Bay Area Urban Creeks
Deadline: 9/22/06 5pm

BAYKEEPER.

Defending Our Waters–from the High Sierra to the Golden Gate

September 22, 2006

Ms. Tam M. Doduc, Board Chair
Members of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Sent via electronic mail to commentletters@waterboards.ca.gov

RE: Proposed Pesticide Toxicity TMDL for Bay Area Urban Creeks.

Dear Ms. Dudoc and Members of the Board:

Thank you for considering our comments on the Proposed Amendment to the San Francisco Bay Basin Plan to Establish a Water Quality Attainment Strategy, Total Maximum Daily Load, and Implementation Plan for Diazinon and Pesticide-Related Toxicity in Urban Creeks ("Basin Plan Amendment"). We commend San Francisco Bay Regional Water Quality Control Board ("Regional Board") staff for their hard work in developing this Basin Plan Amendment and on their significant efforts to provide early and frequent opportunities for public involvement during the development process.

Baykeeper generally supports the Basin Plan Amendment as proposed, but wishes to reiterate a few of the points expressed in our September 19, 2005 letter to the Regional Board, which is attached. These comments briefly address several issues we previously raised, but focus on our concern that the Basin Plan Amendment unnecessarily limits the Regional Board's authority to directly regulate pesticides impairing water quality.

1. <u>The Basin Plan Amendment should explicitly state under what circumstances the Regional Board will exercise its independent authority to regulate pesticides if necessary to attain water quality standards.</u>

The Regional Board has expansive authority to regulate pesticides when necessary to protect water quality. Pursuant to the Porter-Cologne Water Quality Control Act, the State and Regional Boards are the "principle state agencies with primary responsibility for the coordination and control of water quality." CAL WATER CODE § 13001. Much of this responsibility is vested in the Regional Boards, which are charged with establishing and implementing programs for achieving water quality objectives. CAL. WATER CODE §

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13242. This responsibility and its accompanying authority exist in conjunction with and are not limited by the Department of Pesticide Regulation's ("DPR") ability to restrict the registration, sale, transportation, and use of pesticides. *See* CAL. WATER CODE § 13246 ("State offices, departments and boards, in carrying out activities which affect water quality, shall comply with state policy for water quality control unless otherwise directed or authorized by statute…").

Baykeeper understands and supports the Regional Board's desire to work within the context of the 1997 Management Agency Agreement between the State Board and DPR. It is imperative, however, that the Regional Board reserve its authority to act independently if necessary to protect water quality. Therefore, we recommend that the Basin Plan Amendment and accompanying Staff Report be amended to specifically articulate the bases for the Regional Board's authority to regulate pesticides. Additionally, the Basin Plan Amendment should state how and when the Regional Board will exercise this independent authority should the current collaborative approach be unsuccessful in achieving water quality standards.

The Basin Plan Amendment also unnecessarily limits the Regional Board's authority to implement pesticide control measures through National Pollutant Discharge Elimination System ("NPDES") permits. One of the tools available to the Regional Board in controlling pesticide runoff in stormwater is to require municipalities to adopt ordinances—such as restrictions on application—to control pesticides in urban runoff. To date, however, the Regional Board has asserted that such controls are preempted by the California Food and Agriculture Code, which prohibits local governments from regulating "any matter relating to the registration, sale, transportation, or use of pesticides." CAL. FOOD & AG. CODE §11501.1(a).

Section 11501.1(a), however, is not a barrier to implementation of local controls that fulfill federal Clean Water Act requirements. This section expressly provides that "[n]either this division nor Division 7…is a limitation on the authority of a state agency or department to enforce or administer any law that the agency or department is authorized or required to enforce or administer." Cal. Food & Ag. § 11501.1(c). The Regional Board regulates stormwater by issuing municipal stormwater permits pursuant to the federal NPDES program. CAL. WATER CODE § 13001. Federal regulations require municipal stormwater permits to include a program to reduce pollutant discharges in storm "associated with the application of pesticides, herbicides and fertilizer…" 40 C.F.R. § 122.26(d)(2)(iv)(A)(6). Therefore, local ordinances enacted as part of compliance with a stormwater permit are not prohibited by section 11501.1(c) because to interpret it otherwise would interfere with the ability of the Regional Board to implement federal law.

