the enforceable permit provisions and thus satisfied this element. One compliance schedule included a non-numeric final effluent limitation in the enforceable permit provisions; this compliance schedule is discussed below in the last paragraph of this section.

In 18 of the 59 compliance schedules, there was no final effluent limitation included in the associated enforceable permit provisions.

In five of the Regional Board 2 permits, there was at least one compliance schedule that did not include a specific final effluent limitation. Instead, for these compliance schedules, there was a statement in the permit findings that the final effluent limitation would be the wasteload allocation to be derived in an upcoming TMDL or in a site-specific objective (SSO). For the reasons set forth in EPA's October 23, 2006, letter to the California State Water Resources Control Board referenced in the attached May 10, 2007 Memorandum, EPA does not consider this to be an appropriate expression of a final effluent limitation. This issue did not arise in any of the Regional Board 4 or 5 permits.

One Regional Board 2 permit included a final limit dependent on the adoption of a TMDL. It also anticipated the possibility that the TMDL would not be completed prior to the end of the compliance schedule and identified an alternative final WQBEL. It defined the final WQBEL as either "the wasteload allocation to be derived in an

² EPA did not analyze whether any specific numeric limit "derives from and complies with all applicable water quality standards" per 40 CFR § 122.44(d)(1)(vii)(A) because this is beyond the scope of this compliance schedule review.

upcoming TMDL, or no net loading." The permit said that "no net loading" required that the discharge of pollutants must be offset. Although "no net loading" may in certain circumstances be an appropriate final WQBEL, this compliance schedule inappropriately appeared to include time solely for development of the TMDL before requiring the permittee to comply with interim steps leading to compliance with the "no net loading" alternative limit, as discussed in (e) below. Moreover, neither the permit nor the administrative record explained how the compliance schedule would achieve compliance with the alternative limit "as soon as possible."

(e) The compliance schedule inappropriately includes time solely to develop a TMDL, site specific objective (criterion), or use attainability analysis.

A compliance schedule based solely on time needed to develop a TMDL, site specific criterion, or a use attainability analysis is not appropriate. None of the three permits reviewed from Regional Board 5 referenced any TMDL, SSO, or UAA in connection with the length of their compliance schedules. Among the Regional Board 4 permits, two, similarly, did not reference any TMDL, SSO or UAA in connection with the compliance schedule provisions. However, the third Regional Board 4 permit gave the permittee the option of conducting studies leading to development of an SSO. Because this permit did not contain specific actions or tasks leading to compliance with the WQBEL, it was difficult to tell whether this permit included time solely to allow for SSO development.

Each of the six permits from Regional Board 2 contained at least one compliance schedule that relied on the time needed for development of TMDLs or SSOs in allowing permittees time to comply with the final WQBELs. These fell into three categories:

For some of the compliance schedules, the final effluent limitation was expressed as the wasteload allocation to be derived from an upcoming TMDL or SSO, and no rationale was given for the length of the compliance schedule. Given the absence of other explanations for the schedules' length in the permit or administrative record, it appeared that these compliance schedules were included to allow time solely to develop the TMDL or SSO.

The second category involved compliance schedules accompanied by the specific statement, "For pollutants where there are planned TMDLs or SSOs, and final WQBELs may be affected by those TMDLs and SSOs, maximum timeframes may be appropriate due to the uncertain length of time it takes to develop the TMDL/SSO." This language suggests that the compliance schedule inappropriately included time solely to develop a TMDL or SSO.

Finally, some of the Regional Board 2 permits reviewed contained final WQBELs (either numeric limitations, or, in the permit described at the end of (d), above, "no net loading"), but contained compliance schedules that provided an initial period of time solely to allow for development of a TMDL or SSO. These permits did not require the permittee to develop and implement a plan to comply with the final WQBEL unless the

TMDL or SSO was not developed by a date certain. As stated above, it is not appropriate for a compliance schedule to include time solely for the development of a TMDL or SSO.

Attachment: Memorandum from the Director of the Office of Wastewater Management (OWM) to the Director of EPA Region 9's Water Division, May 10, 2007



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 10 2007

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits

FROM: James A. Hanlon, Director
Office of Wastewater Management

TO: Alexis Strauss, Director
Water Division
EPA Region 9

Recently, in discussions with Region 9, questions have been raised concerning the use of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits consistent with the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. § 122.47. The use of compliance schedules in NPDES permits is also the subject of ongoing litigation in California. The purpose of this memo is to provide a framework for the review of permits consistent with the CWA and its implementing regulations.

