Public Comment
Sanitary Sewer System WDRs
Deadline: 5/13/11 by 12 noon

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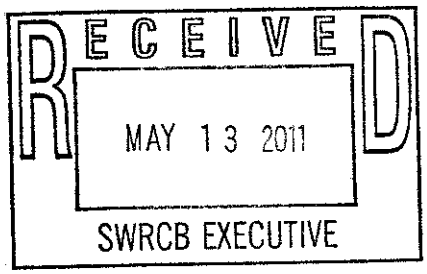
May 13, 2011



Via Electronic Mail
Charles Hoppin, Chair
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
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SUBJECT: COMMENT LETTER: SSS WDR REVIEW AND UPDATE

Dear Chairman Hoppin and Members of the Board:

On behalf of the undersigned clean water associations, thank you for the opportunity to provide comments on the proposed revisions to the Statewide General Waste Discharge Requirements for Sanitary Sewer Systems (SSS WDR). Members of our associations have been diligently implementing the existing Order 2006-003-DWQ (2006 General Order) and have expended significant resources toward improving their systems to reduce sanitary sewer overflows and ensure accurate reporting.

As an initial matter, we want to express our appreciation for the work your staff has done in preparing the draft SSS WDR. We have found the program staff to be open and accessible in receiving our feedback regarding the existing waste discharge requirements (WDR) and the monitoring and reporting program. For reasons discussed further below, we strongly agree with the staff recommendation that the order should remain in the form of a WDR and not a National Pollutant Discharge Elimination System (NPDES) permit or a "hybrid" NPDES/WDR. We believe the issues regarding the form of the order were fully vetted through the Sanitary Sewer Overflow (SSO) Guidance Committee in 2005-2006 and that circumstances have not fundamentally changed. Given that an NPDES permit would simply prohibit SSOs in essentially the same manner as the WDR, we view the potential shift to a federal permit as unwarranted and punitive.

We also believe that wholesale changes to the program are premature and unnecessary. Millions of local public dollars have been expended to comply with the existing general order, and many millions more will be spent in the future as those programs continue to evolve. California is the only state in the nation with a comprehensive regulatory program governing sanitary sewer collection systems. United States Environmental Protection Agency (USEPA) Region 9 has characterized the State's sanitary sewer system regulatory program as the best in the country. It would be unfortunate if, rather than building on the program's successes through refining and improving the basic framework already in place, the State Water Resources Contol Board ("SWRCB" or "State Water Board") were to abandon the course set five years ago through an extensive stakeholder effort.

Our associations are very concerned that the draft SSS WDR represents a significant shift in policy and direction with regard to regulation of sewer collection systems. Given the input the State Water Board received during the 2009 scoping sessions, and the content and tenor of the most recent staff briefings on the WDR, we were surprised and dismayed to see the many proposed revisions that are very burdensome and propose a heightened level of "command and control" over local programs. Our most significant issues are highlighted below, and more comprehensive comments regarding the SSS WDR are included in the attachment.

We Support the Proposed Revised Enrollment Applicability Criteria Based on Volume, but Oppose Inclusions of Some Very Small Systems That Do Not Satisfy Those Criteria.

Our associations agree with the proposed revision to the enrollment criteria that would add a volume threshold to the existing pipe mileage criterion. Application of the dual criteria will avoid imposing the detailed and resource-intensive SSS WDR requirements on very small systems with limited flows that lack the ratepayer base and revenue stream to comply. We suggest, however, that the criteria for flows going to systems be based on average dry weather flow (ADWF) or number of equivalent dwelling units (EDUs) that provide flow to the system. ADWF or EDUs can be measured or is easily calculated. Peak flows, however, will vary year-to-year due to a number of circumstances. Use of peak flows would add significant regulatory uncertainty for small systems.

Our associations also strongly recommend Application Requirement 1.B.3 of the draft SSS WDR be removed. This requirement applies to some very small systems that do not meet the enrollment criteria, but are owned by a larger Enrollee who has a system that does. As currently written, the SSS WDR requires these very small systems to comply with the requirements of the WDR and manage under a sewer system management plan (SSMP). This would place a very heavy regulatory burden on very small systems and discourage regional approaches to wastewater management.

The Streamlining of Spill Notification Points of Contact Is Important.

We support the Staff Report's indication that only the California Emergency Management Agency (Cal EMA) would need to be notified when spills to surface water of any volume occur. This will help reduce duplicative reports that can be confusing to sort out, which burdens both Enrollee and the agencies receiving the reports, and drains staff resources that could be used more productively. However, Paragraph G.4 indicates that Enrollees are to provide immediate notification of SSOs to the local health officer or the local director of environmental health, contrary to the instructions indicated in Section A of the Monitoring and Reporting Program (MRP) and the Staff Report. The State Water Board should clarify that notification need only to be made to Cal EMA throughout the SSS WDR and MRP, and, accordingly, should also delete the sentence contained in the preamble to the Monitoring and Reporting Program, which states:

> The following notification and reporting requirements are *in addition to and do not preclude* other emergency notification and reporting requirements and timeframes mandated by other regulatory programs and agencies (e.g., Storm Water Permit, local County Health Officers, local Director of Environmental Health, Regional Water Quality Control Boards) or State laws. (MRP at p. 1, emphasis added.)

Otherwise, the statements in the Staff Report are confusing at best, given the contradictions with other statements in the WDR and MRP.

We Support the Revised Definition of a "Sanitary Sewer Overflow."

We support the revision to the definition of "sanitary sewer overflow," which specifies that fully-recovered releases to storm drains are not prohibited and not considered Category 1 spills if they do not exceed 1,000 gallons. We would like to see the reporting categories revised, as suggested elsewhere in this letter, so that spills in excess of 1,000 gallons to storm drains or drainage channels, which are fully captured and recovered, would be considered a Category 2 spill. We would like to see additional clarification that drainage channels, as defined on page 7 of the SSS WDR, do not include curbs, gutters, and swales, and that discharges to drainage channels that are not waters of the United States, and which are fully captured and recovered, are similarly not prohibited. Construction trenches must be retained as an example within the definition of a "sanitary sewer system." The MRP definitions of Category 1 and 2 overflows should be harmonized with the revised definition.

Regulating Sewer Systems by NPDES Permit is Unnecessary and Inappropriate.

The public notice for the SSS WDR invites comments on whether the Board should consider substituting a two tiered "hybrid" system for regulating collection systems, in which

some agencies are regulated via NPDES permit and others via WDR. We urge the Board not to move forward with this option, for policy, legal and practical reasons.

The proposed SSS WDR does not authorize any discharges to waters of the United States. To the contrary, the SSS WDR would expressly prohibit all discharges of wastewater from the collection system to surface waters, regardless of water quality. If a SSS discharges without a permit, it is already liable for discharging without a permit and subject to severe civil and criminal penalties. (See e.g. (*Nat'l Pork Producers Council v. United States EPA (Nat'l Pork Producers)*, 2011 U.S. App. LEXIS 5018 (5th Cir. Mar. 15, 2011) at p. 8, citing 33 U.S.C. § 1319).) NPDES permits are to be issued " for the discharge of any pollutant, or combination of pollutants" to waters of the United States. 33 U.S.C. § 1342(a)(1). If a facility requests and obtains an NPDES permit, "*it can discharge* within certain parameters called effluent limitations." (*Nat'l Pork Producers* at p. 7, citing 33 U.S.C. §§ 1342, 1362(14).) Thus, unless the proposed permit would authorize—or excuse through an affirmative defense—certain SSOs to waters of the United States, an NPDES permit is not appropriate.

