**SSO Hearing**: 2/8/06



*Defending Our Waters—from the High Sierra to the Golden Gate*



San Luis Obispo
COASTKEEPER® Program


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January 19, 2006

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

Dear State Water Resources Control Board:

This letter provides comments on the State Water Resources Control Board ("State Board")'s 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–San Francisco Bay and Delta Chapters, Humboldt Baykeeper, Orange County Coastkeeper, Russian Riverkeeper, San Diego Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Santa Monica Baykeeper, Ventura Coastkeeper, Bluewater Network, Coast Action Group, Community Clean Water Institute, Ecological Rights Foundation, Environmental Advocates, Heal the Bay, Lawyers for Clean Water, Natural Resources Defense Council, and Our Children's Earth Foundation.

We appreciate the State Board's efforts to institute a new WDR that will help curb sanitary sewer overflows ("SSOs"), a statewide problem that is causing serious public health risks and harming water quality. The Draft SSO WDR includes commendable provisions that would help to reduce SSOs: a statewide consistent SSO reporting requirement and a requirement for all state publicly owned treatment works (POTWs) to adopt Sewer System Management Plans (SSMPs) with specific components.

The current draft WDR is a substantial improvement over previous drafts prepared by State Board staff due to its deletion of an affirmative defense effectively authorizing the discharge of raw sewage to state waters in certain circumstances. The Water Quality Groups appreciate that the State Board staff has recognized, in the current draft of the WDR, that as an EPA-approved NPDES program, the State and Regional Board's water pollution program "must be administered in conformance" with all requirements of the CWA, including the requirement that NPDES permits not authorize the discharge of sewage from POTWs without imposing secondary treatment and water quality standard-based effluent limitations. 40 C.F.R. § 123.25(a), 122.4 (state programs must be administered in conformance with CWA, including requirement to issue NPDES permits with appropriate effluent limitations); *City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613, 620 (2005); Cal. Water Code §§ 13377, 13263.

Accordingly, we now urge the State Board to promptly adopt the WDR, with the modifications we suggest below.

The most serious shortcoming of the current proposed WDR is that is not also styled to be a National Pollutant Discharge Elimination System (NPDES) Permit under the federal Clean Water Act (CWA). The issuance of a WDR that is not also an NPDES permit renders the WDR's requirements unenforceable by the U.S. Environmental Protection Agency (EPA) and citizens via the CWA's citizen suit provision. In thus blocking citizen suit enforcement of the

WDR, the State Board is effectively ignoring "Congress' clear intention . . . that citizen plaintiffs are not to be treated as 'nuisances or troublemakers' but rather as 'welcomed participants in the vindication of environmental interests.'" *Proffitt v. Municipal Auth. of the Borough of Morrisville*, 716 F. Supp. 837, 844 (E.D. Pa. 1989) (*quoting Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976). The right of access to the courts allows citizens the opportunity for meaningful participation in societal decisions concerning whether raw sewage is kept out of the public's waters. Citizen suits provide citizens the opportunity to bring their views, backed by legal and technical experts, before a neutral body whose only obligation is to enforce the law. From the NGO perspective, preservation of this public participation right is paramount–which requires that the WDR also be made an NPDES permit.

The CWA requires the Regional Water Quality Control Boards and/or the State Board to issue NPDES permits to all POTWs that have SSOs that reach waters of the United States in California. The State Board is not complying with this duty by issuing a WDR only.

CWA section 301(a) provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharger is in compliance with the terms of an NPDES permit. 33 U.S.C. §1311(a). The CWA further defines the discharge of a pollutant as the discharge from a point source to a navigable water, which the CWA further defines as waters of the United States. 33 U.S.C. § 1362(12), (7). The Pacific Ocean, all tidal water bodies; lakes, rivers, streams, and wetlands that flow to the ocean or are used in interstate commerce, any tributaries to those waters, or wetlands adjacent to such waters are all "waters of the United States." *See* 33 C.F.R. § 328(a); 40 C.F.R. § 230.3(s). The sewer lines, manholes, and pump stations from which SSOs originate are all point sources within the meaning of the CWA. *See* 33 U.S.C. § 1362(14). Accordingly, any POTWs, including "satellite collection systems" that route sanitary sewage to regional treatment facilities but do not directly discharge treated sewage to waters, are all "persons" within the meaning of the CWA that have discharged pollutants to waters of the United States.

