

SOUTH COAST

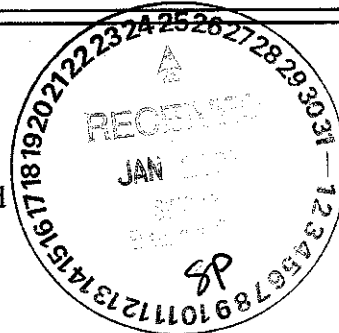


WATER DISTRICT

January 25, 2006

SSO Hearing: 2/8/06

Selica Potter, Acting Clerk to the Board
California State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
Sacramento, CA 95814



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

Dear Board Members:

Please find enclosed a comment letter prepared at the request of the South Coast Water District addressing both practical concerns and the legal structure of the proposed Waste Discharge Requirements for Collections Systems ("Order").

The South Coast Water District supports a consistent approach across the State to overflow reporting and collection system management. We ask the State Board to take note of the extensive and costly programs underway in many agencies to implement programs consistent with the often discussed draft CMOM approach. First and foremost, the South Coast Water District supports the Order issued as waste discharge requirements, and we would like to see the Order supported by an affirmative defense.

The South Coast Water District is a public agency sharing a common goal with state and regional agencies to ensure our work is as protective of the environment as possible and consistent with best practice standards. To that end major investments are being made, and the South Coast Water District appreciates the partnership approach suggested by the Order. The District requests consideration by the State Water Resources Board and staff of the comments submitted in the attached letter as our observations as to how the Order can be improved.

Very truly yours,

Michael P. Dunbar
General Manager
South Coast Water District

cc: Roberta Larson - CASA

Mailing Address: P.O. Box 30205, Laguna Niguel, CA 92607-0205

Street Address: 31592 West Street, Laguna Beach, CA 92651

Fax: (949) 499-4256

Phone: (949) 499-4555

VAN BLARCOM
LEIBOLD
MCCLENDON
& MANN

A PROFESSIONAL CORPORATION

ALISHA M. SANTANA
alisha@CEQA.com

23422 MILL CREEK DRIVE, SUITE 105 - LAGUNA HILLS, CALIFORNIA 92653
TEL 949.457.6300 • FAX 949.457.6305

January 25, 2006

Michael P. Dunbar, General Manager
South Coast Water District
31592 West Street
Laguna Beach, California 92651

Re: COMMENT LETTER – 1/19/06 PUBLIC HEARING FOR SSORP
To be submitted VIA E-MAIL [commentletters@waterboards.ca.gov] AND U.S. MAIL

Dear Mr. Dunbar:

You have requested that Van Blarcom, Leibold, McClendon & Mann review and evaluate the SWRCB Draft Statewide General Waste Discharge Requirements for Wastewater Collection System Agencies ("Order") in an effort to ascertain the legal structure of the Order and to address certain practical concerns with the Order as you have identified them to us. You indicated that comments are due to the State Water Resources Control Board by January 25, 2006, and we have completed a review of the Order and provided comments below.

I. THE DRAFT FACT SHEET

A. Comment Regarding the Need for the Program

The section on "The Need" (page 2 of 9) is compelling and serves to paint the "big picture" of the reason we need this program.

B. Lack of Affirmative Defense and Strict Liability

The Order and Waste Discharge Requirements ("WDR"s) do not allow for an affirmative defense to a Sanitary Sewer Overflow ("SSO"). Since no affirmative defenses are available, the effect is to create a type of strict liability for overflows. It is questionable whether strict liability is

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appropriate in this situation, as traditionally statutory strict liability is reserved for abnormally dangerous activities or defective products. Even though some environmental regulatory schemes sound in strict liability, we do not believe that imposition of liability without regard to fault is appropriate in this instance, primarily given the possibility that SSOs may occur even with the most advanced technology and implementation of best practice approaches to collection system management.

For example, service districts are currently struggling with their lack of state level statutory direction over private laterals that become laden with fats, roots, oils, or grease. Contamination of private laterals is causing a great number of SSOs and other related concerns. In calendar year 2005, of the sixteen (16) SSOs occurring within the jurisdiction of the South Coast Water District, twelve (12) were spills from private laterals. Under the current state of the law, service districts' authority to regulate private property owners' maintenance of their laterals is quite limited. Private property owners are frequently the cause in fact of an SSO yet the service district will have to bear the brunt of the cost of the violation. An appropriate affirmative defense would be that the service district was not the cause in fact of the SSO.

