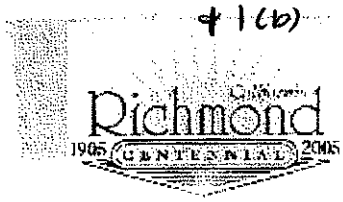
5/2/06 Item 7
SSORP
deadline: 4/24/06
w/ Attachment 1(a)
+ 1(b)

VEOLIA WATER



April 24, 2006

Ms. Tam Doduc, Chair & Members
State Water Resources Control Board
Executive Office, 24th Floor
1001 I Street
Sacramento, CA 95814
Attn: Song Her, Clerk to the Board

SUBJECT: **COMMENT LETTER – 5/2/06 BOARD MEETING – SSO WDR, Item 7**

Dear Chair Doduc and Members of the State Water Board:

The West County Wastewater District ("WCWD"), the City of Richmond ("City") and Veolia Water North America LLC ("Veolia") appreciate the opportunity to provide comments regarding the revised proposed waste discharge requirements ("WDR") applicable to sanitary sewer collection systems in California. As each of the above-named entities currently own and/or operate sanitary sewer collection systems, we have a sincere and continuing interest in the future regulation of this vital infrastructure.

To supplement the previous comments provided by WCWD, we make the following comments on the proposed revisions to the SSO WDR:

1) **The Proposed WDR are unnecessary.**

Because the proposed WDR now reflects the State Board's contention that SSOs are unlawful with the inclusion of an express prohibition, this demonstrates that WDR is not necessary. A Sewer System Management Program ("SSMP"), as the WDR is also requiring, could be and *should be* accomplished through a Water Code section 13267 program instead of this proposed WDR. This is the current program in the Bay Area Region. *See* SSMP Letter (July 2005) attached as Exhibit A. A similar program should be implemented by the State Board in lieu of a WDR if the proposal is to merely prohibit spills, not provide any affirmative defenses in a permit adopted either under State law or the Clean Water Act, and to mandate the development and implementation of SSMPs. Such a 13267 program would produce similar results, namely a reduction in SSOs, and would be enforceable under Water Code 13268. A WDR is not necessary since, with the inclusion of the two added prohibitions, effectively no discharge to land or waters of the state is being authorized, and spills to waters of the U.S. without a permit could be challenged under other legal mechanisms as is currently being done by the State, U.S. EPA, and citizens' groups around the state. This proposal just adds another layer of bureaucracy and cost without resultant benefit.

2) **The WDR represents a new unfunded State mandate.**

The proposed WDR mandates a new program or higher level of service and, thus, is a reimbursable state-mandated program. California Constitution, article XIII.B., section 6. "Costs mandated by the State" are any costs "required as a result of legislation or an executive order." Cal. Gov't. Code §17514. Although the definition of "executive order" specifically excludes "any order, plan, requirement, rule or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code" (Cal. Gov't. Code §17516), the language of this section effectively denies local governments reimbursement from the state for costs mandated by executive orders, and at least one California Court has determined that such restriction unduly narrows the voter's intent. *County of Los Angeles v. State of California, et al,* Los Angeles County Superior Court, Case No. BS 089 769, Ruling on Submitted Matter at pg. 7 (May 9, 2005)(attached herein as Exhibit B). According to that Court, "[t]here is no indication on the factor if section 6 of article XIII.B. that the electorate intended to make an exception for mandates flowing out of Division 7 of the Water Code. On the contrary, section 6 of article XII.B. clearly requires subvention for *any* state mandate, including one authorized by the Water Code." *Id.* "Nothing in the initiative or the voter pamphlet regarding Proposition 4 mentions the State Board or Regional Board or special exceptions for them." In fact, the ballot pamphlet states "this measure "WILL NOT allow the state government to force programs on local governments without the state paying for them." *Ibid.* (emphasis in original).

The Court concluded that "section 17516 unduly restricts Petitioners' constitutional right against involuntary imposition of costs under a state mandate authorized by Division 7 of the Water Code by denying the right altogether." *Id.* at pg. 8. Though the Court concluded that the Commission proceeded as required by *statutory* law, it had not proceeded as required by superior constitutional law. Thus, "the question whether petitioners state valid claims for reimbursement must be remanded to the commission," which was ordered to consider petitioners' unfunded mandate claims, related to the permit challenged in the *County of Los Angeles* case, on the merits. *Id.* at pgs. 8-9.[1]

Similar issues arise in the newly proposed program that includes a higher level of service than previously required of sanitary sewer owners and operators. Thus, the SSO WDR proposed constitutes a reimbursable state-mandated program placed on local government by the State within the meaning of article XIII.B., section 6 of the California Constitution.

3) **The Proposed WDR and Prohibitions Therein Fail to Comply with Water Code Requirements.**

a) **Failure to Comply with Water Code sections 13263 and 13241, including an adequate consideration of costs.**

The revised SSO WDR now states that "Any SSO that results in a discharge of untreated wastewater, which creates a nuisance as defined under the California Water Code section

[1] An appeal is currently pending at the Second District Court of Appeal (Case No. B183981). However, until the trial court is expressly overturned, the ruling and underlying legal issue remains viable.

13050(m) is prohibited. Under Water Code section 13050(m), "nuisance" is defined as anything that meets all of the following requirements:

"1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property , so as to interfere with the comfortable enjoyment of life or property.

2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extend of the annoyance or damage inflicted upon individuals may be unequal.

3) Occurs during, or as a result of, the treatment or disposal of wastes."

