



California Regional Water Quality Control Board Lahontan Region



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April 22, 2005

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**ATTACHMENT P – APRIL 22, 2005
LETTER FROM REGIONAL WATER
BOARD EXECUTIVE OFFICER TO THE
DISCHARGER**

**RESPONSE TO YOUR LETTER DATED JANUARY 14, 2005, CONCERNING
REGIONAL BOARD REGULATION OF THE LOWER OWENS RIVER PROJECT,
INYO COUNTY**

INTRODUCTION

This is in response to your January 14, 2005 letter to Lauri Kemper in which you raise a number of permitting issues regarding the Lower Owens River Project (LORP). Rewatering the Lower Owens River will have far-reaching positive value to the ecosystem of the area. Los Angeles Department of Water and Power (LADWP) has made significant progress in developing this project. However, there are permitting issues that still need resolution. This letter responds to your comments and clarifies the record from our perspective. Additionally, it describes the regulatory approach that I intend to recommend to the Regional Board. This approach will provide clear and appropriate regulation of the discharges associated with the project, and, if accepted by the Regional Board, it will allow project implementation in a timely manner.

Your letter raises two significant issues: first, LADWP's position that the discharges from this project be regulated by various general permits and the water quality certification rather than an individual permit; and, second, that the Los Angeles Aqueduct (LAA) is neither a water of the United States nor a water that is subject to the authority of the Regional Board pursuant to the California Water Code.

GENERAL PERMITS OR INDIVIDUAL PERMIT

LADWP claims that all discharges of waste associated with this project could be covered by three State Water Resources Control Board (State Board) general permits and one Regional Board general permit. In reviewing this position, I considered the project as a whole in determining the applicability of each general permit. I believe this position is appropriate since it is unlikely LADWP would be implementing any individual project components in the absence of others. In further support of this position, this entire project was evaluated under an Environmental Impact Report; therefore, all project impacts should be considered in the context

of the entire project. Additionally, there are two project components that have the potential to adversely affect water quality that are not covered by any general permit.

Two of the general permits under consideration (State Board Order No. WQO 2003-0003 and Regional Board Order No. 2003-034) require compliance with all water quality objectives and are applicable to only low-threat discharges. LADWP's project and CEQA documents clearly indicate that the project will cause violations of receiving water quality objectives, at least temporarily. While the discharges proposed to be covered by these two general permits are not those that will cause violations of water quality objectives, the activities covered by these general permits will facilitate the actions that cause the violations. Discharges that cause or facilitate actions that cause violations of water quality objectives are not considered "low threat discharges." Therefore, in considering the project as a whole, these general permits are not applicable to the discharges generated by this project.

Additionally, Finding No. 12 of State Water Resources Control Board Water Quality Order No. 2003-0003-DWQ states that "Discharges ... that could significantly alter the existing drainage pattern of the discharge site or surrounding area are not eligible for coverage under these General WDRs". The activity that will generate the discharge to be covered by the General WDRs is part of a larger project that is intended to alter drainage patterns, specifically the rewatering of 62 miles of the Lower Owens River and the Delta area of Owens Lake and releases of water to flood 500 acres in the Blackrock Waterfowl Habitat Area. Therefore, this General WDR is not applicable to the project.

While I am prepared to recommend that the Regional Board grant an exemption to Water Quality Control Plan for the Lahontan Region (Basin Plan) prohibitions, thereby allowing violations of water quality objectives, I do not believe that the other two general permits (State Board Orders WQO 2003-0017 and WQO 99-08-DWQ) are valid unless and until such an exemption is granted. Additionally, since the prohibition exemption will likely include conditions, the validity and enforceability of the general permits will be linked to a separate Regional Board action. This situation leads to the possibility of unnecessary confusion.

The rewatering of the Lower Owens River will likely result in violations of water quality objectives, at least during the initial years of the project. Also, the water returned to the LAA from the pump-back facility may cause water quality objectives to be violated in the LAA and downstream tributaries. These two actions are not regulated by any general WDRs or NPDES permits.

Information provided by LADWP in November 2004 indicates that various project components would be covered by more than one of the above-mentioned orders. This fact leads to my concern that there may be inconsistent requirements and duplicative monitoring requirements. This could result in confusion in interpretation by Regional Board staff, LADWP staff, or your

contractors. The intent of a single permit would be to eliminate this possibility and streamline both the permit requirements and the monitoring needed to demonstrate compliance.

In your letter (p. 2, paragraph 2) you state: "While we concede that the Regional Board maintains discretion to require individual permits for certain activities, such discretion must be exercised in a reasonable manner. Requiring an individual NPDES permit where one is not required as a matter of law would constitute an abuse of discretion." I disagree with your premise that the Regional Board may issue an individual permit only where an individual permit is "required by law." To my knowledge, there is no law that requires the Regional Board to use either an individual or a general permit to regulate a specific type of discharge. Rather, a decision to issue an individual permit instead of a general permit (or, as in this case, multiple general permits) is discretionary (see: Finding 9 of WQO No. 2003-0003-DWQ and Finding No. 5 of WQO 99-08-DWQ). Furthermore, as I explained above, there is good reason to combine all of the requirements of the various general permits to provide clarity and avoid duplication and inconsistency.