40 C.F.R. section 122.21(a) provides that "Any person who discharges pollutants ... and does not have an effective permit . . . must submit a complete application" for an NPDES permit.[2] Under this EPA CWA regulation, all POTWs have a mandatory duty to apply for and obtain an NPDES permit regulating the discharge of pollutants, including but not limited to SSOs from their collection systems, to waters of the United States.

Indeed, in remarks to the National Association of Clean Water Agencies on May 2, 2005, *EPA confirmed that all POTWs with SSOs that reach waters of the United States have a duty to*

[2] Except in a few narrow specific circumstances not applicable here.

*apply for NPDES permits* (see attached article published in BNA-Environment Reporter on May 6, 2005). EPA has circulated a draft guidance document so stating. To retain its EPA authorization to administer an NPDES Program for the State of California, the State Board must "exercise control over activities required to be regulated" by the CWA and EPA regulations and issue NPDES permits to facilities requiring such permits. 40 C.F.R. § 123.64(a)(2)(I); 123.25(a)(4). Thus, the State Board *cannot*, consistent with its status as a state agency authorized by EPA to administer an NPDES Permit Program, decline to regulate SSO discharges from POTWs to waters of the United States via the issuance of one or more properly framed NPDES Permit(s).

Again, the primary motivation for not issuing the WDR as an NPDES permit appears to be an attempt to insulate POTWs from U.S. EPA and citizen enforcement of the WDR under the CWA's enforcement provisions, including the citizen suit provision of CWA section 505, 33 U.S.C. § 1365. In fact, however, the State Board would be doing a disservice to POTWs and subjecting them to added CWA liability for failure to meet the duty to apply and obtain NPDES permit authorization imposed by 40 C.F.R. § 122.21(a). For example, citizen plaintiffs have pursued a citizen suit claim against the City of Garden Grove for failure to apply for and obtain NPDES permit coverage when the Santa Ana Regional Board followed a similar approach of issuing an SSO WDR that is not also an NPDES permit.

The Water Quality Groups are mindful of the Fact Sheet contention that the decision in *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 504-06 (2nd Cir. 2005) has called into question the ability to require NPDES permit coverage for facilities without proof that they have actually discharged pollutants to waters of the United States, as opposed to merely having the potential to do so. The Water Quality Groups disagree that the *Waterkeepers* decision properly supports not making the WDR an NPDES Permit. Nothing in *Waterkeepers* implies that it is improper to require NPDES permit authorization for any POTW that has actually had an SSO that has reached waters of the United States. The Water Quality Groups collectively have studied the problem of SSOs from POTWs for several years, looking at well over 100 systems throughout the State. In our experience, as the Fact Sheet acknowledges, all POTW collection systems have SSOs. Moreover, nearly all POTWs both discharge treated sewage to waters of the United States and have SSOs that reach waters of the United States.[3] The State Board should not allow the rare and exceptional case of a POTW not discharging to waters dictate permitting policy for all POTWs. The simple solution is for the State Board to make the WDR both a Porter-Cologne Act permit *and* an NPDES permit, with the NPDES permit authorization extending only to the subset

[3] We have found only two POTWs that do not discharge directly to waters of the United States, Atascadero's and Palmdale's systems. Even the former, however, has storm drains that flow to waters and thus likely has had SSOs that have reached surface waters via storm drains.

of POTWs that self-identify themselves as having discharged pollutants to waters of the United States. The State Board could specify a two-tier approach to the requirement to submit Notices of Intent (NOIs) to be covered by the WDR. One, the State Board could require POTWs that either discharge treated effluent directly to waters of the United States or that have had SSOs that have reached waters of the United States to identify these facts in their NOI, together with a request for NPDES permit coverage. Two, the State Board could require that POTWs that do not discharge their treated effluents directly to waters of the United States or that have never had an SSO that has reached waters of the United States to identify these facts in their NOI, together with a request that they not be given NPDES permit coverage.

