

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of)
)
THE CITY OF SAN BERNARDINO AND THE)
CITY OF COLTON)
)
For Review of Orders Nos. 85-71 and)
85-75, respectively, of the California)
Regional Water Quality Control Board,)
Santa Ana Region. Our Files Nos. A-401)
and A-403.)
_____)

ORDER NO. WQ 86-14

(Order 86-14 rescinded by Order WQ 88-1)

BY THE BOARD:

On July 12, 1985, the California Regional Water Quality Control Board, Santa Ana Region (Regional Board) issued revised waste discharge requirements (requirements) which served as National Pollutant Discharge Elimination System (NPDES) permits in Orders Nos. 85-71 and 85-75 for the Cities of San Bernardino and Colton, respectively. Both sets of requirements regulate discharges of waste from publicly-owned treatment works (POTWs) to the Santa Ana River.

On August 9, 1985, the State Water Resources Control Board (State Board) received a petition from Colton seeking review of its requirements, and on August 12, 1985, the State Board received a petition from San Bernardino seeking review of its requirements. Both sets of requirements established more stringent effluent limitations for discharges to the Santa Ana River than had previous requirements, and both petitions challenged the reasonableness and legality of these provisions. On January 8, 1986, the two petitions were consolidated for purposes of review.

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I. BACKGROUND

San Bernardino and Colton both own and operate wastewater treatment facilities which treat sewage and discharge the effluent to the Santa Ana River. The San Bernardino plant serves that city, Loma Linda, the East Valley Water District, Norton Air Force Base, Patton State Hospital, and an unincorporated portion of San Bernardino County. Presently, the plant receives an average flow of 22.5 million gallons per day (mgd), and has capacity of 24.5 mgd. An average flow of 1.5 mgd is treated in a tertiary treatment facility with a capacity of 3.0 mgd. Discharge from the tertiary treatment facility is used for irrigation. The remaining 21 mgd receives activated sludge (secondary) treatment, and is then discharged to Reaches 4 and 5 of the Santa Ana River.

Colton operates an activated sludge wastewater treatment facility which receives sewage from Colton, Grand Terrace and an unincorporated area of San Bernardino County. The plant receives an average flow of 3.6 mgd, and has design capacity of 5.4 mgd. Treated secondary effluent is discharged to Reach 4 of the Santa Ana River.

The requirements adopted for San Bernardino and Colton establish effluent limitations for the discharges to the Santa Ana River. In order to protect downstream recreational uses of the River, more stringent limitations apply when river flow is continuous between the points of discharge and the lower reaches of the River. As a practical matter, these more stringent limitations will necessitate tertiary treatment. The petitioners argue against such stringent limitations. Instead, the petitioners contend that the Regional Board should have endorsed an alternative approach of ground water pumping to reduce river flows. The petitioners further contend that the requirements do not allow sufficient time for compliance. Finally, San Bernardino argues that

the requirements are in conflict with Revenue and Taxation Code Section 2209 and Article 13B, Section 6 of the California Constitution.

Before addressing these major issues, we will consider a number of peripheral issues raised by the petitioners. In its petition, Colton requested a stay of the effect of the requirements. This request was denied in State Board Order No. WQ 86-1. San Bernardino requested an evidentiary hearing before this Board in order to submit the final Facilities Plan on this project and evidence regarding cost of a future tertiary treatment plant. The Facilities Plan was written as part of the funding process for the Clean Water Grant program, which is administered by the State Board. The study is therefore already within the custody of this Board, and has been made a part of the record in this matter.¹ San Bernardino argues that the proposed evidence regarding plant costs is relevant to its argument that the requirements are prohibited by Revenue and Taxation Code, Section 2209. As will be discussed below, it will not be necessary for this Board to determine whether the plant costs are great enough to trigger application of Section 2209. Therefore, evidence whether the cost is great enough to trigger that code section would not be necessary for our determination in this matter. There is no compelling reason to hold a hearing in this matter, and the request for a hearing is denied.

¹ A draft version of the Facilities Plan was reviewed by the Regional Board, and the Board received extensive testimony from the Plan's author. There were no substantial changes between the draft and final versions.

