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February 22, 2006

Re: SUPPLEMENTAL COMMENT LETTER - 1/19/06 PUBLIC HEARING FOR SSORP

Dear State Water Resources Control Board:

As directed by State Water Resources Control Board Chair Tam Dudoc, I am submitting supplemental comments on the December 5, 2005 Draft Statewide General WDR for Wastewater Collection Agencies ("the WDR") and accompanying Monitoring and Reporting Program on

behalf of the following environmental organizations (collectively, "the Water Quality Groups"):

> California Coastkeepers Alliance, Baykeeper and its San Francisco Bay and Deltakeeper Chapters, Humboldt Baykeeper, Orange County Coastkeeper, Russian Riverkeeper, San Diego Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Santa Monica Baykeeper, Ventura Coastkeeper, Ecological Rights Foundation, Environmental Advocates, Heal the Bay, Lawyers for Clean Water, Natural Resources Defense Council, and Our Children's Earth Foundation.

This letter supplements our letter dated January 19, 2006 ("January letter") with comments on four issues: (1) whether the State Board should issue a permit that is both a California Water Code WDR and a federal Clean Water Act ("CWA") NPDES permit, (2) whether the WDR should include a prohibition on SSOs, (3) whether the WDR should include an affirmative defense to liability for sanitary sewer overflows ("SSOs"), and (4) what time schedules should the WDR specify for development and adoption of Sewer System Management Plans ("SSMPs").

I. Two-Tier Permit With NPDES Permit Authorization Applying to All Those Who Discharge

As noted in our January letter, a two-tier WDR/NPDES General Permit that only requires coverage under the NPDES tier for those publicly owned treatment works ("POTWs") that discharge or intend to discharge to waters of the United States would alleviate any concern that the decision in *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 504-06 (2nd Cir. 2005) precludes issuance of an NPDES general permit for SSOs. With a two-tier permit as described in our January letter, the State Board would not be requiring any POTW operator that did not have discharges of pollutants to waters of the United States to apply for or obtain an NPDES permit. Instead, the State Board would require all POTW operators to determine whether they had discharges subject to NPDES permit coverage and to submit to the State Board the appropriate Notice of Intent (NOI) indicating whether, based on that submission, they would be seeking an NPDES permit coverage or WDR coverage only (i.e., *all* POTWs would file NOIs–some perhaps seeking just California Water Code coverage if the facts so warranted and some seeking both California Water Code and NPDES permit coverage).

If the State Board opts for our suggested two-tier approach, the State Board should include guidance in the WDR on when operators of POTWs should apply for NPDES permit coverage versus only California Water Code permit coverage. The WDR should specify that under 40 C.F.R. § 122.21(a) "any person who discharges or proposes to discharge pollutants or who owns or operates a 'sludge-only facility'" that produces POTW sewage sludge has a duty to apply for an NPDES permit. The WDR should make clear that, consistent with this regulation, *all* POTWs that directly discharge treated sewage to waters of the United States are required to obtain NPDES

coverage for their entire system, including their collection system SSOs. This follows from EPA regulation's definition of a POTW as including sewers, pipes and other conveyances that convey wastewater to a POTW Treatment Plant and EPA's requirement that POTWs subject to CWA regulation be properly operated and maintained. 40 C.F.R. § 403.3, 122.41(e); *see* CWA § 212(2)(A), 33 U.S.C. § 1292(2)(A). The WDR should further specify that any POTWs (including "satellite systems" that do not directly discharge treated sewage to waters of the United States or POTWs that reclaim all their treated wastewater or otherwise do not directly discharge to waters of the United States) that have ever had a collection system SSO to waters of the United States in the past and have not eliminated the possibility of another SSO must seek NPDES permit coverage. The WDR should require submittal of a NOI that includes a description of previous SSOs that have reached waters of the United States and an explanation why the applicant has determined that it does or does not anticipate having any future SSOs to waters of the United States.

II. SSO Prohibition

As noted in our oral testimony before Chair Dudoc on February 7, 2006, EPA's draft "CMOM Regulations" included a general prohibition on SSOs that expressly precluded applying the affirmative defense-like bypass and upset provisions of EPA's existing NPDES regulations to SSOs:

> (f) Municipal Sanitary Sewer Systems – Prohibition of Discharges. (1) General Prohibition. Municipal sanitary sewer system discharges to waters of the United States that occur prior to a publicly owned treatment works (POTW) treatment facility are prohibited. The term POTW treatment facility means an apparatus or device designed to treat flows to comply with effluent limitations based on secondary treatment regulations or more stringent water quality-based requirements. Neither the bypass or the upset provisions at [40 C.F.R. § 122.21] (m) and (n), respectively, apply to these discharges.

