VENTURA COASTKEEPER

April 10, 2009

Executive Officer and Members of the Board
Los Angeles Regional Water Quality Control Board
320 West Fourth Street, Suite 200
Los Angeles, CA 90013

Re: Comments on Tentative Order for Ventura County MS4 Permit Distributed February 24, 2009 (NPDES Permit No. CAS004002)

Dear Ms. Egoscue and Members of the Board:

Thank you for the opportunity to comment on the Los Angeles Regional Water Quality Control Board's (Regional Board) Tentative Order for the Ventura County's Municipal Separate Storm Sewer System (MS4) Permit (NPDES Permit No. CAS004002).

The Ventura Coastkeeper (VCK) is a program of the Wishtoyo Foundation, a community based 501(c)(3) non profit with over 700 members consisting of Ventura County residents, Chumash Native Americans, and the general public that enjoys, depends on, and visits Ventura County's inland and coastal waterbodies. Wishtoyo uses traditional Native American Chumash beliefs, practices, songs, stories and dances to increase awareness of our connection with the environment and to preserve the maritime culture and resources of coastal communities. Core values of the Chumash include sustainable living and respect for the environment.

In 2000, the Wishtoyo Foundation launched VCK to protect, preserve, and restore the ecological integrity and water quality of Ventura County's inland waterbodies, coastal waters, and watersheds. In pursuit of its mission, VCK investigates polluters and, when necessary, takes legal action to stop them. In commenting on the Tentative Permit, VCK draws upon the Wishtoyo Foundation's unique perspective, our involvement with the local community, and our experience protecting, preserving, and restoring the traditional waterways of Ventura County.

VCK's overriding concern is that the Tentative Order modifies numerous requirements contained in previous permit drafts to the detriment of the water quality and ecological integrity of Ventura County's waterways. VCK is not only troubled by these changes, but is concerned about their legal adequacy because they were substituted by the Regional Board into the Tentative Order without any scientific or policy justification supported by evidence articulated in the record, or in another medium available to the public, that demonstrates that the Regional Board's changes were not arbitrary and capricious, or otherwise an abuse of discretion. For example, as NRDC's and Heal the Bay's comment letter points out, the findings and Fact Sheet for the Tentative Order fail to provide an explanation for the Regional Board's decision not to apply a 3% effective impervious area limitation to all regulated projects, nor a reasoned explanation for the Regional Board's decision to allow redevelopment projects (and other projects where onsite implementation is a concern) to comply merely with the SUSMP treatment criteria.

Wishtoyo
3875-A Telegraph Road, #423 • Ventura, CA 93003
Phone 805.658.1120 • Fax 805.258.5735 • www.wishtoyo.org

VCK strongly supports and concurs with the Natural Resources Defense Council's (NRDC) and Heal the Bay's comments regarding the Tentative Order.

In addition to our comments below, we incorporate by reference our letter submitted to the Regional Board on May 28, 2008 concerning the Draft MS4 Tentative Ventura County Permit distributed April 29, 2008. We ask that the Regional Board publically address on the record, the concerns we voiced in that comment letter, and modify the Tentative Order accordingly to protect the water quality and ecological integrity of Ventura County's waterways where it has not done so.

The concerns that VCK specifically voiced in its May 28, 2008 comment letter that have yet to be addressed by the Regional Board and continue to be a concern are:

1.) **Tentative Order Must Link Monitoring Data to Water Quality Standards**

The monitoring program must be sufficient to determine whether a municipality is causing or contributing to violations of the permit. See 40 C.F.R. §122.44(i). The Tentative Order prohibits any discharges from the MS4 that cause or contribute to a violation of water quality standards. Tentative Order Part 3.1 at page 34. Thus, legally, the monitoring program must be sufficient to determine whether the permittees are violating water quality standards. The Tentative Order, however, does not satisfy this requirement for two reasons:

(1) First, the monitoring locations are insufficient to identify the activities or failures that are causing or contributing to impairment. This source identification problem is summarized by Jonathan Bishop, the former Executive Officer of the Regional Board, in a letter to the Principal Permittee dated March 9, 2007:

> "The Monitoring Program has been in effect for several years in the County of Ventura and Permittees report exceedances of several of the same water quality objectives year after year in receiving waters without being able to identify or eliminate the sources of the exceedances. Without differentiation of sources from the Permittee's MS4s, the application of appropriate Best Management Practices (BMPs) to reduce the discharge of pollutants of concern to the maximum extent practicable (MEP) is unattainable."

To evaluate the permittees' compliance with water quality standards and what additional steps must be taken to achieve compliance, the Tentative Order must require upstream monitoring that is representative of their respective discharges. The Regional Board needs to define which major outfalls will be monitored in accordance with this objective. Tentative Order at page F-4. Unless the Regional Board and the permittees know the source of the pollutants causing and contributing to water quality violations, how can anyone know what BMPs are needed or working? For all of these reasons, the Tentative Order needs to contain, at the outset, a robust program of upstream monitoring and source identification.

