

FACT SHEET

STATE WATER RESOURCES CONTROL BOARD

ORDER NO. 2006-0003

STATEWIDE GENERAL WASTE DISCHARGE REQUIREMENTS FOR SANITARY SEWER SYSTEMS

The State Water Resources Control Board (State Water Board) adopted Resolution 2004-80 in November 2004, requiring staff to work with a diverse group of stakeholders (known as the SSO Guidance Committee) to develop a regulatory mechanism to provide a consistent statewide approach for reducing Sanitary Sewer Overflows (SSOs). Over the past 14 months, State Water Board staff in collaboration with the SSO Guidance Committee, developed draft statewide general waste discharge requirements (WDRs) and a reporting program. The WDRs and reporting program reflect numerous ideas, opinions, and comments provided by the SSO Guidance Committee.

The SSO Guidance Committee consists of representatives from the State Water Board's Office of Chief Counsel, several Regional Water Quality Control Boards (Regional Water Boards), United States Environmental Protection Agency (USEPA), Region IX, non-governmental environmental organizations, as well as publicly-owned sanitary sewer collection system agencies. The draft WDRs, reporting program, and associated documents result from a collaborative attempt to create a robust and rigorous program, which will serve as the basis for consistent and appropriate management and operation of sanitary sewer systems.

During the collaborative process, several key issues regarding the draft WDRs were identified. These include:

- Is there a need for statewide collection system requirements?
- Should these systems be regulated under a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to the Federal Clean Water Act or under WDRs issued pursuant to the California Water Code (the Porter-Cologne Water Quality Control Act or Porter-Cologne)?
- Should the regulatory mechanism include a prohibition of discharge and, if so, should the prohibition encompass only SSOs that reach surface waters, ground water, or should all SSOs be prohibited?
- Should a regulatory mechanism include a permitted discharge, an affirmative defense, or explicit enforcement discretion?
- Should the regulated facilities include publicly-owned facilities, privately owned facilities, satellite systems (public and private), and/or private laterals?

- Should all SSOs be reported, and if not, what should the reporting thresholds be; and what should the reporting timeframes be?
- How will existing permits and reporting requirements incorporate these new WDRs?
- How much will compliance with these new WDRs cost?

The WDRs and Reporting Program considered the comments of all stakeholders and others who commented on the two drafts circulated to the public. These documents also incorporate legal requirements and other revisions to improve the effectiveness and management of the regulatory program. Following is a discussion of the above issues, comments received on the drafts and an explanation of how issues were resolved.

The Need

As California's wastewater collection system infrastructure begins to age, the need to proactively manage this valuable asset becomes increasingly important. The first step in this process is to have a reliable reporting system for SSOs. Although there are some data systems to record spills and various spill-reporting requirements have been developed, inconsistent requirements and enforcement have led to poor data quality. A few Regional Water Boards have comprehensively tracked SSOs over the last three to five years, and from this information we have been able to determine that the majority of collection systems surveyed have had SSOs within this time period.

Both the San Diego and Santa Ana Regional Water Boards have issued WDRs over the last several years to begin regulating wastewater collection systems in an attempt to quantify and reduce SSOs. In fact, 44 out of 46 collection system agencies regulated by the San Diego Regional Water Board have reported spills over the last four and a half years, resulting in 1467 reported SSOs. Twenty-five out of 27 collection system agencies subject to the Santa Ana Regional Water Board's general WDRs reported SSOs between the years of 1999-2004. During this time period, 1012 SSOs were reported.

The 2004 Annual Ocean and Bay Water Quality Report issued by the Orange County Environmental Health Care Agency shows the number of SSOs increasing from 245 in 1999 to 399 in 2003. While this number indicates a concerning trend, the total annual spill volume from these SSOs has actually decreased dramatically, as has the number of beach closures due to SSOs. It is likely, therefore, that the rise in number of SSOs reflects better reporting, and not an actual increase in the number of SSOs.

This information also suggests that the Santa Ana Regional Water Board's WDRs, which contain sanitary sewer management plan (SSMP) requirements similar to those in the proposed statewide general WDRs, have been effective in

not only increasing the number of spills that are reported but also in mitigating the impacts of SSOs that do occur.

Data supports the conclusion that virtually all collection systems have SSOs and that implementation of a regulatory measure requiring SSO reporting and collection system management, along with required measures to limit SSOs, will greatly benefit California water quality. Implementation of these requirements will also greatly benefit and prolong the useful life of the sanitary sewer system, one of California's most valuable infrastructure items.