The Water Quality Groups support including a similar prohibition in the WDR, but recommend editing this to track SSO prohibitions provided for in the best of the existing Regional Board NPDES permits to sewage collection system operators.[1] Such permits prohibit all SSOs,

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[1] An example is NPDES Permit No. CA010991 issued by the Los Angeles Regional Board to the City of Los Angeles' Hyperion wastewater treatment plant and appurtenant collection system. Regional Board Order No. 94-021 ("the Hyperion Permit"). Condition IV.2 of the Hyperion Permit provides "Any discharge of wastes at any point other than specifically described in this order and permit is prohibited, and constitutes a violation thereof." The Hyperion NPDES permit describes the discharge of treated sewage from the ocean outfall

not just SSOs shown to reach waters of the United States, in keeping with EPA CWA regulations that require permittees "at all times to properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with conditions of this permit." 40 C.F.R. § 122.41(e). As sewage collection systems are part of the system/appurtenances used to collect and treat sewage to meet CWA requirements and as proper operation and maintenance of such systems would preclude SSOs, it is appropriate to prohibit SSOs in NPDES permits. Furthermore, SSOs that do not directly reach waters, but overflow into public streets and other public places and back up into people's homes and businesses, pose nuisance public health threats that the State Board properly should seek to curtail.

Thus, we recommend the following prohibition:

> Prohibition of Discharges. General Prohibition. Sanitary sewer system discharges that occur prior to a publicly owned treatment works (POTW) or privately owned or operated[2] treatment facility are prohibited. The term treatment facility means an apparatus or device designed to treat flows to comply with effluent limitations based on secondary treatment regulations or more stringent water quality-based requirements. Neither the bypass or the upset provisions at 40 C.F.R. § 122.21(m) and (n), respectively, apply to these discharges.

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downstream of the Hyperion treatment plant. Standard Provision B.7. further provides:

> Any "overflow" or "bypass" of facilities, including the "waste" collection system, is prohibited. . . .

The Hyperion Permit further defines an "overflow" to mean "the intentional or unintentional diversion of flow from the collection and transport systems, including pumping facilities." Hyperion Permit Standard Provision A.31.

Together, these provisions made it clear that *all* SSOs from the Hyperion system are prohibited. The State Board should follow a similar approach in drafting the WDR.

[2] As noted in our January letter, there is some trend toward privatization of municipal sewage collection and treatment. To reflect this trend, the State Board should include privately operated sewage collection and treatment systems in this permit system, as well.

III. SSO Affirmative Defense

The Water Quality Groups remain opposed to the adoption of any affirmative defense to SSOs as stated in our January letter and earlier comments to the State Board, including the affirmative defense-like provisions in EPA's draft CMOM Regulations discussed during the February 7 hearing before Chair Dudoc. These draft CMOM Regulations provisions were as follows:

(f)(2) Discharges Caused by Severe Natural Conditions. - The Director may take enforcement action against the permittee for a prohibited municipal sanitary sewer system discharge caused by natural conditions unless 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, tornados, widespread flooding, earthquakes, tsunamis, and other similar natural conditions);

(ii) There were no feasible alternatives to the discharge, such as the use of auxiliary treatment facilities, retention of untreated wastewater, reduction of inflow and infiltration, use of adequate backup equipment, or an increase in the capacity of the system. This provision is not satisfied if, in the exercise of reasonable engineering judgment, the permittee should have installed auxiliary or additional collection system components, wastewater retention or treatment facilities, adequate back-up equipment or should have reduced inflow and infiltration; and

(iii) The permittee submitted a claim to the Director within 10 days of the date of the discharge that the discharge meets the conditions of this provision.

