

ATTACHMENT
Draft WDRs for Wastewater Collection Systems
Detailed Comments and Response to NGOs June 7, 2005 Letter

The Proposed SSO Reduction Program is Unprecedented in Scope and Will Require a Significant Investment of Public Funds.

As noted in the cover letter, the proposed WDRs would establish a major new regulatory program. In particular, new, specifically identified mandates will include:

- Overflows to surface waters will be prohibited.
- All collection systems will be required to report overflows, both those that reach surface water and those that do not, via an on-line database accessible to the public.
- Every collection system will be required to prepare and implement a sewer system management plan (SSMP).
- SSMPs must be certified by an independent third party organization, which would include representatives of regulatory agency personnel and non-governmental organizations as part of its governing structure.

The Limited Affirmative Defense Language Proposed in the WDRs is both Lawful and Essential to Implementation of the Program.

The NGOs assert that the affirmative defense is unlawful and would “tend to undermine” the Clean Water Act. This argument relies on several faulty premises. First, the letter asserts that SSOs are subject to secondary treatment. However, no court has held sanitary sewers are part of the POTW. The DC Circuit has ruled that combined sewer overflows (CSOs) are not. (*Montgomery Environmental Coalition v. Costle*, 646 F.2d 568 (1980)). The second faulty premise in the NGO letter is that an affirmative defense for SSOs would violate the CWA. This ignores the fact that other defenses already exist under the Act, including the bypass and upset defenses. Furthermore, both the bypass and upset defenses were challenged by the Natural Resources Defense Council when they were promulgated and were upheld by the D.C. Circuit. (See *NRDC v. EPA*, 822 F.2d 105, 124 (1987).) In addition, the affirmative defense concept was proposed by U.S. EPA in a very similar form in its proposed SSO Rule signed by the Administrator (but not promulgated) in January, 2001.

If SSOs are part of the POTW, as the NGOs claim, then they are also entitled to the existing bypass and upset defenses in the NPDES permit rules. It is true that the CWA is a "strict liability" statute, but several courts (including the 9th Circuit) have ruled that some sort of upset defense must be provided for any technology-based effluent

limitations, because technology is inherently fallible.¹ (See *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir.1976) and *Marathon Oil v. EPA*, 564 F.2d 1253 (9th Cir. 1977).) If SSOs are not part of the POTW, the state and federal agencies are free to establish a separate technology standard for sewer collection systems. U.S. EPA's draft SSO Rule, although never promulgated, came close to establishing such a standard. In the absence of a federal technology standard for collection systems, the State can establish one using its best professional judgment. Thus, California can use SSMPs, its version of CMOM (Capacity, Management, Maintenance & Operations), as the technology standard for collection systems. As with any technology standard, the State would be entitled -- indeed, required -- to allow some sort of affirmative defense for upsets of the system.

The limited affirmative defense provided in the draft WDRs would not, as the NGOs argue, block citizens from pursuing their rights. Under the WDRs as proposed, the majority of SSOs would continue to be subject to SWRCB and Regional Board enforcement, and all SSOs would remain subject to citizen suits. We agree that citizen suits can play a vital role in enforcement of environmental laws. We take issue with the NGOs' suggestion, however, that a state permit or regulatory program designed to protect the environment is *per se* invalid if it in any way circumscribes the ability of third parties to file lawsuits. The role of the citizen is to supplement, not supplant, the primary role of the State. (*Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).) In *Gwaltney*, the Court noted that the legislative history of the Act reinforces this view of the role of the citizen suit. (The Senate Committee "intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper *only* "if the Federal, State, and local agencies fail to exercise their enforcement responsibility.")

The SWRCB May Implement This Program Through State-Issued WDRs Rather than an NPDES Permit.

During the SSO Guidance Committee process, many of our organizations advocated the adoption of an NPDES permit governing collection systems.² And, while this may still be the preference of some of our member agencies, we cannot agree with the NGOs' assertion that an NPDES permit is required. One of the primary goals of the SSO reduction program is to create a level playing field for collection system reporting and regulation. This means consistent requirements for those collection systems that are owned and operated by an agency with a treatment plant as well as those that are satellite

¹ The DC Circuit actually remanded the upset rule to U.S. EPA to consider and provide a justification for whether or not it should also provide a defense to exceedances of water quality based limits. EPA has never acted on that remand, but the D.C. Circuit did not find such an extension precluded by the CWA.

