

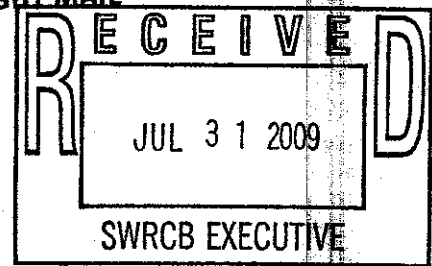
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July 31, 2009

**VIA EMAIL (commentletters@waterboards.ca.gov) AND OVERNIGHT MAIL**

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Ms. Jeanine Townsend  
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Re: **Petition of County of Los Angeles & Los Angeles County Flood Control District Re: Amendment NPDES Permit No. CAS004001 for Bacteria TMDL at Santa Monica Bay Beaches, SRWCB/OCC File A-1780**

Dear Ms. Townsend:

On behalf of the Cities of Monrovia, San Fernando, San Marino, and South El Monte ("Cities"), this will provide comments on the revised draft of the proposed Order in the above-referenced matter. The Cities are co-permittees under the NPDES Permit issued to the County and various cities in the Los Angeles River Watershed and will become subject to various other TMDLs if the Regional and State Boards incorporate such TMDLs with strict numeric effluent limits into the NPDES permits.

As a preliminary matter, the Cities incorporate by reference and adopt the comments previously submitted by the County of Los Angeles and the County Flood Control District on the initial draft Order for this matter as contained in the June 3, 2009 letter and accompanying supporting documents submitted by the County's legal counsel, Howard Gest, Esq. The Cities wish to respond to specific discussion in the revised draft of the proposed Order as follows:

(1) Strict Numeric Limits for "Dry-Weather" Non-Storm Discharges:

The Board staff attempt to distinguish its prior position stated in *In Matter of the Petitions of the Building Indus. Assoc. of San Diego County & Western States Petroleum Assoc.*, State Bd. Order No. WQ 2001-15 ("BIA") on the grounds that those comments applied to "storm water" and that the incorporation of strict numeric TMDLs in this permit deal with "non-storm water" or "illicit discharges." (Revised Draft Order at 8-10). The purported distinctions in the Revised Draft Order are not persuasive for several reasons:

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(a) As pointed out in the County's June 3, 2009 comments, it is quite possible that the so-called "dry weather" determination, as measured only at one point (the USC weather gauge) will misstate the fact that in other areas of the Los Angeles Basin there will be a precipitation event of .01 inch or more. The City Halls of each of the commenting Cities are located a considerable number of miles from the main USC campus. For example, both San Fernando and Monrovia's city halls are located more than 20 miles from the main USC campus. Experience and data submitted to the Regional Board demonstrates the considerable variability of rainfall throughout the Los Angeles basin, and thus, the inapplicability of a rain gauge monitoring point more than 20 miles away from some of the potentially regulated co-permittees.

(b) The Revised Draft Order attempts to distinguish EPA Guidance cited by the County in its June 3, 2009 comment letter on the grounds that the cited Guidance deals solely with stormwater and that this NPDES permit regulates only "non-storm water discharges." But, a review of specific EPA guidance documents and fact sheets related to "non-storm water discharges to storm sewers" or to "illicit discharge detection and elimination" demonstrates that even EPA contemplates a "Best Management Practices" (BMP) approach to such "non-storm water" discharges. EPA's "Storm Water Management Fact Sheet: Non-Storm Water Discharges to Storm Sewers" (Office of Water, Sept. 1999) expressly states that: "identifying and eliminating non-storm water discharges to storm sewers is an important and very cost-effective Best Management Practice (BMP) for improving runoff water quality." (p.1). The rest of EPA's Fact Sheet describes methods to identify and reduce such discharges, but also cautions that identification of non-storm water discharges "may be problematic." (p.2). EPA's NPDES: Illicit Discharge Detection and Elimination" fact sheet describes a "program to detect and eliminate illicit discharges" including an ordinance prohibiting such discharges, a plan to detect and address illicit discharges and an education program on the hazardous associated with illicit discharges. These are the exact types of ordinances and programs that the commenting Cities currently

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has in place. Significantly, neither of these EPA documents demand a “zero-level” discharge for such “non-storm” or “illicit” discharges as the Regional Board’s TMDL requires. The Revised Draft Order also cites to 40 C.F.R. §122.26((d)(2)(iv)(B). But, a full review of the cited provision is completely consistent with the above-cited EPA references: Educational programs and efforts to detect illicit discharges are required; but, nowhere in the regulation does EPA require 100% reduction or elimination of any illicit discharge. By its very nature, illicit discharge is exactly that—“illicit.” It is done without regulatory approval by these Cities (or any other regulatory entity), often with a deliberate intent to escape detection. To mandate that the Cities completely end “illicit” discharges is to mandate an impossible task.