II. CONTENTIONS AND FINDINGS

1. Contention: The requirements for tertiary treatment are inappropriate and improper, and the Regional Board should have accepted the ground water pumping alternative.

Finding: Both petitioners argue that the requirements improperly compel construction of tertiary treatment facilities. Further, the cities contend that the Regional Board should have rejected tertiary treatment in favor of the alternative discussed in the Facilities Plan of pumping ground water from beneath the Santa Ana River.

The two POTWs which are the subjects of these requirements discharge to Reaches 4 and 5 of the Santa Ana River. Historically, flows from Reaches 4 and 5 continued into the lower reaches of the River (Reaches 2 and 3) only intermittently. Reaches 2 and 3 have historically had perennial flows and been used for recreation and other purposes.²

Computer modelling performed in 1975³ predicted that increased sewage discharges to Reaches 4 and 5 would result in perennial flows from Reach 4 to the lower reaches of the Santa Ana River between 1980 and 1985. In fact, wet weather caused flows to continue well into the summer months in the late 1970's and early 1980's.⁴ Since the early 1980's into the present, the Santa Ana River has flowed continuously.

A. Basin Plan -- Beneficial Uses

As will be discussed below, the major contention of the petitioners is that while the Regional Board correctly anticipated the advent

² Water Quality Control Plan for Santa Ana River Basin, 1984, p. 3-8 (hereafter referred to as Basin Plan).

³ These results are reported in the 1975 version of the Basin Plan.

⁴ Basin Plan, p. 5-19.

of perennial flows in the Basin Plan, the Plan did not require advanced treatment of flows into the lower reaches of the Santa Ana River, at least so long as these flows could be controlled at least some of the year. Thus, if the petitioners were to implement a ground water pumping alternative, which would alleviate continuous flows during dry weather periods, then there would be no basis in the Basin Plan for requiring advanced treatment when continuous flows occur.

The Regional Board, on the other hand, reads the Basin Plan to require advanced treatment of sewage effluent whenever flows are continuous from Reach 4 to the lower reaches of the Santa Ana River. While there are some statements in the Basin Plan which may be improved by clarification, we find that the Plan does support the requirements, and that the requirements properly implement the Basin Plan [Water Code Section 13263(a)].

The two provisions in the requirements which are the subject of disagreement are Effluent Limitations A.1.a and A.4.a. Effluent Limitation A.1.a. limits waste discharges from the POTWs when surface flows are continuous from the points of discharge to Reach 4 for specific constituents. Biochemical oxygen demand (BOD) is limited to 20 milligrams per liter (mg/l) and 30 mg/l for a 30-day average and 7-day average, respectively. Suspended solids are similarly limited to 20 mg/l and 30 mg/l. Thirty-day averages for ammonia-nitrogen and total chlorine residual are limited to 18 mg/l and 0.1 mg/l respectively. (Less stringent limitations are established for noncontinuous flows in Effluent Limitation A.1.b.) Effluent Limitation A.4.a. provides:

"During periods of continuous flow in the Santa Ana River from the point of discharge to the Mission Bridge in Riverside the wastewater discharged to the river shall be an adequately disinfected, oxidized, coagulated, clarified, filtered wastewater (or equivalent, as determined by the State Department of Health Services). The wastewater shall be considered adequately

disinfected if at some location in the treatment process the median number of coliform organisms does not exceed 2.2 per 100 milliliters and the number of coliform organisms does not exceed 23 per 100 milliliters in more than one sample within any 30-day period. The median value shall be determined from the bacteriological results of the last 7 days for which analyses have been completed. Filtered wastewater means an oxidized, coagulated, clarified wastewater which has been passed through natural undisturbed soils or filter media, such as sand or diatomaceous earth (or equivalent as determined by the State Department of Health Services), so that the turbidity as determined by an approved laboratory method does not exceed an average operating turbidity of 2 turbidity units and does not exceed 6 turbidity units more than 5 percent of the time during any 24-hour period."

