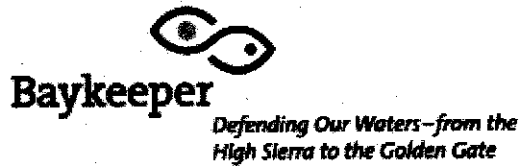


5/2/06 - Item 7
SSORP
deadline: 4/24/06



San Luis Obispo
COA Program



ENVIRONMENTAL ADVOCATES
ATTORNEYS AT LAW

Song Her, Clerk to the Board
State Water Resources Control Board
California State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
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Email: commentletters@waterboards.ca.gov

April 21, 2006

Re: COMMENT LETTER - 5/3/06 BOARD MEETING - SSORP

Dear State Water Resources Control Board:

This letter provides comments on the State Water Resources Control Board ("State Board")'s March 24, 2006 Draft Statewide General WDR for Wastewater Collection Agencies



Song Her, Clerk to the Board

State Water Resources Control Board

COMMENT LETTER - 5/3/06 BOARD MEETING - SSORP

April 21, 2006

("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.

The Water Quality Groups previously provided comments on earlier drafts of the WDR in letters dated January 19, 2006 and February 22, 2006. We incorporate those comment letters by reference.

As we previously noted, 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 and its inclusion of a prohibition on SSOs. 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.

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Need for NPDES Permit

The most serious shortcoming of the current proposed WDR continues to be that is not also styled to be a National Pollutant Discharge Elimination System (NPDES) Permit under the federal Clean Water Act (CWA). As noted in our previous comments, we see three key problems with failing to make the WDR an NPDES Permit: one, this will hamper effective enforcement of the WDR. 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. The State Board and Regional Boards lack the resources to be the sole, effective enforcer of the WDR. Moreover, eliminating EPA and citizen enforcement of water pollution-related violations is contrary to the intent of Congress in enacting the CWA. *E.g., 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)). Two, to retain its NPDES program authorization, the State Board and Regional Water Quality Control Boards must issue NPDES permits to all point sources that discharge pollutants to waters of the United States in California. The Water Quality Groups are very concerned with establishing the precedent that a major category of point source dischargers, municipal sewage collection systems, are in effect being exempted from NPDES permit regulation for their SSOs. No doubt other dischargers will in the future lobby the State Board for similar exemption. Three, while 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, the State Board would in fact be doing a disservice to POTWs and subjecting them to added CWA liability for failure to meet the duty imposed by 40 C.F.R. § 122.21(a) to apply and obtain NPDES permit authorization.

SSO Prohibition

We support the addition of a prohibition on SSOs to the WDR. The prohibition provision added as section C. to the WDR should be modified, however. The provision only prohibits SSOs that reach waters of the United States and that create nuisances, whereas many existing NPDES permits and WDRs for POTWs have more appropriate, broader prohibitions on all SSOs from collection systems. The State Board has no justification for backsliding from these existing NPDES permits and WDRs, which create an appropriate bright line rule that all SSOs are prohibited. Such a bright line rule is necessary to avoid protracted litigation, and delays in enforcement resolution, over whether given SSOs reached waters of the United States (a complex legal concept that continues to evolve with the case law) or created a nuisance. All SSOs are indicative of collection system problems and all SSOs pose risks to human health and/or the environment—making a prohibition on all SSOs appropriate.

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SSMP Time Schedules

As before, we object that the Sewer System Management Plan Time Schedules provided for in the WDR are unduly lenient. The WDR 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 than 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.