If the State Board makes the WDR an NPDES Permit, as it should, the State Board should further include a prohibition on the discharge of sewage from any point source other than expressly authorized discharge outfalls downstream of secondary treatment facilities and in compliance with effluent limitations established for discharges from such outfalls. The prohibition should apply to all SSOs, even those that do not directly reach waters of the United States, as spilling sewage from a collection system before the sewage reaches the designated treatment plant is a failure to properly operate and maintain the POTW as required by EPA regulations. 40 C.F.R. § 122.41(e). Many NPDES permits currently issued by Regional Boards include such prohibitions, and the State Board should not backslide from this approach. Indeed, two premier Regional Board SSO enforcement actions against the City of Los Angeles and City of San Diego relied on such permit conditions to bring successful enforcement that is now having these cities pursue extensive SSO remedial measures. It would create an unduly complicated and inconsistent regulatory regime for some individual NPDES permits and WDRs issued by some Regional Boards to include prohibitions on all sewage spills while the new general WDR omitted a similar prohibition. It would further be unfair and inimical to environmental protection to impose such restrictions on some POTWs while exempting others that lacked such specific individual permits. This would be contrary to the stated purpose of the WDR which is, as it should be, to promote consistent statewide regulation of SSOs.

Our additional comments on specific provisions of the WDR are as follows:

¶ A.2.: The definition of a Sanitary Sewer System (SSS) to be "Any system of pipes, pump stations, sewer lines. . . upstream of the headworks" is potentially problematic in any situation where there are multiple treatment plants in train, as is the case with the City of Los Angeles. There are many miles of sewer line in Los Angeles downstream of the headworks for the Glendale treatment plant that eventually flow to the City's Hyperion Treatment Plant. Read literally, this definition could be interpreted as excluding these many miles of sewer line from the Los Angeles Sanitary Sewer System. Similarly, treated sewage flows from the City of Richmond and the West County Wastewater District (WCWD) are both sent to a combined treatment

structure operated by a third entity, West County Agency (WCA). An SSO downstream of the Richmond or WCWD plants but before the WCA treatment structure would arguably not be from a Sanitary Sewer System. This definition should be amended to address these types of situations.

In addition, this definition should be amended to specify that discharges of sewage to temporary storage and conveyance facilities (such as vaults, temporary piping, construction trenches, wet wells, impoundments, tanks, etc.) are not sanitary sewer overflows provided that the public is not exposed to sewage discharged to such structures.

¶ B.1: There is at least some movement nationwide to privatize the operation of POTWs, including their collection systems. Veolia Water North America Operating Services, LLC, (Veolia), for example, is one private company interested in assuming operational control of POTWs. Richmond has contracted with Veolia to operate Richmond's POTW. EPA regulations make it the duty of the person/entity *who operates* a facility to apply for NPDES permit coverage. 40 C.F.R. § 121.21(b). In keeping with this regulation, this paragraph should be amended to require private contractors that operate SSSs to apply for coverage under the WDR, along with the public agency that owns the SSS.

¶ C.11: This should be amended to require permittees to make their SSMPs available to the public upon request. The EPA General Industrial Storm Water Permit, for example, has a similar requirement.

¶ C.13.iii: This should be amended to require permittees to demonstrate their legal authority to require third-party reporting of SSOs from private lateral sewer lines, inspections of private lateral sewer lines, and maintenance, repair, or replacement of such lines to the extent necessary to prevent problems with SSOs in public sewer lines. In addition, permittees should be required to demonstrate their legal authority to require standards to be met by new private lateral lines/sewer connections. Defective private lateral lines are a source of root intrusion and debris loading into public sewer lines, as well as excessive infiltration and inflow. Improper lateral line connections to public sewers interfere with public sewer line maintenance and performance (for example, lateral lines that protrude into main lines catch fats, oil and grease, roots and debris, causing line blockages. Such protruding laterals also can prevent CCTV inspection of sewer lines). Many POTWs are recognizing that they cannot effectively reduce SSOs from their systems without addressing defective private laterals. Thus, it is critical that such private lateral inspection and maintenance be made part of effective SSMPs.