The petitioners contend that these provisions require construction of tertiary treatment facilities. Such a requirement does not exist, and would, in fact, be prohibited by Water Code Section 13360.⁵ It is apparent, however, that unless the petitioners took other actions to prevent continuous flows to Reach 3, tertiary treatment would be required to achieve these effluent limitations.

Water Code Section 13263(a) provides that waste discharge requirements "shall implement" relevant Basin Plans, and "shall take into consideration the beneficial uses to be protected, [and] the water quality objectives reasonably required for that purpose...." Beneficial uses and water quality objectives are established in Basin Plans (Water Code Section 13241).

⁵ Section 13360 provides, in relevant part:

"No waste discharge requirements or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply therewith in any lawful manner."

We therefore turn first to the Basin Plan to evaluate the propriety of the effluent limitations at issue.

The Basin Plan designates beneficial uses for the downstream Reach 3 of the Santa Ana River, including water contact recreation (Basin Plan, Table 2-1). This use includes body contact recreation such as swimming, where ingestion of water is reasonably possible. (Basin Plan, p. 2-2.) Reaches 4 and 5 of the River are designated as water contact recreation - intermittent. (Basin Plan, Table 2-In explaining the term intermittent, the Basin Plan states:

"[The term] appears in Table 2-1 where, because of natural water conditions, the beneficial use does not occur year-round. The best and most common example is an ephemeral stream. Ephemeral streams in the region include, at one extreme, those which flow only while it is raining or for a short time afterward, and at the other extreme, those which flow through part of the year, usually every year, but which also dry up for part of the year almost every year. While such ephemeral streams are flowing, beneficial uses are made of the water. In that such uses depend on the presence of water they are intermittent. Waste discharges which could eliminate intermittent beneficial uses, whether they are made while those uses exist or not, are not permitted." (Basin Plan, p. 2-3.)

This section of the Basin Plan clearly states that the lower reaches of the River are designated for body contact recreation and that beneficial uses in waters designated as intermittent depend on the presence of water. When there is water flowing from Reaches 5 and 4 to Reach 3, this entire area of the Santa Ana River is designated for body contact recreation. The beneficial use is applicable in water designated as intermittent whenever water is present, whether water is generally present only briefly during and after rainfall, or where water is usually present.

While the beneficial use designation is clear that body contact recreation is to be protected throughout Reaches 3, 4 and 5 whenever water is

present, the petitioners claim that the Basin Plan was concerned only with the potential impact of perennial flows in the River on the water quality in Reaches 3 and 2. Thus, the petitioners claim that the Basin Plan would support a tertiary treatment requirement only if flows are continuous throughout the year, and not if flows are intermittent.

Before addressing this point, it must be understood that although flows are perennial at the present time, the petitioners are not conceding that the current state of affairs will continue. As was stated above, in 1975 a computer model showed that increases in sewage effluent discharges to Reaches 5 and 4 would result in perennial flows. Although the 1975 Basin Plan recommended moving points of discharge and managing effluent to avoid generating perennial flows, this was not done. (Basin Plan, p. 5-19.) In 1977, a Clean Water Grant-funded study of the problem was begun by the dischargers to Reaches 5 and 4. The Facilities Plan was recently completed. The preferred alternative in this plan is pumping ground water, which would both lessen the impact of effluent discharges to Reach 3 (through percolation to ground water) and reduce the area's problems with rising ground water.

While ground water pumping would reduce the amount of effluent flowing to Reach 3 of the Santa Ana River, the petitioners make no claim that it would stop the flow altogether. Currently, the water entering Reach 3 may contain as much as 95 percent sewage effluent during dry weather flow. (Basin Plan, p. 4-5.) Thus, even if the ground water pumping alternative were implemented, there would be periods of continuous flow where effluent reaches the lower portion of the Santa Ana River. It is the petitioners' argument that unless these flows are perennial, the Basin Plan does not authorize the Regional Board to require advanced treatment.