When issuing WDRs, the Water Boards are required to consider the need to prevent nuisance, along with, but not to the exclusion of, other considerations, and are not required to include the proposed prohibition of nuisance. The State Water Board has failed to undertake a full analysis of the Water Code section 13241 factors, including the cost of compliance with the prohibition against nuisance and the other prohibition of discharge to waters of the U.S.[2] The Cost of Compliance section of the Fact Sheet contains no other 13241 factor considerations besides cost, and even the cost considerations appear to only be the costs of implementing an SSMP, not complying with a prohibition on spills to waters of the U.S. or spills that might constitute a nuisance.

To prove the point, the Fact Sheet at page 11 states that the compliance costs associated with implementing the Santa Ana Regional Water Board's general WDR (*see* Order No. R8-2002-0014, at http://www.waterboards.ca.gov/santaana/pdf/02-14.pdf) were used to estimate the costs for compliance with this permit. However, those costs are not reasonable to use in this context because, as the Fact Sheet states on page 2, 1012 SSOs were reported in the Santa Ana Region and, therefore, the costs do not adequately reflect the costs to comply with the prohibition on SSOs to waters included in the Santa Ana permit. The Santa Ana permit not only includes a narrowing of those spills included in the prohibition, it also includes express affirmative defenses for discharges caused by severe natural conditions, and other facts that are merely enforcement considerations in the proposed statewide permit. The differences between the two WDRs were not quantified and, thus, the estimates included in Appendix B of the proposed statewide WDR are not representative.

For these reasons, the prohibitions should be removed as imposed without adequately complying with the requirements of Water Code section 13263, including the provisions of section 13241 and an adequate consideration of actual costs and economic impact.

b) Failure to be Consistent with Water Code Sections 13193 and 13271.

The California Legislature set up specific legal requirements for sewer system overflow reporting under Water Code sections 13193 and 13271, and Health and Safety Code section 5411.5. The reporting requirements in the proposed SSO WDR do not mirror the requirements of these code sections even though the Legislature has specifically spoken on the extent of the Water Boards' authority in this respect. For example, section 13193 requires that a collection

[2] Although Finding 15 alleges that these considerations were made, there is no evidence included in the Fact Sheet supporting the SSO WDR to support this allegation.

system owner or operator report to the appropriate regional board "within 30 days of the date of becoming aware of the overflow event." Water Code §13193(c). The proposed SSO WDR requires reporting within 3 business days after the enrollee is made aware of the SSO, and a final certified report must be filed within 15 days of concluding SSO response and remediation. The SSO WDR thereby conflicts with the express statutory authority on this issue and must be amended.

In addition, section 13193 limits that ability of the Water Boards to request this information to "a year in which the Legislature has appropriated sufficient funds for this purpose." To the best of our knowledge, this appropriation has not been made, thereby further limiting the Water Boards' authority to request information related to overflow reports.

c) Inconsistency with Water Code section 13000.

The prohibitions contained in the proposed SSO WDR are inconsistent with the Water Code's requirement of reasonableness. Including prohibitions in the WDR, when documents in the record, including the findings of the SSO WDR, demonstrate that it may be impossible to completely eliminate SSOs, is not reasonable. *See* Finding 4 ("Many SSOs are preventable...").

4) The Proposed SSO WDR will not Effectuate a Consistent SSO Program.

One of the stated reasons for the proposed SSO WDR is "to create a robust and rigorous program, which will serve as the basis for consistent and appropriate management and operation of sanitary sewer systems." *See* Draft Fact Sheet at pg. 1. However, the desired consistency will not be realized if regional boards are authorized to enact WDRs or other permits that supersede the SSO WDR or that contain additional, more stringent requirements. *See* Proposed SSO WDR at Finding 11, and Provision D.2.(ii) and (iii). If these provisions are included, it is unclear why a statewide WDR is necessary. Further, the proposed SSO WDR does not state when a requirement can be superseded, or what reasons or evidence would justify doing so.

Instead of the proposed system, the WDR should clearly state that the WDR is the primary regulatory mechanism and exceptions to this rule would be very limited (e.g., compliance orders that could not be amended to reflect the WDR requirements). Similarly, the fact sheet or other guidance to the Regional Board should state that NPDES permits should acknowledge that SSOs are separately regulated by the WDR (but would not incorporate the WDR by reference) and provide that contrary provisions (e.g., overbroad prohibition language related to SSOs) should be removed from NPDES permits and be replaced with the standard provisions applicable to collection systems (i.e., duties to comply, report, and properly operate and maintain). 40 C.F.R. §122.41.

5) Comments on Particular Sections.

a) Finding 1.

It is unclear why systems "greater than one mile in length" and only public entities were chosen as the entities to be regulated, and why private entities' systems of similar length are not being regulated. Without providing adequate justification, this delineation of those regulated appears arbitrary and contrary to state law that regulates all public and private entities. *See e.g.*, Water Code §13193(a)(1)(definition of "collection system owner or operator").

b) **Finding 15.**

This recitation of the 13241 factors is inadequate and without supporting evidence. *Topanga Association for a Scenic Community v. County of Los Angeles,* 11 Cal.3d 506, 515 (1974); *So. California Edison v. SWRCB,* 116 Cal. App.3d 751, 761 (1981). A complete 13241 analysis is required before this WDR can be issued since there are no federal law implications. *City of Burbank v. SWRCB,* 35 Cal. 4th 613, 624-25 (2005).

c) **Finding 16.**

The State Board has not included any legislative history from the Clean Water Act ("CWA") to demonstrate that Congress ever intended secondary treatment requirements to apply to SSOs. Congress intended to cover end-of-treatment process discharges from industries and POTWs and to set up technology-based requirements for these discharges. As evidenced by the need for amendments made in 1987 to the CWA, Congress did not even anticipate coverage of discharges such as storm water or CSOs. 33 U.S.C. §1342(p) and (q). The inclusion of blanket conclusions that point sources of effluent must comply with secondary treatment requirements is not adequately supported in the Fact Sheet or by the law. SSOs could be permitted in an NPDES permit, with only BMPs and without secondary treatment requirements being applied, under a permit shield approach or because numeric secondary treatment requirements are infeasible. 33 U.S.C. §1342(k); 40 C.F.R. §122.44(k)(3).

