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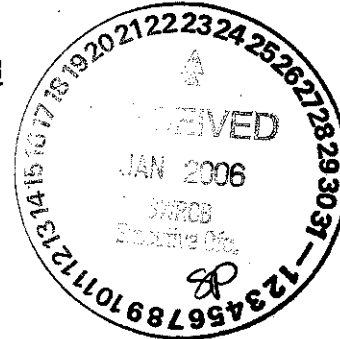
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SSO Hearing: 2/8/06

January 23, 2006

By Fax and Certified Mail

Selica Potter, Acting Clerk to the Board
State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
Sacramento, CA 95814
Fax: (916) 341-5620



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

Dear Ms. Potter:

Hatch & Parent serves as general counsel to the Goleta West Sanitary District (“Goleta West”), an independent special district that operates a wastewater collection system located within the County of Santa Barbara. The wastewater collected by Goleta West is delivered to a wastewater treatment plant separately owned and operated by the Goleta Sanitary District. Goleta West itself does not own or operate a wastewater treatment plant and, therefore, does not engage in any discharge of waste as part of its day-to-day operations. Goleta West has an exceptional record of effectively operating and maintaining its collection system for the purpose of minimizing the risk of inadvertent sanitary sewer overflows (“SSOs”).

The purpose of this letter is to provide Goleta West’s comments upon the proposed Statewide General Waste Discharge Requirements for Wastewater Collection System Agencies (“SSO WDRs”) and the related monitoring and reporting program currently under consideration by the State Water Resources Control Board (“State Board”). Goleta West objects to the adoption of the proposed SSO WDRs for the following reasons, as discussed in greater detail below: (1) the State Board lacks legal authority to issue waste discharge requirements to public agencies that do not engage or propose to engage in ongoing controlled discharges of waste as part of their day-to-day operations; (2) the proposed SSO WDRs fail to provide an affirmative defense or other meaningful restriction upon liability for unavoidable SSOs that occur notwithstanding compliance with the numerous requirements of the SSO reduction program; (3) the program mandated by the proposed SSO WDRs would result in a significant expenditure of public funds by all affected wastewater collection system agencies, with no consideration of whether such costs are warranted on a case-by-case basis; and (4) absent the preemption of overlapping Regional Board orders, the adoption of the proposed SSO WDRs will not further the

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objective of implementing a uniform statewide program for SSO prevention and reporting.

The State Board Lacks Legal Authority to Regulate SSOs Pursuant to the California Water Code Waste Discharge Requirements Provisions.

The draft SSO WDRs reference California Water Code section 13263 as providing legal authority for the adoption of the proposed SSO reduction program.¹ (See SSO WDRs at pp. 3, 5.) In relevant part, section 13263 authorizes the State Board and the Regional Water Quality Control Boards ("Regional Boards") to prescribe waste discharge requirements "as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge . . ." (Cal. Water Code § 13263(a) (emphasis added).) Accordingly, the plain language of the statute restricts the State Board's authority to issue waste discharge requirements to those instances when there is an "existing discharge" or a "proposed discharge" of waste.

The State Board has previously held that the regulatory authority derived from the Water Code's waste discharge requirements provisions is limited, stating: "The language of Water Code Sections 13260 and 13263 suggests that [waste discharge requirements] are applicable to proposed or current controlled discharges, as opposed to past discharges." (See State Board Order No. WQ 96-2, 1996 WL 101751 at *3 (emphasis added).) Thus, in the State Board's own view, waste discharge requirements are intended to regulate only those discharges that are (1) ongoing or proposed, and (2) controlled – such as those that typically occur in the normal course of a particular permittee's operations. In contrast, waste discharge requirements are *not* intended to regulate wholly past discharges nor, by inference, unintended (i.e., non-proposed and uncontrolled) though remotely possible future discharges.