Baykeeper recommends that the Basin Plan Amendment be modified to incorporate findings stating that the TMDL is being promulgated pursuant its federal Clean Water Act authority. We further suggest language be inserted in into the Basin Plan similar to that in the Chollas Creek Diazinon TMDL issued by the San Diego Regional Board, which requires municipal permittees to "[e]nforce existing local ordinances, or adopt new

legal authority, as needed to ensure…compliance with the Waste Load Allocations specified in this TMDL." San Diego Regional Water Quality Control Board Basin Plan Amendment, Chollas Creek Diazinon TMDL, at 6 (August 14, 2002).

2. Ensure that the Basin Plan Amendment will result in increased efforts to control pesticide discharges.

Current efforts to control pesticide pollution are clearly not working because pesticide toxicity still exists in urban creeks. To ensure that the Basin Plan Amendment will result in an improvement in water quality, Baykeeper recommends that it incorporate, at least by reference, the control activities currently being implemented by the most proactive urban runoff management agencies.

3. Codify the federal prohibition to non-stormwater discharges.

Under the Clean Water Act, municipal stormwater permits must effectively prohibit non-stormwater discharges to storm sewers, which are defined as "any discharge to a municipal separate storm sewer system that is not composed entirely of storm water…" 33 U.S.C. § 1342(p)(3)(B)(ii); 40 C.F.R. § 122.26(b)(2). We ask that the Basin Plan Amendment codify this provision by prohibiting the application of pesticides to exterior impervious surfaces connected to storm drains and by requiring urban runoff agencies to develop robust programs to detect improper disposals into storm drains.

4. Allow adaptive implementation to occur more frequently than once every five years.

Baykeeper requests that the adaptive implementation section be revised to allow for ongoing improvements, the need for which can be triggered by information provided by interested third parties.

Thank you for your consideration of these comments.

Sincerely

Amy Chastain
Program Associate

Attachment

Baykeeper

Defending Our Waters–from the High Sierra to the Golden Gate

September 19, 2005

Bill Johnson
Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

RE: Proposed Basin Plan Amendment for Diazinon and Pesticide-Related Toxicity in Bay Area Urban Creeks

Dear Bill:

These comments are respectfully submitted into the record on behalf of Baykeeper, Pesticide Action Network, and Clean Water Action and our thousands of Bay Area members (hereinafter "Baykeeper") as part of the public comment period for the Diazinon and Pesticide-Related Toxicity TMDL and Basin Plan Amendment for Bay Area Urban Creeks ("BPA").

I would like to begin by thanking staff for the efforts you have undertaken to develop this BPA. The public process has been a significant improvement over our experience with some of the Regional Board's past processes. Staff provided draft documents and input opportunities early in the development process, prior to peer review, and Baykeeper participated to the full extent feasible. Staff listened to Baykeeper's comments, and in some instances, Baykeeper's recommended suggestions were incorporated. I urge the Regional Board to continue to develop future TMDLs and regulations in a similar manner and suggest that in the future, the development of these regulations also include opportunities for meaningful exchange of ideas and consensus building between the interested parties prior to issuance of a public review draft.

While Baykeeper applauds some parts of this Basin Plan Amendment, the BPA lacks a few critical components that are essential to meaningful implementation and attainment of the no pesticide toxicity targets. Baykeeper urges staff to make at least the following changes before adopting this TMDL and Basin Plan Amendment (these revisions are described in more detail in the following pages and specific language is suggested where possible):

- Explicitly address new evidence of pesticide toxicity in creek sediments
- Require meaningful actions for Urban Runoff Agencies
- Remove shield for Urban Runoff Agencies
- Require compliance with non-stormwater discharge prohibition
- Require specific actions using Water Board authority
- Revise adaptive implementation to be a continuous and interactive process

I. Explicitly address new evidence of pesticide-related toxicity in creek sediments

Diazinon poses a serious threat to water quality, non-target organisms, and human health. In recognition of this threat, US EPA began a gradual phase out, which terminated in a ban on the sale of diazinon-containing products for residential use. The Basin Plan Amendment, if it had focused simply on diazinon impairment of Bay Area urban creeks, would have failed to provide any meaningful control on the next generation of pesticides. Instead, the BPA commendably recognizes the need to stop the pesticide replacement cycle by focusing on pesticide-related toxicity. Baykeeper endorses this approach, as well as the application of the BPA to all Bay Area creeks that have the potential for pesticide-related impairment. Because TMDLs are the very last line of defense to protect our waterways, they must be especially protective. More important, though, is the need for improved control measures so that our waterways do not require state-of-emergency TMDL assistance for every pesticide that replaces diazinon in the future.