Exemption for Collection Systems Under One Mile in Length

The current draft of the WDR adds a new exemption from regulation for collection systems under one mile in length. The Water Quality Groups oppose this blanket, and in our view unlawful, exemption. *All* point source discharges of pollutants to waters of the United States must be regulated under the CWA and even very small POTWs are capable of such discharges (for example, Avalon, California). Accordingly, the State Board cannot lawfully categorically exempt small collection systems from regulation. *See, e.g., Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1490-91 (9th Cir. 1987), *vacated on other grounds*, 108 S. Ct. 1102-03 (1988), *judgment reinstated*, 853 F.2d 667 (9th Cir. 1988); *Connecticut Fund for the Environment v. Upjohn Co.*, 660 F. Supp. 1397, 1416 (D. Conn. 1987) (court rejected defendant's argument that no violation occurred "when defendant discharged only a de minimis amount of wastewater into the river. The FWPCA does not distinguish between small discharges and large discharges. To the extent, in whatever amount of wastewater was discharged to the river, defendant exceeded the effluent limitations on a given day, a violation occurred.").

Reporting

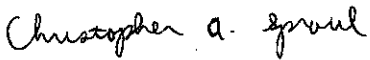
The current Monitoring and Reporting Program for the WDR would require POTWs to report their view of the legal conclusion as to whether an SSO reached waters of the United States. The Water Quality Groups urge the State Board to modify this to simply require POTWs to report factual matters, such as whether the SSO reached a natural or artificial surface water body or waterway, drainage ditch, storm drain, etc. POTW operators should not be called upon to make legal determinations about whether a given water body or waterway is a water of the United States in their SSO reporting.

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We further urge the State Board to make the other editorial and substantive improvements to the WDR suggested in our previous comment letters.

Thank you for consideration of our comments.

Sincerely,

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<p>Mike Sandler Program Coordinator Community Clean Water Institute 6741 Sebastopol Ave. Suite 140 Sebastopol, CA 95472 (707) 824-4370</p>	<p>Heather Hoecherl Heal the Bay 3220 Nebraska Avenue Santa Monica, CA 90404 (310) 453-0395 hhoecherl@HealTheBay.org</p>	<p>Danielle Fugere Bluewater Network 311 California Street, Suite 510 San Francisco, CA 94104 (415) 544-0790 ext. 15 DFugere@aol.com</p>
<p>Alan Levine, Director Coast Action Group P.O. Box 215 Point Arena, CA 95468 alevine@mcn.org</p>	<p>Mati Waiya, Founder and Executive Director Wishtoyo Foundation Ventura Coastkeeper 1591 Spinnaker Dr, Suite 203 Ventura, CA 93001 (805) 658-1120 email: info@wishtoyo.org</p>	<p>Garry Brown Executive Director Orange County Coastkeeper 441 Old Newport Blvd Suite 103 Newport Beach, CA 92663 (949) 723-5424 garry@coastkeeper.org</p>
<p>Tiffany Schauer Our Children's Earth Foundation 100 First St., Suite 100-367 San Francisco, CA 94105 (415) 896-5289</p>	<p>Bruce Reznik Executive Director San Diego Coastkeeper 2924 Emerson Street, Suite 220 San Diego CA 92106 (619) 758-7743 bruce@sdcoastkeeper.org</p>	<p>Nancy Stoner Natural Resources Defense Counsel New York Ave., NW, Suite 400, Washington, DC 20005 202-289-6868 email: nstoner@nrdc.org</p>

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**WASTEWATER PROGRAM
 FY 2005-2006 WDR EXPENDITURES
 Task 128
 AS OF FEBRUARY 2006
 67% OF FISCAL YEAR**

	TASK 128 (SB 390 Ag Drain) WDPE				TOTAL
Region 1	-	-	-	-	-
Region 2	-	-	-	-	-
Region 3	149,116	132,447	89%	149,116	132,447
Region 4	147,584	87,633	59%	147,584	87,633
Region 5	1,106,362	956,708	86%	1,106,362	956,708
Region 6					
Region 7					
Region 8					
Region 9					
EXEC					
OIT					
OCC					
DAS	110,348	72,098	65%	110,348	72,098
DWQ	290,411	242,877	84%	290,411	242,877
Total	1,803,821	1,491,763	83%	1,803,821	1,491,763