¶ C.14.: This should be amended to add a subparagraph requiring SSSs that accept sewage from satellite collection systems to develop a program for managing flows from such satellite systems to the extent that such flows are contributing to capacity shortfalls within the receiving SSS.

¶ C.14.iv: This should be amended to specify pump station repair and rehabilitation as part of operation and maintenance actions/capital improvement plans.

¶ C.14.iv.a: This should be amended to specify that system mapping should include location of interceptor lines, flow equalization temporary storage basins or facilities, upstream treatment works, headworks, overflow structures/flapgates, final treatment works, and outfall pipes.

¶ C.14.vi. This should be amended to include a requirement to ensure public notification of SSOs directly by the permittee unless another public agency has local responsibility for public notification of SSOs.

¶ C.14.viii. This should be amended to specify assessment of rainfall-derived infiltration and inflow (RDI/I) whenever an SSS has identified capacity deficiencies through smoke testing, investigation of unlawful cross-connections of storm water flows into the sanitary sewer, CCTV inspection of lines, and other means to assess sources of RDI/I.

¶ C.14.ix: This should be amended to require systematic information collection and management via a computerized data management system tied to GIS (which small systems can opt out of if they can demonstrate that alternative information management approaches will work in their setting).

The Sewer System Management Plan Time Schedule 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, with comparable time adjustments for the other categories of agencies. The urgency of the SSO problem weighs in favor of more prompt action that the WDR proposes; enforcement actions brought by EPA, the Regional Boards, and citizens have typically required shorter time frames for action which public agencies have been able to meet.

Monitoring and Reporting Program Comments

¶ A.6: This should be amended to mandate reporting of private lateral sewer line spills of which the permittee becomes aware. Tracking the incidence of private lateral spills is important feedback information for assessing the extent of the problem of deteriorating local private lateral lines.

¶ 10.H: This should be amended to specify identification of whether the SSO impacted any area

used for water contact recreation, not just beaches.

¶¶ B.1, B.5.l. and m. and n.: All these record retention requirements should be amended to require retention of records for five years, not three. The applicable Clean Water Act statute of limitations for unlawful discharges of pollutants is five years, not three. As many SSOs are violations of the CWA, records should be kept for the full CWA statute of limitations period.

Thank you for consideration of our comments.

Sincerely,


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*Drinking Water*

## Byproducts, Atrazine, Perchlorate Likely To Get Scrutinized as Endocrine Disruptors

As new information emerges on the reproductive and developmental effects of pharmaceuticals in drinking water, three contaminants in particular could be subject to new federal review, a water utility representative said May 4.

Those contaminants are disinfection byproducts, atrazine, and perchlorate, which either are regulated by the Environmental Protection Agency or are under consideration for regulation, according to Alan Roberson, director of security and regulatory affairs for the American Water Works Association.

Roberson made his remarks during a Webcast sponsored by AWWA, which considered pharmaceuticals, such as prescription and nonprescription drugs, and other contaminants such as personal care products, including shampoo and fragrances.

EPA set a standard for disinfection byproducts in 1998, and is scheduled to issue the Stage 2 Disinfection Byproducts Rule at the end of 2005, he said (40 C.F.R. § 141.64).

Disinfection byproducts, which are formed when organic material reacts with a disinfectant such as chlorine, may be linked to miscarriages and other health problems.

**Atrazine Standard Set in 1991.** A standard for the herbicide atrazine was set in 1991 at 3 parts per billion for atrazine in drinking water, Roberson said (40 C.F.R. § 141.61). Although a 2002 EPA risk review found atrazine probably is not a human carcinogen, it was shown to be a possible endocrine disruptor.

Although perchlorate is not yet regulated, new information could spur EPA action on that contaminant, he said. Perchlorate is linked to thyroid disease.