When may a permitting authority include a compliance schedule in a permit for the purpose of achieving a water quality-based effluent limitation?

In *In The Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177 (1990), the EPA Administrator interpreted section 301(b)(1)(C) of the CWA to mean that 1) after July 1, 1977, permits must require immediate compliance with (*i.e.*, may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977, and 2) compliance schedules are allowed for effluent limitations based on standards adopted after that date only if the State has clearly indicated in its water quality standards or implementing regulations that it intends to allow them.

What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

1. "When appropriate," NPDES permits may include "a schedule of compliance leading to compliance with CWA and regulations . . . as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. 40 C.F.R. § 122.47(a)(3).

2. Any compliance schedule contained in an NPDES permit must be an "enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation ["WQBEL"]" as required by the definition of "schedule of compliance" in section 502(17) of the CWA. *See also* 40 C.F.R. § 122.2 (definition of schedule of compliance).

3. Any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable state or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17); the Administrator's decision in *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990); and EPA regulations at 40 C.F.R. §§ 122.2, 122.44(d) and 122.44(d)(1)(vii)(A).

4. Any compliance schedule that extends past the expiration date of a permit must include the final effluent limitations in the permit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 C.F.R. § 122.2 (definition of schedule of compliance).

5. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule "will lead[] to compliance with an effluent limitation . . ." "to meet water quality standards" by the end of the compliance schedule as required by sections 301(b)(1)(C) and 502(17) of the CWA. *See also* 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A).

6. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is "appropriate" and that compliance with the final WQBEL is required "as soon as possible." *See* 40 C.F.R. §§ 122.47(a), 122.47(a)(1).

7. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. 40 C.F.R. §§ 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL "as soon as possible," as required by 40 C.F.R. § 122.47(a)(1) include: consideration of the steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The permitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State's authorizing provision.

10. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate, consistent with EPA's letter of October 23, 2006, to Celeste Cantu, Executive Director of the California State Water Resources Control Board, in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California.

11. A compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate, consistent with EPA's letter of February 20, 2007, to Doyle Childers, Director Missouri Department of Natural Resources, nor is a compliance schedule based solely on time needed to develop a site specific criterion, for the same reasons as set forth in the October 23, 2006, (referenced in Paragraph 10) and February 20, 2007 letters.

If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.



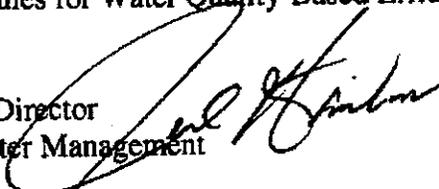
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 10 2007

OFFICE OF
WATER

MEMORANDUM

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FROM: James A. Hanlon, Director
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TO: Alexis Strauss, Director
Water Division
EPA Region 9

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2. Any compliance schedule contained in an NPDES permit must be an "enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation ["WQBEL"]" as required by the definition of "schedule of compliance" in section 502(17) of the CWA. *See also* 40 C.F.R. § 122.2 (definition of schedule of compliance).
3. Any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable state or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17); the Administrator's decision in *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990); and EPA regulations at 40 C.F.R. §§ 122.2, 122.44(d) and 122.44(d)(1)(vii)(A).
4. Any compliance schedule that extends past the expiration date of a permit must include the final effluent limitations in the permit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 C.F.R. § 122.2 (definition of schedule of compliance).
5. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule "will lead[] to compliance with an effluent limitation . . ." "to meet water quality standards" by the end of the compliance schedule as required by sections 301(b)(1)(C) and 502(17) of the CWA. *See also* 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A).
6. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is "appropriate" and that compliance with the final WQBEL is required "as soon as possible." *See* 40 C.F.R. §§ 122.47(a), 122.47(a)(1).
7. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. 40 C.F.R. §§ 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL "as soon as possible," as required by 40 C.F.R. § 122.47(a)(1) include: consideration of the steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The permitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State's authorizing provision.

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If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.