Unfortunately, the BPA does not go far enough to end the pesticide replacement cycle. We are already beginning to find diazinon-replacement products, such as pyrethroids, in our Bay Area waters. Researchers at the University of California, Berkeley recently found widespread toxicity in the sediments of East Bay urban creeks. According to the researchers, five of seven creeks sampled were toxic to the amphipod *Hyalella azteca* on at least one occasion. Of the total samples taken, eight of the fifteen were toxic, and in seven of the eight toxic samples, the toxicity could be explained by the presence of pyrethroids. For example, sediments in Kirker Creek in Contra Costa County were toxic and contained pyrethroids on all three occasions sampled. (Amweg, Erin, and Don Weston. "Monitoring for Pyrethroid Pesticides and Sediment Toxicity in Urban Creeks," presentation to the Urban Pesticide Committee, July 19, 2005.)

If we use diazinon as an indicative model for what to expect for pyrethroids, it will take years for U.S. EPA or the California Department of Pesticide Regulation to review the water quality data and additional years for either of these agencies to break through bureaucratic inertia and confront the pesticide manufacturing lobby to adequately implement restrictions. Thus the local agencies and the Water Board will have evidence of toxicity for years, yet under the old model – codified in the Basin Plan Amendment – they will sit by for other agencies to take action while creeks become more toxic and the beneficial uses of the waters are further harmed.

The Basin Plan Amendment only includes an expression of intent to study the problem further, but it fails to include a credible plan to eliminate actual and potential sources of pyrethroids to urban creeks.

<u>Suggested Revision</u>

The language in the BPA should explain how actions in the Basin Plan will eliminate these new sources of toxicity in creeks.

At a minimum, the Basin Plan should specifically require educational materials regarding pyrethroids and water toxicity to be made available in prominent locations at all retail outlets that sell home and garden chemicals. Urban Runoff agencies might also be asked to send residential consumers fliers to make them aware that chemical methods for outdoor pest control are poisoning our waterways and suggesting non-chemical alternatives. Pyrethroid-containing products should be mentioned specifically and new products known to be problematic could be added to the list as they come into use. Retail stores and Urban Runoff agencies can use existing educational materials with alternative pest control strategies, which have already been created by a number of entities, including the Water Boards, Marin County Storm Water Pollution Prevention Project, and DPR.

Additionally, Baykeeper has suggested other revisions that better support Integrated Pest Management ("IPM") in the sections below, and these revisions could also be used to address our concern regarding the disconnect between the actions in the proposed Basin Plan Amendment and new evidence of toxicity.

II. Require meaningful actions for Urban Runoff Agencies

a. Remove shield

The law requires water quality standards to be met: A stated goal of the Clean Water Act permitting program is to achieve water quality standards by restoring and maintaining the "chemical, physical, and biological integrity" of the nation's waters. CWA 33 U.S.C. § 1251(a). Congress even went so far as to state "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." *Id.* With regard to the TMDL program, this intent is delineated through 40 CFR § 122.44(d)(1): "Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." Section 122.44(d)(1)(i) describes this requirement in further detail: "Limitations must control all pollutants or pollutant parameters…which…are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

*Baykeeper also believes that the law requires numeric effluent limits: "*When the permitting authority determines…that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a state water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant." 40 CFR § 122.44(d)(1)(iii).

But the Basin Plan Amendment does not require compliance with water quality standards, nor does it contain numeric effluent limits. Instead, the BPA provides a shield for Urban Runoff agencies, allowing one of the largest sources of pesticide toxicity in urban creeks to continue without additional control efforts. Baykeeper opposes such bad policy.