Colton states in its petition that the Basin Plan "requires [tertiary] treatment only if 'perennial' flow occurs in Reach 4 of the Santa Ana River." (Colton petition, p. 2.) There is, however, no such statement in the Basin Plan. The discussion regarding tertiary treatment which is contained in the Basin Plan is contained in the section on Water Quality Problems and Issues. (Basin Plan, p. 5-14 and following.) Therein, the Regional Board addressed the problem of increasing discharges which, as was anticipated in 1975, has resulted in perennial flows in the Santa Ana River. The Basin Plan states: "It may now be necessary to provide tertiary treatment at San Bernardino, Colton and Rialto,⁶ to avoid degrading the quality of the river in Reaches 3 and 2." While it is true this statement is made in the context of a discussion of the threats posed by perennial flows, there is nothing to support Colton's claim that the Basin Plan requires tertiary treatment only if flows become perennial. Rather, the beneficial uses are clearly applicable whenever flows are continuous, and, as will be seen below, tertiary treatment of sewage effluent is necessary to protect those beneficial uses.

San Bernardino cites another section of the Basin Plan in support of its argument that the Plan does not require tertiary treatment of the effluent. In the chapter on Implementation, the Plan refers to the positive aspects regarding reclamation of ground water caused by the discharges:

"Although it is not widely considered as such, discharges of treated wastewater to the Santa Ana River constitute the largest single reclamation activity in the basin. These discharges make up as much as 95 percent of the river's dry weather flow. The mineral quality of these flows is generally better than the natural flows would be. These discharges

⁶ Rialto operates the third POTW which discharges to Reaches 4 and 5 of the Santa Ana River.

enhance the in-stream beneficial uses of the river throughout its 26-mile length. Essentially all this water is recharged into the ground water basin in Orange County." (Basin Plan, p. 4-22.)

While this statement does speak to a positive aspect of the discharge of sewage effluent to the river, it in no way establishes levels of treatment for the river. There is also nothing in this section which conflicts with the establishment of beneficial uses to be protected in the Basin Plan.

Finally, San Bernardino argues that the premise of the Basin Plan is that beneficial uses can be protected if continuous flows in the river can be limited to wet season flows. This statement is simply not supported by the Basin Plan.⁷ As is discussed above, San Bernardino also apparently claims that there is no actual body contact recreation use during and after storm events in the area. No evidence was presented for this position, and we find no grounds for changing the designation made in the Basin Plan. In addition, beneficial use designation is not restricted to actual use, but includes "[p]ast, present, and probable future beneficial use of water." (Water Code Section 13241(a).) The upgrading of Reaches 3 and 2 to body contact recreation, along with subsequent development of beach and park areas along the River is described in the Basin Plan, at page 5-14. In adopting the Plan, the Regional Board made a clear choice to compel protection of those beneficial

⁷ While EPA regulations do permit designation of seasonal uses of water in order to require less stringent water quality criteria at certain times of the year, 40 C.F.R. Section 131.10(f), the Basin Plan does not make such a designation. This is understandable given the location of the discharge, where winter temperatures are often high enough to allow swimming and other recreational uses.

uses, notwithstanding the difficulties dischargers will face in upgrading their plants to protect these uses. (See Basin Plan, p. 5-14.)⁸

The determination to protect the Santa Ana River for body contact recreation whenever water is present is consistent with the goals of the federal Clean Water Act, 33 U.S.C. Section 1251 et seq. Section 101(a) of the Act [33 U.S.C. Section 1251(a)] establishes a national goal to end all discharges into navigable waters by 1985, and to achieve an interim goal, by July 1, 1983, "of water quality which provides for the protection and propagation of fish,...and provides for recreation in and on the water...." While the long-term goal of ending all discharges has certainly not been met, we believe that the designation of the River for body contact recreation is consistent with, and authorized by, the interim goal that waters be fishable and swimmable. Regulations adopted by EPA make clear that beneficial use designations must also protect downstream waters and assure beneficial uses will be met there. [40 C.F.R. Section 131.10(b).]

We do note that at page 5-19, the Basin Plan contains language which may be read to link the need for tertiary treatment with perennial flows. This language may be inconsistent with the designation of beneficial uses which provides for body contact recreation whenever water is flowing from the upper reaches to the lower reaches. When the Basin Plan is revised, the Regional Board should clarify this language.