We must strongly disagree with the characterization in the staff report that an *advantage* of the NPDES permit would be to allow increased third party enforcement of the programmatic details of each system's operations and planning. Third party enforcement is already overly aggressive and consuming millions of dollars in public resources annually. Moreover, this view loses sight of the purpose of the SSS WDR in the first place, which is to reduce SSOs, not to second-guess management and operation decisions most appropriately made by local government. As noted, SSOs to waters of the United States are already subject to citizen enforcement. We do not agree that higher monetary penalties are needed for administrative enforcement. The existing potential maximum monetary penalties are so high that the State Water Board's own Water Quality Enforcement Policy (WQEP) establishes a *far lower* per gallon factor than the statutory maximum for calculating monetary liability for SSOs. (WQEP at p. 14.)

Finally, as alluded to in the Staff Report, the contemplated two tier system would create an administrative nightmare. State Water Board and regional water board staff would be required to track and implement two separate permit mechanisms with differing requirements. A single SSO or even a handful of episodic and unintended SSOs to waters of the United States cannot support requiring NPDES coverage in perpetuity, and thus Enrollees would shift back and forth between the two permitting schemes depending upon whether they had recent SSOs to waters of the United States or not. Questions of whether a surface waterbody is in fact a water of the United States or not, which is not always a straightforward matter, would be raised and have to be resolved prior to determining the appropriate permit mechanism for a particular system.

For all of these reasons, we urge the State Water Board to retain the WDR mechanism for regulation of all covered sewer collection systems.

The WDR Should Not Require Public Agencies to Report Spills From Systems They Neither Own Nor Operate.

The SSS WDR would require Enrollees to report spills from privately owned sewer laterals (PSLs) when they become aware of them. Such reporting is currently voluntary. The justification offered for this change is that the State Water Board wants to "get a better picture of" the magnitude of PSL spills and better identify collection systems with "systemic issues" with PSLs. With regard to the latter point, the State Water Board has ample information already available to it from the online database to determine whether PSL problems are a significant contributing factor to a particular system's SSO rates. As to the goal of generating better information regarding PSL spills, we do not believe that the burden of requiring Enrollees to report information or face being in noncompliance with the SSS WDR bears a reasonable relationship to the need for the information and the benefits to be obtained. (Wat. Code § 13267.) Enrollees reporting spills may be liable to the property owner for errors in reporting, and property owners may claim they are entitled to compensation from the local agency for repair or replacement costs stemming from the reported spill. Under the current voluntary reporting scheme, the Enrollee can weigh these factors in deciding whether to report PSL spills or not.

Moreover, this requirement is unlikely to yield very useful information. Enrollees do not always receive timely or complete information regarding the existence of PSLs. Further, there may be various Enrollees who respond to reports of spills before they know whether the spill is in their system or not. If Enrollees are required to report spills whether or not they occur within the Enrollee's system, multiple entities (city, county, POTWs, etc.) could all be required to report a single PSL spill with potentially differing estimates of volume and other information. Rather than enhance the State Water Board's knowledge base, this will actually lead to greater confusion and require additional resources to sort out and match up the multiple reports.

The Proposed Expansion of the Prohibition to Waters of the State is Unnecessary

There does not appear to be any compelling reason to modify the prohibitions to include all surface waters of the State, as the prohibitions already encompass and prohibit the highest risk spills. As noted in the Staff Report, most SSOs over the four-year period since adoption of the SSO WDR have been low volume spills that do not reach surface waters. (*See* Staff Report at p. 8 ("SSO data collected to date indicates that spills that do not reach surface water are high frequency but low volume (i.e., 87% of reported SSOs have not reached surface water and account for 18% of the total reported volume of wastewater spilled, whereas 13% of SSOs reach surface water and account for 82% of the total reported volume of wastewater spilled). As this data clearly demonstrates, the highest risk spills have been covered by the explicit prohibitions in the current SSS WDR.")

In the end, expansion of the prohibition would accomplish only one thing – unnecessarily increase Enrollee liability and exposure to enforcement actions for low priority spills. More

spills will fall under the prohibition and more penalties will potentially be issued for violations of the prohibition. Our clean water associations believe that this expansion is unnecessary and will merely divert limited public funds away from programs and projects designed to reduce, mitigate and eliminate sewer spills.

The Proposed SSS WDR Is Unreasonably Prescriptive With Regard to Local Program Implementation.

The dual purposes of the 2006 General Order were to reduce SSOs and to ensure accurate and publicly accessible SSO reporting information. The prohibitions in the 2006 General Order serve as the performance measure to which all Enrollees are held. To facilitate compliance with these performance standards, Enrollees are required to prepare and implement SSMPs. The SSMPs serve as a means to an end—better system performance—rather than an end in themselves. The 2006 General Order specifies the elements that must be included in the SSMP, but recognizes the flexibility necessary for local agencies to determine how best to comply with the prohibitions and reduce SSOs within their systems.

The proposed SSS WDR does not remove the prohibitions. To the contrary, it expands the reach of those prohibitions to additional surface waters and adds a new prohibition on chlorine residual. The proposed performance standards would be more stringent than under the 2006 General Order. No SSOs to waters are authorized or excused. Yet the draft SSS WDR would go far beyond the 2006 General Order to require very specific and detailed steps of each Enrollee, in addition to the prohibitions. The draft SSS WDR imposes burdensome new and/or expanded requirements, such as development of a Staff Assessment Program, new requirements for contingency planning and natural disaster response planning, preparation of risk and threat analyses of each and every sanitary sewer system asset, and development and implementation of "performance targets" linked to each element of the SSMP and assessed annually. It is inappropriate to add all of these administrative burdens to a performance-based standard and to deprive local agencies of the opportunity to decide for themselves how to best allocate their scarce resources.

The draft SSS WDR also goes far beyond what is reasonable in attempting to dictate that Enrollees allocate a sufficient amount of resources for compliance with the SSS WDR, by mandating that SSMPs include budgets for operation and maintenance as well as capital improvements, and by requiring Enrollee to "demonstrate the agency's ability to properly fund the sewer system *in perpetuity*." While identification of the resources available for implementation of any program is a laudatory goal, obviously public agency budgets must be approved from year-to-year and no public agency that is enrolled in the SSS WDR can guarantee a specified level of funding beyond what has been approved by its legislative body, let alone "in perpetuity." These requirements are unreasonable and overly prescriptive, and should not be included in the revisions to the SSS WDR. In dictating the actions of Enrollee to this degree, the SSS WDR would specify the "particular manner in which compliance may be had" with the order, in contravention of Water Code section 13360(a). In other words, "the [State] Water

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Stacey Heaton, RCRC

John Pastore, SCAP

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Board may identify the disease and command that it be cured but not dictate the cure . . ." (*Tahoe-Sierra Pres. Council v. State Water Res. Control Bd.* (1989) 210 Cal.App.3d 1421, 1438.)

The proposed approach places Enrollees in an untenable position. On the one hand, if the Enrollee succeeds in investing in, managing and operating its system in a manner to reduce SSOs such that the prohibitions are rarely, if ever, violated, the Enrollee may still be found in violation if it failed to undertake each and every one of the myriad specific tasks dictated by the SSS WDR. Conversely, if an Enrollee meticulously adheres to every detail of the SSS WDR in implementing its program and SSOs nonetheless occur, the Enrollee will be in violation of the order and subject to enforcement. The programmatic mandates of the SSO WDR must be scaled back substantially to allow local governments (and the private entities who would be subject to coverage for the first time) to design and implement programs appropriate to their communities that serve the end goal of reducing SSOs that threaten public health or the environment.

