



February 22, 2006

Via Electronic and U.S. Mail

Tam Doduc, Chair
State Water Resources Control Board
P.O. Box 100
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SUBJECT: SUPPLEMENTAL COMMENTS ON SSO RP

Dear Chair Doduc:

The Bay Area Clean Water Agencies (BACWA), the California Association of Sanitation Agencies (CASA), the Central Valley Clean Water Association (CVCWA), the League of California Cities, and Tri-TAC appreciate the opportunity to provide supplemental comments regarding the proposed waste discharge requirements (WDRs) for sanitary sewer collection systems in California. Our associations, which represent public wastewater agencies providing sewer collection, treatment and water recycling services to millions of Californians, previously submitted comments dated January 25, 2006 and participated in the February 8, 2006 public hearing.

At the close of the public hearing, you requested additional information on four issues: (1) A “two-tiered” regulatory mechanism involving both WDRs and an NPDES permit; (2) an affirmative defense; (3) a prohibition of spills; and (4) modifications to the time schedules for Sewer System Management Plan (SSMP) development and reporting. The first three of these issues are inextricably linked. This letter provides our perspective on these three issues and how they are interwoven in the consideration of whether to adopt general WDRs or a general NPDES permit. We have also addressed the fourth issue - the schedule requirements of the SSMP development and the sanitary sewer overflow (SSO) reporting system.

NPDES PERMIT, PROHIBITION AND AFFIRMATIVE DEFENSE

The proposed general WDRs are the product of a two-year, broad-based stakeholder process, during which many of the issues discussed in this letter were debated. We are prepared to accept the WDRs if they are revised as recommended in our January 25, 2006 comments and in the discussion regarding scheduling issues below. We agree with U.S. EPA

Region 9 that the WDRs are a reasonable exercise of the Board's discretion, and a significant step forward to implement a statewide Sanitary Sewer Overflow Reduction Program.

Under the two-tiered mechanism proposed by a coalition of NGOs, sanitary sewer collection systems that have had even a single SSO that reached surface waters would be regulated under an NPDES permit; those systems that had not would be regulated under non-NPDES WDRs. As we understand this system, most collection systems would fall under the NPDES system at the outset, and many others would be subject to NPDES coverage after reporting the first SSO to surface waters under the WDRs. Thus, it seems that the debate is really between retaining the non-NPDES WDRs as the sole regulatory mechanism, or adopting a general NPDES permit.¹

As we stressed at the hearing, the SWRCB has a duty to develop reasonable and attainable water quality regulations and standards, and therefore any permitting scheme, whether solely WDRs or a WDR/NPDES permit, must recognize unpreventable SSOs through some codified language – in the form of an affirmative defense, robust enforcement discretion language, or, preferably, both. We do not categorically oppose an NPDES permit. However, to be both legal and achievable, the NPDES permit must include specific provisions. One creative alternative would be for the SWRCB to adopt a new, technology-based standard applicable to collection systems using its best professional judgment.² California can use SSMPs, its version of CMOM (Capacity, Maintenance & Operation and Management), as the required technology standard for collection systems, and no prohibition would be required. Provided the permittee had implemented an approved SSMP, the permittee would be in compliance with the permit. We believe this is the best approach.

However, U.S. EPA and others will likely request that an NPDES permit include a prohibition as the applicable standard. As we have consistently stated, such a “zero” standard for SSOs is not acceptable and is not required as long as the permit includes requirements meeting BAT/BCT. A prohibition, without an associated affirmative defense, would place over 2000 collection systems throughout the State in the untenable position of attempting to comply with a new unattainable standard. If meaningful affirmative defense and enforcement discretion language is included, however, we would be willing to accept a provision prohibiting SSOs that reach waters of the U.S. This prohibition language is

¹ Additionally, a general SSO permit could include clearly delineated state-only WDR provisions for discharges to land, and NPDES provisions for discharges to waters of the United States.

