



San Francisco Bay Regional Water Quality Control Board

August 22, 2017
CW-820319

East Bay Municipal Utility District
Chandra Johannesson, Manager of Environmental Compliance
(via email only to cjohanne@ebmud.com)
PO Box 24055, M/S 704
Oakland, CA 94623

Subject: Conditional Offer to Settle Violation of NPDES Permit CAG140001
East Bay Municipal Utility District WS-Claremont Tunnel, Oakland, Alameda County

Dear Ms. Johannesson:

This letter notifies East Bay Municipal Utility District (Discharger) of an alleged violation of a discharge limitation, and provides the Discharger the opportunity to settle the violation through payment of **\$3,000** in mandatory minimum penalties pursuant to Water Code sections 13385 and 13385.1. Please reply by **September 21, 2017**.

NOTICE OF VIOLATION

The Assistant Executive Officer alleges that the Discharger has violated the NPDES permit as identified in Exhibit A, which is attached to this letter and incorporated by reference. The Discharger has the opportunity to address the alleged violation as discussed below.

STATUTORY LIABILITY

Water Code section 13385, subdivisions (h) and (i), require the assessment of a \$3,000 mandatory minimum penalty for specified serious and chronic effluent limitation violations. The Discharger is also subject to discretionary administrative civil liabilities of up to \$10,000 per day for each violation, plus \$10 for each gallon discharged but not cleaned up in excess of 1,000 gallons. The Regional Water Board or the State Water Board (collectively Water Boards) may assess these mandatory minimum penalties and discretionary administrative civil liabilities beginning with the date on which the violations first occurred.¹ The formal enforcement action the Water Boards use to assess such liability is an administrative civil liability complaint followed by a public hearing. Alternatively, the Water Boards may refer the matter to the Attorney General's Office for prosecution in the Superior Court. The Superior Court may assess up to \$25,000 per day for each violation, plus \$25 per gallon discharged but not cleaned up in excess of 1,000 gallons.

¹ The statute of limitations does not apply to administrative proceedings to assess mandatory minimum penalties. (See *City of Oakland v. Public Employees' Retirement System*, (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 430.) Also, the equitable doctrine of laches does not apply to mandatory minimum penalties. (See State Water Board Order Nos. 2013-0053, 2013-0054, 2013-0055, and 2013-0099.)

CONDITIONAL OFFER TO SETTLE

The Discharger can avoid a formal enforcement action and settle the alleged violation identified in Exhibit A by accepting this conditional offer. Details of this offer are described below and in the enclosed "Acceptance of Conditional Resolution and Waiver of Right to Hearing" (Acceptance and Waiver).

This offer does not address liability for any violation not specifically identified in Exhibit A.

OPTIONS FOR RESPONSE TO OFFER

To accept this offer, the Discharger must complete, sign, and return the enclosed Acceptance and Waiver on or before the reply date specified in the first paragraph of this letter. Upon receipt of the Acceptance and Waiver, this notice and offer will become a proposed settlement and a part of the Regional Water Board's publicly available files. The Acceptance and Waiver will then be posted for a 30-day public notice period. The Regional Water Board's Executive Officer will then decide whether to accept or reject this proposed settlement based on the comments received. If acceptable, the Executive Officer will counter-sign the Acceptance and Waiver and an invoice will be sent to you for payment.

If the Discharger chooses to contest the violation alleged in Exhibit A, please identify the specific violation and the basis for the challenge (factual error, affirmative defense, etc.) on or before the reply date specified in the first paragraph of this letter. Regional Water Board staff will evaluate each contested violation and take one of two actions:

- 1) Determine that the violation warrants dismissal, dismiss the alleged violation in the California Integrated Water Quality System (CIWQS) database, notify the Discharger of the dismissal, and take no further action against the Discharger for the alleged violation; or
- 2) Determine that the alleged violation is meritorious and notify the Discharger of that determination. The Discharger will then have 30 days from the date of the determination to accept settlement for that violation through a mandatory minimum penalty. If the Discharger chooses not to accept, or makes no reply to the determination, it should expect to be contacted regarding formal enforcement for the contested violation. In a formal enforcement action, information received by Water Board staff during any formal investigation and assessment of the violation, as well as staff costs associated with pursuing the enforcement, may increase the liability beyond that set forth in this conditional offer.

CONDITIONS FOR REGIONAL WATER BOARD ACCEPTANCE OF RESOLUTION

Federal regulations require the Regional Water Board to publish and allow the public at least 30 days to comment on any settlement of an enforcement action addressing an NPDES permit violation (40 C.F.R. § 123.27(d)(2)(iii)). Upon receipt of the Discharger's Acceptance and Waiver, Regional Water Board staff will publish a notice of the proposed settlement of the violation.

Conditional Settlement Offer
East Bay MUD

If staff receives no comments within the 30-day period and no new material facts are available to the Regional Water Board, the Executive Officer will execute the Acceptance and Waiver as a stipulated order assessing the uncontested mandatory minimum penalty pursuant to Water Code sections 13385 and/or 13385.1.

