

Bay Area Clean Water Agencies

Leading the Way to Protect Our Bay

A Joint Powers Public Agency

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Oakland, California 94623

December 18, 2006

VIA EMAIL AND FACSIMILE (510) 622-2460

Mr. Bruce Wolfe, Executive Officer
 San Francisco Bay Regional Water quality Control Board
 1515 Clay Street, Suite 1400
 Oakland, CA 94612

RE: Comments on the Tentative Order Reissuing South Bayside System Authority NPDES Permit (CA0038369)

Dear Mr. Wolfe:

The Bay Area Clean Water Agencies (BACWA) appreciate the opportunity to comment on the Tentative Order for South Bayside System Authority, as well as make comments on policy issues related to the NPDES permit in general. BACWA members own and operate publicly-owned treatment works (POTWs) that discharge to San Francisco Bay and its tributaries. Collectively, BACWA's members serve over 5 million people in the nine-county Bay Area, treating all domestic, commercial and a significant amount of industrial wastewater. BACWA was formed to develop a region-wide understanding of the watershed protection and enhancement needs through reliance on sound technical, scientific, environmental and economic information and to ensure that this understanding leads to long-term stewardship of the San Francisco Bay Estuary. BACWA member agencies are public agencies, governed by elected officials and managed by professionals who are dedicated to protecting our water environment and the public health.

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

- Page 6, Finding F., Technology-Based Limits.** The tentative order states that "This Order includes technology-based effluent limitations based on Secondary Treatment Standards at 40 CFR Part 133 and ~~Best Professional Judgment (BPJ) in accordance with 40 CFR §125.3.~~" The stricken part of this sentence should be removed as was done in the East Bay

Dischargers Authority (EBDA) Permit as a consequence of BACWA comments.

2. **Page 6, Finding G, Water Quality-based Effluent Limitations.** This section should remove the reference to “a proposed state criterion” as proposed state criteria may not be used under state law, because to use “proposed” state criteria before formal adoption would be considered underground rulemaking.
3. **Page 8, Finding M, Stringency of Requirements for Individual Pollutants.** The first and last sentences of this paragraph should be removed as legal conclusions not supported by evidence in the record. There are several instances where the permit requirements are more stringent than required by the federal Clean Water Act.
4. **Page 9, Discharge Prohibitions A and B.** The language for these prohibitions in the EBDA permit adopted August 9, 2006 was made consistent with the new statewide Sanitary Sewer Overflow (SSO) Waste Discharge Requirements (WDR). In particular, the aim was to not incur overlap in the regulatory mechanisms between this NPDES permit and the statewide SSO WDR. To be consistent with the EBDA permit, the prohibitions language should be revised as follows:

III. DISCHARGE PROHIBITIONS

A. Discharge of treated wastewater at a location or in a manner different from that described in this Order is prohibited.

B. ~~Discharge of wastewater into Lower San Francisco Bay,~~ at any point at which the treated wastewater ~~where it~~ does not receive an initial dilution of at least 10:1, is prohibited.

5. **Page 11, Bacteria Effluent Limitation.** The SBSA Tentative Order has a 35 colonies/100 mL effluent limit in addition to their existing 500 MPN/100 mL fecal coliform limit. The Fact Sheet, page F-38 states that "This Order establishes a **water quality based effluent** limit for enterococci bacteria" (emphasis added). It also states "The limit in this Order, 35 colonies/100 mL, is based on applying the marine **water quality standard** for water contact ... (emphasis added). However, the Fact Sheet is silent on how this water quality-based effluent limit (WQBEL) was calculated from the water quality standards.

The Basin Plan, page 4-11, states, "Water quality based effluent limits **shall** be calculated from water quality objectives based on the following equation:

$C_e = C_o + D(C_o - C_b)$ where D = assigned dilution ratio, C_o = WQO and C_b = background concentration." (emphasis added)

The Basin Plan appears quite clear, and prescriptive, in that this formula and therefore dilution should be used in calculating enterococcus WQBELs. To not do so is contrary to the Basin Plan and would in effect, convert a water quality objective (WQO) directly to a

performance-based effluent limit.