Thank you for your consideration of our comments. We look forward to working with the State Water Board to craft a more reasonable SSS WDR that allows California to build on the successes of the existing program and continue our progress toward reducing SSOs and maintaining our critical local infrastructure.

Sincerely,

Amy Chastain

Amy Chastain, BACWA

Roberta L Larson

Roberta Larson, CASA

Karen Keene

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ATTACHMENT 1

CLEAN WATER ASSOCIATION DETAILED COMMENTS
SSS WDR
MAY 13, 2011

I. FINDINGS

A. Finding No. 23 - Legal Authority

Finding 23 presents a laundry list of sources of authority for the SSS WDR. However, the listed Code sections are not linked to any specific provisions of the order and simply state that unspecified provisions of the WDR are to implement the statutory section. These findings are inadequate and must either be deleted or revised to link each cited statute with the WDR provisions that implement it.

B. Finding No. 27 - Staff Report

Finding 27 would incorporate the Staff report into the SSS WDR. The Staff Report summarizes arguments and states the staff's opinions and views regarding the recommended changes. As such, the Staff report is part of the administrative record of adoption but should not be incorporated into the WDR as an operative provision. If the State Water Board elects to incorporate the Staff Report, then we request an additional opportunity to provide comments on or rebut conclusions contained in the Staff Report.

II. DEFINITIONS (DRAFT ORDER SECTION A)

A. Definition A. 1 - Combined Sanitary Sewer System

The definition of "combined sanitary sewer system" should be revised to clarify that a sanitary sewer system is only considered to be a combined system if it is intentionally designed to collect and convey storm water runoff. As written, the definition could be interpreted to include separate sanitary sewer systems that convey incidental storm water runoff during storms or that receive small amounts of storm water through industrial waste connections and/or storm water diversions in place to improve beach water quality.

Recommended language changes:

1. **Combined Sanitary Sewer System** - A system of pipes, pump stations, sewer lines, or other conveyances <u>designed for and</u> used to collect and convey wastewater and storm water runoff.

B. Definition A.3 - Drainage Channel

Recommended language changes:

3. **Drainage Channel** – For the purposes of the SSS WDRs, a drainage channel is defined as a man-made or natural channel that conveys runoff as part of a separate storm water collection system. Drainage channel does not include curbs, gutters, and swales.

C. Definition A.8 & A.9 - Private Laterals

The proposed SSS WDR includes a definition of private lateral. The definition is confusing, in that it goes beyond defining the lateral to discussing alternatives for maintenance. Moreover, "sewer use agreements" are not the only means by which lateral responsibility may be established. For example, lateral responsibility can be established by, among other things, general ownership obligations, easement agreements or ordinances.

Recommended language changes:

8. **Private Lateral** – Privately owned sewer piping that is tributary to an Enrollee's sanitary sewer system. ~~The responsibility for maintaining private laterals can be solely that of the Enrollee or private property owner; or it can be shared between the two parties. Sewer use agreements dictate lateral responsibility and the basis for a shared arrangement."~~

9. **Private Lateral Sewage Discharge (PLSD)** –Wastewater discharges caused by blockages or other problems within laterals that are the responsibility of the private lateral owner and not the Enrollee. Discharges from sanitary sewer systems which are tributary to the Enrollee's sanitary sewer system but are not owned by the Enrollee and do not meet the applicability requirements for enrollment under the SSS WDR are also considered PLSDs.

D. Definition A.10 - Sanitary Sewer Overflow

As noted in the cover letter, the expansion of this prohibition will only create more fodder for enforcement for lower priority events. More spills will fall under the prohibition and more penalties will potentially be issued for violations of the prohibition. Our clean water associations believe that this expansion is unnecessary and will merely divert limited public funds away from programs and projects designed to reduce, mitigate and eliminate sewer spills.

In addition, this expansion means that spills that reach non tributary drainage channels that are not Waters of the United States will be violations of the prohibition, without regard to the fact that they may be fully captured and cleaned up, and that the drain may not flow to other waters. (e.g., flow to fields or retention basins).

Recommended language changes (we have again included recommended language change from Definition A.3, as stated above):

3. **Drainage Channel** – For the purposes of the SSS WDRs, a drainage channel is defined as a man-made or natural channel that conveys runoff as part of a separate storm water collection system. Drainage channel does not include curbs, gutters, and swales.

10. **Sanitary sewer overflow (SSO)** – Any overflow, spill, release, discharge or diversion of untreated or partially treated wastewater from a sanitary sewer system upstream of a treatment plant head-works. SSOs include:

    (a) Overflows or releases of untreated or partially treated wastewater that reach ~~surface~~ waters of the ~~state~~ United States. This includes all wastewater releases to storm drain pipes or drainage channels that are tributary to waters of the United States that are not fully recovered;

E. Definition A.11 - Sanitary Sewer System

The definition should be revised to clarify that it only applies to facilities owned by an individual Enrollee. The current reference to publicly or privately owned pipes, etc. arguably includes privately owned laterals and other facilities that are not the Enrollee's property or responsibility. In addition, it is critical that construction trenches be retained as an example within the definition of a "sanitary sewer system."

Recommended language changes:

11. **Sanitary sewer system** – Any system of ~~publicly or privately owned~~ pipes, pump stations, sewer lines, or other conveyances, upstream of a wastewater treatment plant headworks owned by a single public or private Enrollee and used to collect and convey wastewater to a treatment facility or another downstream sanitary sewer system. Temporary storage and conveyance facilities attached to the sanitary sewer system (such as vaults, temporary piping, construction trenches, wet wells, impoundments, tanks, etc.) are considered part of the sanitary sewer system and discharges into these temporary storage facilities are not considered SSOs. The term "collection system" shall have the same definition as a sanitary sewer system for the purposes of the SSS WDR.

III. PROHIBITIONS (DRAFT ORDER SECTION C)

A. Prohibition C.1

According to the Staff Report, most spills over the past four years since the initial adoption of the SSO WDR have been low volume spills that do not reach surface waters. (*See* Staff Report at p. 8 ("SSO data collected to date indicates that spills that do not reach surface water are high frequency but low volume (i.e., 87% of reported SSOs have not reached surface water and account for 18% of the total reported volume of wastewater spilled, whereas 13% of SSOs reach surface water and account for 82% of the total reported volume of wastewater spilled). As this data clearly demonstrates, the highest risk spills have been covered by the explicit prohibitions in the current SSS WDR.") Thus, the prohibitions already encompass and prohibit the highest risk spills.

Virtually all spills would now be prohibited since the extent of the definition of "surface waters of the state" has not been adequately defined or litigated, and could be held to include drainage channels, such as municipal storm drains, non-tributary ditches and non-adjacent wetlands, which are not covered by the definition of "waters of the United States." (*See U.S. v. Rapanos,* 547 U.S. 715, 734; 126 S.Ct. 2208, 2222 (U.S.S.C. 2006) ("In applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody.").) These channels and other ephemeral waters could now be deemed to be "surface waters of the state" even if dry, and even if the spill is fully contained and cleaned up.