SSOs do not constitute "proposed or current controlled discharges," and thus are not within the purview of section 13263. By their very nature, SSOs are neither ongoing, proposed, or controlled. Instead, they are temporary, unintended, and uncontrolled events. In the case of Goleta West – and likely numerous other targeted permittees – there are no ongoing or proposed SSOs that would justify the issuance of waste discharge requirements pursuant to section 13263. Furthermore, in accordance with the State Board's own prior holding, the regulatory authority granted pursuant to section 13263 is not triggered by any SSO events that may have occurred in the past. Accordingly, section 13263 does not provide the State Board with legal authority to enact the proposed SSO reduction program.

Reinforcing the position that the above statutory framework does not apply to unintended, accidental discharges such as SSOs, the Legislature enacted provisions establishing separate reporting and response requirements for such discharges. (See Cal. Water Code §§ 13193 (requiring wastewater collection system agencies to report SSO events utilizing a uniform spill report developed by the State Board), 13271 (mandating notification of Office of Emergency Services under specified circumstances).) To view SSOs as falling within the purview of sections 13260 and 13263 would render these later-enacted provisions redundant and meaningless. (See *California Teachers Assoc. v. Governing Board of Rialto Unified Sch. Dist.*

¹ All references herein are to the California Water Code unless otherwise noted.

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(1997) 14 Cal.4th 627, 634 (In enacting legislation, it cannot be presumed that the Legislature "engaged in an idle act or enacted a superfluous statutory provision.")

In light of the foregoing, it is evident that SSOs are beyond the purview of section 13263. Because the State Board has cited no other statutory authority to support its adoption of the proposed SSO reduction program, the proposed SSO WDRs must be rejected as outside the restricted scope of the State Board's regulatory authority.

The SSO Reduction Program Must Include a Meaningful Defense Against Liability for Unavoidable SSOs.

The findings set forth in the draft SSO WDRs acknowledge that there are numerous potential causes of SSOs, many of which are beyond the reasonable control of wastewater collection system operators. Even the most well-designed, well-managed, and well-maintained wastewater collection system may experience an SSO from time to time as a result of uncontrollable circumstances, including extreme weather conditions or other natural causes.

Despite the acknowledged risk of unavoidable SSOs, the draft SSO WDRs do not contain a meaningful affirmative defense or other similar provision designed to protect an enrollee from excessive penalties in the event of an overflow that could not have been avoided despite the agency's compliance with the requirements of the SSO reduction program. Instead, the draft SSO WDRs specify various factors to be considered by the State and/or Regional Boards in determining the appropriate amount of civil liability in any given case. (See SSO WDRs at pp. 7-8.) These provisions, while providing loose guidance regarding the exercise of the State and Regional Boards' enforcement discretion, do not meaningfully restrict such discretion or limit an enrollee's potential liability for unavoidable discharges. The provisions must be revised to ensure that good actors are not penalized for unavoidable events.

While an appropriate penalty may be an issue properly addressed on a case-by-case basis, the imposition of potentially substantial monetary fines in the event of an unavoidable, inadvertent SSO would not further the interests sought to be advanced by the proposed SSO reduction program. The limited public funds available to support the effective design, management, operation, and maintenance of wastewater collection systems are undeniably best expended to further such ends. Furthermore, those funds necessary for the timely and thorough cleanup of any discharges, whether inadvertent or otherwise, must similarly be made available for such purposes. Providing the Regional Boards with unbridled discretion to impose excessive monetary penalties in the event of an inadvertent, unavoidable SSO serves no purpose reasonably related to the overall objective of reducing preventable SSOs. Accordingly, at a minimum, the proposed SSO WDRs must be revised to ensure that, in the event of unavoidable SSO, the resulting costs incurred by the implicated wastewater collection agency shall be no more than that amount required to contain and clean up the discharge and to mitigate any impacts caused thereby.

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Compliance with the Proposed SSO WDRs Will Require a Substantial and Unwarranted Expenditure of Public Funds.