In an earlier draft of this plan, staff included a shield for Urban Runoff which stated "an urban runoff management agency that complies with these permit requirements shall be deemed to be in compliance with receiving water limitations relative to pesticides…" Discussion draft at page A-11. Baykeeper strenuously opposed this language. It is factually untrue to say that dischargers are "in compliance" with water quality standards if water quality limits are in fact not met, no matter what actions the agencies have taken. If water quality limits are not met, then the standards have not been attained and the water body is still impaired. This sentence was modified in the new version of the BPA, but it is no better. The new sentence advances exactly the same illogical policy: "Urban runoff management agencies' and similar entities' respective responsibilities for addressing [i.e., meeting] these allocations and targets will be satisfied by complying with the requirements set forth below." BPA at A-10.

Baykeeper believes the shield is inappropriate in a permit, and it is especially inappropriate in the Basin Plan because it undermines the Regional Board's ability to adaptively manage. If water quality has not been improved, then Urban Runoff agencies should be required to take additional measures to try to solve the problem. Instead the BPA claims that many of the requirements that are "set forth" are "already in some [NPDES] permits." BPA at A-5. So the BPA does not require many of the agencies to do anything more than what they are already doing, yet they will be in compliance with the TMDL requirements even though water quality is still impaired.

Best Management Practices, standards, and control measures will change and improve over time. At the very least, the BPA should allow for permits to require an iterative approach to implement new measures until standards are met.

<u>Suggested Revision</u>

The above-mentioned sentence and all similar shields should be removed from the proposed BPA language. Instead Urban Runoff agencies should be required to devise and implement additional new measures until water quality standards are achieved. This TMDL cannot serve as the TMDL for all future pesticide toxicity unless and until it contains real requirements for Urban runoff agencies to take meaningful measures to eliminate pesticide toxicity (see section II (d)(ii) below for examples of what more can be done).

If the Water Board insists on keeping this type of sentence in the BPA, it should be revised to read:

> "It is believed that Urban Runoff management agencies and similar entities will be able to address these allocations and targets by complying with the requirements set forth below and as further incorporated in their permits. If these allocations and targets are not met, the Regional Board shall require additional control measures through adaptive implementation until water quality standards are attained."

b. Require at least status quo, if not more

Baykeeper's main criticism of this proposed Basin Plan Amendment is that it requires *less* than what is already required of the dischargers. For example, Santa Clara developed a pesticide control program in response to Provision C.9(d) of their stormwater permit. The program requires educational outreach, training programs, and IPM use on public property. These are all actions required generally in the BPA. However, the Santa Clara program goes farther by contemplating the inclusion of school districts, the discouragement of pesticide use on new developments, and the recognition of least toxic pest control operators, among other actions. *See* Santa Clara Valley Urban Runoff Pollution Prevention Program, Final Pest Management Performance Standard and Guidance Documents approved February 2002.

The requirements laid out in the BPA do not seem to allow the Urban Runoff agencies to go this far. It may also be noteworthy to point out here that in spite of existing programs, like that of Santa Clara, pesticide toxicity is still occurring. Therefore, what is being done by the most active programs now may turn out to be inadequate to protect water quality, hence the need to remove the shield as described in greater detail above.

If pesticide toxicity is to be curbed, the BPA should at least identify the full range of pesticide control activities currently required of the most active Urban Runoff agencies. Rather than do that, the BPA only identifies municipal maintenance activities, outreach and education, monitoring, and coordination with other entities, completely ignoring other actions many of the agencies are already required and willing to take.

Suggested Revision

One example of requirements that the BPA is missing includes existing requirements in urban runoff permits. An example of these missing requirements would be some of the actions being taken by the Santa Clara program described above. The BPA should at least be revised to include existing pesticide control requirements from the most active stormwater programs. The BPA should also contemplate changing future permits to require written records for why an Urban Runoff agency chose not implement least toxic alternatives in spite of established IPM programs.

Existing permits also require pollutant source control actions for new development and redevelopment projects. The source control measures "shall, as part of their continuous improvement process…summarize source control requirements for projects to limit pollutant generation, discharge, and runoff…" Contra Costa Countywide NPDES Permit Amendment, Order No. R2-2003-0022 (k). The permit specifically includes measures such as "landscaping that minimizes irrigation and runoff, promotes surface infiltration where appropriate, *minimizes the use of pesticides and fertilizers*, and where feasible removes pollutants from stormwater runoff." *Id* (k)(vii) (emphasis added). This requirement and such pesticide toxicity control measures should be codified in this BPA so that future permits uniformly require these types of source control activities on these sites.

