OC Public Works
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Shane L. Silsby, Director

January 19, 2015

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board

Subject: SWRCB /OCC Files A-2236(a) through (kk); Comments on Proposed Order *In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0175)*

Dear Ms. Townsend:

The County of Orange ("County" or "Orange County") appreciates the opportunity to provide comments on the State Water Resources Control Board's ("State Water Board") Proposed Order *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except those Discharges Originating from the City of Long Beach MS4* ("Proposed Order"). In this Order, the State Water Board reviews the Los Angeles Regional Water Quality Control Board's ("Los Angeles Water Board") November 2012 adoption of the municipal separate storm sewer system ("MS4") permit for the Los Angeles County Flood Control District, the County of Los Angeles, and 84 incorporated cities within Los Angeles County (hereinafter referred to as the "Los Angeles MS4 Order"). The Proposed Order makes findings with respect to municipal stormwater permitting in general, and establishes an alternative compliance pathway for meeting receiving water limitations, which are contained in most MS4 permits. Therefore, the Order is highly significant to the County of Orange which is subject to Phase I MS4 permits administered by the Santa Ana and San Diego Regional Water Quality Control Boards.

I. The County Generally Supports the Proposed Order's Alternative Compliance Pathway

The County of Orange generally supports the Proposed Order's findings and discussion recognizing the need for alternative pathways for compliance with receiving water limitations. Since State Board Order No. 99-05, compliance has never been defined by strictly meeting numeric standards. In fact, for most constituents of concern, immediate compliance in all places in a watershed is unattainable. The MS4 community has understood compliance to be through the iterative process whereby a discharger can be in compliance with water quality standards, receiving water limitations and other numeric standards if that discharger is diligently and

rigorously developing and implementing best management practices ("BMPs") and adjusting those practices where exceedances continue to occur. The MS4 has understood the iterative process to be one of time that occurs over successive permit terms, and only where an MS4 is not developing a diligent and rigorous set of BMPs and demonstrating progress can a MS4 been deemed to be out of compliance with the receiving water limitations provision.

As has been universally recognized by all stakeholders (and based on prior discussions over the years with State and Regional Board staff), the 9th Circuit Court of Appeals decision in *Natural Resources Defense Council, Inc. v. County of Los Angeles* turned the iterative process on its head by disregarding prior State Board decisions on receiving water limitations and making each and every permit provision individually enforceable.[1] The Proposed Order's recognition of an alternative compliance pathway then is laudable as MS4s can dedicate time and resources toward planning processes that can achieve attainment of water quality standards over time. The County also supports approaches to compliance, such as CASQA's model language, which better enable the creative watershed planning that is needed to support multiple water resource management objectives and provide the needed additional legal assurance for complying with receiving water limitations. Elements of the Water Quality Improvement Plan (WQIP) provisions of Board Order R9-20130001 also merit explicit consideration in this regard.

Despite establishing a general framework for compliance, however, the Proposed Order continues to retain the illusory distinction that receiving water limitations are independent from the provisions that establish the iterative process, and goes so far as to cite to a superior court holding that was not upheld on appeal, and is therefore not legal precedent.[2] This interpretation is novel and its inclusion in the Proposed Order will only serve to confuse decisionmakers in future administrative proceedings and litigation as to what constitutes compliance. As the administrative agency charged by the Legislature and the EPA with overseeing water quality, the State Board has the legal authority to clarify what its prior orders mean.

II. The Proposed Order Should Mandate that All Regional Boards Provide Alternative Compliance Pathways

Orange County is split between two Regional Boards – the Santa Ana and San Diego regions. In the pending permit for the Santa Ana region, the draft permit contains an alternative compliance pathway largely consistent with the Proposed Order. In the pending permit for the San Diego region, there is no compliance pathway.[3] At the initial adoption hearing on May 8, 2013, the Regional Board declined to adopt a pathway after two options were recommended, with citations by Regional Board staff in the record that the permittees were immediately out of compliance on Day 1. Such an approach is contrary to prior State Board decisions and the spirit of the Proposed Order. In fact, few areas in the law, with the exception of certain torts like products liability, contain this kind of liability regime. This problem is coupled with the fact that the Proposed Order recommends that Regional Boards adopt and enforce

[1] (9th Cir. 2011) 673 F.3d 880, 902.
[2] Proposed Order, Sec. II.A, pg. 12; *see also* fn. 41.

[3] R9-2013-0001; readopted as to Orange County enrollment in R9-2015-0001.

numeric standards, a position that is contrary to federal law[4] and conflicts with the intentions of an alternative compliance pathway.

Under a non-compliance approach, MS4s will be forced to spread stormwater funding across every pollutant rather than focusing on long-term planning and environmentally significant constituents of concern. Therefore, the State Board should direct all Regional Boards to open up all MS4 permits within 6 months from the adoption of the Proposed Order and institute an alternative compliance pathway.

III. The Proposed Order Should Recognize That Water Quality Standards Cannot Be Attained in All Cases and That Those Standards May Need to be Adjusted as Part of a Water Quality Management Plan

In Orange County, in common with other Southern California MS4s, a priority water quality issue of concern is fecal indicator bacteria ("FIB"). Current monitoring and research demonstrates that FIB objectives are likely to be unattainable in wet weather conditions. Extensive financial resources, however, are dedicated to attaining bacteria water quality standards. At the same time, stormwater is increasingly being viewed as an under-utilized resource as the State focuses on the resilience of local water systems and groundwater regulation in anticipation of climate change and population growth.