² There are several legal bases for this approach. The collection system can be deemed to be a separate entity from the treatment plant subject to CWA best available control technology economically achievable and best conventional control technology (BAT/BCT) requirements; or, the Board could find that numeric effluent limitations are infeasible for these types of discharges and apply Best Management Practices (BMPs) pursuant to 40 C.F.R. §122.44(k)(3), (4).

consistent with the Clean Water Act and would not necessarily expand the universe of actionable SSOs.

Given the significant additional exposure to enforcement NPDES permit coverage would create, any NPDES permit adopted with a prohibition must incorporate a limited affirmative defense for rare and exceptional discharges of sewage to waters of the United States that are deemed unpreventable. Representatives of the NGO community and USEPA agreed during the hearing that an affirmative defense is not *per se* unlawful (and is arguably *required*). The affirmative defense concept was proposed by U.S. EPA in its proposed SSO Rule signed by the Administrator (but not promulgated) in January 2001. Therefore, the relevant question is whether a proposed affirmative defense is sufficiently narrow as to be consistent with the purposes of the Act.

As discussed by a NGO representative at the hearing, defenses already exist under the Act, including the bypass and upset defenses. If collection systems are part of the POTW, then the collection systems are also entitled to at least the existing bypass and upset defenses in the federal NPDES permit regulations at 40 C.F.R. §121.41(m) and (n). It is true that the CWA is a “strict liability” statute, but several courts (including the 9th Circuit Court of Appeals) have ruled that some sort of upset defense must be provided for any technology-based effluent limitations, because technology is inherently fallible. (See *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir.1976) and *Marathon Oil v. EPA*, 564 F.2d 1253 (9th Cir. 1977).)

We are mindful of your comments that an affirmative defense be narrowly tailored and specific. If the Board chooses to regulate collection systems under an NPDES permit, the permit should include both a narrow affirmative defense, to provide the limited but necessary protection from liability and enforcement discretion, to guide discretionary enforcement decisions related to alleged violations of the NPDES permit that are not covered by the narrowly tailored affirmative defense language.

If the Board chooses to proceed with an NPDES permit that includes a prohibition, rather than implementing the WDRs or technology-based programmatic NPDES permit as proposed, we recommend the following language for the Board’s consideration.

“A.PROHIBITION³

The discharge of untreated sewage to any water of the United States is prohibited.

³ We could accept this language in the WDRs as well, if accompanied by the affirmative defense.

B. AFFIRMATIVE DEFENSE

The permittee may establish an affirmative defense to an action brought for noncompliance with the discharge prohibition if the permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:

- (i) The discharge was caused by severe natural conditions (such as hurricanes, tornadoes, widespread flooding, earthquakes, tsunamis, and other similar natural conditions);
- (ii) The discharge was caused by unforeseen acts of a third party such as vandalism or terrorism;
- (iii) The discharge was caused by a wet weather event greater than a 5-year storm.

C. ENFORCEMENT DISCRETION

The following factors shall be considered in determining the appropriateness of an enforcement action and/or a penalty for a discharge that does not meet the criteria set forth in Provision B. above:

- The Permittee has complied with the schedule and requirements for reporting and developing and implementing an SSMP;
- The discharge could not have been prevented by the exercise of reasonable control described in an approved SSMP for:
 - Proper management, operation and maintenance;
 - Adequate treatment facilities or sanitary sewer system facilities or components to the extent practicable (e.g., adequately sized treatment or collection facilities to accommodate growth, infiltration and inflow, etc.);
 - Preventive maintenance (including regular cleaning, and fats, oils and grease (FOG) control); and
 - Inflow and infiltration prevention and control to the extent practicable.
- The collection system design capacity is appropriate to reasonably prevent SSOs.
- The Permittee took all reasonable steps to control and mitigate the impact of the SSO as soon as practicable.”

SCHEDULING ISSUES

The fourth issue you identified was the schedule for WDR implementation, especially for completion of the SSMP requirements. Numerous comments were submitted to your

Board stating that many agencies would have a difficult time meeting the deadlines contained in the WDRs for completion of various portions of the SSMP. Some commenters advocated a longer period of time for full-scale implementation of the on-line reporting system and the Overflow Emergency Response Plan. Each of these schedule-related issues is discussed below.