The BPA also fails to fully codify activities required in U.S. EPA regulations. The BPA should incorporate at least the minimum pesticide control activities that the U.S. EPA stormwater regulations specifically require urban runoff agencies to include in their management plans. According to the regulations, for example, municipal stormwater permits must include a program to reduce pollutant discharges in storm sewers "associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, *permits, certifications and other measures for commercial applicators and distributors,* and controls for application in public right-of-ways and at municipal facilities." 40 CFR § 122.26(d)(2)(iv)(A)(6) (emphasis added). Under this language, Urban Runoff agencies could require local agencies such as school districts, to implement Integrated Pest Management ("IPM") ordinances. Additionally, County Agricultural Commissioners and Pest Control Operators could be required to institute permit or certification programs that would promote IPM for residential use.

These types of revisions would help improve the BPA strategy from the less-than-status-quo approach it is currently taking to an approach that incorporates at least the status quo with regard to urban runoff management.

c. Require enforcement of non-stormwater discharges

The Clean Water Act requires U.S. EPA through the states to set standards to regulate discharges into the nation's surface waters. Under the Clean Water Act, municipal stormwater permits must effectively prohibit non-stormwater discharges to storm sewers. CWA § 402(p)(3)(B)(ii). Illicit discharges are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water…" 40 CFR § 122.26(b)(2). Permitting regulations for stormwater contain detailed provisions requiring, as part of the application procedure, municipalities to characterize illicit discharges into the storm drain system. 40 CFR 122.26(d)(1)(iv)(D) requires a "field screening analysis" for illicit connections and illegal dumping, including field sampling at least 500 major outfalls. Section 122.26(d)(1)(v)(B) requires permit applications to contain a description of the existing program to identify illicit connections to the municipal system. And the regulations require permit programs to include "inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented." Moreover, section 122.26(d)(2)(iv)(B) requires a description of a program involving a schedule to detect and remove illicit discharges and improper disposal into the storm drain.

Urban Runoff agencies should enforce the Clean Water Act's strict prohibition on non-stormwater discharges to storm drain systems. This CWA prohibition includes the placement of pesticides or other toxic materials on building exteriors, walkways, and other impervious surfaces such that they could be washed or carried by runoff into the storm drain system. Enhanced enforcement of this prohibition has to be part of the BPA implementation strategy, if the BPA is to comply with federal requirements.

Suggested Revision

The BPA should codify the prohibition of non-stormwater discharges, including the application of pesticides to exterior impervious surfaces connected to storm drains, and should require Urban Runoff agencies to develop robust programs to detect and remove illicit discharges and improper disposal into the storm drains.

Educational and outreach programs should be required to include warnings regarding the non-stormwater discharge prohibition, including its applicability to pesticide applications.

Additionally, agencies should be required to develop a plan to enforce the discharge prohibition, with specific attention to pesticide applications.

II. Require specific actions using Water Board authority: Water Board has the authority to regulate pesticides and should do so through NPDES permits and by other means

a. Water Board has authority

Section 11501.1 of the California Food and Agricultural Code has been cited as a barrier to local control and regulation of pesticides. This legislative barrier has prevented local cities from regulating the sale and use of pesticides, even when the applications are resulting in localized effects, such as aquatic toxicity in neighborhood creeks and ponds. While this restriction may have been the result of the California legislature's determination that pesticide use and regulation is an area of state-wide concern, the regulation does not reasonably intend for local agencies to be entirely unable to protect public health or local waterways. Thus the regulation expressly provides that "[n]either this division nor Division 7…is a limitation on the authority of a state agency or department to enforce or administer any law that the agency or department is authorized or required to enforce or administer." Cal. Food & Ag. Code § 11501.1(c).

The State Board "shares authority for implementation of the federal Clean Water Act and the state Porter-Cologne Act with the Regional Boards." Water Quality Control Plan for the San Francisco Bay Basin at 10. The Regional Board is a state agency authorized by federal law and Congress to enforce the Clean Water Act, and therefore the Board is not limited by § 11501.1. Rather the delegation of authority to implement the Clean Water Act requires the Board to fully adopt and implement regulations under the Clean Water Act in order to protect the region's water quality.