⁸ The petitioners argue that the Basin Plan would be implemented if, through ground water pumping, the flows returned to their historical levels, i.e. continuous flow during part of the year. The petitioners ignore the fact, however, that in the 1984 Basin Plan revisions, Reaches 5 and 4 were upgraded to include intermittent water contact recreation. Previously, the Basin Plan had not designated this beneficial use. (Basin Plan, Table 2-1.)

B. Limitations Necessary for Protection of Beneficial Uses

The Basin Plan itself does not establish necessary levels of treatment or effluent limitations. Rather the Plan determines the beneficial uses to be protected, and the water quality objectives for receiving water, and the Regional Board then establishes waste discharge requirements necessary to protect the beneficial uses. (Water Code Section 13263.) Thus, effluent limitations were adopted in the requirements in order to protect beneficial uses. The limitations included in the requirements are consistent with guidelines and regulations adopted by the Department of Health Services for body contact recreation.

The Department of Health Services has issued Uniform Guidelines for Sewage Disinfection (Guidelines) which provide disinfection criteria for various public exposures to sewage effluent. The relevant category in the Guidelines for the petitioners' discharges to the River is that where a Regional Board has identified water contact recreation as a beneficial use and most of the following conditions exist:

- "1. The discharge occurs in a residential area.
2. The discharge occurs in an area where there is ready access to the stream and exclusion of the public is not a realistic alternative.
3. Historical attempts to post the stream to warn and exclude the public have been unsuccessful.
4. The recreation potential in the stream is high and justified because of weather, proximity to other recreation areas, etc.
5. Public interest has been identified and the resident population wants or expects body contact recreation in the stream." (Guidelines, p. 4.)

It is clear from the record in this case that the category described above is the proper category for these discharges. The recommendation contained in the Guidelines for this category of discharge is the following:

"The effluent must be adequately disinfected, oxidized, coagulated and filtered wastewater. The wastewater shall be considered to be adequately disinfected if at some point in the treatment process the median MPN of the total coliform organisms does not exceed 2.2/100 ml." (Guidelines, p. 4.)

The effluent limitations at issue incorporate the recommended level of treatment contained in the Guidelines. (Requirements, Effluent Limitation A.4.a.) We therefore conclude that the level of treatment required by the Regional Board is neither inappropriate nor improper.

We also find relevant the criteria for wastewater reclamation adopted by the Department of Health Services. (Title 22, California Administrative Code, Section 60301 et seq., "Reclamation Criteria.")⁹ Section 60315 of the Reclamation Criteria provides:

"Reclaimed water used as a source of supply in a nonrestricted recreational impoundment shall be at all times an adequately disinfected, oxidized, coagulated, clarified, filtered wastewater. The wastewater shall be considered adequately disinfected if at some location in the treatment process the median number of coliform organisms does not exceed 2.2 per 100 milliliters and the number of coliform organisms does not exceed 23 per 100 milliliters in more than one sample within any 30-day period. The median value shall be determined from the bacteriological results of the last 7 days for which analyses have been completed."

The beneficial use of body contact recreation, especially where 95 percent of the stream flow is often made up of sewage effluent, can be

⁹ The Basin Plan states that the discharges to the River constitute a large reclamation activity (Basin Plan, p. 4-22). While streamflow augmentation is not specifically addressed in the Reclamation Criteria, the classification, "Nonrestricted Recreational Impoundment," Title 22, California Administrative Code, Section 60315, establishes treatment levels necessary for reclaimed water used for recreational purposes. This category is appropriately applied to the discharges to the Santa Ana River.

adequately protected only by advanced treatment. The criteria adopted by the Department of Health Services for wastewater reclamation impoundments used for unrestricted recreation are plainly applicable by analogy. The need for advanced treatment is also supported by the Department's Guidelines and a letter from the Department supporting the requirement.¹⁰ We therefore conclude the Effluent Limitation A.4.a. properly incorporates the Department's treatment requirements.

2. Contention: The petitioners claim that they cannot comply with the time schedule contained in the requirements, and that the schedule is therefore inappropriate.

