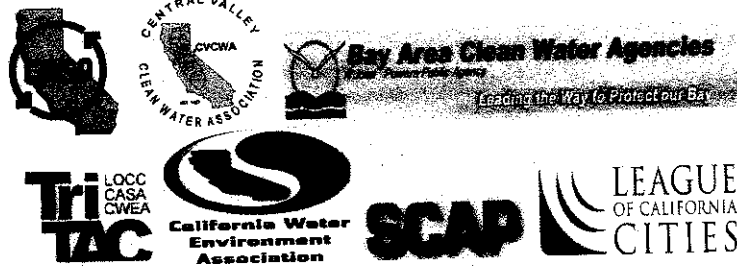


5/2/06 Item 7
SSORP
deadline: 4/24/06



April 24, 2006

Via Electronic and U.S. Mail

Tam Doduc, Chair, and Members
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

c/o Song Her, Clerk to the Board
commentletters@waterboards.ca.gov

SUBJECT: COMMENT LETTER – 5/2/06 BOARD MEETING – SSORP

Dear Chair Doduc and Members of the Board:

The Bay Area Clean Water Agencies, the California Association of Sanitation Agencies, the California Water Environment Association, the Central Valley Clean Water Association, the League of California Cities, the Southern California Alliance of POTWs, and Tri-TAC appreciate the opportunity to provide comments regarding the March 24, 2006 revised draft waste discharge requirements (WDR) for sanitary sewer collection systems in California. Our associations, which represent public wastewater agencies providing sewer collection, treatment and water recycling services to millions of Californians, previously submitted comments dated January 25, 2006 and February 22, 2006, and participated in the February 8, 2006 public hearing. We appreciate that several of our comments regarding details of the WDR are reflected in the revised draft; a few key issues remain, however, that require further changes to the WDR if it is to be successfully implemented.

Before turning to the implementation issues, we wish to express our collective disappointment that the State Water Board staff has chosen to propose a prohibition of SSOs in the revised WDR without an accompanying affirmative defense to liability for unavoidable SSOs that occur despite the enrollee's best efforts. We have consistently stated from the inception of the SSO Guidance Committee process that any permitting scheme, whether a WDR or an NPDES permit, that incorporates a prohibition must recognize unpreventable SSOs by providing a limited affirmative defense. As we stressed at the February 8th hearing, the State Water Board has a duty to develop attainable standards. Imposing a prohibition

without an affirmative defense threatens to place over 1,500 collection systems throughout the State in the untenable position of attempting to comply with a new unattainable standard. We urge the Board to reconsider the inclusion of a prohibition in the WDR unless accompanied by a limited affirmative defense.

THE SIX MONTH SCHEDULE FOR COMPLIANCE WITH ONLINE REPORTING REQUIREMENTS IS INADEQUATE

As we have stated previously, the proposed WDR is a significant new regulatory program that will affect approximately 1,500 public agencies statewide. Many of these agencies do not currently have permits and reporting requirements and are responsible only for complying with statutory requirements for emergency notification. It is unrealistic to expect that all of these agencies can be trained and reporting online within 6 months of WDR adoption. As the State Water Board's experience with NPDES reporting using CIWQS has demonstrated, even systems that have been Beta tested will require additional refinement and modification before they can be reliably used for compliance purposes. In addition, the online reporting system requires familiarity with terminology and definitions if the database is to yield the accurate information essential to a level playing field.

In order to provide adequate training to facilitate successful implementation of the SSO reporting system, the WDR must be amended to phase-in compliance timelines. Equally importantly, the system must be fully tested and ready for implementation before any agency is required to utilize the system for compliance. Based on our April 4, 2006 review of the latest version of the online reporting system, we believe that the system needs numerous improvements, including the process for enrolling for coverage under the WDR, to ensure that the State Water Board will receive meaningful information from the system. We suggest that a special work group be formed to work with State Water Board staff to define improvements that should be made to the reporting system before the system is launched. Once the system has been modified, there should be a period of additional testing of the system. Provisions should be made for subsequent reporting system modifications based on the additional testing before the system is used officially for reporting.

We recognize that the State Water Board has limited resources available to provide training, and our associations are committed to work with the Board as partners to develop and implement the needed training program. The Board should provide collection system agencies' contact information to facilitate the training effort. Also, the Board will need to be actively involved in development and approval of training materials, as certain parts of the training may involve professional or legal interpretations. We emphasize, however, that adequate time for orderly and thoughtful training and troubleshooting of the system is critical to our willingness to undertake this effort.