Pharmaceuticals traditionally have not been considered contaminants and have not been monitored.

Although research on the health effects of these newly recognized contaminants is in the early stages, some studies are showing they might disrupt the endocrine system in wildlife, according to the U.S. Geological Survey.

Roberson said EPA's regulatory schedule for screening and testing the three contaminants in not yet clear. If further review is warranted, he said, it would probably lead to more frequent monitoring, at a higher cost, for drinking water utilities.

**Geological Survey Investigation.** To better understand the effects of pharmaceuticals in the environment, the USGS is studying the source, occurrence, and movement of the compounds, and their effect on the ecology, according to Dana Kolpin, a research hydrologist at USGS.

Kolpin said USGS has detected 158 compounds in water with a wide variety of uses, including prescription and nonprescription drugs, caffeine, and DEET.

USGS has said that most endocrine disruptors have been found at low concentrations in water and that some can survive drinking water and wastewater treatment. Kolpin said USGS has developed ways to measure small concentrations of pharmaceuticals and most have been found at low levels.

"Our ability to measure contaminants currently exceeds our understanding of their environmental effects," he said.

**Rapid Evolution Predicted.** On May 2, Ed Furlong, a research chemist with USGS, told BNA that the organization's research was probably just touching on a small fraction of the total number of pharmaceuticals in the environment.

To date, there is little data to determine whether there are human and ecosystem effects, he said.

"We're in the beginning stages of trying to understand transport, fate, and effect of pharmaceuticals," Furlong said.

However, "understanding will probably evolve fairly rapidly because people have done similar kinds of work for pesticides, and many of the compounds we are looking at have some chemical relationship to pesticides," he said.

By Patricia Ware

*Discharge Permits*

## EPA Says Permits Needed for Communities That Send Wastewater for Outside Treatment

Communities that send their wastewater to a centralized location outside their jurisdiction for treatment should apply for a Clean Water Act permit to ensure their discharges are covered in the event of a sewer spill, Environmental Protection Agency officials said May 2.

Officials from EPA's Office of Wastewater Management addressed a meeting of the National Association of Clean Water Agencies about a draft "fact sheet" on sanitary sewer overflows (SSOs) that was distributed for review to state regulators in March.

The Clean Water Act prohibits discharges to rivers, lakes, and streams in the absence of a National Pollutant Discharge Elimination System (NPDES) permit.

"We want to get the message out that if they have an SSO that discharges to waters of the United States, or [has] the potential to discharge to waters of the U.S., that they have a duty to submit a permit application and be subject to the NPDES permit program," said Kevin Weiss, the SSO program manager at EPA.

Members of NACWA, formerly called the Association of Metropolitan Sewerage Agencies, questioned how the document would apply to "satellite collection systems." These generally are small communities that do not own or operate their own wastewater treatment plants, but collect stormwater and wastewater and send it to a neighboring community or regional sewer district for treatment.

Operators of the centralized facilities that treat this imported wastewater have maintained they should not be liable for sewer overflows and other potential Clean Water Act violations in satellite communities because they have no legal authority to address the underlying issues of infrastructure or management outside their jurisdiction.

**States Reluctant to Issue Permits.** Some states have been reluctant to issue permits to satellite systems because it would significantly increase the number of permits and state resources are already limited. In some

cases, a regional sewer authority may have dozens of satellite communities as customers, many of which are small and have limited resources, one official said.

"Who are you going to come after in an overflow?" Ray Orvin, executive director of the Western Carolina Regional Sewer Authority, asked the agency officials. His system operates 12 treatment plants that serve 400,000 people in four counties in the Greenville, S.C., area.

Some states do not think they have the legal authority to issue permits to satellite systems, said Lisa Hollander, assistant general counsel for the Northeast Ohio Regional Sewer District.

Weiss said EPA would make case-by-case determinations of whether the operator of the publicly owned treatment works or the satellite community would be liable in the event of a sewer overflow.