If, however, significant comments are received in opposition to the proposed settlement, this offer may be withdrawn. In that circumstance, we will also treat the Acceptance and Waiver as withdrawn. We will advise the Discharger of any withdrawal and may issue an administrative civil liability complaint and schedule a hearing before the Regional Water Board or State Water Board. For such a hearing, the Discharger will be free to argue against the alleged violation. We will treat the Discharger's Acceptance and Waiver as a settlement communication and will not use it as evidence in the hearing. We will provide the Discharger with additional information on hearing procedures if a hearing is to occur.

If the Executive Officer executes the Acceptance and Waiver, payment of the settlement amount shall be due within 30 calendar days from the date of the Executive Officer's signature. In accordance with Water Code section 13385(n)(1), funds collected pursuant to Water Code sections 13385 and 13385.1 shall be deposited into the State Water Pollution Cleanup and Abatement Account. Failure to pay the penalty within the required time may subject the Discharger to further liability.

OPPORTUNITY FOR SUPPLEMENTAL ENVIRONMENTAL PROJECT

In lieu of paying all of the mandatory minimum penalty to the State Water Pollution Cleanup and Abatement Account, the Discharger may elect to apply a portion of the penalty to fund a supplemental environmental project (SEP).^{2,3}

There is currently one SEP option available: the SEP Fund to supplement the Regional Monitoring Program (RMP). This SEP Fund will supplement RMP studies that would not otherwise be conducted through the Regional Water Board's annually approved RMP cost allocations. The guiding principal of the RMP is to collect data and communicate information about water quality in the San Francisco Estuary in support of management decisions to restore and protect beneficial uses of the region's waters. Information about the RMP is available at <http://www.sfei.org/rmp>. The non-profit San Francisco Estuary Institute manages and administers RMP funds. No funds will go to the Regional Water Board.

The Discharger also may choose to pay the total mandatory minimum penalty to the State Water Pollution Cleanup and Abatement Account. These options are represented in the enclosed Acceptance and Waiver.

² Water Code section 13385(l)(1) authorizes the Regional Water Board, with the Discharger's concurrence, to direct a portion of the penalty to be expended on a SEP in accordance with the State Water Board's Enforcement Policy. If the penalty is less than or equal to \$15,000, 50 percent of the penalty may be expended on a SEP. If the penalty exceeds \$15,000, up to \$15,000 plus 50 percent of the penalty that exceeds \$15,000 may be expended on a SEP.

³ See State Water Board's Policy on Supplemental Environmental Projects (2009) (http://www.waterboards.ca.gov/rwqcb5/water_issues/enforcement/sep_policy_2009.pdf).

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REGIONAL WATER BOARD CONTACT

Please send your reply to the attention of Debbie Phan, either by email or U.S. mail. If you want to discuss or have questions regarding this matter, please contact Debbie Phan at (510) 622-2116 or Debbie.Phan@waterboard.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Mumley', with a long horizontal stroke extending to the right.

Thomas Mumley
Assistant Executive Officer

Enclosures: Exhibit A-Notice of Violation
Acceptance and Waiver

Conditional Settlement Offer
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EXHIBIT A
Notice of Violation

Discharger: East Bay Municipal Utility District WS-Claremont Tunnel
375 Eleventh Street, Oakland, Alameda
NPDES Permit CAG140001

The following table lists the alleged violation for which the Discharger is subject to civil liabilities pursuant to Water Code sections 13385. The table lists the mandatory minimum penalty (MMP) that applies.

No	CIWQS Violation ID No.	Occurrence Date	Violation Description (Unit)	Effluent Limitation	Reported Value	Percent Group II Pollutant Exceeds Effluent Limitation	Violation Type	CWC Section 13385(h) Required MMP
1	1023758	4/4/2017	Chlorine, total residual, instantaneous maximum (mg/L)	0.0	3.17	> 20 (See Note 1)	S	\$3,000
Total								\$3,000
Legend: CIWQS = California Integrated Water Quality System database that the Water Boards use to track violations and enforcement. Violation ID = Identification number assigned to permit violation within CIWQS. S = Serious. A penalty applies under Water Code section 13385(h) whenever an effluent limitation is exceeded by 40 percent or more for a Group I pollutant or 20 percent or more for a Group II pollutant. Place: 820319 WDID: 4DW0079 Regulatory Measure: 415768								

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ORDER NO. R2-20
ACCEPTANCE OF CONDITIONAL RESOLUTION
AND WAIVER OF RIGHT TO HEARING

East Bay Municipal Utility District
East Bay Municipal Utility District WS-Claremont Tunnel
375 Eleventh Street, Oakland, Alameda County
NPDES Permit CAG140001, Regulatory Measure 415768

By signing below and returning this Acceptance of Conditional Resolution and Waiver of Right to Hearing (Acceptance and Waiver) to the Regional Water Quality Control Board (Regional Water Board), East Bay Municipal Utility District (Discharger) hereby accepts the conditional offer to settle alleged violation through payment of mandatory minimum penalties and waives the right to a hearing before the Regional Water Board to dispute the alleged violation. The violation is attached to this Acceptance and Waiver as Exhibit A and incorporated by reference.