Recommended Language Change:

1. Any SSO that results in a discharge of untreated or partially treated wastewater to ~~surface water of the state~~ a water of the United States is prohibited. This includes:

   ~~(a)~~ Discharges to storm drains or drainage channels that are not fully captured and returned to the sanitary sewer system or captured and otherwise appropriately disposed of if the storm drain or drainage channel is tributary to a water of the United States ~~surface water of the state, and~~

   ~~(b) Discharges to drainage channels if the drainage channel is a surface water of the state or tributary to a surface water of the state.~~

B. Prohibition C.3

Prohibition C.3 indicates that potable water would have to be de-chlorinated before it could be used for spill clean-up (in the event water used for clean-up is not fully recovered). Placing restrictions on the use of potable water in cleaning up an SSO that is otherwise likely to

violate either of the first two prohibitions simply adds further unnecessary challenges. In addition, the amount of potable water used, combined with the distance it would have to travel to reach a surface water (so the chlorine would readily degrade) does not warrant the additional on-site operational difficulty in dechlorination. We request that this prohibition be removed.

IV. PROVISIONS (DRAFT ORDER SECTION D)

A. Provision D.4

As discussed in the cover letter and further below, an Enrollee should not be required to report spills from laterals that it neither owns nor maintains. This is an additional administrative burden without any evidence that it would provide any benefit. There is no evidence to support a finding that additional actions are necessary to correct private lateral spills when they occur. By virtue of the fact that such events directly affect service to occupied structures, corrective action occurs without the need for additional regulation of an Enrollee that does not own or maintain the impacted lateral.

Recommended Language Change:

4. The Enrollee shall report all SSOs in accordance with Section G of the SSS WDR. ~~In addition, the Enrollee shall report PLSDs they become aware of in accordance with Section G of the SSS WDR."~~

B. Provision D.6

We are concerned that the SSS WDR retreats from the language governing enforcement discretion contained in the existing WDR. The language in Provision D.6 of the existing WDR provides some reassurance that, in the case of an SSO enforcement action, the State Water Board and/or Regional Water Board would consider why the SSO might have occurred and to what extent it would have been reasonably possible for the Enrollee to prevent it.

The factors described in subsections (a) through (g) of Provision D.6 are highly relevant to the Enrollee's efforts to properly manage, operate and maintain its system, and these factors should be considered in enforcement actions. The proposed revisions to the SSS WDR would transform the existing enforcement discretion language, which expresses a clear statement of the State Water Board's intent regarding enforcement priorities and responses, into a purely advisory provision, which individual regional boards are free to follow or ignore as they choose. We request that the existing language be retained.

Recommended Language Change:

6. In any enforcement action, the State Water Board and/or Regional Water Board will consider the appropriate factors under the duly adopted State Water Board Enforcement Policy. Consistent with the Enforcement Policy, the State Water Board and/or Regional Water Board shall consider

the Enrollee's efforts to contain, control, and mitigate SSOs when considering the California Water Code Section 13327 factors. In assessing these factors, the State Water Board and/or Regional Water Board will ~~may~~ also consider whether:

C. Provision D.8

Provision 8 suggests that SSS will need replacing within the timeframe of these WDR. The reference to "eventual replacement" should be removed because the need to replace sewers is dependent on several factors. Sewers should not be replaced automatically when they reach a certain age, especially when they are in good condition and functioning as designed. This outcome would unnecessarily waste limited public resources. For example, the useful life of certain types of high strength plastic pipe has yet to be determined. The fact-based determinations should be left to the expertise and discretion of the individual Enrollee, not generically mandated in the permit.

Recommended Language Change:

8. The Enrollee shall allocate adequate funding and other resources to ensure that the proper maintenance, operation, management, and ~~eventual replacement and~~ repair of its sanitary sewer system are provided for by establishing a proper rate structure, accounting mechanisms, and auditing procedures to ensure an adequate measure of revenues and expenditures. These procedures shall comply with applicable laws, regulations, and generally acceptable accounting practices.

D. SSMP – Provision D.12

D.12(b) - Organization: The SSS WDR requires disclosure of the names, phone numbers and e-mail addresses of governing board members in the SSMP. There is also a new proposed requirement in the MRP to provide personal information about field personnel that respond to spills. It is unclear whether the State Water Board may legally even require this disclosure by either public or private Enrollees, but in any event these requirements are overly intrusive and not necessary to determining compliance with the operative provisions of the SSS WDR. A single member of a governing body has no authority to make any decisions or to direct the activities of the agency staff. The State Water Board can act only as a whole, and only in compliance with noticing and other procedural requirements. Many agency governing boards change annually, and there is significant turnover due to municipal elections, so the information will have to be updated frequently. Moreover, requiring disclosure could have a chilling effect on people seeking employment for collection system agencies. Each Enrollee should simply be required to designate the legally responsible person, by position title, vested with authority to make the necessary decisions and submit the required reports.

Recommended Language Change:

(b) **Organization:** The SSMP must identify:

. . .

(ii) The names, email addresses, and telephone numbers for ~~current governing board members including the board chair and names, email addresses, and telephone numbers for agency management, administrative, and maintenance positions responsible for implementing specific measures in the SSMP program including~~ the Legally Responsible Official(s) and Data Submitter(s) registered with the State Water Board. The SSMP must identify lines of authority through an organization chart or similar document with a narrative explanation of each ~~individuals~~ position's role and responsibility; and"

D.12(c) - Legal Authority: The additional requirements regarding ensuring access are unnecessary and have the potential to create confusion. For example, the requirement to "ensure access" in easements and rights of way is unnecessary because, by definition, easements and rights of way include a right of access, even if access is not expressly addressed in the document. The general requirement to ensure access included in the existing WDR should be maintained.

The proposal to include authority to "limit flows . . . from connected sources" is problematic because it is uncertain what ability any Enrollee has to limit flow from connected sources. For example, would an Enrollee be required to insert a device into an existing system to limit the amount of flow, or are other actions required? Such requirements would be unusual and problematic to implement.

The requirement that authority include the ability to "ban new connections" raises concerns because it is uncertain and has the potential to be very controversial. For example, if the intent is to provide agencies with the authority to declare complete moratoriums on connections, that could be very problematic and unnecessarily create stress between public agencies and their constituents. Also, wastewater agencies have legal obligations to provide sewer service to their constituents, so a provision indicating that they have the ability to simply discontinue providing new service could be legally unenforceable and subject to legal challenge. This provision should be eliminated, or at minimum, revised to clarify that the authority to ban new connections is limited to those circumstances in which such action is necessary to prevent a public nuisance or otherwise protect public health and safety and is based on the direction of the Regional Water Board or Public Health Department.

The additional requirement that the legal authority section specify whether Enrollees own and maintain service laterals is out of place in the Legal Authority section in that it refers to ownership and maintenance responsibilities, not the legal authority of an Enrollee.

Recommended Language Changes:

(iii) Ensure access ~~in easements, right of ways, and any other areas sanitary sewer system facilities are installed~~ for maintenance, inspection, or repairs of the sanitary sewer system and for any portions of the service lateral owned or maintained by the Enrollee;

~~(iv) Limit flows to the sanitary sewer system from connected sources including service laterals and satellite collection systems;~~

(iv) Ban new connections where necessary to prevent a public nuisance or otherwise protect the public health and safety;

(v) Limit the discharge of roots, fats, oils, and grease and other debris that may cause blockages; and

(vi) Enforce any violation of its sewer ordinances and, if applicable, collect penalties.