The Porter-Cologne Water Quality Control Act of 1969 expressly states the intent that State and Regional Water Boards "shall be the principle state agencies with primary responsibility for the coordination and control of water quality." 7 Cal. Water Code § 13001. Therefore, while the California Food & Ag Code may also vest the Department of Pesticide Regulation ("DPR") with authority to protect water quality, the Water Boards have the primary authority and responsibility to protect water quality under both Federal and California law.

Suggested Revision

A few clear findings in the Basin Plan Amendment would help provide the context for the Water Board's authority, and Baykeeper suggests staff consider incorporating the following findings:

> "This TMDL is being promulgated by a state agency pursuant to the federal TMDL program, and the resulting restrictions on stormwater agencies are issued under the federal NPDES program."

"As is evidenced from impairment in Bay Area urban creeks and San Francisco Bay, FIFRA labeling requirements do not protect water quality."

"Based on the findings above, the Water Board has the authority to take specific actions to ensure reversal of toxic impairment due to pesticides in urban creeks."

b. Water Board should not cede this authority

Baykeeper strongly agrees with the BPA language stating that the Water Board "could consider the need to use its own regulatory authorities to control pesticides discharges," if DPR does not act. BPA at A-9. This strategy to restrict the use of potentially harmful pesticides is promising. However, the TMDL is unclear as to the Water Board's plan if DPR is not doing its job.

Failure by the Water Board to fulfill the responsibility to implement and enforce the Clean Water Act would be considered a breach of the federal delegation of authority and, in this case, the NPDES program under section 402. By leaving the primary decision making regarding pesticide toxicity in the watershed up to the California Department of Pesticide Regulation, the BPA inappropriately cedes this federal authority to another state agency. Therefore the bigger question may be whether or not the Water Board has shirked a federally authorized obligation, thereby requiring federal EPA to step in.

Suggested Revision

The BPA should contain an additional paragraph on page A-9 that elaborates on the Water Board's authority and action plan if DPR does not act. This paragraph should answer the following questions: How long is too long to wait for DPR to act? What triggers a decision that DPR is not doing its job? What does the Water Board plan to do upon a determination that DPR is not acting in a sufficient manner to protect and improve water quality in urban creeks?

Additionally, the Water Board should clearly identify interim actions that will be taken after it notifies DPR that water quality is being or has the potential to be impaired by a pesticide. These actions can include raising a warning flag for local agencies, requiring additional control measures specific to the pesticide of concern, researching and suggesting alternatives or categorical controls (e.g., ant control measures), and restricting use of certain pesticides with potential to cause toxicity on local agency and public properties. These types of immediate

interim actions should be delineated in the BPA, and the Water Board should commit to taking these types of steps if toxicity is suspected.

c. Water Board can take concrete actions to use its authority

Staff has generated a list of potential regulatory actions that it can take. Staff Report at 111. As staff recognizes, it may be necessary to implement many or all of these options in order to decrease and prevent pesticide toxicity in Bay Area creeks: "Without regulatory action, however, water quality impairment would likely be a recurring problem for Bay Area urban creeks." *Id.* But staff stops short by dismissing the Water Board's ability to fully use its authority by saying that these actions are inefficient, expensive, and unenforceable. *Id*. This policy decision serves to dismiss the Water Board's ability to fully use its authority, and creates unnecessary and unsubstantiated barriers on protecting water quality.

Baykeeper does not share staff's belief that employing these options would pose substantial enforcement challenges. If communication between the Water Board and DPR is prioritized, many or all obstacles can be avoided. Additionally, the regulatory actions do not have to be all or nothing, as implied in the Staff Report. The adoption of a few of the programs when necessary, rather than all of them at the same time, could go a long way towards water quality protection, and these actions would undoubtedly pose few obstacles if taken one at a time.

Only aggressive regulation of pesticides and pesticide application will enable water quality objectives to be achieved, therefore the Water Board should be prepared to take action as well as work collaboratively with DPR and all other agencies in addressing pesticide toxicity in creeks.

Suggested Revision

Baykeeper believes it is critical that the Board do as much as possible to gather information about pesticide use and its affects on water quality by initiating water quality evaluations of pesticides and by filling information gaps by requesting such information from all potential sources, including pesticide manufacturers, applicators, and DPR.