(2) Second, the Tentative Order does not articulate how to make a determination of compliance with water quality standards. To make such a determination, the Tentative Order must link the measurements obtained by the monitoring program to water quality standards such as those set forth in the California Toxics Rule ("CTR"). VCK is asking the Regional Board to invest a significant amount

Wishtoyo
3875-A Telegraph Road, #423 • Ventura, CA 93003
Phone 805.658.1120 • Fax 805.258.5135 • www.wishtoyo.org

of time to articulate how monitoring data can be converted into a determination of compliance with water quality standards. Not only is it legally required, but it will greatly simplify implementation and enforcement of the final permit.

Has the Regional Board evaluated how many person years it will take to review all of the various reports, Storm Water Quality Management Plans and field inspections required by the Tentative Order (apart from the time it is taking to draft the nearly 200-page permit)? The State Board itself found that "the current level of program staffing resources is not sufficient to fully implement the storm water program." Draft Enforcement Report, CA State Water Board, January 2008, page 14. For fiscal year 2006-2007, the State Board estimated that the NPDES Storm Water Program needed 400 staff in order to operate a fully-functioning program. As of April 2008, the NPDES Storm Water Program had about 100 staff. Baseline Enforcement Report (FY 2006-2007), CA State Water Board, revised April 30, 2008, page 21.

Adoption of water quality standards will lessen the need for so many reports, plans and programs because it will be clear from the monitoring program alone whether the permittees are in compliance and, more importantly, the permittees will know better how to achieve compliance.

It is also important to put the Tentative Order into context. This is the third iteration of Ventura County's Phase I MS4 Permit (first adopted in 1994). Tentative Order at page 1. The MS4 Permit has been regulating storm water discharges for nearly 15 years but storm water continues to exceed water quality standards and impair our waters. Tentative Order at page 1-3. In 2007, monitoring data showed elevated pollutant concentrations at all monitoring sites during one or more monitored wet weather storm events, and at specific sites during one or more dry weather events. Ventura Countywide Stormwater Quality Management Program, Annual Report for Permit Year 7, Reporting Year 13 (October 2007) at page 9-17. Yet, the Tentative Order limits monitoring to three mass emission stations and an undefined set of major outfalls. Let's not wait another five to seven years before we make a serious attempt to identify the source of this pollution.

2.) Require Compliance with MALs and Provide a Method of Enforcement

VCK feels that the MALs (a) are too high relative to water quality standards (such as the CTR), and (b) they constitute technology-based effluent limitations that do not reflect the Maximum Extent Practicable (MEP) standard.

Notwithstanding those issues, at a minimum, the Tentative Order needs to actually require compliance with the MALs on a reasonable schedule, and to provide a mechanism for enforcement.

Staff has indicated that, to account for sampling abnormalities, the Tentative Order allows the permittees to exceed the MALs 20% of the time over the first three years of the Tentative Order before attempting to require any corrective action. Tentative Order Part 2 at pages 33-34. If the MALs are exceeded more than 20% of the time, the violating permittee is required to "include an assessment of the sources responsible for the MAL exceedances, the existing stormwater programs and BMPs that address those sources, an assessment of potential program enhancements, alternative BMPs and actions the Permittee shall implement to reduce discharges to a level that is equivalent to or below the MALs, and an implementation schedule for such actions for Executive Officer approval. The MAL Action Plan shall provide the technical rationale to demonstrate the proposed measures and controls will attain the MALs," which is precisely what every permittee is required to do in the first place. Id. Thus, the

Wishtoyo
3875-A Telegraph Road, #423 • Ventura, CA 93003
Phone 805.658.1120 • Fax 805.258.5735 • www.wishtoyo.org

Tentative Order undermines the very MAL standards it sets forth and requires no real progress for at least three more years in a program intended to achieve compliance in 1992.

The Tentative Order should be revised to provide that any exceedance of the MALs shall create a presumption that the permittees have not complied with MEP and require all permittees upstream from the point of discharge to notify the Regional Water Board within 30 days of knowledge of such exceedance and thereafter submit a MAL Compliance Report in accordance with the procedures set forth for RWL Compliance Reports at Part 3.3 of the Draft Permit. If there is any sampling abnormality, the EO can make such a determination and modify the contents of the MAL Compliance Reports accordingly.