~~In addition, the Enrollee shall specify whether they own and maintain service laterals, and the portion(s) owned and/or maintained including pipe, clean outs, and backflow prevention devices.~~ Any policies and procedures related to requirements for sewer easements shall also be addressed in this section of the SSMP.

D.12(d) - Operation and Maintenance Program: The provision requiring a listing of the names of contractors is unworkable because Enrollees need the flexibility to utilize and change contractors on a regular basis without the need to continually update their SSMPs. Further, the selection of contractors is already governed public contracting laws, which may conflict, or not work well, with the proposed WDR requirements, resulting in additional limitations on an Enrollees ability to make timely contractual determinations. The decision regarding what contractor should be hired should be left to the discretion of Enrollees and not be subjected to additional regulatory oversight.

The provision requiring a description of lateral replacement and repair programs should be deleted because it infers that Enrollees are required to have private sewer lateral inspection and replacement programs. Such a requirement would intrude upon local municipal affairs and drastically expand the duties and responsibilities of Enrollees.

The provisions relating to Staffing Assessment, Contingency Planning and Operation and Maintenance (O & M) and sewer system replacement funding also substantially intrude into the day-to-day operations of Enrollees and should be eliminated. For example, the Staff Assessment Program would dramatically increase the obligations of a public agency and, potentially, create a tension between an Enrollee's obligation to comply with its SSMP and the privacy and due process rights of employees. The proposed rule would require agencies to "identify any staff

deficiencies, review the abilities of staff and identify needed changes." Compliance with these requirements would be time consuming and create a potential privacy violation for agencies when identifying staff related issues. The contingency planning and O & M and sewer system replacement funding sections also delve into the day-to-day operations of Enrollees. The WDR would set up an unreasonable, unworkable and impossible standard of specifying funding for sewer systems "in perpetuity," in other words, for eternity. At best, these provisions are duplicative of what is already being done by Enrollees. At worst, they create additional, contradictory requirements that interfere with each individual's and Enrollee's ability to plan and run its operation in an efficient and appropriate manner and to modify operations as necessary based on changing circumstances.

Recommended Language Changes:

(ii) **O&M:** . . .

The ~~SSMP shall identify the name(s) of contractors conducting routine work on the sewer system for implementation of the SSMP and a description of services provided;"~~

(iii) **Rehabilitation and Replacement:** . . .

This ~~section shall also include a description of any private sewer lateral inspection and replacement programs implemented within the sewer system service area;"~~

(iv) ~~**Staff Assessment Program:** The Enrollee must develop and implement a Staff Assessment Program (Assessment Program) for its sanitary sewer collection system operations staff, from line staff through supervisors, including contractors, or others performing or overseeing collection system O&M. The Assessment Program shall identify any staff deficiencies in meeting requirements for competently performing collection system O&M activities required by the Enrollee to adequately maintain sanitary sewer system assets. This includes review of current staff job duties, training, skill sets and/or abilities against the requirements needed by the Enrollee to comply with the SSS WDR. The Assessment Program shall be updated at least every 12 months. All deficiencies identified shall be addressed by the Enrollee, including any needed changes including but not limited to adjustments to O&M procedures and staff training activities.~~

(v) ~~**Contingency Planning:** Identify the most critical collection system assets and operating procedures including components posing the highest risks and threats for an SSO. Contingency planning shall include a list of the~~

~~most critical replacement part inventories that should be maintained by the Enrollee.~~

~~(vi) **O&M and Sewer System Replacement Funding:** The SSMP shall include budgets for routine sewer system operation and maintenance and for the capital improvement plan including proposed replacement of sewer system assets over time due to normal assets aging. Budgets shall include costs, revenues, and revenue sources for funding the work over a sufficient period to demonstrate the agency's ability to properly fund the sewer system in perpetuity."~~

D.12(f) - Overflow Emergency Response Plan: The last sentence requiring that contracts and agreements be included as part of the SSMP should be eliminated because it is unduly burdensome and is likely to create confusion regarding the requirements for an adequate SSMP. The need for third party contracts will necessarily vary between Enrollees, depending upon their available staff and the legal requirements that govern their contractual activities. Including a provision in the WDR that requires contract documentation be attached to the SSMP infers that these documents represent a mandatory requirement for an adequate plan, and that they are subject to regulatory oversight. The WDR should leave each Enrollee with the flexibility to determine what, if any, contracts and agreements are necessary to have an adequate response plan.

Further, natural disaster response planning should not be a required element of the Overflow Emergency Response Plan. It is inappropriate to include natural disaster planning and response in an Overflow Emergency Response Plan because natural disaster planning/response is an entirely separate issue from overflow response. Government agencies are already required to use National Incident Management System (NIMS) and Standardized Emergency Management System (SEMS) protocols, based on use of an Incident Command System, in managing incidents where more than one agency responds. Cities, special districts, and other Enrollees must already be familiar with these protocols and trained in them, because response to incidents is inherent in the operation of a city or special district.

Natural disaster planning is also different than overflow response, because it involves many aspects of a city or special districts' operations, not just collection systems. Many wastewater agencies in California are members of the California Water/Wastewater Agency Response Network (CalWARN), a water sector mutual aid organization. The purpose of this organization is to expedite assistance of one agency to another in the case of a natural disaster or other large emergency. Since natural disaster response planning is covered by other California state government agencies such as the California Emergency Management Agency (CalEMA), natural disaster planning should not be included as a requirement in the SSS WDR. A requirement to include natural disaster planning as part of the SSMP would be a duplicative and unnecessary use of resources. It could also potentially be detrimental, if the natural disaster response plan in the SSMP differed from the agency-wide response plan, leading to confusion in emergency situations

Recommended Language Change:

(f) **Overflow Emergency Response Plan . . .**

. . .

(ii) A program to ensure appropriate response to all overflows including ~~documentation of steps needed to prepare for natural disasters, hazardous weather events, and other~~ severe circumstances that will affect sewer system operation. ~~Program documentation should include contracts or agreements in place that may be needed in the event of SSOs to help mitigate the discharge;"~~

D.12(f)(vi) - Risk Analysis: The proposed risk and threat analysis requirements would create a tremendous burden on each Enrollee to create a document that includes all of the detailed information requested. For example, requiring an analysis that includes "the expected consequences of each identified failure" would require engineering, geological, topographical and flood plain information to model the potential direction and scope of various spills. The cost of such analysis would be significant, with a corresponding value that would be extremely limited at best, particularly for small spills that were completely contained and recovered.

Recommended Language Change:

(vi) A program and procedures to ensure that all reasonable steps are taken to contain and prevent the discharge of untreated and partially treated wastewater to surface waters of the state ~~that includes a risk and threat analysis of all sanitary sewer system assets.~~ The program shall also specify steps to minimize or correct any adverse impact on the environment resulting from SSOs including such accelerated or additional monitoring as may be necessary to determine the nature and impact of the discharge.

~~The risk and threat analyses shall identify the highest risks and threats ranked in order posed by sewer system failures such as but not limited to gravity sewer main lines, laterals, force mains, air relief valves, pumping facilities, and other facilities or equipment the failure of which could be expected to produce an SSO. The analyses shall include the expected consequences of each identified failure. The analyses shall also include system-specific activities, procedures, and strategies employed by the Enrollee to help minimize the risks and threats of SSOs with consideration given to known problem areas identified within the collection system."~~

D.12(g) - FOG Control Program: The requirement to identify "required staffing levels" should be removed because it presumes a fixed staffing level for each Enrollee at all

times. The necessary staffing levels will vary depending upon the size of an Enrollee's system, frequency of grease-related problems and number of customers producing substantial amounts of FOG that enter into systems. Enrollees should have the flexibility to staff for FOG related services as needed, rather than a fixed staffing level for something that may or may not be required.