(c) The Revised Draft Order cites federal regulations pursuant to the Clean Water Act, 40 C.F.R. §122.44(d)(1)(vii)(B) as requiring that storm water permit limitations be consistent with “applicable wasteload allocations.” (p.9). Of course, to the extent that the Board adheres to a strict distinction between “storm water” regulation and “non-stormwater” guidance, then it cannot, with any consistency, then resort to justification based upon “storm water” regulation. Moreover, the preface to each subpart of Section 122.44 states that each NPDES permit shall meet the requirements of the subparts “when applicable.” In turn, 40 C.F.R. §122.44(k)(3) provides that BMPs shall be adopted when ‘numeric effluent limitations’ are infeasible. See *Citizens Coal Council v. EPA*, 447 F.3d 879, 896, n.18 (6th Cir. 2006)(en banc)(“The EPA’s NPDES permit regulations reflect the EPA’s longstanding interpretation of the CWA as allowing BMPs to take the place of numeric effluent limitations under certain circumstances.”) The Revised Draft Order does not address why 40 C.F.R. Section 122.44(k)(3) is ignored without any discussion or analysis. Indeed, this very State Board has previously issued an NPDES permit, General Permit No. CAS00001, which expressly found that for certain facilities: “[I]t is not feasible at this time to establish numeric effluent limitations. This is due to the large number of discharges and complex nature of storm water discharges. This is also consistent with the U.S. EPA’s August 1, 1996 “Interim Permitting Approach for Water

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Quality Based Effluent Limitations in Storm Water Permits.”  
(CAS000001, Waste Discharge Requirements, p.2, §9 ). General  
Permit No. CAS00001 is still effective today.

(2) Language in the Revised Draft Order about Applying Strict Numeric Limits in TMDLs to Stormwater Permits:

On pages 10-11, the Revised Draft Order engages in speculation about the potential application of strict numeric TMDLs to *stormwater* permits. While the Cities believe that no strict numeric limitation is viable even in the context of a “dry weather” presumptive “non-storm water” discharge, certainly this language is not part of nor necessary to the draft Order. It should be stricken as irrelevant to the issue currently before the Board.

Alternatively, if the Board attempts to utilize this particular permit modification as a “model” for the implementation of TMDL numeric limits to all stormwater permits, even in wet weather conditions, then it should clearly state its intention and re-open the entire hearing for a complete discussion with all affected stakeholders.

(3) The Proposed Modification to the NPDES Permit Would Violate EPA Clean Water Act Regulations by Making an Individual Co-Permittee Liable for Operations Beyond Those in Its Own Storm Sewer System:

The proposed modification to Section 2.5 of the permit purports to make any MS4 that “contributes to” an exceedence of a bacteria standard measured at the wave wash area of the Santa Monica Bay liable for such an exceedence. It remains something of a mystery as to how the Regional Board will determine from examining bacteria at the wave wash point where that “excessive” bacteria came from. Rather, based upon the permit’s general assertion of joint and several liability among all co-permittees, the proposed modification would appear to make all co-permittees jointly and severally liable without any competent evidence that an individual city’s MS4 in fact “contributed” to an exceedence above the TMDL bacteria standard. To the extent that the State Board adopts this implicit standard, it is in direct violation of 40 CFR §122.26(a)(3)(vi), which states that a co-permittee of an NPDES permit is only responsible for discharges from the MS4 system that it operates. *Cf. San Francisco Baykeeper v. City of Saratoga*, 141 F.3d 1178 (1998) (“EPA’s regulations implementing the Clean Water Act make clear that the City [of Saratoga] would be liable if it could be considered the operator of the Saratoga-Sunnyvale storm

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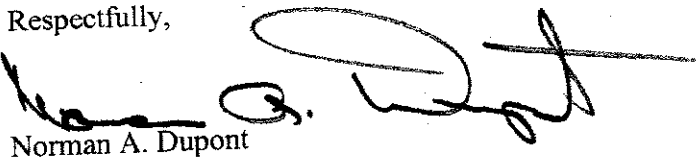
outfall.”)(citing 40 C.F.R. §122.26(a)(3)(vi)). EPA’s definition of a co-permittee, 40 CFR §122.26(b)(1), limits that co-permittee to responsibility for a “discharge for which it is the operator.” The Regional Board’s suggested modification to the NPDES Permit would now make a co-permittee municipality jointly and severally liable for someone’s unknown discharge that ended up at a downstream measuring point far beyond the municipality’s limits of authority, i.e., the wave wash in the Santa Monica Bay. The State Board must revise the proposed permit modification to avoid this result.

(4) Conclusion:

For these reasons, the Cities of Monrovia, San Fernando, San Marino, and South El Monte respectfully submit that the State Board should:

- (1) Reject the Los Angeles Regional Board’s amendment to the extent that it imports into the NPDES permit any strict numeric limit based upon the Bacteria TMDL; and
- (2) Strike the language on pages 10-11 of the Revised Draft Order discussing an “issue [not] before us”; and
- (3) modify the proposed permit modification to add wording making it clear that the Regional Board can find that a co-permittee is liable for a discharge that exceeds the bacteria TMDL measured at the wave wash point if and only if the Regional Board can demonstrate by competent evidence that the specific co-permittee’s MS4 operations caused that particular exceedence.

Respectfully,



Norman A. Dupont