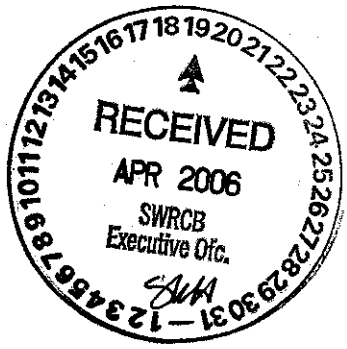
SSORP (5th BM)
deadline: 4/24/06

LEIBOLD, MCCLENDON & MANN

A PROFESSIONAL CORPORATION

STEPHEN M. MILES
steve@CEQA.com

23422 MILL CREEK DRIVE, SUITE 105
LAGUNA HILLS, CALIFORNIA 92653
(949) 457-6300
FAX: (949) 457-6305



April 18, 2006

Song Her, Clerk to the Board
State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: COMMENT LETTER – 5/3/06 BOARD MEETING- SSORP Submitted VIA E-MAIL [commentletters@waterboards.ca.gov] AND U.S. MAIL

Dear Board Members,

We serve as Special Counsel to South Coast Water District ("South Coast"), which was created in 1932 under the County Water District Act (Cal. Water Code § 30000). South Coast is an independent special district dedicated to providing water and sewer services to the coastal communities of Dana Point, South Laguna, and areas of San Clemente. On behalf of South Coast we would like to express our gratitude to you for allowing us to continue to submit comments on the Draft Waste Discharge Requirements ("WDRs") for Sanitary Sewer Overflows ("SSOs"). Below are additional comments that we would like to share with the Board regarding the WDRs.

NPDES v. WDR

Of primary and utmost concern to South Coast is the push by non-governmental organizations and other proponents (collectively, "Proponents") to have the SSO WDRs styled as National Pollution Discharge Elimination System ("NPDES") permits. Proponents first argue that the federal Clean Water Act requires the State to issue NPDES permits to

systematic dischargers of pollutants into the waters of the United States and that failure to issue a permit under the NPDES Permit Program results in a failure to comply with federal law. Additionally, Proponents argue that by not fashioning the WDRs as an NPDES permit the State Water Resources Control Board ("SWRCB") precludes the Environmental Protection Agency ("EPA") and private citizens groups from bringing suit against a collection systems operator for a violation of the Clean Water Act.

The arguments presented by Proponents misconstrue and blur the lines that distinguish WDRs and NPDES permits. Proponents are attempting to persuade you, the SWRCB, into believing that failure to treat the WDRs as an NPDES permit results in a failure to comply with the federal Clean Water Act. South Coast submits that the preceding assertion is fallacious. By drafting, adopting, and enforcing the SSO WDRs, the SWRCB demonstrates its compliance with and dedication to federal law. There are several points that South Coast would like to make in response to Proponents' arguments.

First, there is a paramount distinction between the functions of a WDR and an NPDES permit. The function of an NPDES permit is to allow authorized discharges of wastewater or other "pollutants" into the waters of the United States in accordance with the limitations set forth in the permit. The WDRs, on the other hand, are designed to prevent discharges to waters by regulating the manner in which collection system operators collect sewage for discharge to treatment systems. This type of activity is outside of the scope of NPDES permitting, but is within the State's authority to protect the public health, welfare, and environment consistent with California Water Code Section 13050.

Secondly, requiring collection system operators to obtain an NPDES permit is simply infeasible. SSOs are by nature unanticipated, unplanned events. The NPDES permitting scheme contemplates a certain level of foresight on the part of a discharger that a discharge will occur. Indeed, the NPDES permitting system requires dischargers to apply for and secure an NPDES permit prior to any discharge of wastewater into the waters of the United States. (*See* 33 U.S.C. § 1342, NPDES permitting system requirements) When applying for an NPDES permit, the applicant must specifically articulate when it plans to release wastewater, the location of the discharge and the extent of its reach, and the amount of wastewater that will be discharged. Neither a collection system operator, nor any other responsible agency, would ever be able to state with specificity any of these requirements. Therefore, it would be virtually impossible for a collection system operator to ever secure an NPDES permit prior to an SSO.

Third, the WDR system was adopted by the State Legislature in an effort to create a state system of enforcement and regulation of water quality. Despite the State WDRs being created in response to the federal Clean Water Act, the State WDR regulatory scheme and the federal NPDES Permitting Program operate concurrently, yet independent of one

another. A discharger could theoretically be required to comply with both regulatory schemes to the extent that they do not conflict with one another, in which case the federal law would ordinarily control: "The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards." (*Burbank*, 35 Cal. 4th at 628.) The laws do not conflict and must be treated separately.

Finally, Proponents are concerned about enforcement of the Clean Water Act as against collection system operators. Proponents claim that by not styling the WDRs as NPDES permits the SWRCB is precluding the EPA and other private citizens groups from enforcing the Clean Water Act. This is not accurate.