Recommended Language Change:

(g) **FOG Control Program:** . . .

...

(v) Authority to inspect grease-producing facilities and enforce for violations of the local FOG control requirements. ~~The FOG Control Program shall identify required staffing levels to inspect and enforce the FOG ordinance.~~

D.12(i) Performance Targets: The proposed changes represent a substantial expansion that presumes a performance program is needed. For example, Enrollees would be required to identify performance targets, which presumes that Enrollees are having significant SSO problems in the first instance. It is not clear how the performance targets relate to the prohibitions. The additional detail required would create significant administrative burden with little or no evidence that this effort would have a corresponding benefit. The new requirements would require that Enrollees "identify performance targets and illustrate SSO trends," modifications, and maintain a detailed log of any changes made, including identification of staff responsible for implementing each change, regardless of how significant or insignificant the change may be. The detailed reporting and accountability provisions in existence under the current WDR already effectively document the performance of Enrollees and steps that have been taken to correct problems that arise from time-to-time. The additional reporting, planning and documentation that would be required as part of the proposed performance targets and program modification provisions above would create an unnecessary additional layer of administrative work.

Recommended Language Changes:

~~(i) Performance Targets and Program Modifications: The Enrollee shall develop performance targets and incorporate necessary program modifications to monitor the Enrollee's progress in reducing SSOs over time. The performance targets and program modifications must be reviewed an annual basis and shall include at a minimum the following steps:~~

~~(i) Identify performance targets and illustrate SSO trends, including: SSO frequencies and volumes. Results for performance target~~

~~attainment and spill trends shall be included and routinely updated in the SSMP;~~

~~(ii) Collect and maintain appropriate records and information to establish and prioritize the performance targets;~~

~~(iii) Link each performance target with the appropriate SSMP element(s);~~

~~(iv) Monitor the effectiveness and success of each SSMP element in meeting each performance target developed;~~

~~(v) Update SSMP elements, as appropriate, to achieve the performance targets; and~~

~~(vi) Maintain an SSMP Change Log that includes a list of all modifications and changes made to the SSMP including date and identification of staff responsible for implementing each change.~~

V. MONITORING AND REPORTING PROGRAM (DRAFT ORDER SECTION G)

The SSO Category designations need to be refined. Currently, Category 1 SSOs are defined as spills of *any* volume to surface water or a drainage channel, a discharge of any volume to a storm drain that is not fully captured, and spills 1,000 gallons or more regardless of spill destination. Category 2 SSOs are defined as all other SSOs.

In practice, several spills have been defined as Category 1 when there was no chance that the spill went to waters of the United States. For instance, a spill that enters a storm drain that flows to a retention basin with no outlets, or a drainage channel that ends in a field. In addition, a 1,000 gallon spill in a field would be Category 1 even though the spill was fully contained and did not leave the property. These types of spills should not be classified as Category 1 spills.

Because of the problems experienced when working with the current definitions, the categories should be refined as follows:

Category 1 – Any volume spill that reached a water of the United States directly, or reached a water of the state or other conveyance system (storm drain pipe, drainage ditch, or channel) that discharges to a water of the United States and was not fully contained/recovered.

Category 2 – Spills of 1000 gallons or more that were fully contained and recovered (e.g., discharged to land or fully captured in a street, curb, gutter, storm drain pipe, or drainage ditch or channel.)

Category 3 – Spills of less than 1000 gallons that did not reach waters of the United States (e.g., discharged to land or were otherwise fully captured).

The changes to Category 1 remove the 1,000 gallon distinction, which is unnecessary for this definition. Further, it expands the coverage to any storm drain pipe, which is not currently covered by the "drainage channel" language and which has been difficult to distinguish in the field.

The new Category 2 and 3 are divided at a 1,000 gallon threshold to differentiate which spills need to be reported to Cal EMA and will give the State Water Board separate, more easily trackable information on the de minimis spills of less than 1,000 gallons that do not implicate waters of the United States.

In addition to the request that mandatory PLSD reporting be removed from the proposed revisions to the SSS WDR, several minor revisions should be made to clarify MRP requirements:

- The second paragraph referring to other notification and reporting requirements is unnecessarily confusing and should be removed.

- Item 1.H under the description of mandatory information to be included in Category 2 SSO reports should be revised to read: "SSS failure point (main, lateral, etc.), if applicable."

- Item 3.I under the description of mandatory information to be included in Category 1 SSO reports should be revised to read: "Name of surface waters impacted (if applicable and if known) . . ."

- Item 1.D under the minimum records to be maintained by the Enrollee should be revised to read: " . . . and the complainant's name and telephone number, if known."

ATTACHMENT 2

CLEAN WATER ASSOCIATION LEGAL COMMENTS
SSS WDR
MAY 13, 2011

I. The Contemplated Two-Tiered System Resembles NPDES Regulation of "Probable" Dischargers Which Is Invalid Under Existing Law

The two-tier permitting scheme described in the public notice would require sanitary sewer collection systems that have a single SSO event that reaches waters of the United States to thereafter be regulated under a NPDES permit. In addition, those systems that have not yet had an SSO event would be regulated under the WDR, and required to regularly report to the State Water Board until such time as they do record a "qualifying" event. The legality of establishing this two-tiered "hybrid" system for regulating collection systems is dubious.

Specifically, this proposed hybrid structure strongly resembles a previously rejected regulatory scheme that required all entities, regardless of their discharge history, to report to the regulating entity based on the mere "possibility" or "probability" that they may discharge in the future. Federal courts have rejected regulation of "probable" dischargers by the USEPA in this manner, finding such regulation contrary to provisions of the Clean Water Act (CWA).

A. *Waterkeeper Alliance, Inc. v. United States EPA (CAFO I)*

USEPA has attempted to regulate "probable" dischargers in other circumstances and has been constrained by the courts based on the plain statutory language of the CWA. Specifically, in 2003, USEPA promulgated a rule relating to Concentrated Animal Feeding Operations (CAFOs) where challengers contended that the USEPA exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate that they had no potential to discharge. (*Waterkeeper Alliance, Inc. v. United States EPA* (2005) 399 F.3d 486, 504 (*Waterkeeper Alliance, Inc.*) Based on the plain statutory language of the CWA, which authorizes the USEPA to exercise such permitting and reporting authority only where there is a discharge of pollutants, the court found that "unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." (*Ibid.*, citing 33 U.S.C. § 1311(a), (e); 33 U.S.C. § 1342 (a)(1), (b).) Moreover, the court found that " . . . the Clean Water Act, on its face, prevents the EPA from imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge." (*Waterkeeper Alliance, Inc., supra,* 399 F.3d 486, 506.)

As applied to the two-tier permitting scheme, the State Water Board would be requiring SSSs that have not yet reported a discharge to continually demonstrate that they have no potential to discharge through the reporting mechanisms prescribed in the WDR. Though couched in different terms than the invalidated CAFO regulations, the intent and the ultimate

effect of a two-tier system applied to SSSs is the same. The State Water Board would be requiring entities for which there is no data indicating that a discharge of pollutants has occurred, but only have the "potential" to discharge, to continually report on their activities and perpetually demonstrate to the State Water Board why they should not be regulated under an NPDES permit. This is clearly unsupportable under the language of the CAFO I decision, and potentially subject to challenge on those grounds.