Finding: Provision C.8 in San Bernardino's requirements and C.9. in Colton's requirements establish the following time schedule for compliance with Effluent Limitations A.1.a. and A.4.a.:

<u>Task</u>	<u>Compliance Date</u>	<u>Report of Compliance Due Date</u>
Develop a Plan to Achieve Compliance	10/1/85	11/1/85
Start Design of Facilities	2/1/86	2/15/86
Status Report	6/1/86	6/15/86
Status Report	9/1/86	9/15/86
Start Construction	1/1/87	1/15/87
Status Report	3/1/87	3/15/87
Status Report	9/1/87	9/15/87

¹⁰ Letter from C. E. Anderson to James W. Anderson, dated July 1, 1985.

<u>Task</u>	<u>Compliance Date</u>	<u>Report of Compliance Due Date</u>
Status Report	1/1/88	1/15/88
Full Compliance	3/1/88	3/15/88

The petitioners claim that compliance with the requirements would necessitate construction of tertiary treatment facilities, which could not be done in the time allotted in the schedule. The Regional Board concedes that it may not be possible to meet the dates contained in the schedule but claims that it was legally required to establish these dates.

The dates established by the requirements are based on Sections 301(b)(1)(c) and 301(i)(1) of the Clean Water Act, [33 U.S.C. 1311(b)(1)(C) and 1311(i)(1)]. Section 301(b)(1)(C) requires that existing POTWs, by July 1, 1977, meet effluent limitations based on secondary treatment [Section 301(b)(1)(B)] and:

"...any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations (under authority preserved by section 510), or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act." [33 U.S.C. Section 1311(b)(1)(C).]¹¹

Water quality standards, within the meaning of Section 301(b)(1)(C) include the designation of beneficial uses for navigable waters by the state. (See Clean Water Act, Section 303(c)(2); [33 U.S.C. Section 1313(c)(2)].) Thus, the federal Clean Water Act requires that POTWs meet effluent limitations

¹¹ Section 510 [33 U.S.C. Section 1710] authorizes states to impose limitation standards and requirements regarding pollution discharges to surface waters, so long as these are not less stringent than federal standards and requirements.

necessary to protect beneficial uses designated in the Basin Plan for navigable waters by July 1, 1977. An extension of this date, to July 1, 1988, is permissible under Section 301(i)(1), [33 U.S.C. Section 1311(i)(1)]. That subsection provides that where construction is required for a POTW to meet the limitations in Section 301(b)(1)(B) (for secondary treatment) or 301(b)(1)(C), but construction cannot be completed by 1977, or the federal government has failed to provide financial assistance for the project, the NPDES permit for the POTW may be modified to include a compliance schedule:

"...based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988...." [33 U.S.C. Section 1311(i)(1) (emphasis added.)]

While the petitioners make much of their claim that federal grant monies will not be provided for a tertiary treatment facility,¹² and that achievement of effluent limitations will require more than secondary treatment required by Section 301(b)(1)(B), the Clean Water Act clearly requires issuance of NPDES permits with effluent limitations, to be effective by July 1, 1988, which will protect beneficial uses designated in the Basin Plan. As discussed previously, California regulations and guidelines require the imposition of effluent limitations which will achieve advanced treatment for the protection of the designated use of body contact recreation. The Regional Board is therefore correct in stating that it had no choice but to impose a compliance schedule in the NPDES permits which required achievement of effluent limitations by July 1, 1988.

¹² In fact, no final determination has been made regarding grant eligibility for that project or for any alternative.

The date established by the Regional Board for full compliance was March 1, 1988--four months prior to the latest date allowable for full compliance pursuant to Section 301(i)(1) of the Clean Water Act. Given the necessity of "breaking in" a new plant prior to achieving dependable compliance with requirements, we find that the minimum four months' period between completion of construction and the statutory deadline is reasonable. We therefore find that the compliance schedules adopted in the requirements are appropriate and proper.