An NPDES permit is an exception to the Clean Water Act's prohibition of discharge of wastewater into the waters of the United States. If a discharger secures an NPDES permit, the discharger is *permitted* to release wastewater into the waters of the United States in accordance with the terms of the permit. In essence, by securing an NPDES permit, a discharger is protected from liability under the Clean Water Act. (*See Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1092-1093, describing NPDES permit as an exception to the general provisions of the Clean Water Act.)

This turns Proponents' argument on its head. Assuming that a collection system operator was somehow able to secure an NPDES permit and an SSO within that operator's control was undertaken in accordance with the permit, the EPA and citizen groups would have no colorable basis for a lawsuit anyhow. Only if there was a violation of the NPDES permit would the challengers have grounds to sue. But practically speaking, as established above, it is nearly impossible for a responsible entity of an SSO to secure an NPDES permit prior to a release of wastewater because an SSO is a purely unexpected event and can occur despite the most thorough maintenance and implementation of best practices.

It is South Coast's position that subjecting SSOs to an NPDES permit is impractical, superfluous, it confuses the regulatory schemes, and it is not required under the law. The WDR system and NPDES Permit Program can and should operate independently of one another.

Prohibition of SSOs and An Affirmative Defense

SSOs by nature are unplanned events with many overflows attributable to acts of third parties, whose behavior is typically beyond the control of local agencies. Contamination of private sewer laterals is currently causing a great number of SSOs and other related concerns. In calendar year 2005, of the sixteen (16) SSOs occurring within the jurisdiction of South Coast, twelve (12) were spills from private laterals; this is the

equivalent of 75% of all SSOs in South Coast's jurisdiction. Under the current state of the law, service districts' authority to regulate private property owners' maintenance of their laterals is nearly completely restrained. Private property owners are frequently the cause in fact of an SSO yet the service district will have to bear the brunt of the cost of the violation. An affirmative defense would appropriately relieve the service district of liability in this scenario.

Moreover, allowing an affirmative defense under the SSO WDRs would be consistent with the California Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"). Article 5 (Cal. Water Code §§ 13350 *et seq.*) discusses Civil Monetary Remedies for violations of the Porter-Cologne Act. The Legislature has carved out several exceptions to liability for a violation of any waste discharge requirement, two of which are pertinent to our discussion of SSO WDRs. First, in Section 13350(c)(4), the Legislature says that "there shall be no liability . . . if the discharge is caused by . . . (4) [a]n intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." Secondly, in Section 13350(c)(5), a discharger is exempted from liability if "despite the exercise of every reasonable precaution to prevent or mitigate the discharge," the discharge occurred anyway.

Both of these statutory exemptions to civil liability for violation of general waste discharge requirements suggest that an affirmative defense should be provided to the specific SSO WDRs. What the exceptions above illustrate is that if a violation of a WDR is caused by a third person or occurs despite the most thorough and best practices, a violator should not be financially liable. The Legislature intended for there to be a "safe harbor" in such situations. These same general principles should apply to the more specific WDRs for SSOs, especially given that the majority of SSOs within South Coast's jurisdiction are caused by third party private laterals which South Coast does not have authority to directly regulate.

A final justification for inclusion of an affirmative defense in the WDRs is that the most recent draft of the Draft Order includes a provision in Section C entitled "Prohibition." Section C.2. specifically prohibits "[a]ny SSO that results in a discharge of untreated wastewater, which creates a nuisance as defined in California Water Code Section 13050(m). . . ." The effect of this provision is to expand the scope of liability for collection systems operators. A brief hypothetical is illustrative. Assume that an SSO were to occur on private property, in a person's backyard, because of a defective sewer lateral. That SSO would subject a collection systems operator to liability under the nuisance provision, even if the wastewater never reaches the waters of the United States. The collection systems operator will be held responsible for an SSO that was completely beyond its control. For this reason, an affirmative defense would be appropriate.

Given the discussion above relating to affirmative defenses, South Coast believes it would be appropriate to offer suggestions as to possible affirmative defenses that the Honorable Members of the Board may entertain. Appropriate affirmative defenses may include, for example: no liability if the SSO was (1) caused by a private third party or (2) occurred despite exercise of best practices. South Coast strongly urges the Board to draft and include an affirmative defense as part of the Draft SSOs WDRs.

Implementation Schedule

The South Coast Water District is sufficiently staffed and is prepared to meet the proposed implementation schedule set forth in the WDRs. South Coast Water District does not oppose the schedule.

Conclusion

In conclusion, South Coast supports adoption of the SSO WDRs, subject to the conditions discussed above. Thank you for the opportunity to share in the development and drafting of the SSO WDRs. Should you have any questions or concerns regarding the contents of this letter, please do not hesitate to contact our offices.

Very truly yours,

LEIBOLD, McCLENDON & MANN, P.C.

Stephen M. Miles, Special Counsel

cc: Michael P. Dunbar, General Manager
South Coast Water District

Betty C. Burnett, District Counsel/Director of Administration
South Coast Water District