B. *Nat'l Pork Producers Council v. United States EPA* (CAFO II)

After the adverse decision in the CAFO I case, USEPA promulgated a new rule which purported to regulate CAFOs that "propose to discharge" rather than requiring all CAFOs to demonstrate they do not have the potential to discharge or procure an NPDES permit. The court viewed this a merely a change in form, rather than substance, noting that:

> At first blush it seems that the EPA, by regulating CAFOs that 'propose' to discharge, is regulating CAFOs that want to discharge. However, as the Farm Petitioners' counsel explained at oral argument, the EPA's use of the term 'propose' is not the same as the common understanding of the term . . .. Instead, the EPA's definition of a CAFO that 'proposes' to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to this definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging. This definition thus requires CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of *Waterkeeper*, as well as Supreme Court and other well-established precedent. (*Nat'l Pork Producers Council v. United States EPA* (5th Cir. Mar. 15, 2011) 2011 U.S. App. LEXIS 5018 * 1, ** 28-29.)

Taken together, the thrust of the CAFO I and CAFO II decisions is clear. Regardless of the particular language or structure used, the court will not allow a regulatory agency to circumvent the plain language of the CWA by requiring those who do not actually discharge to report to that agency in order to justify why they should not be regulated under an NPDES permit. The USEPA and State Water Board may only require those who are engaging in the actual discharge of pollutants to either apply for an NPDES permit or prove to the regulating entity that they do not need one. These agencies may not preemptively regulate the "proposed" or "potential" discharge of an entity that is not currently discharging. A two-tiered system where those SSSs covered under the WDR are essentially required to demonstrate to the State Water Board on an ongoing basis that they should not fall under an NPDES permitting scheme because they do not discharge runs afoul of this rule.

C. Requiring NPDES Permits in Perpetuity After a Single, Isolated SSO Event Is Likely Unsupportable Under the CAFO Decisions

Under a two-tiered system, if even a single overflow event resulting in discharge occurs, an entity then subject to the NPDES permit could be regulated under that permit in perpetuity,

without any evidence that a discharge from the same portion of the system will occur in the future. As noted in the general letter, a single SSO, or even a handful of episodic and unintended SSOs, cannot support requiring NPDES coverage in perpetuity, particularly when the SSOs occur in different parts of the system, for different reasons, and the causes have been addressed or corrected.

As described in the CAFO I case, "effluent limitations can, pursuant to 33 U.S.C. § 1311(e), be applied only to 'point sources of discharge of pollutants,' i.e., those point sources *that are actually discharging*." (*Waterkeeper Alliance, Inc., supra,* 399 F.3d 486, 505, emphasis added.) The occurrence of a single SSO event does not mean that the responsible entity is "actually discharging" as it had no intent that the accidental, unanticipated event would occur and has no intention of allowing another SSO event in the future. Thus, the occurrence of one or a few isolated SSO events has no logical correlation to, and is not a predictor of, the occurrence of another future event. By requiring an NPDES permit in perpetuity based on a single event, the State Water Board would be regulating the "potential" discharge of pollutants from an entity that has no intent to discharge in the future, violating the rules set forth in the CAFO I and CAFO II decisions.

Moreover, the basis for the two-tier scheme does not integrate with the purposes for issuance of NPDES permits in most contexts. The CWA gives NPDES authorities "the power to issue permits *authorizing the discharge* of any pollutant or combination of pollutants." (*Waterkeeper Alliance, Inc., supra,* 399 F.3d 486, 504, citing 33 U.S.C. § 1342 (a)(1); 33 U.S.C. § 1342(b), emphasis added.) The concept behind NPDES permit regulation is that certain point sources are actually *allowed* to discharge a certain amount of pollutants under the permit. However, an NPDES permit for an SSS would be nothing more than a series of discharge prohibitions akin to those contained in the WDR, not the authorization of a continuing discharge and therefore does not fit within this framework. In sum, because the SSS WDR does not authorize any SSOs to waters of the United States, there is no need for an NPDES permit. The two-tier permitting scheme, whether covering a pre-SSO event or post-SSO event, constitutes the regulation of a "probable" future discharge, and regulation of "probable" discharges through the NPDES permitting program is inappropriate and contrary to the rules highlighted in the CAFO I and CAFO II decisions.

D. Liability for Failing to Apply for a Permit Is Beyond the State Water Board's Authority

Also in the CAFO II decision, the court noted that the 2008 Rule which provided that a CAFO can be held liable for failing to apply for a permit was invalid because the USEPA did not have the statutory authority to create this liability. According to the court, the CWA provides a comprehensive liability scheme and does not itself contain any penalties for failing to apply for an NPDES permit. To the extent that a two-tier permitting system would necessarily require SSSs that have one discharge event to apply for an NPDES permit, and contains additional provisions of liability for failing to do so, this would be beyond the State Water Board's authority under the logic of the CAFO II decision as well.

E. Affirmative Defenses Are Allowable and Would Be Necessary if the State Water Board Pursues an NPDES Permitting Scheme for SSOs

If the State Water Board is considering imposing a dual system of WDR and NPDES permits, then it should include affirmative defenses or a liability shield that renders the Enrollee not liable if the prescribed requirements do not work and an SSO event occurs under either structure. Affirmative defenses related to conditions of NPDES permits already exist under the appropriate federal regulations, and have been upheld. (See *NRDC v. EPA* (1987) 822 F.2d 104, 124.) For example, federal regulations provide for an affirmative defense when an "upset" occurs, as well as an affirmative defense for an intentional "bypass" under certain circumstances. (See 40 C.F.R. § 122.41(n), (m).) The necessity of an affirmative defense was raised by the regulated community in comments regarding the previous SSS WDR in 2006, and a version of a defense was previously proposed by the USEPA in an SSO Rule signed by the Administrator (but not promulgated) in January 2001. Without the inclusion of an affirmative defense, the new WDR and potentially NPDES permits in the future would place collection systems in the untenable position of being subject to liability for failing to comply with an unreasonable zero SSO standard that the State Water Board has already acknowledged is unattainable. (*See* Fact Sheet for the 2006 General Order at pp. 5-6.)

II. Mandating Private Lateral Sewer Reporting Is Beyond the Authority of the State Water Board

The WDR contain a requirement that mandates reporting of private lateral sewer discharges (PLSDs) when Enrollees become aware of them, which is proposed as a replacement for the existing voluntary reporting provisions. However, no authority exists under the Water Code or any other provision of law that would allow the State Water Board to require Enrollees to report on the activities of others that, by definition, are the responsibility of the private lateral owner and not a discharge resulting from the actions of the Enrollee.

