

Comment Letter - Draft Drinking Water Systems General Permit and Resolution from Donald A. Peter

August 12, 2014

TO:

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Subject: Comment Letter - Draft Drinking Water Systems General Permit and Resolution.

From:

Donald A. Peter
P.O. Box 925
Three Rivers, CA 93271
(559) 561-7626
peterdalan@att.net

I am a member of South Fork Estates Mutual Water Company. I serve as the D-1 Grade certified (unpaid) operator for the company. I do not serve on our Board of Directors and my views are not necessarily those of the company or its board.

We have 32 residential connections and are located in the foothills of Tulare County in the unincorporated community of Three Rivers. Currently, our system derives its water from two groundwater wells drilled into fractured rock. We do not chlorinate or otherwise treat our water.

My comment is on the Draft SWRCB Order "Statewide National Pollutant Discharge Elimination System (NPDES) Permit for Drinking Water System Discharges to Surface Waters" which is in the final rounds of the adoption process. I will refer to it as the "Draft Order" and cite the July 3, 2014 version.

This Draft Order clearly applies to every community water system in the State with over 15 connections. Table 1 (on the first page) and paragraph A of section II (page 7) define the terms "community water system" and "water purveyor." "Water purveyor" is an entity that owns/operates the water system (e.g. private companies, mutual water companies, water districts, etc.)

This Draft Order adversely and unfairly affects small water systems/purveyors in four ways:

1. The time period between adoption of the order and the requirement to submit either an application for a permit or a Notice of Non-applicability is too short for small, particularly very small systems to make informed decisions. If the Draft Order is adopted by the SWRCB on September 23, there will be only 68 calendar days until the required submission of either the Notice of Intent or Notice of Non-Applicability is due on December 1, 2014. I did not find any discussion in the Draft Order of the means that the SWRCB will take to notify systems of the new requirements.

2. Unclear and ambiguous concepts, terms and wording in the Draft Order create difficulty for small systems in making informed decisions.

3. Small systems have limited resources available to make the informed decisions required by the Draft Order.

4. The fee scheduled is strongly biased against small, particularly very small systems with fewer than 200 connections.

Issue # 1: Short Period to Comply.

The State Water Board is scheduled to consider adoption of this order on September 23, 2014. According to the Draft Order, all community systems/purveyors must, by December 1, 2014, submit either a Notice of Intent (an application for a permit as described in this order) or a Notice of Non-Applicability. (Paragraph E of Section III (page 11) of the Draft Order.)

The Draft Order and accompanying SWRCB documents indicate that there have been extensive meetings, discussions and other communication with “stakeholders,” “prospective water purveyors,” “interested agencies,” “persons,” and “interested parties” regarding this draft. Apparently, “stakeholders” etc. did not include the small community water systems/purveyors affected by the Draft Order.

I am not aware of our water system receiving any notice from the SWRCB involving this Draft Order – and I am the one who usually sorts and opens the mail. (I became aware of the Draft Order in the last few weeks by an email alert from the Cal-Nevada section of the American Water Works Association (AWWA) in which I have an individual membership.)

According to a slide contained in a presentation made by a CDPH representative to Tulare County water systems in early 2014, there are 3,000 community water systems in California of which 2,300 are classified as small (serving less than 3,300 people). It would not have been difficult or expensive for the SWRCB to mail a notice directly to each of the included systems to allow them advance notice of the Draft Order and sufficient opportunity to provide comment and input.

In short, many if not most small water systems/purveyors may presently not be aware that adoption of this Draft Order is being considered.

Small and very small systems simply do not have the resources to quickly respond to complicated regulatory requirements – especially without orientation and training. (I have found no mention in the Draft Order or accompanying documents from the SWRCB any consideration for providing orientation or training for small systems.)

Some of the characteristics and challenges for small systems include:

- a. Predominately rural.
- b. Many located in mountain and foothill communities.
- c. Predominately moderate and low income residents.
- d. Managed and operated largely by unpaid volunteers - most of whom have day jobs. The time they have available to manage and operate their systems are evenings and weekends, when government offices are usually closed.
- e. Few if any paid staff.
- f. Limited available funding. Available funding is used for operating and maintaining the system, water quality testing, new or replacement infrastructure funding, administrative expenses and regulatory fees.
- g. Most are non-profit entities, either mutual water companies or independent/special districts. There simply is insufficient income generated by small systems to justify the paid staff and expectation of profit on investment required by a private company.
- h. Most are struggling with the challenges presented by the current statewide drought.