Steve Sweeney, an attorney in the EPA Office of General Counsel, said that if enforcement officials think "satellite communities need to do something to effectuate the remedy, these communities would be brought in as indispensible parties."

The draft fact sheet clarifies permit conditions. Specifically, facilities with permits must:

- notify the permitting authority in the event of a sewer overflow;
- provide a written report within five days of learning of an overflow;
- establish a process for notifying third parties of overflows that could endanger health because of the likelihood of human exposure;
- maintain records of overflows; and
- properly operate and maintain their facilities in accordance with a specified program, such as the capacity, management, operation, and maintenance.

**Satellite Communities Said to Lack Incentive.** One municipal official said satellite communities do not have an incentive to apply for a permit. If they obtain permit coverage and have an overflow, they would be subject to an enforcement action for violating the permit, including penalties.

If there is an overflow without a permit, the satellite community most likely would be part of a larger consent order negotiated after an enforcement action against the system as a whole. Such a negotiation could take 10 years, but the cost may be spread more broadly.

Clyde Wilbur, an engineering consultant, asked whether satellite communities that obtain permits would be allowed to participate in negotiations to resolve enforcement actions resulting from an overflow.

He has done work for the Allegheny County Sanitation Authority (ALCOSAN), which serves about 800,000 people in 82 communities in the Pittsburgh area.

"We don't interpret the fact sheet to mean that during enforcement cases, you should invite municipal satellites to discuss the remedy for the permittee," Weiss said, adding that EPA officials recognize the complexity of dealing with satellite systems.

Linda Boornazian, director of the permits division in the EPA Office of Wastewater Management, said the draft fact sheet was only intended to pull out and clarify issues involving SSOs that do not need to be addressed through a formal rulemaking.

"In the fact sheet, we didn't take on the whole satellite issue," she said. "We just want to reiterate that you can't discharge without a permit."

**Treatment Officials Need to Be Involved.** Several NACWA officials said EPA should have treatment officials involved in the discussions with states over the fact sheet.

"If permits are required, a POTW owner absolutely has to be at the table," said Donnie Wheeler, general manager of the Hampton Roads (Va.) Sanitation District. "There is the very tortured issue of liability involved with SSOs. Hampton Roads is incurring liability because we think it is in the best interest of the communities we serve."

Hollander said the standards are the primary issue with permitting satellite communities.

"Unless you have a consistent standard, you can't explain to the satellite community what is expected of it," she said.

Gordon Garner, an engineering consultant with CH2M Hill in Kentucky, said the fact sheet is merely taking away from what he said is the real issue, which is the lack of a consistent, national policy for dealing with sewer overflows.

BY SUSAN BRUNINGA

*Enforcement*

## Former Delaware Official Sentenced For Wastewater Discharges Into Wetlands

PHILADELPHIA—A federal court in Wilmington, Del., sentenced a former manager in Delaware's natural resources agency to six months in prison and two years probation for illegally discharging polluted wastewater into wetlands, the Environmental Protection Agency announced April 28 (*United States v. Daisey*, D. Del., No. 04-CR-134, 4/28/05).

William Daisey, the former chief of operations for the Delaware Department of Natural Resources and Environmental Control (DNREC) dredging facility in Lewes, Del., was sentenced in U.S. District Court for the District of Delaware after pleading guilty in January to a criminal violation of the Clean Water Act (36 ER 178, 01/28/05).

Daisey admitted that from January 2000 until April 2001, he regularly directed a DNREC employee to discharge wastewater contaminated with hydrocarbons and other chemicals associated with used oil and antifreeze into a sump pit, from which the water was pumped through an underground pipe into nearby wetlands, according to EPA.

Daisey was charged with knowingly discharging pollutants without a required Clean Water Act permit.

The DNREC facility in Lewes is used for docking and maintaining dredge boats operated by the state and for warehousing supplies, chemicals, and equipment used by beach replenishment crews.

After an EPA search of the facility in July 2003, DNREC conducted an EPA-supervised cleanup at a cost of about $325,000, removing two tons of hazardous and nonhazardous waste that had been stored or disposed on the site, EPA said.

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