In addition to information gathering, however, the Board should be prepared to exercise its regulatory powers at the same time as, or in conjunction with DPR. This would include restricting the use of pesticides that do or may threaten water quality until they are no longer a threat to water quality, placing regulatory/contractual controls on pest control professionals, banning sales or applications of pesticides within the San Francisco Bay area, incorporating best management practices into permits and Waste Discharge Requirements, and requiring local agencies, school districts, County agricultural commissioners and Pest Control Operators to adopt and implement robust IPM ordinances and certification programs.

The Water Board can and should also set aggressive guidelines as to what constitutes IPM. There are too many agencies and applicators who claim to be doing IPM, but because they follow more lax models or automatically claim that pesticide-use is necessary, they do not actually result in meaningful and holistic pest control assessment and least toxic controls. By

setting forth strict guidelines in the Basin Plan Amendment, every local agency, pest control operator, and certification program will be on the same level playing field. This revision could easily be made by modifying Table 10.1 on page 80 of the Staff Report and including this type of table in the BPA with language about how the IPM program should be adaptively managed to ensure up to date control measures and considerations. The Water Board should also include requirements to review and enforce these IPM programs as necessary.

d. Water Board can and should require NPDES permittees to restrict pesticides where they impact local water quality

i. Section 11501.1 does not limit the Water Board, and federal law preempts any limitation on local agencies implementing Water Board requirements pursuant to federal law

In response to a 1984 state Supreme Court decision that upheld a local government's right to regulate pesticides, the California legislature amended the state code to limit local regulation of pesticides. Cal. Food & Ag. Code § 11501.1. A prohibition on local regulation of pesticides that are harming water quality, however, conflicts with the federal Clean Water Act. Therefore, when regulation of pesticides is required by the Water Board to carry out the purposes of the federal Clean Water Act, the Food and Ag. Code allows for the Water Board to do so: "[n]either this division nor Division 7…is a limitation on the authority of a state agency or department to enforce or administer any law that the agency or department is authorized or required to enforce or administer." Cal. Food & Ag. Code § 11501.1(c).

The law of preemption requires the federal Clean Water Act to be prioritized ahead of a California Code provision. Pursuant to the Supremacy Clause of the United States Constitution, art. VI, cl. 2, all state or local laws that interfere with or are contrary to federal law are preempted. *Hillsborough Co. v. Automated Medical Labs, Inc*., 471 U.S. 707, 713 (1985), *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). Preemption of state law can be either express or implied. State laws are impliedly preempted when the federal regulatory scheme is so "pervasive" that it demonstrates Congress' intent to completely occupy a field. *Id.* In the absence of express or implied preemption, a state law will still be invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray* v. *Atlantic Richfield Co*., 435 U.S. 151, 158 (1978). Such a conflict will be found when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52 (1941). *See also Hillsborough* 471 U.S. at 713; *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 679 (2003) (obstacle preemption turns on whether the goals of the federal statute are frustrated by the effect of the state law).

According to the U.S. Supreme Court, the savings clause of the Clean Water Act demonstrates that Congress did not intend to expressly preempt all state laws affecting water pollution. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Thus, on its face, section 11501.1 is not invalidated simply on the grounds that the Clean Water Act preempts state laws respecting water

pollution. In the absence of express preemption, however, section 11501.1 is invalid if it prevents compliance with the Clean Water Act or if it stands as an obstacle to the execution of the Act's purposes and objectives. *See supra, Hines et al.*

The Clean Water Act gives the Water Board power to condition permits and certifications on conditions necessary to achieve the goals of the Act. *See* § 1342(a)(1), § 1341(a)(2). Thus, if necessary, the Water Boards may condition the issuance of a permit on the permit holder's agreement to regulate uses of a pollutant that are impairing a local water body. If the impairing pollutant is a pesticide, then section 11501.1 would prevent the permit holder from complying with the terms of the permit, thereby creating conflict with compliance of both section 11501 and the Clean Water Act. Prohibiting local regulation of pesticides when those pesticides are impairing local waters, however, frustrates the most fundamental purpose of the Clean Water Act because, in many cases, regulation may be the only way to clean up those waters. Therefore a reading of section 11501.1 to prevent local regulation of pesticides when that regulation is either required by the Water Board or necessary to achieve water quality objectives clearly conflicts with the Clean Water Act and is thus preempted by federal law.