Small systems are often encouraged to consolidate with other small systems or merge with a larger system. In most cases this is not feasible or practicable. Small systems are usually geographically distant from other systems. Some use surface water and some use wells. The quality and characteristics of the source water may be different. Some systems treat and others do not. The age and condition of the infrastructure may be significantly different. (The alternative for many small systems may not be consolidation, but instead, disbandment and reversion to individual residential wells.)

Issue # 2: Unclear, Misleading, and Ambiguous Concepts, Terms and Wording in the Draft Order.

The definition and meaning of the words in the Draft Order are crucial to its understanding. An example of a misleading term used in the Draft Order is "municipal supply well." The word "municipal" is usually used in the context of a town, city or urban location. However, the definition in Appendix A of the Draft Order is: "A groundwater well that is installed...to pump ground water for the primary purpose of delivering drinking water to a municipality or **community**." [Bold print added for emphasis.] In other words, every well (operated for delivering drinking water) of every community water system, rural or urban, is by definition of this Draft Order, a "municipal well."

The problems with unclear, misleading and ambiguous terms are:

1. Any two individuals reading the same text, in good faith, may have a different and perhaps conflicting understanding of what the text means.
2. It calls into question the meaning of other terms used in the document, whether defined in the document or not.
3. Use of vague and ambiguous language violates one of the objectives of the Draft Order, namely "regulatory efficiency and consistency." (Page 4 of the Fact Sheet.)

Rules and regulations should be written to ensure that the individuals who are required to comply with them are provided with clear, unambiguous text, free of any possibility of misunderstanding of meaning. The test should be what the reader understands the text to mean, not what the author intended it to mean.

Misleading terms and words become a serious problem when they are not clearly defined in the Draft Order. And as explained below, one of these terms is crucial to determining if a system is required to obtain a permit under this Draft Order.

There are two issues that must be understood in order to determine if a community water system requires a permit. The first relates to the term "discharge."

The Draft Order in paragraph C, section I, is unambiguous in declaring that almost any type of discharge of water from a community water system meets the threshold for requiring a permit. For example, discharges:

- Include treated, potable, and raw drinking water.
- A discharge can be planned, (e.g. exercising a hydrant) or unplanned/emergency (e.g. a malfunctioning control on a storage tank or a vehicle hitting a fire hydrant).
- As far I can tell, there is no minimal amount required to meet the threshold for a discharge. It could be 20, 200, 2,000, or 2,000,000 gallons. A discharge is a discharge.

The second issue is essentially the proximity of the discharge to a "Water of the United States." This is where the Draft Order is critically unclear.

The first paragraph of the Draft Order includes the following: "Such discharges may occur directly, or through a constructed storm drain or **other conveyance system**, to waters of the United States (U.S.) including...creeks, rivers...." (Bold print added for emphasis.)

I have not found a definition for "storm drain" or "other conveyance system" in the Draft Order. "Storm drain" could be defined as a "man-made conduit, usually made of concrete or metal, covered or uncovered, specifically designed to move water from one point to another, with minimal water loss due to evaporation or absorption into the ground."

But what is the definition for "other conveyance system"? Is it limited to man-made structures with the characteristics of a storm drain? Or does it include the naturally occurring gullies, arroyos drainages, etc. in the mountains and foothills, which, taken altogether, could be considered to be a naturally occurring "conveyance system"? These natural features do "convey water." And eventually, whether it be 500 feet, 5,000 feet, 5 miles, or 50 miles, most will intersect with a water of the U.S.

These natural features differ from storm drains in one significant way. Storm drains are designed to move water from one point to another without significant water loss in-route, either by evaporation or absorption into the underlying soil. In contrast, natural drainage features allow, almost encourage, evaporation and absorption of water into the soil. California rains are seasonal and most of the year these natural drainages are dry. When dry, any discharge from a small community system will quickly evaporate or be absorbed into the soil of the drainage well before it could enter a water of the U.S.

When seasonal rains do occur, any discharge from the typical small water system that enters into one of these natural features will either quickly disappear into the ground or become indistinguishable from naturally occurring rain. These naturally occurring drainages receive rain from hundreds, if not thousands of acres of land. One inch of rain on one acre is 27,000 gallons. Given this, does every discharge into a naturally occurring "conveyance system" require a permit, even if it is 500 or 5,000 feet, or 5 or 50 miles from a water of the U.S.?