Furthermore, under the CWA, the State was and is authorized to seek federal funds to address impacts of sanitary sewer overflows where grants to local agencies were not otherwise authorized for this use. 33 U.S.C. §1281(n)(1). The Governor of the affected State was to request such funds, "where correction of such discharges is a major priority for such State." *Id.* If overflows were to be subject to the secondary treatment requirements, grant funds would have been more generally available to local agencies for this purpose.[3] Funds under this section were authorized "upon the request and demonstration of water quality benefits by the Governor of an affected State." 33 U.S.C. §1281(n)(2). In addition, two-thirds of the non-point source grant funding under CWA section 205(j)(1) was to address water quality problems of marine bays and estuaries subject to lower levels of water quality due to impacts of SSOs. 33 U.S.C. §1285(j)(2). Thus, it is arguable that SSOs are not point source discharges at all, but non-point source discharges not subject to the NPDES requirements.

Finally, CWA section 221 authorized EPA to make grants to States, which in turn would then provide grants to municipalities to control sanitary sewer overflows. 33 U.S.C. §1301(a). As recently as Fiscal Year 2003, Congress appropriated $250,000,000 for making grants to municipalities for sanitary sewer controls. 33 U.S.C. §1301(g)(2). Again, if sanitary sewer overflows subject to secondary treatment requirements, such requirements would have had to be in place by July 1, 1977 (or no later than 1988). 33 U.S.C. §1311(b)(1)(B) and (i). Furthermore, had such requirements been clearly applicable to SSOs, it would have been unnecessary for Congress to request a report on the human health and environmental impacts of sanitary sewer overflows by December 31, 2003. *See* Pub. L 106-554, §1(a)(4). The result of this was a technology clearinghouse for "cost-effective and efficient technologies for addressing human health and environmental impacts due to . . . sanitary sewer overflows." *Id.* Such a technology

[3] *See* 33 U.S.C. §1291 (explaining limitations on grant funds for sewage collection systems).

clearinghouse would be unneeded if the CWA required secondary treatment for SSOs.

EPA's report to Congress in 2004, as commissioned by the above, shows that SSOs are really not that large of a water quality problem when compared to CSOs or stormwater discharges.[4] More than half of the reported SSOs were less than 1,000 gallons (below California's reportable quantity) and more than 80 percent were less than 10,000 gallons. EPA Report No.833-R-04-001 at pg . 4-25 (Aug. 2004). SSOs, as a high end estimate, represent less than 1% of the average municipal discharge volume as compared with 51% for treated wastewater, 45% for urban storm water runoff, and 4% for CSOs. *Id.* at pg. 4-29, Table 4.9 (and footnote c). Similarly, SSOs are less than 1% of the BOD and TSS load, and 2% of the fecal coliform loading. *Ibid.* at Tables 4.11 and 4.12. Further, EPA's report clearly shows that not all SSOs would cause water quality standards violations and, therefore, would not necessarily even be a permit violation if the permit required no violations of water quality standards. *Id.* at pg. H-3, Table H.1.

Because the Findings included in the proposed statewide WDR may be premised on improper assumptions and legal analysis, the WDR should be revised prior to adoption to remove or correct these improprieties.

d) Finding 20.

Permitting is a defined "project" under the California Environmental Quality Act ("CEQA"). The CEQA exemptions relied upon in Finding 20 of the proposed WDR do not apply in all cases and, therefore, CEQA compliance is required before adoption of the WDR. For example, Cal. Code Regs., title 14, section 15308 expressly excludes "construction activities," which will be necessary for any SSMP adopted under the requirements of this WDR. Further, section 15301 only applies where there is "negligible or no expansion of an existing use." Where collection system capacity must be increased, pipes resized larger, and additional lines added to accommodate flows to avoid spills, this is an expansion of the use and this exemption would not apply. Further, section 15263, although not referenced, also would not apply as this is not a Clean Water Act permit. Since none of the exemptions cited apply, CEQA compliance is required prior to adoption of this WDR.

e) Provision A.1.

This definition of SSO is overbroad and beyond the authority of the Water Boards to regulate "discharges that could affect the quality of state waters." *See* Fact Sheet at pg. 3. First, there is no volume restriction such that one drop would still qualify as an SSO, even though this would not affect water quality. Second, it is not clear that the Water Boards have regulatory authority over wastewater backups into buildings as there are no surface water or ground water implications for such a discharge such that it "could affect the quality of the waters of the state" and require a WDR. Water Code §13260(a)(1). In addition, backups into buildings and onto private property are often due to private laterals that are not being regulated by this WDR. Therefore, this definition is overly broad and should be narrowed.

f) Provisions A.2. and 3.

[4] Even the WDR fact sheet recognizes that spill volumes have decreased dramatically in some parts of this state. *See* Fact Sheet at pg. 2.

Since there is no justification for limiting regulation to public entities with more than one-mile of pipes, these definitions should be amended to apply to all sanitary sewer systems. As such, the WDR must be revised accordingly, and renoticed to make sure all systems to be covered have the ability to comment.

g) Provision A.5.