Given the reasons described above, I believe that one permit is the more appropriate regulatory approach given the complex nature of this project.

LOS ANGELES AQUEDUCT

Much of your January 14, 2005 letter is devoted to convincing us that the LAA is not a water of the United States subject to the requirements of the federal Clean Water Act. We disagree with your position that the recent Supreme Court of the U.S. decision in *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*, is applicable to this determination. Furthermore, the State Water Resources Control Board has adopted an NPDES permit that regulates the discharge of pesticides to waters of the United States (Water Quality Order No. 2004-0009-DWQ). This order describes waters of the United States on page 7 of the Fact Sheet as: "... Waters of the United States include ... impoundments of and tributaries to waters of the United States ... Waters of the United States include, but are not limited to, irrigation and flood control channels that exchange water with waters of the United States." The LAA moves water from the Owens River, a water of the United States to Haiwee Reservoir, an impoundment of waters of the United States. The LAA is a tributary to Haiwee Reservoir and therefore a water of the United States.

Given prior conversations with LADWP staff and the position taken in your January 14, 2005 letter, I do not believe that LADWP will accept the above as a demonstration that the LAA is a water of the United States. Rather, it is obvious that this disagreement will likely only be resolved through lengthy fact-finding and possible judicial action. Rather than pursue that path, which would delay implementation of a valuable project, I will not pursue regulation of discharges to the LAA under the federal Clean Water Act unless LADWP specifically requests such a permit. I am taking this position without conceding our position that the LAA is a water

of the United States. If you decide not to request an NPDES permit, LADWP assumes whatever risk is involved in discharging to this water body without it.

In the large paragraph on page three of your January 14, 2005 letter you state: "The Regional Board has no jurisdiction to require any state or federal permits for discharges to the Los Angeles Aqueduct." This is the only place in the letter where you dispute the authority of the Regional Board to regulate discharges to the LAA under state law. The only rationale you provided is that the Water Quality Control Plan does not list the LAA as a water body under the Regional Board's jurisdiction. We disagree with LADWP on this position. The Basin Plan lists most water bodies by name in Table 2-1. Additionally, it lists minor surface waters and includes the following statement "Unless otherwise specified, beneficial uses also apply to all tributaries of surface waters identified in Table 2-1." The LAA is specifically listed as the "receiving water" of many of the listed water bodies. Additionally, both Tinemaha Reservoir and Haiwee Reservoir are listed in the Basin Plan as water bodies and waters in the LAA are tributary to both reservoirs. Water in the LAA is periodically released (both controlled and uncontrolled) into the Owens River, a water of the United States. Therefore, the LAA is tributary to the Owens River and is therefore a water of both the state and the United States.

You state in your letter "... the City of Los Angeles does not intend to cede jurisdiction over its municipal drinking water supply for unauthorized regulatory purposes." The Regional Board is not asking LADWP to "cede jurisdiction." Rather, I intend to recommend that the Regional Board, pursuant to its statutory authority, regulate the discharge of a waste to a water of the state. As you know, much of the state's waters are eventually used for municipal water supply, similar to the water in the LAA. Regional boards regulate discharges of waste to these waters in order to protect the quality of the waters for all beneficial uses (e.g. municipal water supply, aquatic habitat). The regional boards currently regulate discharges of waste to waters that are diverted to the LAA. Furthermore, waters that the LAA is tributary to in Los Angeles County (Fairmont, Bouquet Canyon and Drinkwater Reservoirs) are waters listed in the Los Angeles Regional Board's Water Quality Control Plan. While LADWP may have a legal right to use the water for a beneficial purpose, it does not have a right to degrade or pollute that water from the discharge of waste at any point before the last location that the water is permanently diverted from waters of the state and put to use. Such discharges could adversely affect the quality of the waters for any of the listed beneficial uses as the water makes its way to the final diversion location.

I consider the discharge from the pump-back facility to the LAA to be a discharge of water containing waste based on the following facts:

1. The water quality of the Owens River during the initial years following project construction could, according to the project EIR (Water Quality Section 14.7.2), adversely affect many of the beneficial uses. It will be necessary for the Regional Board to allow LADWP to exceed water quality objectives in the Owens River in violation of a Basin Plan prohibition in order to allow the project to proceed.