3.) Trigger for Receiving Water Limitation Compliance Reports is Too Subjective

Part 3 of the Tentative Order is internally inconsistent. Part 3.1 states that "[d]ischarges from the MS4 that cause or contribute to a violation of water quality standards are prohibited." Tentative Order at page 34. But, Part 3.3 of the Tentative Order goes on to say that "[i]f exceedances of water quality standards or \water quality standards *persist* . . ,the permittee shall ensure compliance with discharge prohibitions and receiving water limitations by [submitting a Receiving Water Limitations [RWL] Compliance Report...]." Tentative Order at pages 34-35 (emphasis added). By allowing violations of water quality standards to "persist" for an undefined period of time, the Tentative Order in effect permits rather than prohibits such violations. The word "persist" needs to be deleted from Part 3.3 of the Tentative Order because (a) it is inconsistent with the permit's stated objective of ensuring compliance with water quality standards, and (b) it undermines effective enforcement of water quality standards by setting a totally subjective trigger for RWL Compliance Reports. Tentative Order Finding F.2 at page 21.

4.) Principal Permittee Should Share In Responsibility for Permittees' Compliance

The Principal Permittee's pipes convey pollutants from the municipalities to waters of the United States via point sources. Yet, the Tentative Order purports to relieve the County from any liability for these discharges which is inconsistent with the requirements Clean Water Act. Draft Permit, Part 4.E.1(b) at page 39 (stating that "the Principal Permittee is not responsible for ensuring compliance of any other individual permittee"). Not only is this illegal, it is bad public policy. If the parties want to make a distinction between the responsibility of the Principal Permittee and the other permittees, they need to monitor upstream to determine pollutant source and relative contribution of the permittees to water quality impairment. Otherwise, all permittees upstream from a discharge violating water quality standards (including the Principal Permittee) should be jointly responsible for such violations. The permittees can work out relative liability amongst themselves.

5.) Replace TMDL "Workplans" with Existing RWL Compliance Report Process

To enforce compliance with Total Maximum Daily Load requirements ("TMDLs"), the Tentative Order provides: "Part 6 of this Order incorporates provisions to assure that Ventura County MS4 permittees comply with WLAs and other requirements of TMDLs covering impaired waters impacted by the permittees' discharges. Each permittee shall attain the storm water WLAs incorporated into this Order by implementing BMPs in accordance with the MS4 effluent quality workplan and source identification approved by the Executive Officer." Tentative Order at page 85. However, the Tentative Order does not define "MS4 Effluent Quality Source Identification Workplans." Staff indicated that

Wishtoyo
3875-A Telegraph Road. #423 • Ventura. CA 93003
Phone 805.658.1120 • Fax 805.258.5135 • www.wishtoyo.org

said Workplans are one and the same document as the workplans required of the permittees at Part 6.II of the Draft Permit, which must be approved by the Executive Officer of the Regional Board. Tentative Order Part 6.II at page 85. There is no need to create another type of compliance report. The Tentative Order should delete all references to the workplans and simply provide that any exceedance of WLAs is a violation of water quality standards and requires RWL Compliance Reports in accordance with Part 3 of the Draft Permit.

6.) Protect Areas of Special Biological Significance (ASBS)

The California Ocean Plan prohibits discharges to Areas of Special Biological Significance (ASBS) (now called "State Water Quality Protection Areas") such as Mugu Lagoon. Although Calleguas Creek flows into Mugu Lagoon, the Tentative Order does not appear to impose any additional requirements based on Mugu's ASBS status. The Tentative Order needs to address the legal protection afforded to Mugu Lagoon by the California Ocean Plan. Moreover, Mugu Lagoon has special significance because it was originally the location of Muwu, a traditional Chumash village from which the name "Mugu" is derived. Allowing polluted discharges of storm water to Mugu Lagoon disregards the value of our traditional village and resources.

Additionally, the VCK has the following specific comments regarding the Tentative Order:

1.) The Tentative Order, by wrongly eliminating a provision from the Tentative Order stating that the public can offer documentary evidence of Receiving Water Limitation (RWLs) violations, thwarts the needed efforts of watershed watchdogs to enforce the Clean Water Act (CWA) and impermissibly obstructs the CWA's citizen's suit provision.

The permit explicitly stating that the public can offer documentary evidence of a violation of RWLs is necessary to rightfully encourage the public to conduct their own waterbody sampling and monitoring, as intended and needed, under the CWA to protect the water quality and ecological integrity of Ventura County's inland and coastal waterbodies.

In response to the persisting and newly emerging water quality threats in Ventura County, citizen groups are turning towards local citizen led watershed protection strategies. Because state agencies do not have the resources to conduct regular water quality monitoring where needed on every waterway in Ventura County, citizen involvement in monitoring and reporting water pollution is vital to the protection of Ventura County's waterbodies. Watershed watchdogs, like the Ventura Coastkeeper, often detect potential water quality problems early, quickly, and efficiently through sampling and monitoring conducted by staff, and organized and trained volunteers. The water quality data and information gathered by watchdog groups, can be utilized to alert state and local agencies of the need for emergency response, CWA enforcement actions, permit requirements, or additional inspections to prevent further contamination. Even without the severe California state budget cutbacks that further strain the resources of state environmental agencies, the role of watershed watchdogs in ensuring the enforcement of the CWA is critical.