The REC-1, full immersion body contact beneficial use that the enterococcus WQO was derived to protect, does not exist at the outfall or within the zone of initial dilution. The point of application is at or near the surface at the nearest point where swimming, board surfing, or other potential full body contact recreation is likely to occur. It is therefore completely protective to calculate the WQBEL using dilution.

In the case of SBSA, this approach would even be very conservatively protective given that their 1996 receiving water study documented that there was no body contact recreation occurring in the vicinity of their outfall. That conclusion, as summarized on page F-38 of the Fact Sheet, was the basis for originally establishing the limited contact 500 MPN/100 mL fecal coliform limit in the prior permit. The issue of dilution was raised during the process of setting fecal coliform limits for SBSA (and San Mateo) in 1998, but was tabled since it was deemed, at that time, to be more appropriately dealt with through a Basin Plan amendment.

Enterococcus WQBELs calculated with dilution were included in the North San Mateo County Sanitation District permit just adopted in November 2006. Similar enterococcus WQBELs (based on dilution) were included in the Sewer Authority Mid-Coastside Permit adopted on December 13, 2007.

6. **Page 14, Mercury Mass Limits.** BACWA incorporates by reference earlier legal arguments made in BACWA petitions for review of Bay Area permits adopted from 2000 through 2003 (e.g. Petition for Review of Central Contra Costa County Sanitation District's Permit, Appeal No. OCC A-1399 (a)), in order to preserve BACWA's legal rights to challenge the mercury mass limits should the mercury TMDL not be timely adopted or should it be adopted in a manner different than that currently proposed. BACWA intends to withdraw this comment or any legal action taken to enforce this comment once an acceptable mercury TMDL has been timely adopted and implemented.
7. **Page 19, Paragraph VI.C.3. Best Management Practices and Pollutant Minimization Program.** Words such as "conduct," "implement," and "implementation" must be removed from this section of the permit related to Pollutant Minimization Programs (PMP) and Pollution Prevention Plans (PPP) in accordance with the SWRCB's precedential order in the Tosco Avon Refinery case, Order No. 2001-06. Under this case, the Regional Water Board lacks the authority to require incorporation of or "implementation" of a PMP or PPP in a state-issued permit. *See* Water Code §13263.3(k) ("a regional board . . . may not include a pollution prevention plan in an waste discharge requirements or other permit issued by that agency"); Order No. 2001-06 at 38-40 and 60, para. 9 (March 7, 2001)("The Regional Board cannot require in a permit that a discharger implement a pollution prevention plan.") (all emphasis added).

Under the Tosco decision, the State Board made no differentiation between PPPs and PMPs. *See* Order No. 2001-06 at 39 ("the Board treats a waste minimization plan the same as if it were labeled a pollution prevention plan."). The state law proscription against including

PPPs in permits was to ensure that the contents of PPPs are not subject to citizen suits under the Clean Water Act. *Id.* In that case, the Board found that state law, at Water Code §13263.3, did not prevent a requirement in a permit to prepare a PPP/PMP. *Id.* at 40. However, a requirement to implement the plan was inconsistent with the process set forth in section 13263.3 because the Regional Water Board can only require a discharger to comply with the PPP “after providing an opportunity for comment at a public proceeding with regard to that plan.” *Id.* citing Water Code §13263.3(e).

The only way to avoid this inconsistency with the law is for the permit to not include words such as implement or conduct or for the permit to expressly state that for any PPP or PMP, the permit does not incorporate this plan by reference into the permit.

In addition, BACWA requests that language be revised to reflect more realistic goals for pollutant loadings. Language should be revised to be consistent with the recently adopted Vallejo permit as follows:

- a. The Discharger shall continue to ~~implement and~~ improve, in a manner acceptable to the Executive Officer, its existing Pollutant Minimization Program to ~~reduce~~ promote minimization of pollutant loadings of copper, cyanide, mercury, and nickel to the treatment plant and therefore to the receiving waters. In addition, the Discharger shall implement any applicable additional pollutant minimization measures described in the Basin Plan’s implementation requirements associated with the copper SSO and cyanide SSO if and when each of those SSOs become effective and alternate limits takes effect.