The SSO reduction program mandated by the draft SSO WDRs is unprecedented in scope and will require a significant expenditure of local ratepayer dollars. More importantly, there has been no demonstrated need for the implementation of such a program on an industry-wide basis. Should the State Board elect to enact the proposed SSO WDRs, numerous wastewater collection agencies, such as Goleta West, that have a track record of responsible system operation and maintenance and effective SSO prevention will be saddled with additional unnecessary costs, which in turn will have a direct and substantial effect upon customer rates.

Staff estimates that the monthly compliance cost per household would be roughly six dollars. (See SSO WDRs Draft Fact Sheet dated 12/5/05 ("Draft Fact Sheet") at p. 9.) Notwithstanding staff's assertion that this amount represents "a very manageable sum," it is quite evident that the exact opposite is true – such a charge would result in an increase in monthly service fees of over 40% for single family residence ratepayers within the Goleta West service area. Such a substantial increase in monthly wastewater service charges is anything but "manageable." There is no reasonable basis for the State Board to impose such additional costs upon ratepayers when an agency's existing management, operation, and maintenance practices effectively address the identified objectives of the proposed SSO reduction program.

If Adopted, the Proposed Statewide SSO Reduction Program Must Preempt Duplicative and/or Inconsistent Regional Board Waste Discharge Requirements.

Staff's stated intent in pursuing the enactment of a statewide SSO reduction program is "to have one statewide regulatory mechanism that lays out the foundation for consistent collection system management requirements and SSO reporting." (Draft Fact Sheet at p. 7.) Similarly, the draft findings set forth in the proposed SSO WDRs state that the enactment of a statewide program will "[p]rovide for a unified statewide approach for the reporting and database tracking of SSOs[, e]stablish consistent and uniform requirements for SSMP development and implementation[, and p]rovide statewide consistency in [SSO] reporting." (SSO WDRs at p. 3.)

Notwithstanding the purported need for a uniform approach to SSO reduction and reporting, the draft SSO WDRs propose to permit more stringent Regional Board requirements in "some instances." (See *id.* at pp. 2-3.) However, the draft order fails to specify those "instances" that would warrant such duplicative regulation by the Regional Boards, whereby the Regional Boards are presumably given unbridled discretion to issue separate waste discharge requirements as they see fit. Such a provision is far too broad and far too vague to meaningfully protect potential permittees from the risk of duplicative, inconsistent, and/or overburdensome regulation by the Regional Boards. More importantly, such a provision runs directly contrary to the overall objective of eliminating the confusion inherent in overlapping, potentially inconsistent regulatory requirements regarding wastewater collection system management and SSO reporting through the creation of a uniform statewide regulatory framework.

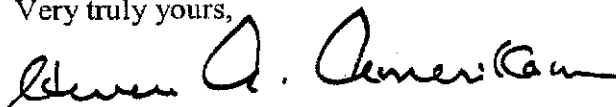
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Given the potential for confusing and inconsistent regulatory requirements, the proposed SSO WDRs should be revised to include a provision displacing any Regional Board orders addressing the same subject matter. At a minimum, should the State Board desire to permit the issuance of overlapping Regional Board requirements in certain limited circumstances, the State Board must specifically identify those circumstances that would warrant such regulation by the Regional Boards and enumerate specific findings that must be made by the Regional Boards to support the issuance of such overlapping regulation. Absent such restrictions upon the Regional Boards' authority to independently regulate SSOs, the Regional Boards may impose overlapping requirements absent any showing of necessity and permittees' compliance obligations will remain unclear and inconsistent.

For the reasons set forth herein, Goleta West formally objects to the adoption of the proposed SSO WDRs. Goleta West reserves the right to submit additional comments regarding the draft SSO WDRs at or prior to any State Board hearing on the matter.

Should you have any questions regarding the foregoing, please do not hesitate to contact me at (805) 963-7000. Thank you for your attention to this matter.

Very truly yours,



Steven A. Amerikaner
For HATCH & PARENT
A Law Corporation

cc: Board of Directors, Goleta West Sanitary District
Mark Nation, General Manager, Goleta West Sanitary District