The State Water Resources Control Board's stated goal is to decrease the number of SSOs throughout California. Indeed, the State Board classifies the WDR as an environmental enhancement project (relying on the California Environmental Quality Act ["CEQA"] Guidelines¹), which is not analogous to requirements addressing abnormally dangerous activity or defective products subject to strict liability standards.

We acknowledge the argument in favor of not allowing an affirmative defense: certain SSOs could occur without penalty. Therefore, the argument goes, the elimination of the affirmative defense gives the WDRs greater force and effect. But, the very essence of an affirmative defense is that certain extenuating circumstances exist such that imposition of liability or penalty upon the discharger would be unfair or unjust. Providing an affirmative defense protects service districts from arbitrary circumstances beyond their control. It protects the investments made by service districts to implement best practice maintenance and management approaches.

Additionally, some argue that the WDRs should be styled as a National Pollutant Discharge Elimination System (NPDES) permit under the Federal Clean Water Act. The result of this type of arrangement would be to allow the Environmental Protection Agency (EPA) and other Clean Water Act Citizens Groups to sue a discharger of an SSO for a violation of the NPDES permitting system.

As a practical matter, it would be infeasible to treat the WDRs—a set of requirements—as a NPDES permit equivalent. The two mechanisms, the WDRs and the NPDES permit, are two separate and distinct mechanisms for controlling wastewater discharge and both permitting approaches are

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contemplated by the Federal Clean Water Act allowance of state in-lieu authority. These mechanisms coexist and should not be commingled.

Additionally, eliminating the distinction between WDRs and NPDES permits is inappropriate because litigation on an NPDES permit focuses on a systematic discharger, whereas an SSO involves an inadvertent spill from a portion of the collection system that is not the "point source" focus of the NPDES permit. The NPDES permitting system is designed to regulate agencies that knowingly discharge wastewater into state waters, a complete reading of 40 C.F.R. 122.21(a) supports this proposition. That section requires that "any person who discharges or proposes to discharge pollutants . . ." apply for a permit. Nothing in this section addresses accidental or inadvertent discharges; the entire context of the statute addresses intended discharges and forms the basis of regulation of the quantity and quality of the intended discharge.

C. Lack of an Affirmative Defense and Board's Discretion

In addition to the lack of an affirmative defense, the offered alternatives are equally problematic. Instead of providing an affirmative defense, the WDRs empower the State and/or Regional Water Resources Control Boards to use their discretion to decide whether to pursue an enforcement action against the offending "Enrollee".

The first problem lies in interpretation. The WDRs refer to several factors that the Board shall consider when exercising its discretion to pursue an enforcement action. The factors that the Board must consider are outlined in the Water Code and within the Order itself. Even though these factors are readily identifiable, different Boards will likely interpret the factors differently, eliminating the benefit of a state-wide approach.

If an affirmative defense is available, the permittee can present evidence of its compliance and discussions with the Board will focus on the quality of the discharger's program in light of set standards. This allows enforcement activities over time to contribute to the definition of best practice standards. It also allows agencies to focus available funding on the solution with confidence that its investments will be honored. Agencies that blatantly fail to comply will not be able to establish the basis for the affirmative defense and will remain open to enforcement action.

II. DRAFT ORDER

A. Definitional Clarification

Page 2 of 19, number 10 states that "Information regarding SSOs must be provided to Regional Water Boards and other regulatory agencies . . ." It is unclear from the context the identity of the other regulatory agencies that must be notified.

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We believe there are two ways of clarifying what is meant by "other regulatory agencies." The first approach would be to rewrite the sentence as follows: "Information regarding SSOs must be provided to Regional Water Boards and other regulatory agencies, *as required by law*. . . ." The second approach is to provide a definition of "other regulatory agencies" in the DEFINITIONS section of the Draft Order.

B. California Environmental Quality Act Categorical Exemption

The Board (on Page 4 of 19, number 18) claims that the action to adopt the Order qualifies for categorical exemptions that would relieve the project from environmental review under CEQA.² We take issue with the claimed Class 1 exemption.

Class 1 exemptions are for existing facilities. California Code of Regulations, title 14, section 15301 defines Class 1 exemptions as "consist[ing] of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving *negligible or no expansion* of use beyond that existing at the time of the lead agency's determination." (Italics added) Section 15301 provides examples of what may be an existing facility. In Section 15301(b) we see that "existing facilities of both investor and publicly-owned *utilities* used to provide electric power, natural gas, *sewerage*, or other public utility services. . ." are given a categorical exemption.