We recommend that the WDR be amended to provide for phased implementation of the reporting requirements. Several months will be required up front to fine tune the system, develop the training materials and make all of the logistical arrangements. Then, training and reporting obligations should be phased-in geographically. We believe it makes sense to begin with enrollees in those regions that are most familiar with the types of requirements set forth in the WDR and that are generally already subject to more detailed SSO reporting. All enrollees would be reporting online within approximately 18 months of adoption of the WDR.

We propose that the WDR be amended to revise the schedule for compliance with the reporting requirements as follows:

Task and Associated Section	Completion Date – Enrollees in Regions 4, 8 & 9	Completion Date – Enrollees in Regions 1, 2 & 3	Completion Date – Enrollees in Regions 5, 6 & 7
Reporting Program Section G	8 months after WDR adoption	12 months after WDR adoption	18 months after WDR adoption

THE PROPOSED SCHEDULE FOR SEWER SYSTEM MANAGEMENT PLAN (SSMP) DEVELOPMENT IS INADEQUATE

The proposed regulations will extend the WDR process to hundreds of communities that, unlike sanitation agencies and cities that operate wastewater treatment plants, are not currently subject to similar WDR requirements. We remain concerned that the additional master planning, operational and capital improvement program requirements will present funding and logistical issues for many of these smaller communities. Additionally, many communities will have adopted their FY2006-07 budgets prior to the effective date of the proposed WDR, which will present additional implementation issues. Compliance may require that these communities adopt sewer fees or raise existing fees by substantial amounts. We continue to urge the Board to include sufficient time be given to the cities to address these very real compliance issues. These circumstances alone require additional time for cities to provide public information and outreach.

In addition, similar to the need for adequate training for the SSO reporting system, collection system agencies throughout the state will require training for implementing the SSMP components for the WDR. The industry will initially be focused on developing training materials and conducting training for the SSO reporting system on what will already be an aggressive schedule. Although it makes sense to coordinate the training for both the SSO reporting system and the SSMP components, practically speaking this will be difficult,

especially early in the process since the development of the SSMP training materials will lag behind the development of the SSO reporting system training materials. Therefore, we recommend that the timelines for preparation of the SSMP Development Plan and each of the tasks set forth in Section D be extended 12 months from that presented in the current version of the WDR.

THE REPORTING SYSTEM MUST BE REVISED TO ELIMINATE THE REQUIREMENT TO REPORT LEGAL CONCLUSIONS

The electronic reporting system, which is referenced as an attachment to the WDR, is an important aspect of WDR implementation. As currently designed, the system requires collection system operators to respond to legal questions and then submit the report under penalty of perjury. When reporting an SSO, the database requires the enrollee to answer, in yes or no fashion, whether the SSO reached "waters of the United States." Similarly, the enrollee is required to answer, yes or no, as to whether the SSO created a "public nuisance." In addition, for the monthly report required to indicate that no SSOs occurred during the reporting period, the certification should specify that no SSOs occurred to "the best of my knowledge." The issue of what is, and what is not, a water of the United States, is far from clear, as evidenced by the United States Supreme Court docket for the current term. Similarly, whether or not a nuisance exists is a question determined by application of statutory and case law to specific facts. This is simply not the sort of question that can, or should, be answered by collection system workers responding to SSOs. Enrollees should be required to report the facts—what was the destination of the SSO, what was the volume, was it captured and contained—not questions of mixed law and fact, which are nuanced and evolving.

We urge the State Water Board to direct staff to revise the SSO reporting form to eliminate these questions and instead require enrollees to report the relevant facts that will enable the Regional Boards, the health officers and others charged with the evaluating whether enforcement action is warranted to make these determinations.

THE WDR SHOULD BE THE STANDARD FOR ALL COLLECTION SYSTEMS EXCEPT IN RARE CIRCUMSTANCES

We agree with the statement in the Fact Sheet that "[I]n order to provide a consistent and effective SSO prevention program, as well as to develop reasonable expectations for collection system management, these General WDRs should be the primary regulatory mechanism to regulate public collection systems." (Fact Sheet at p. 10.) The language in the WDR, however, does not reflect this intent. Instead, the WDR states that the Order "establishes *minimum requirements* to prevent SSOs. Although it is the State Water Board's intent that this Order be the primary regulatory mechanism for sanitary sewer systems statewide, Regional Water Boards *may issue more stringent or more prescriptive WDRs* for

sanitary sewer systems." (Draft WDR at Finding 11.) In other words, the finding characterizes the requirements contained in the WDR as a floor rather than a consistent standard, and essentially invites Regional Boards to adopt differing requirements. This is potentially problematic for the State Water Board's recent efforts to standardize NPDES permits in order to facilitate electronic reporting and enhance consistency.