NPDES vs. WDRs

Porter-Cologne subjects a broader range of waste discharges to regulation than the Federal Clean Water Act. In general, the Clean Water Act prohibits the discharge of pollutants from point sources to surface waters of the United States unless authorized under an NPDES permit. (33 U.S.C. §§1311, 1342). Since not all SSOs result in a discharge to surface water, however, not all SSOs violate the Clean Water Act's NPDES permitting requirements. Porter-Cologne, on the other hand, covers all existing and proposed waste discharges that could affect the quality of state waters, including both surface waters and groundwater. (Wat. Code §§13050(e), 13260). Hence, under Porter-Cologne, a greater SSO universe is potentially subject to regulation under WDRs. In addition, WDRs under Porter-Cologne can address both protection of water quality as well as the prevention of public nuisance associated with waste disposal. (*Id.* §13263).

Some commenters contend that because all collection systems have the potential to overflow to surface waters the systems should be regulated under an NPDES permit. A recent decision by the United States Court of Appeals for the 2nd Circuit, however, has called into question the states' and USEPA's ability to regulate discharges that are only "potential" under an NPDES permit. In *Waterkeeper Alliance v. United States Environmental Protection Agency* (2005) 399 F.3d 486, 504-506, the appellate court held that USEPA can only require permits for animal feedlots with "an actual addition" of pollutants to surface waters. While this decision may not be widely followed, especially in the area of SSOs, these are clearly within the jurisdiction of the California Water Code.

USEPA defines a publicly owned treatment works (POTW) as both the wastewater treatment facility and its associated sanitary sewer system (40 C.F.R. §403.3(o)¹). Historically, only the portion of the sanitary sewer system that is owned by the same agency that owns the permitted wastewater treatment facility has been subject to NPDES permit requirements. Satellite sewer collection systems (i.e. systems not owned or operated by the POTW) have not been

¹ The regulation provides that a POTW include sewers, pipes, and other conveyances only if they convey wastewater to a POTW.

typically regulated as part of the POTW and, therefore, have not generally been subject to NPDES permit requirements.

Comments were received that argued every collection system leading to a POTW that is subject to an NPDES permit should also be permitted based upon the USEPA definition of POTW. Under this theory, all current POTW NPDES permits could be expanded to include all satellite sewer collection systems, or alternatively, the satellite system owners or operators could be permitted separately. However, this interpretation is not widely accepted and USEPA has no official guidance to this fact.

There are also many wastewater treatment facilities within California that do not have discharges to surface water, but instead use percolation ponds, spray irrigation, wastewater reclamation, or other means to dispose of the treated effluent. These facilities, and their satellite systems, are not subject to the NPDES permitting process and could not be subject to a statewide general NPDES permit. POTWs that fall into this category, though, can be regulated under Porter-Cologne and do have WDRs.

In light of these factors, the State Water Board has determined that the best approach is to propose statewide general WDRs at this time.

Prohibition of Discharge

The Clean Water Act prohibits the discharge of wastewater to surface waters except as authorized under an NPDES permit. POTWs must achieve secondary treatment, at a minimum, and any more stringent limitations that are necessary to achieve water quality standards. (33 U.S.C. §1311(b)(1)(B) and (C)). Thus, an SSO that results in the discharge of raw sewage to surface waters is prohibited under the Clean Water Act.

Additionally, California Water Code section 13263 requires the State Water Board to, after any necessary hearing, prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge. The requirements shall, among other things, take into consideration the need to prevent nuisance.

California Water Code section 13050 (m), defines nuisance as anything which meets all of the following requirements:

- a. 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.
- b. Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

- c. Occurs during, or as a result of, the treatment or disposal of wastes.

Some SSOs do create a nuisance as defined in state law. Therefore, based upon these statutory requirements, the WDRs include prohibitions in Section C. of the WDRs. Section C. states:

C. PROHIBITIONS

1. Any SSO that results in a discharge of untreated or partially treated wastewater to waters of the United States is prohibited.
2. Any SSO that results in a discharge of untreated or partially treated wastewater, which creates a nuisance as defined in California Water Code section 13050(m) is prohibited.

Furthermore, the State Water Board acknowledges the potential for more stringent water quality standards that may exist pursuant to a Regional Water Board requirement. Language included in Section D.2 of the WDRs allows for these more stringent instances.

D. PROVISIONS

2. It is the intent of the State Water Board that sanitary sewer systems be regulated in a manner consistent with the general WDRs. Nothing in the general WDRs 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 WDRs, superseding the general WDRs, for a sanitary sewer system, authorized under the Clean Water Act or California Water Code; or
 - (iv) Interpreted or applied to supersede any more specific or more stringent WDRs or enforcement order issued by a Regional Water Board.