While the Clean Water Act clearly requires issuance of NPDES permits with compliance schedules mandating achievement of effluent limitations by a date no later than July 1, 1988, both this Board and EPA are cognizant that many POTWs may not in fact be able to comply with this deadline. For purposes of regulating noncompliance with the statutory deadline and implementing NPDES permits, EPA has adopted a National Municipal Policy on Publicly-Owned Treatment Works. [National Municipal Policy, 49 Fed. Reg. 3832 (January 30, 1984).] The National Municipal Policy provides that where "extraordinary circumstances" preclude POTWs from achieving compliance with the statutory deadline, the POTWs will be placed on "enforceable schedules for achieving compliance as soon as possible thereafter." The policy envisions the following scenario: The NPDES permit must contain the statutory deadline, but, under extraordinary circumstances, a later date may be established through an enforcement action.¹³ The California NPDES Compliance Policy, adopted by the

¹³ See e.g., Memorandum on "Deadlines and the National Municipal Policy," from Glenn L. Unterberger, Associate Enforcement Counsel for Water, EPA to EPA
(CONTINUED)

State Board March 15, 1984, was adopted to implement the National Municipal Policy, and provides that where violations of NPDES permits occur, Regional Boards shall take appropriate enforcement actions to require compliance at the earliest possible date.¹⁴

It appears from the record before us that the Regional Board should adopt an enforcement order, such as a cease and desist order pursuant to Water Code Section 13301, to establish a compliance schedule for the petitioners. Given the date of adoption of the requirements, it is reasonable to assume the petitioners can demonstrate "extraordinary circumstances" will prevent them from complying with the 1988 deadline, if their selected method of compliance is construction of tertiary treatment facilities. In establishing a time schedule, it should be noted that while the availability of federal grant funds may be relevant to the speed in which compliance may be achieved, the Clean

13 (FOOTNOTE CONTINUED)

Regional Counsel (January 30, 1986), which states:

"In the National Municipal Policy, the Agency recognized that many POTWs were in violation of the Act long after 1977, and that sound policy after promulgation of the 1981 Clean Water Act Amendments required these POTWs to come into compliance as soon as possible. The Policy called for the development of compliance schedules for municipalities affected by the Policy. As a policy matter, the Agency selected July 1, 1988 as the latest date to be included in such schedules (unless a POTW could demonstrate extraordinary circumstances). The date seemed a sensible choice, in part because in §301(i) Congress authorized permit extensions up to no later than 1988. However, it must be remembered that the legal, statutory-based deadline for compliance for each POTW is and will remain the deadline in its NPDES permit, which will be July 1, 1988 or earlier."

¹⁴ In addition to State authority to enforce NPDES permits, EPA also has authority to take enforcement actions against dischargers in violation of state-issued permits. (Clean Water Act Section 309; 33 U.S.C. Section 1509.)

Water Act requires POTWs to comply with water quality objectives "whether or not they receive Federal funds." [National Municipal Policy, 40 Fed. Reg. 3832; See, also, Clean Water Act Section 301(i)(1).]

While an enforcement action with a time schedule will not change the deadline contained in the permits, it will assure the cities that the Regional Board has exercised its discretion to allow further time for compliance, so long as the cities comply with the enforcement orders.¹⁵ Thus, issuance of enforcement orders with reasonable time schedules will allow San Bernardino and Colton to comply with the requirements without risking further Regional Board enforcement actions for failure to meet the 1988 deadline. The Regional Board should adopt such enforcement orders within six months of this order, and should refrain from taking any other enforcement actions for failure to comply with the time schedule in the permits pending issuance thereof.

We will therefore remand this matter to the Regional Board to take appropriate enforcement action including establishment of a time schedule which will require compliance with effluent limitations at the earliest possible date.