The inclusion of "any volume" of wastewater ignores statutory reportable quantities. The WDR should have an exclusion for de minimis overflows of less than 100 gallons.

h) Provisions C.1 and 2.

An adequate justification and analysis of the 13241 factors has not been performed on these prohibitions. Without compliance with Water Code section 13263, these prohibitions are unlawful and should be removed.

i) Provision D. 1.

This language prejudges whether something is a violation. The language should state that "Any noncompliance with this Order may constitutes a violation of the California Water Code . . ." Several defenses exist in the Water Code that would make such prejudgment inappropriate.

j) Provision D.2.

These provisions should be modified or removed. Reference to the Clean Water Act is unnecessary as this is not an NPDES permit. In addition, as stated above, allowing other WDRs or orders to be more stringent eliminates the purpose of this WDR, which was to have a uniform program across the state. If every regional board can do what it wants so long as the requirements are more stringent, then nothing has been accomplished through this regulatory effort.

k) Provision D.3.

This should be the driving regulatory requirement – to eliminate SSOs to the extent feasible. Language elsewhere in the permit essentially recognizes that not all SSOs are preventable. Therefore, this language, as opposed to a harsh and unattainable prohibition, should be the keystone of the WDR.

l) Provision D.6.

It still remains unclear why the enforcement discretion cannot be labeled an affirmative defense. The Santa Ana WDR (Order No. R8-2002-0014) contains affirmative defense language and was duly approved. This WDR should be amended to contain the same or similar language in order to meet the mandate of reasonable water quality regulation in this state-only permit, as required by Water Code section 13000.

Inclusion of affirmative defense language will not affect the ability to file citizen suits as state law does not authorize third party enforcement of WDRs. Similarly, since this WDR is not being proposed as an NPDES permit, there is no justification for *not* including affirmative defenses where compliance is impossible or infeasible since there is no issue related to running afoul of

federal law. This is merely a policy question for the Water Boards for which we request reconsideration prior to adoption.

m) Provisions D.6.(v), D. 9. and D.10

These provisions discussing "adequate treatment facilities," "adequate capacity," and newly added language related to "appropriate design capacity to reasonably prevent SSOs" are vague and ambiguous and will lead to much aggravation in the future over what is meant by these terms. Perhaps inclusion of a clause stating "defined in accordance with recognized engineering principles" would aid in the clarity. This same clause should be applied in Provision D.10. when discussing "adequate capacity."

The term "adequate resources" in Provision D.9. is again vague and there doesn't appear to be any consideration for a community's size, median income, or some other measure of ability to pay. These vague terms must be defined more carefully before the WDR is adopted.

n) Provision D.11.

This section references an "Enrollee's elected board." However, not all Enrollees, as defined, have "boards." Some state and federal agencies lack boards as do municipalities, which generally have city councils. This language should be amended.

Additionally, the requirement that SSMPs be "approved" is unclear. Board or council members may not possess the necessary expertise on SSOs and wastewater systems, so it is unclear what approved really means. Does it mean the entity will adequately fund the program? Does it mean the board is certifying the statements and claims in the SSMP? We suggest that the word "acknowledged" or some other verb would be more appropriate in this case.

o) Provision D.13.

The first line of this provision states that there are "mandatory" elements of the SSMP. However, the next sentence states that if not appropriate or applicable, certain elements need not be addressed. Thus, the use of the word "mandatory" in the first sentence is inappropriate and should be changed back to "essential" as originally proposed.

p) Provision G.1.

This provision should be limited to "relevant information" requested by the Water Boards. Otherwise, the provision is overbroad and potentially burdensome.

q) Fact Sheet Comments

- **Pg. 3** – The text in the first paragraph of the "NPDES vs. WDR" section should be amended to read "Since not all SSOs result in a point source discharge to surface water…"
- **Pg. 3** – Fourth to the last line contains a typographical error – "are of SSOs" should be "area of SSOs"
- **Pg. 4** – The first paragraph of the "Prohibition of Discharge" section should be amended as follows: "…Point source discharges from POTWs must achieve. . . Thus, an SSO that

results in an unpermitted point source ~~the~~ discharge of raw sewage to surface waters is prohibited under the Clean Water Act."

- **Pg. 8, first full paragraph –** The Water Board justifies not adding private sewer systems because this regulation would be "unmanageable and impractical." This is not the test for whether or not something is regulated. A WDR is required for any person discharging "waste . . . that could affect the quality of the waters of the state, other than into a community sewer system" unless waived under section 13269. Water Code §13260(a)(1) and (b). Since a waiver is not being proposed, the WDR should cover all persons likely to discharge SSOs that could affect the quality of the waters of the state.

r) Monitoring and Reporting Program Comments

- **First Page, first paragraph -** The second sentence states that "Revisions to this MRP may be made at any time by the Executive Director." It is not clear that the Executive Director has been provided with legal, delegated authority to amend WDRs. Absent clear authorization, this provision is unlawful.

- **SSO Spill Reporting Timeframes –** As specified above, many of these timeframes are contrary to express statutory provisions related to reporting of sewage spills. Since these provisions are contrary to law, these provisions must be amended accordingly.

- **Confusion related to Private Lateral SSOs -** On page 2 of the MRP, it first states in paragraph 6, that "Private Lateral SSOs may be reported..." Then, in the next section related to "mandatory information," the MRP includes at paragraph 9, reference to private lateral SSOs. This information should NOT be mandatory as for many collection systems, private laterals are beyond the jurisdiction of the system to control. This inconsistency must be corrected to remove private lateral SSOs from the mandatory reporting requirements.