In addition, the WDR as drafted requires all collection systems to enroll for coverage within three months of adoption. Because a number of collection system agencies are already covered by WDRs or NPDES permits, some agencies will be faced with the prospect of having to comply with multiple, conflicting requirements.

The WDR should establish a standard to govern all collection systems, except where specific requirements are set forth in a consent decree or other enforcement order. This clarification can be accomplished by amending Findings 11 and Provision D.2 as follows:

Finding 11: Some Regional Water Boards have issued WDRs or WDRs that serve as National Pollution Discharge Elimination System (NPDES) permits to sanitary sewer system owners/operators within their jurisdictions. ~~Although it is~~ It is the State Water Board's intent that this Order be the primary regulatory mechanism for sanitary sewer systems statewide. Thus, regional boards should rescind existing individual and general WDRs that are specific to collection systems upon adoption of this Order. While this Order does not supersede existing NPDES permits governing sanitary sewer collection systems, or WDRs for POTWs that discharge to land, it is the State Water Board's intent that, at the time of renewal, existing NPDES permits be revised to include in the NPDES permit only those requirements specified in 40 CFR 141 (a) through (e). Any other requirements for the sanitary sewer collection system will be provided under this Order. Existing WDRs should be amended as soon as reasonable to remove collection system related provisions. Where necessary to ensure compliance with the provisions of this Order, the regional boards may pursue enforcement actions including issuance of time schedule orders and cease and desist orders that supplement the requirements of the WDR. This Order establishes minimum requirements to prevent SSOs., Regional Water Boards may issue more stringent or more prescriptive WDRs for sanitary sewer systems. Upon issuance or reissuance of a Regional Water Board's WDRs for a system subject to this Order, the Regional Water Board shall coordinate its requirements with stated requirements within this Order, to identify requirements that are more stringent, to remove requirements that are less stringent than this Order, and to provide consistency in reporting.

D. PROVISIONS

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2. It is the intent of the State Water Board that sanitary sewer systems be regulated in a manner consistent with this WDR. Nothing in this WDR shall be:

- (i) Interpreted or applied in a manner inconsistent with the Federal Clean Water Act, or supersede a more specific or more stringent state or federal requirement in an existing permit, regulation, or administrative/judicial order or Consent Decree;
- (ii) Interpreted or applied to authorize an SSO that is illegal under either the Clean Water Act, an applicable Basin Plan prohibition or water quality standard, or the California Water Code;
- (iii) ~~Interpreted or applied to prohibit a Regional Water Board from issuing an individual NPDES permit or WDR, superseding this WDR, for a wastewater collection systems, authorized under the Clean Water Act or California Water Code; or~~
- (iv) Interpreted or applied to supersede any more specific ~~or more stringent WDR or~~ enforcement order issued by a Regional Water Board.

THE DEFINITIONS OF MAJOR AND MINOR SSOS REQUIRE REVISION

The definition of major SSO is overly broad. We understand the desire to distinguish major SSOS from minor SSOS in order to identify and focus regulatory oversight on SSOS that significantly impact public health, safety, and the environment. The definition of major spills as written may result in insignificant low volume spills being classified as major when no negative impact to the public or environment has occurred.

We are also concerned that the State electronic reporting system does not appear to distinguish between lateral SSOS and mainline SSOS. This approach effectively penalizes those agencies which have taken responsibility for all or a portion of the lateral, because the SSOS-per-mile-comparison data will be skewed since it is typical for there to be more (albeit usually smaller) SSOS from laterals. The Region 2 electronic SSO reporting system allows for distinguishing between these two types of SSOS, and the State program should also, in order to maintain fairness among agencies.

We recommend that the definitions of major and minor SSOs in the WDR and the Monitoring and Reporting Program be revised as follows:

SSO Categories

1. Major - All discharges of sewage from an enrollee's sanitary sewer system that:
 - A. Equal or exceed 1000 gallons, or
 - B. Result in a discharge to a storm drain, drainage channel, or surface waters of the United States that is not captured or contained; or
 - C. ~~Create or threaten to create~~ a condition of pollution or nuisance as defined in the California Water Code section 13050.
2. Minor - All other discharges of sewage from an enrollee's sanitary sewer system, that:
 - A. ~~Are less than 1000 gallons, and~~
 - B. ~~Do not result in a discharge to surface waters of the United States or tributary to waters of the United States; and~~
3. Public Lateral SSOs - SSOs from the publicly-owned portion of a lateral.
4. Private Lateral SSOs - SSOs from a private lateral that are caused by blockages or other problems in the publicly-owned portion of a sanitary sewer system within a privately owned lateral.