ii. Federal regulations require Urban Runoff agencies to have authority to pass ordinances to reduce illicit discharges

The Basin Plan Amendment should require NPDES permit language to provide proper authority to local agencies to fulfill federal obligations. "All state programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each except that states are not precluded from omitting or modifying any provisions to impose more stringent requirements." 40 CFR § 123.25(9) (storm water discharges). Permittees are required to have legal authority to "prohibit through ordinance, order, or similar means, illicit discharges to the municipal storm sewer system" and permittees must be required to comply with and enforce these conditions. 40 CFR § 122.26(d)(2)(1)(B).

If legal authority is "not sufficient to meet the criteria…the [permittee] shall list additional authorities" that will be needed to meet the criteria and shall include a "schedule and commitment to retain such additional authority." 40 CFR § 122.26(d)(1)(ii).

<u>Suggested Revision</u>

Baykeeper agrees that residential use of pesticides presents a real challenge to the achievement of water quality standards for urban creeks. We also acknowledge the Urban Runoff agencies' fear at challenging the state limitation on local control of pesticides. These challenges and fears, however, should not prevent Water Board and Urban Runoff agencies from taking additional aggressive measures to regulate pesticides.

Under the Food and Ag Code § 11501.1, local agencies' power to regulate pesticide use extends to public property. Urban Runoff agencies can and should be required to regulate the application of pesticides to public land by banning those pesticides that have the potential to threaten water quality and by requiring all of their contracted pesticide applicators to employ IPM. And if it has

not yet done so, all local agencies should adopt strict IPM ordinances for their own public properties.

Additionally, local governments should undertake studies of pesticide use and effects in their jurisdiction and use that information to craft more complete IPM ordinances for the city and to educate citizens. Once residents learn that their City Council is refusing to use a certain toxic chemical on public property, they may think twice about using these chemicals on their own property.

In addition to regulating pesticide use on public land, the Water Board can also require Urban Runoff agencies to take steps to address pesticide use on private land. For example, all commercial landowners who require commercial applications of pesticides on their property could be required under zoning and land use ordinances to implement IPM plans. And both commercial and residential applicators could be required to provide advance notice to the city and to persons who might be affected by the pesticide applications. These types of requirements, which do not prevent the sale or use of pesticides, do not rise to the level of state-wide pesticide regulation and therefore are permissible under California code.

III. Revise adaptive implementation to be a continuous and interactive process

Adaptive Implementation should be revised to allow for continuous improvements, the need for which can be triggered by information gathered or provided by interested parties. Review by the Water Board every five years does not allow for rapid and continuous response to evolving data. The Water Board and local agencies should be able to address and adapt their implementation programs and management plans within a fluid timeframe, and as quickly as necessary to prevent aquatic toxicity.

The Urban Runoff agencies are already committed to continuous improvement of their control actions. This continuous improvement process should be incorporated into the adaptive management strategy of the BPA. If other agencies do not appropriately respond to monitoring data and other evidence provided, NPDES permits should include time sensitive triggers, which require local agencies to take further actions, including implementing additional BMPs and/or source control measures to address harms caused to local water bodies.

<u>Suggested Revision</u>

The language in adaptive implementation should be revised to allow review and revision at the request of an interested party or local agency based on substantial new information.

Additionally, the language should be improved to trigger and require Urban Runoff and other responsible agencies to take interim actions when new information is collected.

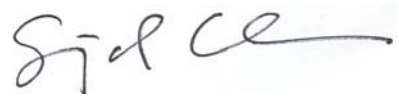
IV. Conclusion

Baykeeper believes the changes we have requested herein are reasonable and necessary in light of the spirit and letter of the Clean Water Act. Moreover, we have attempted to provide specific suggestions for revisions where possible, in order to demonstrate that the changes we are requesting are completely feasible and warranted.

If Staff should have questions or be inclined not to incorporate the revisions we have suggested, Baykeeper would appreciate an open dialogue that may include other interested parties to determine how these concerns will be addressed otherwise.

Thank you for this opportunity and for your consideration of Baykeeper's comments.

Sincerely,



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