- **Reporting to Other Agencies –** The section at the bottom of page 3 of the MRP is confusing. All of the relevant reporting responsibilities should be listed here and additional regional reporting requirements should be replaced for consistency statewide.

- **Recordkeeping –** The requirement on page 4 of the MRP has been changed to require records to be kept for 5 years, instead of 3 years. No justification for this change has been provided and this requirement seems inconsistent with the three year statute of limitation for enforcement under state law. C.C.P. §338(i).

- **Customer Complaints -** The requirement at page 5 of the MRP to include a requirement that collection systems maintain a "list and description of complaints for customers or others from the previous 5 years." This requirement is overbroad as customer complaints may have nothing to with SSOs. Each of these requirements in section B.5. must expressly be limited to collection systems and SSO-related issues.

- **Applicability –** The MRP states that the MRP will be effective on the date of adoption. However, the online reporting and other provisions may not be operable upon the adoption date of the permit. The requirements should make clear that many of the reporting mandates only become applicable to an enrollee after the date of enrollment and after the electronic database is fully operational.

The undersigned entities hope that the Water Board will take these comments into consideration and make the requested changes before adopting any statewide WDR for SSOs.

Sincerely,

E.J. Shalaby
West County Wastewater District

Rich Davidson by JES

Rich Davidson
City of Richmond

James Good
Veolia Water North America LLC

741945.1

California Regional Water Quality Control Board
San Francisco Bay Region

Alan C. Lloyd, Ph.D.
Agency Secretary

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
http://www.waterboards.ca.gov/sanfranciscobay

Arnold Schwarzenegger
Governor

Attachment 1 (a)

Date: July 7, 2005
File No. 1210.57 (MTC)

TO: Sewer System Authorities (attached list)

SUBJECT: New Requirements for Preparing Sewer System Management Plans

This letter is to notify you, as a Sanitary Sewer Collection System Agency, that you are required to prepare a Sewer System Management Plan (SSMP) pursuant to Section 13267 of the California Water Code. The enclosed SSMP Development Guide should be used to develop your plan, which will contain the following ten elements:

1. Goals
2. Organization
3. Overflow Emergency Response Plan
4. Fats, Oils, and Grease (FOG) Control Program
5. Legal Authority
6. Measures and Activities
7. Design and Construction Standards
8. Capacity Management
9. Monitoring, Measurement, and Program Modifications
10. SSMP Audits

As indicated in the attached guide, if you believe any element of this program is not applicable to your agency, your SSMP does not need to address it, but an explanation in the SSMP should be provided, indicating why that element of the SSMP is not applicable. Failure to prepare and maintain an SSMP will subject you to monetary liabilities that may be imposed by the San Francisco Bay Regional Water Quality Control Board (Regional Water Board). The following paragraphs provide some background and further details on the requirements and liabilities.

Background
This requirement is the result of a collaborative effort between the Bay Area Clean Water Agencies (BACWA) and the Regional Water Board to reduce and prevent sanitary sewer overflows. Over the past two years, BACWA and Regional Water Board staff met to develop

draft SSMP guidelines. In 2004, six workshops were held for collection system agencies to present the draft SSMP guidelines and refine the contents for a comprehensive sanitary sewer overflow (SSO) control program for the region. This program comprises two components: 1) electronic reporting of SSOs; and, 2) development and implementation of SSMPs. The requirement for electronic SSO reporting began on December 1, 2004. The enclosed SSMP Development Guide incorporates input from collection system agencies in the San Francisco Bay Area.

Response Form
The first step of the process for developing your SSMP is to return a completed copy of the attached **SSMP Form A** to the Regional Water Board, to indicate that you have received this letter, understand the requirements, and intend to comply. There is a space on the form for feedback about the regional SSO control program. The Regional Water Board will continue working with BACWA to ensure successful implementation of this program.

Schedule
Individual elements of the SSMP are required to be completed according to the schedule shown below:

Required Schedule for SSMP Elements

SSMP Item	Required Completion Date
• Goals • Organization • Emergency Response Plan • FOG Control Program	August 31, 2006
• Legal Authority • Measures and Activities • Design and Construction Standards	August 31, 2007
• Capacity Management • Monitoring, Measurement, and Program Modifications • SSMP Audits	August 31, 2008

Notification to Regional Water Board of Completed SSMP Elements
You must notify the Regional Water Board when you complete each set of SSMP elements. Use the attached forms as follows:

- Use **SSMP Form B-1** to indicate completion of the first set of SSMP elements
- Use **SSMP Form B-2** to indicate completion of the second set of SSMP elements
- Use **SSMP Form B-3** to indicate completion of the third and last set of SSMP elements

Applicability to NPDES Permitted Facilities
For Publicly-Owned Treatment Works (POTWs) whose discharges are regulated in NPDES permits, and who also operate sanitary sewer systems, any requirement for development of an SSMP in your NPDES permit should be considered fulfilled using the requirements outlined in this letter.

Annual Reports for Reporting of SSOs
As indicated in a previous letter from the Regional Water Board dated November 15, 2004, the first annual report for your agency's SSO control activity is due March 15, 2006, and should cover 13 months from December 1, 2004, through December 31, 2005. Subsequent annual reports are due March 15th, and should contain information for the preceding 12-month calendar year. Additional detail on requirements for annual reports will be forwarded to your agency later this year.