(3) Discharges Caused by Other Factors. - For discharges prohibited by paragraph (f)(1) of this section, other than those covered under paragraph (f)(2) of this section, the permittee may establish an affirmative defense to an action brought for noncompliance with technology based permit effluent limitations if the permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) The permittee can identify the cause of the discharge event;

(ii) The discharge was exceptional, unintentional, temporary and caused by factors beyond the reasonable control of the permittee;

(iii) The discharge could not have been prevented by the exercise of reasonable control, such as proper management, operation and maintenance; adequate treatment facilities or collection system facilities or components (e.g., adequately enlarging treatment or collection facilities to accommodate

growth or adequately controlling and preventing infiltration and inflow); preventive maintenance; or installation of adequate backup equipment;

(iv) The permittee submitted a claim to the Director within 10 days of the date of the discharge that the discharge meets the conditions of this provision; and

(v) The permittee took all reasonable steps to stop, and mitigate the impact of, the discharge as soon as possible.

Strictly speaking, the first of these clauses, "Discharges Caused by Severe Natural Conditions," did not create an affirmative defense. Patterned after EPA's existing bypass regulation set forth at 40 C.F.R. § 122.41(m), this clause would not have rendered SSOs lawful, but instead would have constituted "codified enforcement discretion." EPA would have bound itself not to take enforcement actions under these conditions. This clause, as drafted, would avoid one conflict with the CWA in not purporting to render SSOs to waters of the United States lawful, which neither EPA nor the State Board can do–as staff's draft Fact Sheet properly concludes. Instead, the clause would only purport to codify agency enforcement discretion to not take enforcement actions against SSOs caused by "severe natural conditions," which are identified as exceptional, catastrophic natural events. The clause would nonetheless still conflict with the CWA.

The Water Quality Groups believe that EPA cannot legally under the CWA bind itself to not to take CWA enforcement actions given CWA section 309(a) (33 U.S.C. § 1311(a))'s mandate that EPA "shall" take enforcement action when it finds a CWA violation. *See United States v. City of Hoboken*, 675 F. Supp. 189, 27 ERC 1107, 1116 (D.N.J. 1987) ("[T]he Act imposes a nondiscretionary duty on the EPA to take action to prevent permit violations, including the issuance of compliance orders by the Administrator and the filing of civil lawsuits."); *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 130 (D.S.C. 1978) (finding that language of statute and legislative history mandate EPA enforcement actions for CWA violations). Moreover, while the law has long recognized that the executive branches of government are presumed to have discretion whether to take enforcement in any given case unless a statute otherwise directs, this principle extends only to deciding case-by-case whether enforcement is warranted upon due consideration of all the facts and relevant factors in actual potential cases. *See*, *e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). This principle is violated if an administrative agency predetermines that it will not take enforcement for any class of cases of a certain type in advance of being presented with actual potential cases or the facts in those cases. The Water Quality Groups similarly contend that the State Board cannot legally bind itself not to take enforcement actions. One, as an agency with EPA authorization to administer an NPDES program in California, the State Board must adhere to CWA dictates, including the duty to enforce CWA violations. *City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613, 620

(2005); Cal. Water Code §§ 13377, 13263. Two, the California Water Code establishes the State law governing the State Board's enforcement discretion, which only the legislature, not the State Board via permit action, can change.

While the Water Quality Groups agree that it would be a proper exercise of enforcement discretion not to seek enforcement sanctions for SSOs caused by catastrophic natural events, we do not agree that the WDR should include a provision circumscribing enforcement discretion in this respect. Existing law well governs enforcement discretion (*see, e.g.*, California Water Code §§ 13268, 13350, 13385), making such a clause unnecessary and only potentially confusing–points well made by the Central Valley and Central Coast Regional Boards, agencies that bear responsibility for bringing state enforcement actions. Existing law and the sensible judgment of enforcers has proven more than adequate here; in our long experience with SSO enforcement, we are unaware of a single instance when EPA, a state agency, or a citizen group has sought to penalize a POTW operator for SSOs stemming from catastrophic events. For example, EPA brought an enforcement action against Miami for SSOs, but omitted SSOs caused by Hurricane Andrew from its action. Thus, there simply is no need for State Board action to ensure that enforcement is not undertaken for SSOs stemming from catastrophic natural events. Furthermore, we are concerned that defining what constitutes "severe natural conditions" is potentially unclear, leading to prolonged litigation and hindrance of legitimate enforcement activity. Normally expected peak rainfall events are presently causing SSOs from many POTWs. We are concerned that if the WDR bars enforcement for SSOs during "widespread flooding," this would likely lead to prolonged litigation over whether now routine claims related to wet weather SSOs are barred. Such prolonged litigation would both drain resources best devoted to preventing SSOs and risk that wet weather spills that do great harm to public health and the environment be allowed to continue unabated.