For example, the recent Urban Water Resources Research Council of the Environmental and Water Resources Institute of the American Society of Civil Engineers report – *Pathogens in Urban Stormwater Systems* (ASCE, 2014) concluded that ". . . consistent attainment of concentration-based primary contact recreational standards at end of pipe during all discharge conditions is unlikely for most passive stormwater controls (excluding disinfection)." Where disinfection has been used, monitoring in Orange County has shown that while disinfection and passive systems (e.g., wetlands) have been effective at the point of treatment, FIB regrowth occurs shortly downstream. These findings led the ASCE report to find that TMDLs for FIB will need to establish endpoints that may differ from 100 percent compliance with recreational water quality objectives.

In addition, the County has been rigorously dealing with the issue of naturally occurring selenium rising up into its flood control channels and seeping into waters of the U.S. by virtue of the high water column. The existing TMDL for selenium establishes the limit of 5 ppm found in the California Toxics Rule ("CTR"). The standard, however, is unattainable due to the non-anthropogenic nature of selenium, the extensive shallow groundwater that is a key feature of central Orange County's hydro-geological landscape, and the lack of BACT. It is therefore currently impossible to comply with this standard even if all discharges in the watershed ceased. The County has been working with Regional Board staff and EPA on a revised TMDL that will focus on dry weather conditions, tissue-based sampling and long-term development of a site specific objective. This issue is further compounded by national criteria being established by EPA and recent litigation in the State of Kentucky over a tissue-based approach. In the County's case, the changing federal and state regulatory and court regimes will take years to play out. Therefore, it is cases like these where the State Board should recognize that the traditional

[4] *See e.g., NRDC v. EPA* (9th Cir. 1992) 966 F.2d 1292; *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

iterative process is insufficient to meet water quality standards and that a reasonable assurance analysis alone is insufficient to predict and attain water quality standards. In many cases, the standards themselves need to be changed.

IV. The State Board Should Encourage Numeric Targets, Not Numeric Objectives

Federal law does not require EPA or state governments to require strict compliance with numeric standards or objectives, but instead, Congress contemplated a regulatory scheme whereby a MS4 must diligently and rigorously implement BMPs in order to be deemed in compliance with WQS. Where a numeric standard can be met, MS4s should meet those standards and protect the public health. However, based on the reasons and examples set forth above, implementing numeric standards in all cases as the objective and outcome of BMPs is technically and economically infeasible. It also shifts the entire environmental burden to the MS4s and redirects vital resources. Therefore, the State Board should encourage meeting numeric targets where feasible.

V. The Proposed Order Needs toRretain the 85th Percentile Retention Standards As a Compliance Endpoint

The County strongly supports the continued inclusion, without revision, of the "stormwater retention approach" based on the 85th percentile, 24 hour event, as a compliance endpoint. This performance standard is based upon studies discussed in the *Water Environment Federation/American Society of Civil Engineers report – Urban Runoff Quality Management* (WEF/ASCE, 1998), which determined this optimal capture volume to be the point beyond which costs escalate disproportionately to rapidly diminishing returns. More recent studies have shown this level of retention can produce up to 90 percent reductions in pollutant loadings. Transformative water quality benefits will undoubtedly accrue from this level of pollutant load reduction. However, the continued inclusion of this performance standard as a compliance endpoint in certain watersheds will enable watershed areas to be managed in a way that realizes additional water resource management, such as local water supply augmentation. The management of sections of the Santa Ana River in Orange County, for example, is an effort that maximizes retention to capture an estimated 250,000 acre feet of runoff annually for groundwater replenishment.

VI. The Proposed Order Should Delete the Requirement For a Reasonable Assurance Analysis

The Proposed Order contains a requirement that a Reasonable Assurance Analysis (RAA) be done in order for a permittee to receive approval of its WMP or EWMP and be deemed in compliance with receiving water limitations and other numeric standards. Orange County contends, however, that an alternative compliance pathway, such as that proposed by CASQA, is sufficiently robust and does not necessitate the addition of a RAA. A WMP will provide enforceable, objective and measurable requirements for MS4s without having to implement an RAA. RAA imposes unnecessary and costly modeling requirements on MS4s. Furthermore, Orange County and other southern California regions are not covered by TMDLs to the extent

that Los Angeles is, where such models have already been developed and where such modeling efforts have previously been conducted for many pollutant-waterbody combinations.

Under federal and state law, TMDLs are the responsibility of the State and Regional Boards to establish. A RAA is essentially a "TMDL-lite" process that seeks to attain the same objectives of a TMDL – establishing a numeric standard that can be achieved over so many years. RAA then shifts the TMDL financial and regulatory obligations from the Regional Board to the MS4s. Although an MS4 may choose to work with its Regional Board to develop TMDLs collaboratively as deemed appropriate and necessary in the future, the County disagrees with the Proposed Order's centerpiece of the alternative compliance pathway as it has no duty to fully assume the Regional Board's regulatory responsibilities. Furthermore, federal law is clear as to how a TMDL should be established, and RAA would "backdoor" the TMDL process into the WMP approach without the Regional Board going through the necessary steps to formulate a TMDL. This would be a violation of federal law. There is also no federal or state authority by which a RAA could be required by a Regional Board. Even assuming such authority, a RAA is unnecessary and goes beyond MEP

The County thanks you for allowing it the opportunity to provide these legal and technical comments. Please do not hesitate to contact us with any further discussions or questions.

Very truly yours,

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Water Quality Compliance

Chris Crompton
Manager,

/s/ Ryan Baron
Ryan M. F. Baron
Senior Deputy County Counsel