I could not find anywhere in the Draft Order where it clearly addresses if a discharge covered by this order must reach a water of the U.S. before a permit is required. However, consider the Notice of Non-Applicability (page 5, Appendix B-1 and B-2). Block C, "Reason for Non-Applicability," gives four options. The first three options refer to coverage under other permits and are discussed in more detail in paragraph B-2, section II of the Draft Order.

The fourth option is not discussed anywhere in the Draft Order. It states: "Discharges of the above system(s): ... Do not discharge to a water of the U.S. or conveyance that drains to a water of the U.S." This text appears to mean that a permit is required if any discharge, of any amount, as defined in the Draft Order, reaches the entrance to a "conveyance that drains into a water of the U.S.," regardless of the distance from the entry point to the nearest water of the U.S.

Issue # 3: Lack of Resources to Make Informed Decisions.

One last point regarding the Notice of Non-Applicability and the Notice of Intent (application for permit). Above the signature line on both documents is the following paragraph:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

My question: Realistically, how many small systems (as described under Issue #1) have available on their "staff" or from any other source, persons with the background and knowledge that could be considered qualified to evaluate the information needed to determine if a permit is required - as required by the Draft Order as presently written? Or have the financial resources to hire a professional to assist in their compliance? (I know that as a D-1 certified operator, I am not qualified to advise my board on this matter, and I know of no other member of our mutual water company who would be qualified to do so.)

And if small water systems do not have qualified personnel, is it fair to expect anyone to sign a statement that implies that they do?

Issue # 4: The Fee Scheduled is Biased Against Small Systems.

The two page fee schedule is confusing and not easy to navigate. However, guidance for what the fee will be for a permit issued to a community water system in accordance with the Draft Order is found in paragraph F of section II of the Draft Order (Threat and Complexity of Discharge and Basis of Permit Fee). Quoting the paragraph:

"When mitigated through implementation of appropriate management practices... the discharges covered under this Order are of low threat and low complexity and are within category 3..."

Therefore the minimum annual fee will be category 3, which, according to the fee schedule is \$1,704 per year, regardless of size of the water system.

However, on the SWRCB web site under "Fees" is the following: "Fee Schedule (NPDES permit Fees): See Category 3 of Section 2200(b)(9) for the base annual fee. **Add a 21 percent surcharge for the total annual fee.**" [Bold print added for emphasis.]

Therefore, the minimum annual fee for a water system requiring a fee, regardless of size will be category 3 with a 21 percent surcharge - which is \$2,061.84 per water system.

- For the smallest system with 16 residences the fee will be \$128.87 per residence.
- For the system where I live with 32 residences the fee will be \$64.43 per residence.

Consider that the smallest 485 community systems will generate \$1,000,000 in fees to the SWRCB, which is the same amount of revenue generated by the 485 largest community water systems subject to category 3. This does not appear to be equitable or justified.

In comparison, the last CDPH fee for small systems in fiscal year 2013-2014 was \$ 6.00 per connection with a minimum charge of \$250.00 per year. Obviously the CDPH fee was based on size of the water system, which is commensurate with the complexity of the system. The SWRCB fee for the permit required by this Draft Order is not.

Mutual Goals.

The primary objective for all water systems is to provide clean water to our customers. This is particularly true for small water systems. The owners of our systems are the users of the system. And, we want to operate our systems in a manner so that we do not contaminate waters of the U.S.

I assume that the State Water Board has similar objectives, especially now that regulatory oversight of water systems has transferred to the Water Board from CDPH. There is no reason why we can't work together to achieve our mutual goals.

One of the better aspects of the Draft Order is the inclusion of "Best Practices." Prevention should be the focus of our mutual effort. Small systems would welcome assistance in evaluating our systems and training on best practices to prevent problems before they occur.

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Evaluation and training assistance is best provided by third party organizations, such as the California Rural Water Association. This allows both the evaluator/trainer and system personnel to be candid thereby increasing the effectiveness of the training.

The expense of this training is usually outside the reach of small systems. Perhaps the SWRCB could assist in providing the resources needed by small systems to obtain this training.

In conclusion, this Draft Order will be the first major directive issued by the State Water Board to small water systems since it assumed responsibility as our primary regulator. This first impression will establish the climate between the State Water Board and small systems for some time to come.

We hope the State Water Board will show leadership in recognition of our mutual objectives, and work in partnership with small systems to achieve our mutual goals, based on mutual understanding, mutual respect and mutual cooperation.

Thank you for your consideration of this comment.

Donald A. Peter

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