Without explicitly stated authority that the public can use water quality data as documentary evidence of MS4 RWLs violations, watershed watchdogs may preclude themselves from using their resources to detect MS4 RWL violations, and thus their civil duties protect the water quality and ecological integrity of Ventura County's inland and coastal waterbodies will be thwarted. Further, precluding

Wishtoyo
3875-A Telegraph Road, #423 • Ventura, CA 93003
Phone 805.658.1120 • Fax 805.258.5135 • www.wishtoyo.org

watershed watchdogs from sampling waterbodies to detect RWL violations, will leave an undermanned Regional Board Staff with insufficient resources to adequately monitor Ventura County's waterways for RWL violations.

Additionally, by eliminating the permit provision that clearly allows the public to offer documentary evidence of RWL violations, the Tentative Order impermissibly obstructs the CWA's citizen's suit provision that encourages the public to conduct their own monitoring. To supplement state and federal enforcement of the Clean Water Act, Congress empowered citizens to serve as "private attorneys generals" and bring their own lawsuits to stop illegal pollution discharges.[1] If a violator does not comply with the Clean Water Act or with the regulatory agency's enforcement actions, then any person or entity that either is or might be adversely affected by any violation has the right to file a citizen suit against the violator to prohibit the pollution from continuing. Thus, the citizen suit provision of the Clean Water Act is a crucial tool that Congress intended to be utilized to protect and improve the water quality of Ventura County's rivers, streams, coastal waters, and wetlands.

Removing permit terms that invite the public to offer documentary evidence of Receiving Water Limitation (RWLs) violations, functionally operates to dissuade the public from utilizing their resources to sample Ventura County's waterways because if they fear that their sampling data cannot be used as documentary evidence of a RWL violation, then they may not have the incentive to sample for RWL violations. Thus, not explicitly stating that the public can offer documentary evidence of RWLs violations, and implying that the public cannot offer documentary evidence of RWLs by removing this provision from a draft permit, thwarts the citizen suit provision of the CWA because it dissuades the public from collecting evidence of RWL violations.

Additionally, the public's and watershed watchdog's utilization of Monitoring Quality Assurance Project Plans (QAPPs) approved and certified by the Regional Board, all but eliminates concerns that permittees will have to address incorrect allegations.

2. **The VCK would also like to emphasize its concurrence with, and incorporate by reference, the following Tentative Order comments, recommendations, and justifications submitted by NRDC and Heal the Bay to improve the Tentative Order:**

   A. **The Tentative Order Fails to Explicitly State that Waste Load Allocations from Applicable TMDLs Must be Enforceable Permit Limitations.**

   B. **The Tentative Order Is Inadequate to Control Stormwater Pollution from New Development and Redevelopment and Fails to Ensure Compliance with the Maximum Extent Practicable Standard.**

   C. **The Tentative Order Impermissibly Allows the Discharge of Pollutants from New Dischargers and Sources.**

   D. **The Tentative Order Fails to Include Provisions that Effectively Prohibit all Non-Stormwater Discharges, as Required by the Clean Water Act.**

[1] The citizen suit authority can be found in Subchapter V, General Provisions, Section 505, of the Clean Water Act (USC 33, Section 1365).

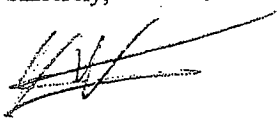
Wishtoyo
3875-A Telegraph Road, #423 • Ventura, CA 93003
Phone 805.658.1120 • Fax 805.258.5735 • www.wishtoyo.org

E. **The Permit Application Is Incomplete for Failure to Include an Assessment of Controls for Reducing the Discharge of Pollutants into Stormwater that is not Arbitrary and Capricious.**

We thank the Board Members and Board Staff for this opportunity to comment on the Tentative Order. As the ecological integrity and water quality of Ventura County's inland and coastal waterbodies continue to be detrimentally impacted by stormwater runoff, we urge the Board and its Executive Officer to implement the comments submitted by NRDC, Heal the Bay, and the Ventura Coastkeeper into Ventura County's MS4 permit to adequately protect Ventura County's waterbodies.

Thank you for considering our comments. Please feel free to contact us with any questions.

Sincerely,



Jason Weiner, MEM
Associate Director & Staff Attorney
Ventura Coastkeeper

Wishtoyo
3875-A Telegraph Road, #423 • Ventura, CA 93003
Phone 805.658.1120 • Fax 805.258.5135 • www.wishtoyo.org