The Discharger agrees that Exhibit A shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the Regional Water Board to assert jurisdiction over the alleged violation through its Assistant Executive Officer. The Discharger agrees to pay the penalties authorized by Water Code sections 13385 and 13385.1, which shall be deemed payment in full of any civil liability pursuant to Water Code section 13385 that otherwise might be assessed for the violation described in Exhibit A. The Discharger understands that this Acceptance and Waiver waives its right to contest the allegation in Exhibit A and the amount of civil liability assessed for the violation.

The Discharger understands that this Acceptance and Waiver does not address or resolve liability for any violation not specifically identified in Exhibit A.

Upon execution, the Discharger shall return the Acceptance and Waiver to the following address:

California Regional Water Quality Control Board, San Francisco Bay Region
NPDES Wastewater Enforcement Section
Attention: Debbie Phan
1515 Clay Street, Suite 1400
Oakland, California 94612

The Discharger understands that the federal regulations set forth in Code of Federal Regulations, title 40, section 123.27(d)(2)(iii), require the Regional Water Board to publish notice of, and provide at least 30 days for, public comment on any proposed resolution of an enforcement action. Accordingly, prior to execution by the Regional Water Board's Executive Officer, this Acceptance and Waiver will be published for public comment as required by law.

The Discharger understands that, if no comments are received within the public notice period that cause the Regional Water Board's Executive Officer to reject the settlement amount, the Executive Officer will execute the Acceptance and Waiver. The Regional Water Board's resolution of these violations will preclude State Water Resources Control Board (State Water Board) action for the same violation.

The Discharger understands that if significant comments are received in opposition to the conditional offer, the offer may be withdrawn. In that circumstance, Water Board staff will

Acceptance of Conditional Resolution and Waiver of Right to Hearing
East Bay MUD
Regulatory Measure: 415768

advise the Discharger of the withdrawal and may issue an administrative civil liability complaint and schedule the matter for a hearing before the Regional Water Board or State Water Board. For such a hearing, the Discharger understands that its executed Acceptance and Waiver will be treated as a settlement communication and will not be used as evidence in the hearing.

The Discharger understands that funds collected for violations pursuant to section 13385 and 13385.1 shall be deposited in the State Water Pollution Cleanup and Abatement Account.

The Discharger understands that, in lieu of full payment of the assessed mandatory minimum penalty to the State Water Pollution Cleanup and Abatement Account, it may elect to pay a portion toward a supplemental environment project (SEP). There is currently only one SEP option, the SEP Fund to supplement the Regional Monitoring Program (RMP). This SEP Fund supplements RMP studies that would not otherwise be conducted through the Regional Water Board's annually approved RMP cost allocations. The guiding principal of the RMP is to collect data and communicate information about water quality in the San Francisco Estuary in support of management decisions to restore and protect beneficial uses of the region's waters. Information about the RMP is available at <http://www.sfei.org/rmp>. The non-profit San Francisco Estuary Institute manages and administers RMP funding. No such funds go to the Regional Water Board.

The Discharger agrees to pay the amounts indicated below to the State Water Pollution Cleanup and Abatement Account and, if chosen, the SEP Fund. The Discharger understands that the Regional Water Board will consider the Discharger to have fulfilled any SEP obligation if and when the San Francisco Estuary Institute receives the Discharger's contribution to the SEP Fund. (Place a "✓" or "✗" in one box below and fill in the blanks as appropriate. Selecting to pay a portion of the assessed liability to the SEP Fund will not change the total amount to be paid.)

- ☒ Pay a portion of the assessed liability to the RMP SEP Fund.
- \$ 1,500 Amount to be paid to the SEP Fund (cannot exceed \$1,500)
- \$ 1,500 Amount to be paid to the State Water Pollution Cleanup and Abatement Account (\$3,000 less amount above)
- \$ 3,000 Total assessed mandatory minimum penalty (sum of amounts above).
- ☐ Pay total assessed mandatory minimum liability to the State Water Pollution Cleanup and Abatement Account.

The Discharger understands that once the Regional Water Board's Executive Officer executes this Acceptance and Waiver, payment no later than 30 days after the date of the Executive Officer's signature is a condition of this Acceptance and Waiver. The Discharger shall pay the assessed civil liability to the State Water Pollution Cleanup and Abatement Account and San Francisco Estuary Institute (for the SEP Fund) as selected above. The State Water Board will send an invoice for any payment due to the State Water Pollution Cleanup and Abatement Account. The Regional Water Board will send an invoice for any payment due to the SEP Fund.