Basis for Requirement and Liabilities
Because SSOs are a threat to water quality, you should be aware that this letter establishes formal requirements for technical information pursuant to California Water Code Section 13267. Failure to respond, late response, or incomplete response may subject you to civil liability imposed by the Water Board to a maximum of $1,000 per day. Any revisions of the request set forth must be confirmed in writing by Regional Water Board staff.

State-wide SSO Control Program
The State Water Resources Control Board (State Water Board) has recently begun the development of a state-wide SSO control program. Regional Water Board and BACWA representatives are working with State representatives to ensure compatibility between the Regional and State programs. In the event the State program has additional requirements beyond the Regional program, these elements will need to be incorporated into the SSMP. Collection System agencies will be notified of any new requirements as they occur. Currently, the State Water Board's proposed SSMP has a more aggressive development and implementation time schedule.

Questions
If your agency has questions about program requirements or SSMPs, please contact Michael Chee at mchee@waterboards.ca.gov or (510) 622-2333.

Sincerely,

Bruce H. Wolfe
Executive Officer

Attachments:

- Sanitary Sewer Authorities Mailing List
- SSMP Form A: Notification Form To Indicate Receipt of Letter Requiring the Development of an SSMP
- SSMP Form B-1: Notification Form To Indicate Completion of First Set of Sewer System Management Plan (SSMP) Elements
- SSMP Form B-2: Notification Form To Indicate Completion of Second Set of Sewer System Management Plan (SSMP) Elements
- SSMP Form B-3: Notification Form To Indicate Completion of Third (and Final) Set of Sewer System Management Plan (SSMP) Elements
- Fact Sheet – Requirements For Submitting Technical Reports Under Section 13267 of the California Water Code

Enclosure:
Sanitary Sewer Management Plan (SSMP) Development Guide

Attachment 1(b)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/09/05			DEPT. 324
HONORABLE VICTORIA CHANEY	JUDGE	E. SABALBURO	DEPUTY CLERK
HONORABLE #24	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
F. ROJAS, C.A.	Deputy Sheriff	NONE	Reporter

4:00 pm BS089769

COUNTY OF LOS ANGELES
VS
STATE OF CALIFORNIA ET AL

Consolidated with BS089785 and
Related with BS080548 -LEAD CAS

Plaintiff Counsel

Defendant Counsel

NO APPEARANCES

NATURE OF PROCEEDINGS:

NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 5-9-2005 upon each party or counsel named below by facsimile.

Date: 5-9-2005

John A. Clarke, Executive Officer/Clerk

By: _____ E. Sabalburo

Howard Gest
(213) 688-7716

Helen G. Arens
(213) 897-2802

Paul Starkey
(916) 445-0278

MINUTES ENTERED
05/09/05
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/09/05			DEPT. 324
HONORABLE VICTORIA CHANEY	JUDGE	E. SABALBURO	DEPUTY CLERK
HONORABLE #24	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
F. ROJAS, C.A.	Deputy Sheriff	NONE	Reporter

4:00 pm BS089769

Plaintiff Counsel

COUNTY OF LOS ANGELES
VS
STATE OF CALIFORNIA ET AL

Defendant Counsel

Consolidated with BS089785 and
Related with BS080548 -LEAD CAS

NO APPEARANCES

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER HEARD APRIL 25, 2005

The Court hereby makes its ruling pursuant to its "RULING ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS" as signed and filed this date.

Respondent's motion for judgment on the pleadings is GRANTED as to the second cause of action. As to that part of the third cause of action in which petitioners request an order directing respondent to find their claims to be reimbursable, respondent's motion is construed as a motion to strike a request for improper relief, and is GRANTED.

Petitioners' motion for judgment on the pleadings is GRANTED as to their third cause of action (except as to the request for improper relief).

Both parties' requests for judicial notice are GRANTED.

Accordingly, the petitions for writ are GRANTED IN PART. The court finds respondent has not proceeded in a manner required by law. Respondent is ordered to set aside its order returning petitioners' claims and to consider the claims on their merits.

CLERK'S CERTIFICATE OF MAILING/

MINUTES ENTERED
05/09/05
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

FILED
LOS ANGELES SUPERIOR COURT
MAY 09 2005
JOHN A. CLARKE, CLERK
BY E. SABALBURO, DEPUTY

COUNTY OF LOS ANGELES, et al.,
Petitioners,
vs.
STATE OF CALIFORNIA, et al.,
Respondents

CITY OF ARTESIA, et al.,
Petitioners,
vs.
STATE OF CALIFORNIA, et al.,
Respondents

LEAD CASE NO. BS 089 769
RELATED CASE NO. BS 089 785

RULING ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

Hearing date: 4/25/05
Ruling date: 5/9/05

After considering the moving, opposing, and reply papers and the arguments of counsel at the hearing, the court now rules as follows:

Respondent's motion for judgment on the pleadings is GRANTED as to the second cause of action. As to that part of the third cause of action in which petitioners request an order directing respondent to find their claims to be

reimbursable, respondent's motion is construed as a motion to strike a request for improper relief, and is GRANTED.

Petitioners' motion for judgment on the pleadings is GRANTED as to their third cause of action (except as to the request for improper relief).

Both parties' requests for judicial notice are GRANTED.

Accordingly, the petitions for writ are GRANTED IN PART. The court finds respondent has not proceeded in a manner required by law. Respondent is ordered to set aside its order returning petitioners' claims and to consider the claims on their merits.