The “promote minimization of” language is consistent with the Vallejo Sanitation and Flood Control District permit adopted on August 9, 2006.

8. **Page 16 and F-28, VI.C.4., Requirement to Support SSO and TMDL, and Assure Compliance with Final Limits.** BACWA believes it is inappropriate to require, in advance, pollutant reductions by permittees starting July 1, 2009, in the event site-specific objectives and TMDLs are not developed. In some cases, municipal governments around the Bay Area have contributed millions of dollars to conduct studies, the technical work is complete, and peer review is complete. The only activity that remains is the Basin Plan Amendment adoption and approval process, over which the permittees have no control. In other cases, such as the dioxin TMDL, work has not even begun, through no fault of BACWA, or the agencies it represents. In addition, this provision assumes that wholly new technologies capable of reducing trace contaminants from POTW effluent can be developed in a few months. Moreover, the need for these technologies is extremely doubtful, and in any event no agency should be put in the position of having to develop technologies that would obviate the need for TMDLs. BACWA has supported timely and appropriate action by the Regional Water Board to adopt TMDLs and SSOs. Completion of this critical work will render this entire issue moot. If these BPA are not approved in a timely manner, we hope that together we can consider what the next steps will be. We request that the language should revised as follows:

(page 21)

4. Requirement to Support SSO and TMDL, and Assure Compliance with Final Limits.

This Order grants a compliance schedule for cyanide, alternate final limits for cyanide and copper based on pending SSOs, and dioxin-TEQ based on TMDLs. The Discharger shall participate in and support the development of the cyanide SSO, copper SSO, and dioxin-TEQ and PCB TMDLs. ~~In the event the cyanide SSO, or copper SSO, or dioxin-TEQ TMDL are not developed by July 1, 2009, the Discharger shall submit by July 1, 2009, a schedule that documents how it will further reduce cyanide, copper, and/or dioxin-TEQ concentrations as necessary to 1) ensure compliance with the final limits specified in Section IV, Effluent Limitations and Discharge Specifications, or 2) through a mass offset strategy in accordance with policies in effect at that time. Under the latter scenario, a permit amendment will be necessary to implement the strategy.~~

(page F-50)

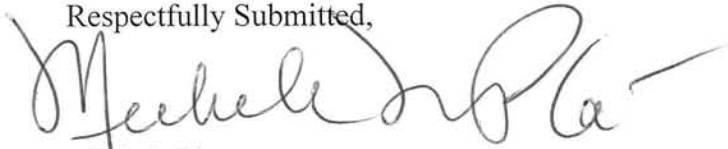
4. Requirement to Support SSO and TMDL, and Assure Compliance Schedules with Final Limits

~~... However, should the TMDL and SSO not be completed in time, the Discharger will need to reduce its discharge concentrations to meet the final WQBELs in this Order. As such, this requirement is necessary to identify additional steps for the Discharger to take to comply with the final limits specified in this Order. Finally, because of the ubiquitous nature of the sources of dioxin-TEQ, this provision also allows the Discharge to address compliance with calculated WQBELs through other strategies such as mass offsets.~~

- 9. Page F-33, Dioxin-TEQ.** BACWA is very concerned that the Regional Water Board has included a numeric final effluent limit for dioxin TEQ in the SBSA Tentative Order. There are numerous legal issues that do not support this action as referenced in the SBSA comment letter (Exhibit 1). BACWA recommends, primarily because there is no approved numeric limit for dioxin TEQ, that the numeric final effluent limit be removed. BACWA requests that the permit be changed to be consistent with recently adopted permits for discharges with reasonable potential based on dioxin TEQ, such as the Vallejo Sanitation and Flood Control District NPDES permit adopted on August 9, 2006. There should be no mass or concentration effluent limit for dioxin-TEQ.

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

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michele Pla", with a long horizontal flourish extending to the right.

Michele Pla
BACWA Executive Director

cc: Daniel Child, South Bayside System Authority