Need for Adequate Time to Allow Training for On-Line Reporting System and SSMP Development

It is imperative that members of the collection system community are provided adequate training to assist in ensuring compliance with the requirements of the WDRs. As such, the California Water Environment Association, which has provided training over the past 78 years to members of the POTW community, has provided us with estimates of the costs and time required to provide such training. CWEA estimates that after adoption of the WDRs, it would take at a minimum two and one-half to three and one-half years to conduct training throughout the state for both the SSO database reporting system and the SSMP requirements. This estimate is based on the assumption that over 2000 collection system agencies throughout the state would require training. The estimated time frame includes development of the materials that will be needed for the training sessions, since no materials exist at this time. The cost for the training material development and the actual training would be on the order of \$2.5 to \$3.0 million. This does not include the costs incurred by the agencies for staff time in attending the training.

At a minimum, we request that you do the following to ensure that enrollees can comply with the WDR requirements:

- Ensure that the on-line reporting system is fully operational before instituting a requirement to use it;
- Tie the completion dates to the date of enrollment, not the date of WDR adoption;
- Allow adequate time before the completion date to allow training to occur on a statewide scale, which is likely to take at least 36 months.

If we are to reach our shared goal of a successful program, it is critical that sufficient time and thought be devoted to implementation, as has been done for development of the SSORP.

Schedule for Development & Implementation of the Overflow Emergency Response Plan

Enrollees are required to develop – and presumably to begin implementing – Overflow Emergency Response Programs between 9 and 18 months after adoption of the WDR.

Rigorous overflow emergency response programs should be developed and implemented as quickly as possible. However, particularly for large agencies that will need

to procure specialized equipment such as hydro-vactor trucks and retain and train additional personnel to perform these new responsibilities, 9-12 months will simply not be enough time to accomplish everything. Therefore, we recommend that for larger agencies more time be allowed (on the order of 18-24 months) for full program development and implementation, or, that the Board clarify that while a plan must be developed in the given timeframe, implementation of some aspects will take longer than specified and those elements should be described in the plan. Additionally, as with other aspects of the schedule, this task should be triggered by the date of enrollment, not the date of WDR adoption.

SSMP Development Timeline

Many small agencies stated that they would have problems funding much of the rehabilitation work in such a short time and several large agencies stated that they could not physically complete the work in the time frame given due to the budgeting, hiring, and purchasing rules and regulations that they must follow, including the time needed to raise rates (and generate the needed funds) to pay for the program. Estimates of the additional time to actually complete all required program elements vary. It is important to recognize, however, that while many agencies (particularly small agencies) will contract out for some program elements, hundreds of agencies will be trying to procure the same services at the same time, leading both to shortages and, quite likely, higher costs. It should also be recognized that the differences in the amounts of time for different sizes of agencies are negligible and not significant enough to make this a truly “phased” approach.

In reviewing the draft WDRs, two sections of the SSMP stand out as being especially problematic to complete within the proposed SSMP schedule. The first is the requirement to identify and prioritize system deficiencies and to implement short and long term rehabilitation actions contained in Section 13 (iv) (c). The second is the requirement to develop a System Evaluation and Capacity Assurance Plan contained in Section 13 (viii) (a-c). The time line for these tasks is not achievable because it will take most public agencies one budget cycle (12 months) to generate the revenue to pay for staff and resources and a second budget cycle (12 months) to acquire the resources to perform the studies/analyses necessary to develop the corrective programs. Once all the essential data is collected it will take minimum of 12 months to develop to corrective plans and programs such as a master plan that includes capacity assurance and both short term and long term capital improvement programs. Consequently, if the WDRs are adopted in April or May of 2006, the time for public agencies to request new resource money in the 2006/2007 budget cycle will have already passed. This means that at onset of this new requirement, most public agencies will be 12 months behind in their ability to generate the revenue to achieve the currently required schedule.