² We also wish to correct the NGOs' assertion that the primary motivation for issuing a WDRs rather than an NPDES permit appears to be an attempt to "insulate" POTWs from U.S. EPA and citizen enforcement. Many in the collection system community advocated the concept of an NPDES permit, which, if it were to include similar affirmative defense language, would provide protection from citizen enforcement not provided by the proposed WDRs.

agencies, which convey wastewater but do not have treatment responsibilities. As we understand SWRCB staff and counsel have concluded, any attempt to cover all collection systems under an NPDES permit is significantly undermined by the recent Second Circuit Court of Appeals decision regarding permitting of confined animal feeding facilities (CAFOs), which held that U.S. EPA could not require all CAFOs to apply for permits, only those with documented actual discharges to surface waters. (*Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005).) The court also held that U.S. EPA could not even place the burden on the CAFOs to demonstrate that they did not have discharges.

Nor do we find it compelling that U.S. EPA has circulated a draft "Fact Sheet" suggesting that satellite collection systems should be permitted under the NPDES program. It strains credulity to believe that U.S. EPA would spend years developing a proposed new SSO rule if the entire major program could simply have been implemented under existing regulations. Several Regional Water Boards have adopted WDRs to address collection systems, some of which include similar affirmative defense language. None of these were challenged as violating the CWA. Furthermore, the proposed defense is very narrow; it precludes enforcement for only those SSOs that occur when certain carefully defined circumstances prove that the SSOs were beyond the reasonable control of the operator and occurred in spite of the operator's compliance with the SSMP, etc. We are deeply troubled by the NGOs' complaint that this limited defense would somehow prevent them from suing for "non-negligent" discharges. The WDRs is not an NPDES permit, and therefore citizen suits for even this small category of overflows would not be barred. Rather, the existence of the defense would allow a collection system operator to argue to a judge that compliance with the WDRs is a relevant factor in determining liability under the CWA. While this is not a particularly powerful tool, it at least provides collection system operators with *an* argument to make in their defense. This does not warrant the vehement reaction of the NGOs, and we can only conclude that even a small step toward protecting municipalities from unnecessary third party litigation is unacceptable to them. This is difficult to square with their repeated assurances to public agencies that they only sue the "bad actors" and would not target well-constructed, well-managed systems that have occasional overflows.³

Additional Time Beyond the November 2005 Timeline is Required to Fully Define and Address Key Aspects of the WDRs.

Resolution 2004-080 directs SWRCB staff to develop an SSO Reduction Program for presentation to the Board in November 2005. We have always considered this timeline very aggressive and ambitious. In addition to the issues discussed above, several aspects

³ Nor can we take seriously the parade of horrors that we are assured will flow from issuing these WDRs. Suffice it to say that we do not see "wholesale administrative amendment of the Water Code" resulting in degradation of the State's waters as an inevitable consequence of adoption of WDRs that will require billions of dollars of investment in infrastructure, all toward the goal of reducing SSOs. WDRs that include a similar affirmative defense have been in place in Orange County since 2003, and the sky has not fallen. We urge the Board to ignore the rhetoric and focus on the facts.

of the draft WDRs remain to be addressed satisfactorily from the local government perspective, such as the extent of new responsibilities to be imposed on public collection system owners with respect to private property and sewer laterals, and the phase-in schedule for the program. In light of the recent controversy over critical aspects of the draft WDRs, we request that you allow additional time for your staff, in coordination with the SSO Guidance Committee, to determine whether it is possible to resolve the disagreement over the issuance of WDRs with an affirmative defense.

We believe that further consideration of a robust, objective and credible SSMP certification process is central to any resolution of the impasse regarding the WDRs. Absent a certification process that provides NGOs, as well as regulators and collection system professionals, the opportunity to participate in the development of industry standards, monitor performance, and consider input from the public regarding SSMP implementation, we are not optimistic that a consensus regarding the proposed WDRs can be reached. Phase I of this effort, evaluating various certification models and funded by CASA, is now almost complete, but at least two additional phases of work are needed: defining the details of a third party organization—structure, legal authority, roles and responsibilities, funding, etc—and ultimately, actually establishing the organization so that it can begin its work. One perspective that all participants in the SSO Guidance Committee seem to share is that this cannot be done by November. Rather than abandon the sole avenue that may provide some hope of a reasonable resolution in the name of expediency, we ask that the Board grant additional time to refine and develop the program.

Conclusion

We greatly appreciate the SWRCB's vision of employing a collaborative approach in establishing and working with the SSO Guidance Committee, and believe that the SWRCB staff has made every effort to accommodate varying points of view as well as differing interpretations of the law. Our organizations remain committed to the collaborative process. We are uncertain, however, in light of the June 7, 2005 letter to your Board, whether the NGO community shares that commitment. We were very disappointed that they felt the need to provide detailed legal argument to the Board outside of the collaborative process on issues critical to the development of acceptable WDRs. We are hopeful that, with additional time beyond November 2005, a collaborative solution may yet be possible.