INTRODUCTION

Pursuant to authority granted it by Water Code section 13377, respondent California Regional Water Quality Control Board for the Los Angeles Region (Regional Board) issued Order No. 01-1820, which adopted National Pollutant Discharge Elimination System Permit No. CAS004001 (the permit). The permit requires petitioners, local public entities, to effectively prohibit pollution from entering into storm sewers by inspecting industrial, commercial and construction sites and instituting other measures. Petitioners contend the permit mandates a new program or higher level of service and thus constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. (Undesignated statutory references are to the Government Code.)

Petitioners County of Los Angeles, City of Artesia and others filed four test claims with respondent Commission on State Mandates (the commission) seeking funding for the mandate. The commission returned the claims, correctly reasoning that section 17516 deprived it of jurisdiction to hear them and that it has no discretion to circumvent that section sua sponte. Petitioners appealed. The commission denied the appeals for the reasons given in its return of the claims.

Petitioners then instituted these mandate actions pursuant to section 17559, naming the commission as a respondent as to the second and third causes of action. In the second cause of action petitioners seek a declaration that section 17516 is unconstitutional. In the third cause of action petitioners seek a writ of mandate pursuant to Code of Civil Procedure section 1094.5, requesting that the court find section 17516 to be unconstitutional on its face or as applied in this case and direct the commission to accept petitioners' test claims for filing and approve them reimbursement.

Respondent Commission moves for judgment on the pleadings. The Water Resources Control Board and Regional Board filed an amicus brief in support of the commission's motion.

Petitioners also move for judgment on the pleadings.

DEFINING THE ISSUES

The court notes at the outset that it cannot grant petitioners all the relief they seek. In their second cause of action petitioners seek a declaration that section 17516 is unconstitutional. Declaratory relief is available when, "in cases of actual controversy relating to the legal rights and duties of the respective parties," a party "bring[s] an original action . . . for a declaration of his or her rights and duties . . . ." (Code Civ. Proc., § 1060.) The only actual controversy between petitioners and respondent is whether petitioners' claims should be deemed reimbursable. The sole and exclusive procedure by which to adjudicate this controversy is a mandate action under Code of Civil Procedure section 1094.5. (Sections 17552, 17559.) The only pertinent relief under Code of Civil Procedure section 1094.5 is a finding that respondent "has not proceeded in the manner required by law." Declaratory relief is not available. Therefore, respondent's motion for judgment on the pleadings is granted as to the second cause of action.

In their third cause of action petitioners seek, among other things, an order directing respondent to approve their claims for reimbursement. The court has no power at this time to do so. (See §§ 17551, 17552; *Lucia Mar Unified School Dist. v. Honig*

(1988) 44 Cal.3d 830, 837 [the commission must evaluate the merits of a subvention claim in the first instance].) Therefore, respondent's motion for judgment on the pleadings on this issue is construed as a motion to strike petitioners' plea for inappropriate relief, and is granted.

The only proper issue before the court at this time is whether the commission should consider the merits of petitioners' claims, not whether it should approve them.

DISCUSSION

Article XIII B was added to the California Constitution by California voters in 1979 as part of Proposition 4, the purpose of which was to limit state and local spending. Section 6 of article XIII B prohibits the Legislature or any state agency from shifting costs of state government onto local public entities:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . .

(*Ibid.*)

In 1984 the Legislature enacted section 17500 et seq., which "provides the sole and exclusive procedure by which [a public entity may] claim reimbursement under article XIII B, section 6." (Section 17552.) Pursuant to the procedure, "Reimbursement for state mandates is available only for "'costs mandated by the state,' as defined in Section 17514." (Section 17561, subd. (a).) "'Costs mandated by the state'" means any cost required as a result of legislation or an *executive order*." (Section 17514, emphasis added.) The Legislature defined "Executive order" [as] any order, plan, requirement, rule, or regulation issued by any . . . agency, department, board, or commission of state government." (Section 17516.) However, it specifically excluded from that definition "any order, plan, requirement, rule or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." (*Ibid.*)

The question is whether the Legislature can limit the reach of section 6 of article XIII B by excluding orders, plans, requirements, rules or regulations "issued by . . . any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code.". If it can, then the commission may not consider petitioners' test claims. If it cannot, the claims must be remanded to the commission for consideration in the first instance. (See *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at p. 837.)

Neither party disputes that the court may evaluate the constitutionality of section 17516. (See *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 595-596 [superior court has authority to declare Government Code § 20020 unconstitutional as applied and to issue writ of mandate directing administrative agency not to enforce it].)

Neither is it disputed that the Legislature may impose reasonable restrictions on subvention rights by establishing procedures for implementation of those rights. (*Berkeley Unified School Dist. v. State of California* (1995) 33 Cal.App.4th 350, 361 (*Berkeley Unified*) ["We discern no undue restriction of the constitutional right against involuntary imposition of costs under a state mandate in limiting the [agencies] to the remedy provided them under section 17612."].) And any doubt about a Legislature's power to act should be resolved in the Legislature's favor. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810; *Brown v. Community Redevelopment agency of the City of Santa Ana* (1985) 168 Cal.App.3d 1014, 1019.)

> There is a clear limitation, however, upon the power of the Legislature to regulate the exercise of a constitutional right. As stated in *Chesney v. Byram*, 15 Cal.2d 460, 464, "all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it."

(*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471; see also *Berkeley Unified, supra,* 33 Cal.App.3d at p. 361; *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 184.)

The only part of section 17516 under consideration is that which excludes regional board orders from the definition of "executive order," effectively denying local

governments reimbursement from the state for costs mandated by those orders. The court must determine whether it unduly narrows or embarrasses the voters' intent.

What was the voters' intent?