THE ESTIMATE OF THE COST TO LOCAL AGENCIES TO IMPLEMENT THE WDR ARE SIGNIFICANTLY UNDERSTATED

The State Water Board staff estimate for the annual cost of implementing the WDR is \$870 million, which represents a monthly cost increase of \$6 per household. Based upon industry experience with mature SSMP programs, our experts estimate that annual costs to local agencies are more likely to be on the order of \$3 billion, which represents an additional \$30 per month for the average household—a significant increase.

The State Water Board estimates are based on very small sample from a unique locale. This small (< 2 %) sample was extrapolated to the state level using data that does not agree with the published demographic data (2000 Census average household size for occupied residential units was 2.95 vs. 2.5 used in State Water Board Staff estimate). The Orange County agencies from whom the cost information was obtained exist in a unique

environment (low annual rainfall, flat topography, sewer system age, density, etc.) that would not be expected to translate to other locations. The proposed WDR creates a \$3 billion unfunded mandate for local agencies. We agree that it is important to maintain and manage sewer infrastructure to maximize performance and reduce SSOs. Yet, there is no factual basis to demonstrate that the WDR will significantly improve water quality.

NO PROGRAM INFORMATION HAS BEEN PROVIDED TO SUPPORT THE PROPOSED WDR FEES, WHICH WILL RAISE IN EXCESS OF \$2.5 MILLION ANNUALLY

In our January 25, 2006 comment letter, we expressed concern that the State Water Board had not identified the scope of its regulatory program or the level of waste discharge fees that would be required to support the State and regional board oversight of the WDR. None of this information has been provided to date. Instead, the State Water Board is proposing a fee schedule seemingly unrelated to the revenues needed for the program. We are concerned about an approach by which the State Water Board raises revenue first and then determines how to spend it. It is difficult to say with certainty how much revenue will be generated from the proposed fees; even using the State Water Board's estimate of 1,250 enrollees (which we believe to be conservative) the fees would generate at least \$ 2.5 million. This level of expenditures has not been justified.

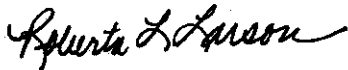
Moreover, the fee schedule is inequitable. Dividing communities into those over 50,000 in population and those under 50,000 is seemingly arbitrary. We recommend that the State Water Board instead adopt a schedule similar to that for the municipal stormwater program, which uses a sliding scale based on population. Without knowing the level of revenue that the Board needs to support its program, however, we are unable to recommend the fee amounts that would be associated with each population category. Before adopting any fee schedule the State Water Board must identify the level of service that will be provided for the fees and justify that level of effort.

We ask that the State Water Board give very careful consideration to these comments and direct staff to make the revisions we have recommended. Our earlier comments focused on many of the overarching legal and policy issues that have been debated at length over the past year. As the adoption of the WDR draws near, however, we have focused on those pragmatic issues which, if not remedied, will significantly hamper the implementation of this major new mandate.

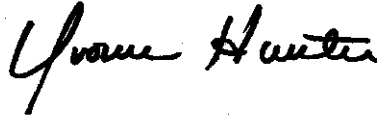
Tam Doduc, Chair, and Members
State Water Resources Control Board
April 24, 2006
Page 9

Thank you for your consideration. If you have any questions regarding our comments, please contact Roberta Larson, CASA's Director of Legal and Regulatory Affairs, at (916) 446-7979.

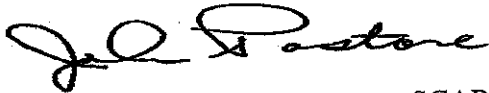
Sincerely,



Roberta Larson, Director, Legal and
Regulatory Affairs, CASA



Yvonne Hunter, Legislative Representative,
League of California Cities



John Pastore, Executive Director, SCAP



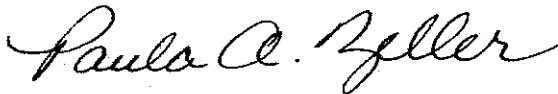
Charles V. Weir, Chair, Tri-TAC



Michele Pla, Executive Director, BACWA



Warren Tellefson, Executive Officer, CVCWA



Paula Zeller, President, CWEA

cc: Bryan Brock, State Water Resources Control Board (via electronic mail)