Permitted Discharge, Affirmative Defense, and Enforcement Discretion

Commenters from the discharger community have requested inclusion of an affirmative defense to an SSO on the grounds that certain SSO events are unforeseen and unavoidable, such as SSOs due to extreme wet weather events. An affirmative defense is a mechanism whereby conduct that otherwise violates WDRs or a permit will be excused, and not subject to an enforcement action, under certain circumstances. Since many collection system industry experts believe that not all SSOs may be prevented, given certain circumstances (such as unforeseen vandalism, extreme wet weather, or other acts of God), many

collection system owner representatives believe this should formally be recognized by including an affirmative defense for these unavoidable SSOs.

Previous informal drafts of the general WDRs included affirmative defense language, which was contingent upon appropriate development and implementation of sanitary sewer management plan (SSMP) requirements, as well as a demonstration that the SSO was exceptional and unavoidable. Other stakeholders, including USEPA and the environmental groups opposed the concept of an affirmative defense for SSOs. They argued that its inclusion in the WDRs would undermine the Clean Water Act and inappropriately limit both Regional Water Board and third party enforcement.

After considering input from all stakeholders, and consulting with USEPA, staff is not recommending inclusion of an affirmative defense. Rather, the draft WDRs incorporate the concept of enforcement discretion, and explicitly identify what factors must be considered during any civil enforcement proceeding. The enforcement discretion portion of the WDRs is contained within Sections D. 6 and 7, and is consistent with enforcement discretion provisions within the California Water Code.

Facilities Subject to WDRs

Collection systems consist of pipelines and their appurtenances, which are intended to transport untreated wastewater to both publicly-owned and private wastewater treatment facilities. While wastewater treatment facilities are owned by a wide variety of public and private entities, public agencies (state and federal agencies, cities, counties, and special districts) own the vast majority of this infrastructure.

Collection systems that transport wastewater to POTWs could be grouped into four different categories:

1. Publicly-owned treatment works – pipelines and appurtenances that are owned by a public agency that also owns a wastewater treatment facility;
2. Publicly-owned satellites – pipelines and appurtenances that are owned by a public agency that does not own a wastewater treatment facility; and
3. Private laterals - pipelines and appurtenances that are not owned by a public agency, but rather discharge into one of the above types of facilities.
4. Privately owned treatment works – pipelines and appurtenances that are owned by a private entity, which also owns a wastewater treatment facility (often a septic tank and leach field).

The WDRs require all public agencies, which own wastewater collection systems (category 1 and 2 above) to enroll in the WDRs. Privately owned systems (categories 3 and 4) are not subject to the WDRs; however, a Regional Water

Board may at its discretion issue WDRs to these facilities on a case-by-case or region wide basis.

Collection systems discharging into POTWs (categories 1, 2, and 3) represent, by far, the greatest amount of collection system infrastructure within California. Since regulating private entities (categories 3 and 4) on a statewide basis would be unmanageable and impractical (because of the extremely large number and lack of contact information and other associated records), staff believes focusing on the public sector is the best option for meaningful and consistent outcomes. The legal authority and reporting provisions contained in the WDR do require limited oversight of private laterals (category 3) by public entities. Given this limited responsibility of oversight, public entities are not responsible or liable for private laterals.

State Water Board staff will notify all known public agencies that own wastewater collection systems, regarding their obligation to enroll under these WDRs. However, because of data inaccuracies, State Water Board staff may inadvertently not contact an agency that should enroll in the WDRs or erroneously contact a public agency that does not own a collection system. Staff will make every effort to accurately identify public agencies. In the event that a public agency is overlooked or omitted, however, it is the agency's responsibility to contact the State Water Board for information on the application process. An agency can find the appropriate contact by visiting the State Water Board's SSO homepage at www.waterboards.ca.gov/ss0.

SSO Reporting

SSOs can be distinguished between those that impact water quality and/or create a nuisance, and those that are indicators of collection system performance. Additionally, SSO liability is attributed to either private entities (homeowners, businesses, private communities, etc...) or public entities. Although all types of SSOs are important to track, the reporting time frames and the type of information that need to be conveyed differ.

The Reporting Program and Online SSO Database clearly distinguish the type of spill (major or minor) and the type of entity that owns the portion of the collection system that experienced the SSO (public or private entity). The reason to require SSO reporting for SSOs that do not necessarily impact public health or the environment is because these types of SSOs are indicators of collection system performance and management program effectiveness, and may serve as a sign of larger and more serious problems that should be addressed. Although these types of spills are important and must be regulated by collection system owners, the information that should be tracked and the time required to get them into the online reporting system are not as stringent.