Initiatives are to be interpreted so as to give effect to the intent of the electorate. (*Davis v. City of Berkeley* (1990) 51 Cal.3d 227, 234 (*Davis*); *Arvin Union School Dist. v. Ross* (1985) 176 Cal.App.3d 189, 198.) "[I]n construing the meaning of [Article XIII B], our inquiry is not focused on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XII B in 1979. To determine this intent, we must look to the language of the provision itself." (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*).) In doing so, article XIII B "should be construed in accordance with the natural and ordinary meaning of its words." (*Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174, quoting *ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 865.)

Article XIII B was adopted in 1979 as part of Proposition 4, the purpose of which was to limit state and local spending. (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1580 (*Hayes*).) It was presented to voters as "the next logical step to Proposition 13." (See California Ballot Pamphlet, Special Statewide Election, November 6, 1979, p. 18, Arguments in favor of Proposition 4 (Ballot Pamphlet); see also *County of San Diego v. State of California* (1997) 15 Cal.4th 68.)

Section 6 of article XIII B was enacted to preclude the state from shifting the financial responsibility for providing public services from itself to local government. (*Hayes, supra*, at p. 1580.) It requires subvention "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government." A "mandate" of "a new program or higher level of service" is any requirement placed on local government by state-level government. (*County of Los Angeles, supra*, 43 Cal.3d at p. 56.)

> We conclude that the drafters and electorate had in mind the commonly understood meanings of the term ["program"]—programs that carry out the

> governmental function of providing services to the public, or law which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

(*Ibid.*)

There is no indication on the face of section 6 of article XIII B that the electorate intended to make an exception for mandates flowing out of Division 7 of the Water Code. On the contrary, section 6 of article XIII B clearly requires subvention for *any* state mandate, including one authorized by the Water Code.

Respondent and amicus argue that when the language of an initiative is unclear the court can resort to extrinsic construction aids such as the historical context in which the initiative was adopted and the ballot arguments that accompanied the initiative. (*Davis*, *supra*, 51 Cal.3d at pp. 235, 237, fn. 4; *McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 215-216.) However, the language is clear. Even if it were not, the historical context of Proposition 4 and the ballot materials describing it indicate no intent to carve out any exceptions from the subvention requirement (other than those explicitly noted in section 6 itself). (See Ballot Pamphlet, p. 18 ["Additionally, this measure: (1) WILL NOT allow the state government to force programs on local governments without the state paying for them."], quoted in *County of Los Angeles*, *supra*, 43 Cal.3d at p. 56.)

Nothing in the initiative or the voter pamphlet mentions the State Board or Regional Board or special exceptions for them.

Amicus argues that by adopting Proposition 4 the voters intended to carry forward the subvention scheme then found in Revenue & Taxation Code § 2209. No evidence or authority supports the argument. The court must determine the intent of the voters in passing the initiative, not the Legislature in passing a prior subvention scheme. (*County of Los Angeles*, *supra*, 43 Cal.3d at p. 56.) The court finds no indication that the electorate intended Proposition 4 to continue the prevailing taxation scheme. On the contrary, the sweeping language of the initiative and voter pamphlet indicate voters intended to change the scheme significantly. Further evidence of such intent is the adoption of Proposition 13 one year prior to Proposition 4 and three years after enactment

of Revenue & Taxation Code section 2209. Proposition 13 effected a significant change in the law of taxation in California. It would be illogical to presume that in effecting change voters intend that things stay the same. Therefore, the court cannot presume that Proposition 4 was intended to endorse and continue prior subvention requirements. (See *McLaughlin, supra,* 75 Cal.App.4th at pp. 212-215 [court will not imply that voters, in adopting Proposition 227 requiring English immersion programs, intended to continue to allow school district general waivers of these requirements where no such exception was written in the proposition and to imply it would conflict with the language of the proposition].)

The court concludes section 6 of article XIII B was intended to require subvention for any state mandate requiring local government to institute a new program or higher level of service, including mandates imposed under the authority of the Water Code.

Section 17516 unduly restricts petitioners' constitutional right against involuntary imposition of costs under a state mandate authorized by Division 7 of the Water Code by denying the right altogether.

Conclusion

Pursuant to the above reasoning, the commission's motion for judgment on the pleadings is granted as to the second cause of action. As to the third cause of action, respondent's motion for judgment on the pleadings is construed as a motion to strike petitioners' plea for inappropriate relief, and is granted.

Petitioners' motion for judgment on the pleadings is denied as to the second cause of action and granted as to the third cause of action.

Accordingly, the petitions are granted in part. (Code of Civ. Proc., § 1094.5.) The court finds the commission, though it proceeded as required by statutory law, as it was constrained to do, has not proceeded as required by superior constitutional law. (Code Civ. Proc., ¶ 1094.5, subd. (a).) The question whether petitioners state valid claims for reimbursement must be remanded to the commission, which is ordered to consider

petitioners' claims on their merits. (§§ 17551, 17552, 17559; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 837.)

In Sum:

Respondent's motion for judgment on the pleadings is GRANTED as to the second cause of action. As to that part of the third cause of action in which petitioners request an order directing respondent to find their claims to be reimbursable, respondent's motion is construed as a motion to strike a request for improper relief, and is GRANTED.

Petitioners' motion for judgment on the pleadings is GRANTED as to their third cause of action (except as to the request for improper relief).

Both parties' requests for judicial notice are GRANTED.

Accordingly, the petitions for writ are GRANTED IN PART. The court finds respondent has not proceeded in a manner required by law. Respondent is ordered to set aside its order returning petitioners' claims and to consider the claims on their merits.

IT IS SO ORDERED.

Dated: 5/9/05

Victoria Gerrard Chaney
Judge