The very definition of a PLSD demonstrates that mandatory reporting of a PLSD is not the responsibility of the Enrollee, as the WDR states, "[w]astewater discharges caused by blockages or other problems within laterals *are the responsibility of the private lateral owner and not the Enrollee* . . ." (WDR at p. 9, provision 9, emphasis added.) Moreover, the statutory provisions the State Water Board cites as the authority for requiring Enrollees to report PLSDs does not support such a requirement. (See WDR at p. 6, provision 23; p. 30, provision 5.) Specifically, Water Code section 13271 states, in pertinent part, that any person who "*causes or permits* any hazardous substance or sewage to be discharged in or on any waters of the state . . ." will be subject to certain reporting and other requirements. (Wat. Code, § 13271, emphasis added.) However, merely because an entity regulated by the SSS WDR investigates or is aware of a PLSD does not mean that the Enrollee has "caused" or "permitted" a sewage discharge. Upon initial investigation, if the Enrollee concludes that it did not "cause" or was not responsible for "permitting" the PLSD, then that entity is under no legal obligation to report said information to the State Water Board. Mandating that Enrollees do so as part of the WDR is not within the authority of the State Water Board.

The WDR also cite Water Code section 13193(c) as statutory authority for this mandatory reporting requirement, which states in pertinent part, " . . . in the event of a spill or overflow *from a sanitary sewer system that is subject to the notification requirements set forth in Section 13271*, the applicable collection system owner or operator . . ." must submit a report conforming to certain requirements. (Wat. Code, § 13193, emphasis added.) However, as noted above, Enrollees are not responsible for PLSDs under the express terms of Water Code section 13271. Moreover, this provision only applies to a spill or overflow from one's own sanitary sewer system, not from another party's private sewer lateral. As such, none of the cited provisions of the Water Code give the State Water Board the legal authority to require mandatory reporting of PLSDs.

A. Mandatory Reporting of PLSDs Puts Regulated Entities at Risk of Individual Liability

Entities regulated by the SSS WDR are concerned that they will be held responsible for inaccurate or incomplete reporting of SSO events involving private sewer laterals. The initial investigation performed by the regulated entity will only confirm that the Enrollee is not responsible for the event. It will not confirm the responsibility of a particular private system or owner, nor confirm the cause, volume or other circumstances surrounding the event.

Moreover, the owners of the private laterals may incur liability, and other action may be pursued against the PLSD owner as a result of the discharge. By mandating that the Enrollees submit information regarding events that are not their responsibility, for which precise information is not always readily available, and for which a third-party may be subject to liability based on the Enrollee's reporting, the State Water Board would be placing Enrollees in a precarious position. The State Water Board would, in effect, be asking regulated entities to investigate the activities of, make judgments regarding, and report information about other entities. Inadvertent errors in submissions, or conflicting reports among Enrollees, could lead to the improper assessment of penalties or liability on a private lateral owner, and those private owners may choose to sue the Enrollees that provided such information. Enrollees are under no statutory obligation to report this information, and doing so only increases the Enrollees' potential liability exposure. For these reasons, the reporting of PLSDs by Enrollees should remain voluntary.

III. The Proposed Approach to Establishing Prescriptive System Requirements Violates Water Code Section 13360 by Specifying the Manner of Compliance.

The burdensome nature of the proposed revisions contained within the WDR may violate Water Code section 13360. This provision specifies that:

> No waste discharge requirement 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 with the order in any lawful manner. (Wat. Code, § 13360(a).)

Articulated another way:

> . . . the Water Board may identify the disease and command that it be cured but not dictate the cure . . . Water Code section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement . . . It preserves the freedom of persons who are subject to a discharge standard to elect between available strategies to comply with that standard. (*Tahoe-Sierra Pres. Council v. State Water Res. Control Bd.* (1989) 210 Cal.App.3d 1421, 1438.)

Previous State Water Board orders have acknowledged that Water Code section 13360 allows the Regional Board to regulate discharges of waste but only so long as it does not tell the discharger precisely how to meet established limits. (State Water Resources Control Board Order No. WQ 83-3 (Apr. 21, 1983), citing *Pacific Water Conditioning Association v. City Council of Riverside* (1977) 73 Cal.App.3d 546.) The variety of examples provided in these comments regarding specific mandates contained within the WDR cross the line from general order to specific mandates regarding the methods of compliance.

For example, the SSS WDR mandates development of a Staff Assessment Program, requirements for contingency planning and natural disaster response planning, preparation of risk and threat analyses of each and every sanitary sewer system asset, and development and implementation of "performance targets" linked to each element of the SSMP and assessed annually. These detailed provisions wrongfully insert the State Water Board into the operational staffing and management decisions of a local government entity, implying that the State Water Board has control over and interest in approving local municipal affairs. This is but one example of the State Water Board going beyond prescribing general requirements and instead dictating the manner of compliance contrary to Water Code section 13360.

IV. Including Personal Information About Board Members and Field Personnel in the SSMP Is Unnecessary and May Involve Personal and Confidential Information Under the California Public Records Act

The information being sought by the State Water Board as part of the reporting requirements in the WDR is unnecessarily detailed and may infringe upon the privacy rights of employees. This information may be exempt from disclosure under the California Public Records Act (PRA). For example, there is a proposed requirement to include the names, telephone numbers, email addresses, and other personal information of governing board members as well as field personnel that respond to spills. These requirements seem overly intrusive and in the case of the latter requirement, could have a chilling effect on people seeking employment with collection system agencies. This information at this level of detail is unrelated to the conduct of the public's business and is therefore not a matter that the State Water Board should be requesting from Enrollees.

Specifically, California courts have held that ". . . purely personal information unrelated to 'the conduct of the public's business' could be considered exempt" from the definition of a public record, and hence not subject to disclosure. (*Cal. State Univ., Fresno Ass'n v. Superior Court* (2001) 90 Cal.App.4th 810, 824 825, internal citations omitted.) The statutory list of records exempt from disclosure under the California PRA includes "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Gov. Code, § 6254(c).) The weighing process under Government Code section 6254, subdivision (c) to determine whether the disclosure would constitute an unwarranted invasion of privacy requires a consideration of almost exactly the same elements that should be considered under Government Code section 6255, which looks at whether the public interest in disclosure outweighs that of nondisclosure. (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 345, citing *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 780.) As noted in the cover letter, the need for this information is virtually non-existent, particularly as it relates to field personnel who respond to spills, and therefore the "interest" of the State Water Board in procuring that information is minimal. However, the continued updates of this information would be burdensome on the Enrollees, and the submittal of personal information regarding field personnel would have a chilling effect on people seeking employment with these agencies. Therefore, such a request would likely be unsupportable under the PRA, and by analogy, the limitations on the State Water Board to demand such information should be subject to the same considerations.

V. The State Water Board Must Consider the Unfunded State Mandate Potential of these Requirements.

Any mandates contained in this proposed SSS WDR, besides the prohibition of spills to waters of the United States, are not required by federal law and, therefore, constitute objectionable unfunded state mandates. Recent determinations by the Commission on State Mandates have held as much. (*See e.g.*, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21, *Municipal Stormwater and Urban Runoff Discharges,* STATEMENT OF DECISION available at http://www.csm.ca.gov/sodscan/121.pdf.) Many of the proposed SSS WDR requirements are new, constituting a "new program," or creating a "higher level of service" over the previously required level of service that impose additional costs, thereby implicating an unfunded state mandate. Federal law does not regulate discharges to land or to waters of the state or other conveyances that do not reach waters of the United States, and therefore those elements of the SSS WDR that do not directly address these issues may be unfunded state mandates. Moreover, the proposed SSS WDR substantially increases mandatory requirements for local agencies who operate collection systems, thereby potentially creating new unfunded mandates subject to reimbursement from the state. Because sewer service fees are subject to the Prop 218 voting and protest provisions, no rate increases are guaranteed and, therefore, state mandates may be implicated if local funding is not authorized by the voters.