2. LADWP intends to pump this poor quality water into the LAA. It has not specified any conditions that would preclude this pumping.
3. The water in the LAA just upstream of the pump-back discharge contains water from the Owens River and other tributaries that is likely to be of much better water quality than the pump-back water. While I acknowledge that much of the water in the LAA was diverted from the Owens River, the diversion occurred approximately 60 miles upstream of the point of discharge from the pump-back facility. Due, in part, to project-related construction activities in this 60-mile stretch of river, the pump-back water quality may not be sufficient to support beneficial uses in the Owens River (see 1 above).
4. LADWP's decisions of when it uses the pump-back facility will have a direct effect on whether the beneficial uses in the LAA and in downstream waters will be protected or adversely affected. The potential for adverse effects is dependent on the water quality and volumes of the LAA water immediately upstream of the discharge from the pump-back facility. The discharge of the return water could cause a violation of receiving water objectives, depending upon the volume or concentration of the return water.

REGULATORY APPROACH AND STATUS

As indicated above, I have directed Regional Board staff to develop one individual permit that regulates all discharges associated with the project. We intend to specifically delineate which discharges are regulated solely pursuant to state authority and those discharges regulated under our Clean Water Act delegation. As indicated previously, I do not intend to recommend that the Regional Board regulate any discharges under NPDES permit authority unless LADWP submits a request for coverage under Clean Water Act authority. Additionally, this action will grant water quality certification for the project and will address necessary exemptions to prohibitions in the Regional Board's Water Quality Control Plan. Finally, the certification will address the discharge of pump-back water to the LAA since there is no general permit that covers this type of discharge.

The Regional Board received from LADWP: 1) an Application for *General WDRs for Discharges to Land with a Low Threat to Water Quality* (Water Quality Order No. 2003-003-DWQ), dated January 19, 2005; and 2) a Notice of Intent (application) to comply with *General NPDES Permit For Limited Threat Discharges to Surface Waters* (Order No. R6T-2003-0034) dated January 31, 2005. As I have indicated previously in this letter, I do not believe that these permits are applicable to the project. Therefore, LADWP's Lower Owens River project is hereby excluded from coverage under either of these General Permits (filing fees will be refunded).

Information submitted with the letter stated, "LADWP submitted a Notice of Intent to comply with the terms of the General Permit to Discharge Storm Water Associated with Construction Activities (WQO No. 99-08-DWQ) to the State Water Resources Control Board on January 28, 2005 for construction activities associated with the Lower Owens River Project (LORP)." It is our understanding that LADWP has filed a Notice of Intent and has received a Notice of

Applicability. Pursuant to Finding 5 and Provision D.1.b. of this General Permit, the applicability of this permit to the project is terminated upon adoption of an individual permit by the Regional Board.

Regional Board staff will use applications received from LADWP for NPDES general permits or an individual permit as a basis for developing the individual permit. Additionally, we will use all information received in various report submittals to date, in prescribing requirements pursuant to applicable state law and regulations for the specific discharges described. We intend to use the Notice of Intent for coverage under WQO No. 99-08-DWQ for the construction aspects of the project as the basis for the NPDES portion of the permit to be developed.

Since a Notice of Intent application has been submitted, the WDR/NPDES Permit will also regulate discharges of storm water associated with construction activities (under NPDES requirements). The pump station discharges to the Los Angeles Aqueduct will be regulated under California Water Code requirements unless LADWP submits an NPDES Permit application for the discharge. The proposed Board Order being developed will also include an exemption to waste discharge prohibitions for the Lower Owens River, grant Water Quality Certification under appropriate conditions pursuant to Clean Water Act Section 401, and specify a monitoring and reporting program for the Project.

TIMELINE FOR REGULATORY ACTION (REVISED)

The following is an outline of tentative dates for significant permit actions and supersedes any prior schedule from the Regional Board:

By April 30, 2005: We will mail “tentative” requirements in draft form for a 30-day public review and comment period. We intend to use the mailing list from the Project *Final Environmental Impact Report* (June 23, 2003).

By June 10, 2005: We will mail “proposed” requirements in draft form for a 30-day public review and comment period prior to a public hearing on the proposed requirements. The “proposed” requirements may be modified in response to comments received on the “tentative” draft. By May 10, 2005, we will have published a notice of the planned public hearing in newspapers of record and on the Internet.

July 13-14, 2005: The Regional Board will hold a public hearing on the “proposed” requirements at the Regional Board’s regular meeting in Bishop. The specific location of the meeting has not yet been determined. This is the earliest potential date for Regional Board adoption of waste discharge requirements/NPDES Permit, and issuance of Section 401 Water Quality Certification.

We would be glad to meet with you to attempt to resolve any issues or questions such that the Regional Board regulatory actions and the Lower Owens River Project can proceed without additional delay. If you have questions or comments concerning this letter, or desire a meeting with Board staff, please contact Lauri Kemper, North Lahontan Watersheds Division Manager, at (530) 542-5436, or Alan Miller, Senior Water Resource Control Engineer, at (530) 542-5430.

(ORIGINAL SIGNED BY)

HAROLD J. SINGER
EXECUTIVE OFFICER

cc: Attached Mailing List

HS/la