Obviously, SSOs that are large in nature, affect public health, or affect the environment must be reported as soon as practicable and information associated with both the spill and efforts to mitigate the spill must be detailed. Since the Online SSO Database is a web based application requiring computer connection to the internet and is typically not as available as telephone communication would be, the Online Database will not replace emergency notification, which may be required by a Regional Water Board, Office of Emergency Services, or a County Health or Environmental Health Agency.

Incorporating Existing Permits

It is the State Water Board's intent to have one statewide regulatory mechanism that lays out the foundation for consistent collection system management requirements and SSO reporting. While there are a significant number of collection systems that are not actively regulated by the State or Regional Water Boards, some efforts have been made to regulate these agencies on a facility-by-facility or region-by-region basis. General WDRs, individual WDRs, NPDES permits, and enforcement orders that specifically include collections systems are mechanisms that have been used to regulate collection system overflows.

However, because of these varying levels of regulatory oversight, confusion exists among collection system owners as to regulatory expectations on a consistent and uniform basis (especially with reporting spills). Currently, there are a myriad of different SSO reporting thresholds and a number of different spill report repositories. Because of the varying levels of reporting thresholds and the lack of a common database to capture this information, an accurate picture of SSOs throughout California is unobtainable.

In 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. The draft WDRs detail requirements associated with SSMP development and implementation and SSO reporting.

All NPDES permits for POTWs currently include federally required standard conditions, three of which apply to collection systems. NPDES permits must clarify that the following three conditions apply to that part of the collection system that is owned or operated by the POTW owner or operator. These conditions are:

- Duty to mitigate discharges (40 CFR 122.41(d))
- Requirement to properly operate and maintain facilities (40 CFR 122.41(e))
- Requirement to report non-compliance (40 CFR 122.41(l)(6) and (7))

Understandably, revising existing regulatory measures will not occur immediately. However, as time allows and, at a minimum, upon readopting existing WDRs or WDRs that serve as NPDES permits, the Regional Water Boards should rescind redundant or inconsistent collection system requirements. In addition, the Regional Water Boards must ensure that existing NPDES permits clarify that the three standard permit provisions discussed above apply to the permittee's collection system.

Although it is the State Water Board's intent that this Order be the primary regulatory mechanism for sanitary sewer systems statewide, there will be some instances when Regional Water Boards will need to impose more stringent or prescriptive requirements. In those cases, more specific or more stringent WDRs or an NPDES permit issued by a Regional Water Board will supersede this Order. Finding number 11, in the WDRs states:

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. This 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. 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.

Cost of Compliance

While the proposed WDRs contain requirements for systems and programs that should be in place to effectively manage collection systems, many communities have not implemented various elements of a good management plan. Some agencies are doing an excellent job managing their collection systems and will incur very little additional costs. Other agencies will need to develop and implement additional programs and will incur greater costs. However, any additional costs that a public agency may incur in order to comply with these General WDRs are costs that an agency would necessarily incur to effectively manage and preserve its infrastructure assets, protect public health and prevent nuisance conditions. These General WDRs prescribe minimum management requirements that should be present in all well managed collection system agencies.

In order to estimate the compliance costs associated with the proposed WDRs, staff analyzed costs associated with implementing the Santa Ana Regional Water Board's general WDRs. Twenty-one agencies, which discharge to Orange County Sanitation District, submitted financial summaries for the last five years, representing both pre- and post-WDRs adoption. Operation and maintenance costs, program development costs, as well as capital improvement costs were

considered and fairly accurately represent what can be expected statewide with the adoption of the General WDRs.

After extrapolating the sample to yield a statewide cost perspective, the projected annual cost of implementing the statewide WDRs is approximately \$870 million. This total represents \$345.6 million in O&M costs and \$524.5 for capital improvement projects.

While this sum is substantial, presenting the costs on a per capita or per household basis puts the figure in perspective. Department of Finance estimated the total population for Californians that may be subject to the WDRs to be 30.3 million persons (1/1/05). Dividing the population by the approximate average household size of 2.5 yields 12 million households. The average household in California is assumed to be 2.5 persons. The increased average annual cost (in order to comply with these WDRs) per person is estimated to be \$28.74 and \$71.86 per household (or \$5.99 per month per household)

Given these average costs there will be some communities that realize higher costs on a per household basis and some that realize less cost. Furthermore, larger communities will probably also realize an economy of scale, which is dependent upon a community's size. While larger communities may see lower costs associated with compliance, smaller communities will probably see a higher cost associated with compliance. Costs for compliance in small communities may be as high as \$40 per month per household.