At first reading it appears that the work required in these sections would have to be completed in 18 months and 30 months respectively (>100,000 population). For instance that would mean that sewer system deficiencies would have to be identified and the short and long term rehabilitation be completed in 18 months. Careful reading of those two sections,

however, indicates that the intent of the two requirements is that a plan on how to identify the problems and correct them be developed as part of the SSMP. The actual work would then be completed after the SSMP was certified.

Accordingly, we propose changes to the WDRs to further define what is to be completed within the deadlines currently contained in the document. The changes are shown in underline strikeout format as follows:

13 (iv) (c) ~~Develop rehabilitation and replacement plan to identify and prioritize system deficiencies and implement short term and long term rehabilitation actions to address each deficiency. The program should include regular visual and TV inspections of manholes and sewer pipes, and a system for ranking the condition of sewer pipes and scheduling rehabilitation. Rehabilitation and replacement should focus on sewer pipes that re at risk of collapse or prone to more frequent blockages due to pipe defects. Finally, the rehabilitation and replacement plan should include a capital improvement plan that addresses proper management and protection of the infrastructure assets. The plan shall include a time schedule for implementing the short and long term plans plus a schedule for developing the funds needed for the capital improvement plan;~~

13 (viii) (a) **Evaluation:** Steps needed to evaluate those portions of the sanitary sewer system, which re experiencing or contributing to an SSO discharge caused by hydraulic deficiency. The evaluation must provide estimates of peak flows (including flows from SSOs that escape from the system) associated with conditions similar to those causing overflow events, estimates of the capacity of key system components, hydraulic deficiencies (including components of the system with limiting capacity) and the major sources that contribute to the peak flows associated with overflow events;

(b) **Design Criteria:** Where design criteria do not exist or are deficient, the steps needed to develop a program to assess the current capacity of the sanitary sewer system owned or operated by the Enrollee; and

(c) **Capacity Enhancement Measures:** The steps needed to eEstablish a short and long-term CIP to address identified hydraulic deficiencies including prioritization, alternatives analysis, and schedules. The CIP may include increases in pipe size, I/I reduction programs, increases and redundancy in pumping capacity, and storage facilities. The CIP shall include an implementation schedule and shall identify sources of funding;

(d) **Schedule:** The enrollee shall develop a schedule of completion dates for all portions of the capital improvement program developed in (a-c) above. This schedule shall be reviewed and updated every five years.

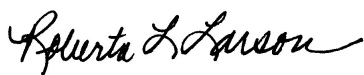
SSO Reporting Program Deadlines

One additional issue relating to timelines is the requirement in the MRP that final reports for major spills be completed through the Online SSO System within 15 days of the spill conclusion. We would like to ask that that deadline be modified to state that the report is due within 15 days of the conclusion of spill response and remediation. For most spills, this will not make a difference in when the report is submitted, since in most cases response and remediation is concluded very quickly. However, for major events, response and remediation may take more time, and it is premature (and in some cases not possible) to submit a final certified report within 15 days of the spill itself. As an alternative, the State Water Board could include a requirement for an interim report within 15 days, if the response and remediation is not complete and it is not possible to submit a final report within that timeframe.

CONCLUSION

As you know, our associations have been actively involved in the SSO Reduction Program since its inception. The effort to launch a major new regulatory program necessarily involves addressing a number of complex and challenging issues—legal, technical and fiscal. We appreciate the opportunity to submit further comments on the draft WDRs to aid in clarifying some of these issues. We reiterate that our associations are prepared to accept the WDRs with the revisions recommended in this letter as well as those submitted to you on January 25, 2006.

Sincerely,



Roberta Larson, Director, Legal and
Regulatory Affairs, CASA



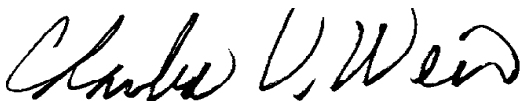
Yvonne Hunter, Legislative Representative,
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Charles V. Weir, Chair, Tri-TAC

cc: Bryan Brock, State Water Resources Control Board (*via electronic mail*)