We do not believe that a Class 1 exemption is appropriate for the State Board's reliance in this case. A Class 1 exemption is not appropriate here because the WDR will require actions by the public utility systems that would ostensibly include Section 15301(b) activities. But, the WDR is not a Class 1 activity. We cannot currently determine with certainty whether the WDR will result in *negligible or no expansion* of the current sewage pipelines. It is quite foreseeable that when various utilities implement the requirements of the WDRs, they will choose to expand their pipelines and/or other systems increase capacity, engage in major replacement of pipelines, or increase maintenance of their current systems. Each of these tasks could result in much more than a negligible expansion of use; and, therefore, would vitiate the applicability of the Class 1 exemption absent legislation that defined actions in compliance with the WDRs as within Class 1.

C. Analysis of the Environmental Impacts of the Order

California Public Resources Code, section 21159 states that "[a]n agency listed in Section 21159.4³ shall perform, at the time of the adoption of a rule or regulation requiring the installation of

² Cal. Pub. Resc. Code, §21000 *et seq.*

³ Referring over to Public Resources Code, § 21159.4, we see that the article applies to "the State Water Resources Control Board, a California regional water control board, the Department of Toxic Substances Control, and the California Integrated Waste Management Board."

pollution control equipment, or a performance standard or treatment requirement, an *environmental analysis*⁴ of the reasonably foreseeable methods of compliance.”

The WDRs are a set of rules that outline the performance standards and treatment requirements that are necessary in the event of an SSO. Arguably, the WDRs also require the installation of pollution control equipment if doing so would prevent SSOs or remedy an unwarranted discharge.

Under California Public Resources Code, section 21159, the State Water Resources Control Board is required to conduct an environmental analysis of the reasonably foreseeable methods of compliance with the WDRs. If the State Board undertakes a program level environmental analysis would greatly assist service districts when implementing the WDRs. We respectfully encourage that an environmental analysis of the WDRs be completed prior to adoption of the Draft Order.

D. Remedies for Non-Compliance

Page 6 of 19, Section C, number 1 says that “[a]ny noncompliance with this Order constitutes a violation of the California Water Code and is grounds for an enforcement action.” It would be helpful if the Order specifically identified the pertinent statutory sections. We were able to compile the following list, which may serve as a foundation for additional provisions:

- Compliance time schedules (Cal. Water Code, section 13300);
- Cease and desist orders (Cal. Water Code, section 13301);
- Cleanup orders (Cal. Water Code, section 13304(a));
- Cleanup by the regional board with the discharger liable for the costs (Cal. Water Code, section 13304 (b));
- Injunctions (Cal. Water Code, sections 13304 & 13331);
- Emergency summary judicial abatement (Cal. Water Code, section 13340);
- Civil penalties (Cal. Water Code, section 13387); and
- “Fix It” Tickets (Cal. Health and Safety Code, section 39250(b)).

E. Definition of “Up-to-Date”

On Page 10 of 19, number (iv)(a), the term “up-to-date” should be defined. We would recommend 3-5 years (5 years being the outer limit because that is when the Order requires the Enrollee to update its SSMP).

⁴ “The environmental analysis shall, at minimum, include, all of the following: [¶] (1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance. [¶] (2) An analysis of reasonably foreseeable feasible mitigation measures. [¶] (3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation.” (Cal. Pub. Res. Code, § 21159(a))

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F. Audits

On Page 13 of 19, number (x) provides for audits. The Order should indicate the entity that will perform such audits. We would recommend that compliance be self-regulatory with compliance certification from the State Water Resources Control Board every five (5) years.

III. DRAFT WDRs

While reviewing the Draft WDRs, we encountered two minor typographical errors. The first discrepancy appears on Page 4 of 5, number 2, which requires the Enrollee to report SSOs to County Health officials in accordance with Health and Safety Code, section 5410 *et seq.*. California Health and Safety Code, section 5410 *et seq.* does not address reporting. The proper citation should be reflected in the final draft.

The second minor error can be found on Page 4 of 5, Letter B. The numbering is off. The first paragraph is numbered "1" and the second paragraph is numbered "3."

IV. CONCLUSION

We thank you for the opportunity to review the order. If the State Board has any questions or concerns, we would be happy to have them contact Stephen M. Miles, Special Counsel to the South Coast Water District at (949) 457-6319.

Very truly yours,

VAN BLARCOM, LEIBOLD,
MCCLENDON & MANN, P.C.



By: Alisha M. Santana

cc: Betty C. Burnett, Esq.
District Counsel/Director of Administration
South Coast Water District

Stephen M. Miles
Van Blarcom, Leibold, McClendon & Mann