¹⁵ In a memorandum entitled, "Eligibility for Variances under Section 301(i)(1) of the Clean Water Act," from Colburn T. Cherney, EPA Associate General Counsel to Rebecca Hanmer, Director of EPA Office of Water Enforcement and Permits, the difference between permit extensions of enforcement actions is explained:

"...the two processes are functionally distinct. A Section 301(i)(1) extension is set forth in a permit, which thereby establishes a new compliance deadline for the POTW. An administrative order is an enforcement action. Compliance with the order does not relieve the POTW from its legal obligation to comply with the permit deadline. See Montgomery Environmental Coalition v. EPA, 19 E.R.C. 1169, 1171 (D.C. Cir. 1983). The order merely assures the POTW that EPA will exercise its discretion not to enforce against the permit violation if the POTW complies with a specified set of requirements." (Page 9)

3. Contention: San Bernardino contends that the requirements are in contravention with Revenue and Taxation Code Section 2209 and Article 13B, Section 6 of the California Constitution.

Finding: Revenue and Taxation Code Section 2209 creates an exception from the general rule requiring reimbursement of state-mandated costs to local agencies for orders, plans, requirements, rules and regulations issued by the State and Regional Boards. Subsection (c) also provides a statement of legislative intent:

"It is the intent of the Legislature * * * that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available.

"'Major' means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility."

It is San Bernardino's argument that the requirements are in contravention of this statement of legislative intent. It is not necessary for us, however, to decide this question because the statement refers only to "enforcement orders." The Regional Board has not yet issued an enforcement order in this matter, and we therefore will not decide the issue.¹⁶

¹⁶ We note while we do remand this case for consideration of an enforcement order, there is no reason for this Board to determine now whether such an order would contravene Section 2209. There are a number of scenarios in which we would not later receive a petition raising this issue, including adoption of enforcement orders to which all parties agree and enforcement actions taken by EPA.

San Bernardino also contends that the requirements are in violation of Article 13B, Section 6 of the California Constitution. That section provides:

"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, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

(a) Legislature mandates requested by the local agency affected;

(b) Legislation defining a new crime or changing an existing definition of a crime; or

(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

We disagree with San Bernardino's contention that this constitutional amendment applies to the requirements in question. As discussed in our previous Order, No. WQ 82-8, the requirement to reimburse local agencies for state-mandated costs does not apply to NPDES permits issued by the Regional Boards. There are four bases for this conclusion: (1) the NPDES program is a federally-mandated program, rather than state-mandated; (2) the Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq., was adopted prior to the date of applicability of the amendment; (3) the exclusion for Regional Board orders contained in the Revenue and Taxation Code is continued in the constitutional amendment; and (4) the constitutional amendment does not apply to sewer projects where user fees are available. Following adoption of this Order, the Legislature adopted legislation implementing Article 13B, Section 6 (Government Code Section 17500 et seq.) which restates the exclusion of Regional Board orders from state mandates (Section 17516), the exclusion of costs mandated by federal programs [Sections 17513 and 17556(a)(3)], and the

exclusion of programs where there is authority to change fees [Section 17556(a)(4)]. Finally, claims for reimbursement of state mandates rest solely with the Commission on State Mandates, and not with the agency issuing the underlying order. (Government Code Section 17552.)

In conclusion, we find that the requirements do not violate Revenue and Taxation Code Section 2209 or Article 13B, Section 6 of the California Constitution.

III. CONCLUSIONS

The waste discharge requirements adopted by the Regional Board are appropriate and proper. The requirements properly establish effluent limitations which will protect the beneficial use of body contact recreation in the Santa Ana River. The requirements also properly establish compliance schedules with final deadlines of July 1, 1988. This matter will be remanded to the Regional Board, however, for adoption of enforcement orders with time schedules which the dischargers can meet at the earliest possible dates. Finally, these requirements are not in conflict with statutory or constitutional provisions regarding reimbursement to local agencies for state-mandated costs.

IV. ORDER

1. The Regional Board is directed to adopt, within six months of this Order, appropriate enforcement orders establishing time schedules for compliance with the requirements.

2. In all other respects, the petitions are denied.

CERTIFICATION

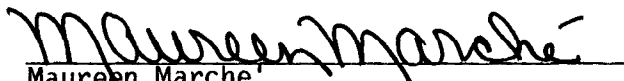
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 21, 1986.

AYE: W. Don Maughan, Chairman
Darlene E. Ruiz, Vice Chairwoman
Edwin H. Finster, Member
Eliseo M. Samaniego, Member
Danny Walsh, Member

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board

