



September 2, 2004

VIA ELECTRONIC SUBMISSION

Ann Powell
San Francisco Bay Region
California Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: NPDES Permit and WDRs for East Bay Municipal Utility District, Permit No. CA0038440

Dear Ms. Powell:

I am writing on behalf of San Francisco Baykeeper ("Baykeeper") to respectfully request that the Regional Board revise the draft NPDES permit for East Bay Municipal Utility District ("EBMUD"). Baykeeper agrees with comments submitted on behalf of Our Children's Earth Foundation ("OCE") and believes the proposed permit is flawed because 1) EBMUD facilities are Publicly Owned Treatment Works ("POTWs") which require secondary treatment limitations, and 2) interim permit limits must be set at levels that will ratchet down pollutant levels to meet Water Quality Based Effluent Limitations ("WQBELs"). Due to these flaws, the draft permit violates unambiguous legal requirements and thus, should not be adopted as proposed. In addition to the comments below, Baykeeper elects to incorporate by reference the letter, contained in the Regional Board record for this matter, of Mr. Chris Sproul at Environmental Advocates submitted on behalf of OCE.

We believe this draft permit is illegal because it fails to impose secondary treatment regulations on EBMUD's wet weather facilities, as required by law. The Board is required to impose effluent limitations on POTWs based on "secondary treatment as defined by the Administrator," and these facilities classify as POTWs. 33 U.S.C. §1311(b)(1)(B). The Clean Water Act ("CWA") defines POTWs as "any devices and systems used in the ... treatment ... of municipal sewage." 33 U.S.C § 1292(2). Congress did not redefine *treatment works* for later sections of the CWA, so logical statutory interpretation requires that this earlier definition also apply to subsequent sections of the CWA, including the one applicable here. Additionally, EPA regulations implementing the CWA state plainly that facilities designed to "provide treatment of municipal sewage" are POTWs. 40 C.F.R. § 403.3(p). Therefore, under these broad and unambiguous definitions, there is no doubt that EBMUD's wet weather facilities are POTWs.

Moreover, EPA has openly acknowledged that these facilities are POTWs, and the Board has stated that a letter from EPA to this effect is imminent and will supercede the out-dated 1986 letter relied upon in this permit. SFRWQCB Tentative Order Re NPDES Permit No.

CA0038440 at 8, August 3, 2004. Board staff has indicated to Baykeeper that this specific language in the draft permit is perhaps too strong, and that it remains unclear when EPA will issue the letter. Regardless of the issuance of the letter, however, the fact remains that under the terms of the CWA and EPA's own existing regulations the Board is required by law to permit these facilities under secondary treatment regulations in order to protect water quality. It is entirely improper for this permit, which will not be reissued for another five years, to allow polluting discharges to continue in violation of existing law until the year 2009 simply because the EPA letter has not arrived in the mail.

As POTWs, EPA requires the Regional Board to impose 30-day average BOD and TSS effluent limitations that do not exceed 30mg/l and 7-day average BOD and TSS limits that do not exceed 45 mg/l. Additionally, the Board must impose effluent limitations that require 85% removal of influent BOD and TSS. 40 C.F.R. §133.102. This permit fails to impose these required limits. In place of these limitations, Board staff indicated that EBMUD will be asked to conduct "investigations" to determine what new and available technologies can be implemented at these facilities to prevent harmful discharges. Baykeeper urges the Board to require more meaningful action in this permit, such as asking the permittee not only to investigate but also to implement technologies that will significantly reduce water quality impacts.

Finally, the CWA does not allow for the use of a compliance schedule in lieu of meaningful effluent limitations and, in fact, expressly prohibits states from establishing or enforcing effluent limitations that are less stringent than standards required by the CWA. *See* 33 U.S.C. § 1370. Instead, the CWA sets forth that WQBELs and standards "shall be achieved...[no] later than July 1, 1977. 33 U.S.C. § 1311(b)(1)(C). The proposed permit, however, authorizes a schedule that gives EBMUD at least five more years to achieve WQBELs for priority toxic pollutants. By allowing interim permit limits that are more lenient than WQBELs, the draft permit violates the law not only by allowing exceedences of limits but also by allowing exceedences well beyond the statutory deadline. This draft permit seems to ignore the fact that compliance schedules are only intended to facilitate achievement of compliance with effluent limitations and are not intended to allow avoidance of these limits.

Based on these comments and those incorporated herein, Baykeeper urges the Board to reissue a permit for EBMUD that better complies with the spirit and the letter of the law.

Sincerely,

/sc/

Sejal Choksi

San Francisco Baykeeper

Cc: Lila Tang, NPDES Division Chief
Chris Sproul, Environmental Advocates