The second of these clauses, "Discharges Caused by Other Factors" is modeled after EPA's existing upset regulation set forth at 40 C.F.R. § 122.41(n). The upset regulation was adopted in response to *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977), which provided that EPA must allow for an equipment failure affirmative defense to violation of end-of-pipe technology-based effluent limitations given that treatment technology is not infallible and technology-based limitations by definition are set to match the performance capabilities of pollution reduction technology. This second clause in the draft CMOM Regulations would have allowed only for an affirmative defense to SSO liability for violation of technology-based effluent limitations, but not any prohibitions on SSOs that would be derived from water quality standards. This is an important limitation, as it would violate the CWA to allow for an affirmative defense that effectively authorized SSOs that violate water quality standards. NPDES permits must include effluent limitations necessary to ensure attainment of water quality standards, which would necessarily include prohibiting rather than authorizing SSOs which cause or contribute to water

quality standard violation. *See* 33 U.S.C. § 1311(b)(1)©); 40 C.F.R. 122.44(d)(1); *Sierra Club v. Union Oil Co*, 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *judgment reinstated*, 853 F.2d 667 (9th Cir. 1988); *In the Matter of Star-Kist Caribe, Inc*., 3 E.A.D. 172; 1990 EPA App. LEXIS 45 at *11-*12 (U.S. EPA Administrator April 16, 1990).

In our view, the *Marathon Oil Co.* decision and the existing upset defense in EPA regulations are not applicable to SSOs, which are inherently different from end-of-pipe effluent discharges that are regulated by technology-based effluent limitations. Collection system SSOs, by definition, occur upstream of treatment facilities and the outfalls that treatment facilities are authorized to discharge from. Given these circumstances, technology-based effluent limitations on SSOs make little sense. The CWA and EPA regulations would mandate that SSOs, being discharges of sewage from POTWs, be subject to secondary treatment-based effluent limitations if any such effluent limitations were to be set. *See* 33 U.S.C. § 1311(b)(1)(B); 40 C.F.R. part 133. No SSOs, however, could meet such limitations, given that collection system SSOs occur upstream of secondary treatment facilities. Indeed, we are unaware of any existing NPDES permits imposing such technology-based effluent limitations on SSOs, reflecting implicit agency awareness that such limitations could never be complied with and do not suit the reality of SSOs. Given the absence of technology-based effluent limitations on SSOs, an upset affirmative defense patterned after the draft CMOM regulations would be a nullity–there simply are no technology-based effluent limitations to which the defense would potentially apply. In addition, SSOs cannot sensibly be seen as "upsets," i.e., noncompliant discharges caused by extraordinary equipment failure at a facility that normally can comply with a technology-based limitation. Given that all SSOs would necessarily fail to meet secondary treatment-based effluent limitations, any given SSO could not be seen as an aberrational instance of noncompliance with technology-based limitations with which a POTW collection system normally complies.

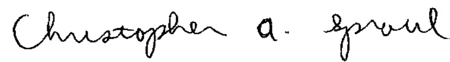
IV. Time Schedules for SSMP Adoption

As noted in our January letter, the Water Quality Groups agree with the comments of the Central Coast and Central Valley Regional Boards that the Sewer System Management Plan Time Schedule in the current draft of the WDR provides for unduly prolonged schedules for SSMP finalization. Enforcement actions brought by EPA, the Regional Boards, and/or citizen groups typically have ended in settlement agreements providing for more ambitious schedules for adoption of CMOM-like management plans analogous to the SSMPs than would be required by the current draft of the WDR. Accordingly, as noted in our January letter, the WDR draft should be amended to specify that all agencies with a service population greater than 100,000 adopt final SSMPs within two years rather than three years, and all agencies with a service population less than 2,500 adopt final SSMPs within three years rather than three years and nine months.

We do not object to the suggestion offered by several commentors that POTW operators be given flexibility as to which SSMP elements to adopt first so long as they meet an overall final target for their complete SSMPs. Rather than being required to complete specific elements of the SSMP by intermediate deadlines, POTW operators could be required to meet a general interim goal of reasonable progress toward meeting their final deadline and to submit periodic reports on their progress.

Thank you for consideration of our comments.

Sincerely,



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