

Los Angeles Regional Water Quality Control Board

**ORDER ON OBJECTIONS REGARDING REVISED TENTATIVE ORDER
AND RESPONSES TO COMMENTS**

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT
FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES
WITHIN THE COASTAL WATERSHEDS OF LOS ANGELES COUNTY,
WITH THE EXCEPTION OF DISCHARGES ORIGINATING FROM
THE CITY OF LONG BEACH
(NPDES PERMIT NO. CAS004001)**

On June 6, 2012, staff of the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board or Board) circulated a Tentative NPDES Permit for MS4 Discharges within the Coastal Watersheds of Los Angeles County, with the Exception of Discharges originating from the City of Long Beach (Tentative Order and Los Angeles County MS4 Permit, respectively). The written comment period on the Tentative Order closed at noon on July 23, 2012. The Board received hundreds of pages of written comments from permittees, interest groups, government agencies, academia, and individuals.

On October 4 and 5, 2012, the Board held the initial portion of the public hearing. The Board received information from its staff, and oral comments from parties and interested persons, regarding the Tentative Order.

On October 18, 2012, Board staff circulated a Revised Tentative Order that included revisions to the Tentative Order as a result of the written and oral comments received by the Board. Between October 23-26, 2012, Board staff circulated responses to the significant written comments received by the Board. And on November 5, 2012, Board staff circulated a Second Revised Tentative Order that included additional changes to the Revised Tentative Order released on October 18, 2012.

The Board received a letter dated October 29, 2012, from Mr. Ray Tahir of TECS Environmental Compliance Services on behalf of his clients.¹ The letter raises substantive and procedural objections to the Revised Tentative Order and responses to comments. The Chair, having reviewed the objections, rules as follows:

Objection:

Mr. Tahir raises the following procedural objections:

- (1) The Revised Tentative Order adds new language that constitutes a significant change and, therefore, merits a new 45 day review and comment period; and

¹ Mr. Tahir identifies the following cities as his clients: Baldwin Park, Carson, Compton, Claremont, Duarte, El Monte, Gardena, Glendora, Irwindale, Lawndale, Lomita, Pico Rivera, San Gabriel, San Dimas, South El Monte, Pico Rivera, and West Covina.

- (2) The Revised Tentative Order does not contain revisions and answers to questions in response to written comments on the Tentative Order released on June 6, 2012 that were submitted to the Board on or before July 23, 2012.

Mr. Tahir also provides substantial written comments on the substance of the Revised Tentative Order.

Ruling:

For the reasons set forth below, the procedural objections are OVERRULED.

Regarding Mr. Tahir's substantive comments, as noted in the Notice of Opportunity for Public Comment and Notice of Adoption Meeting dated October 18, 2012, the Los Angeles Water Board is not accepting additional written comments on the Revised Tentative Order. Accordingly, Mr. Tahir's substantive written comments are untimely and will not be included in the administrative record.² However, Mr. Tahir may orally comment on revisions to the Tentative Order at the public hearing on November 8, 2012.

- 1) *Claim that the Revised Tentative Order represents a significant change that merits a new review and comment period*

The revisions to the Tentative Order do not rise to the level of significance that require a new notice and comment period. The revisions were made in direct response to written and oral comments received by the Board and concern matters that the parties and interested persons knew to be at issue.

Both state and federal law require a notice and comment period prior to the adoption of an NPDES permit. California Water Code section 13167.5 prescribes a notice and public comment period of at least thirty days prior to the adoption of waste discharge requirements, including NPDES permits. The section explicitly states, however, that it does not require the regional board "to provide more than one notice or more than one public comment period prior to the adoption of waste discharge requirements" State law therefore does not require a new notice and comment period.

Federal regulations promulgated pursuant to the Clean Water Act also require a thirty day public comment period on draft NPDES permits. As stated in section 124.10(b) of title 40 of the Code of Federal Regulations (40 C.F.R.), "public notice of the preparation of a draft permit ... shall allow at least 30 days for public comment." Nowhere do the regulations suggest that revisions to a draft permit, however significant, require an additional public comment period. In fact, 40 C.F.R. section 124.14(b) grants discretion to the EPA Regional Administrator to either "reopen or extend the comment period," "prepare a new draft permit, appropriately modified," or both – "if any data information or arguments submitted during the public comment period ... appear to raise substantial new questions concerning a permit." Although not directly controlling on the States' authority, section 124.14 illustrates that the decision to reopen the comment period is discretionary, even if the comments raise substantial new questions concerning the permit.

² Mr. Tahir also states that the lack of review time for the Revised Tentative Order released on October 23 is unjustifiably short and that comments were required to be submitted by October 29. The Board first notes that the Revised Tentative Order was released on October 18, and not October 23. Further, the Board did not allow written comments on the Revised Tentative Order. It is therefore unclear why Mr. Tahir believes the Board imposed a deadline of October 29 for written comments.

Though the comments may trigger the permit drafters to modify the permit, as was the case here, a new comment period is permissible but not required. (See, e.g., *In re Dominion Energy Brayton Point, L.L.C.* (Feb. 1, 2006) NPDES Appeal 03-12, 2006 WL 3361084.)

In the context of administrative rulemaking, revisions to a proposed rule only require a new comment period if the modifications are not the "logical outgrowth" of the rule as it was initially proposed. (*NRDC v. USEPA* (9th Cir. 2002) 279 F.3d 1180, 1186-1188.) Even a substantial variation does not necessitate a new comment period so long as the final regulation is "in character with the original proposal." (*Id.*, quoting *Hodge v. Dalton* (9th Cir. 1997) 107 F.3d 705, 712.) Analogously, in the context of a permit proceeding, a new comment period is only required if the revised permit is essentially a *new* draft permit because the revisions are not the "logical outgrowth of" or "in character with" the permit as initially proposed. Here, the revisions to the Tentative Order are the direct consequence of the written and oral comments received. As reflected by the tracked changes, the revisions to the Tentative Order discretely address particular comments and do not fundamentally alter the character of the Tentative Order.

The purpose of the notice and comment requirements is not to lead to the absurd result that agency proceedings are subject to a new round of comments with every substantive revision. Rather, the public has a one-time right to comment on the issues raised by the tentative permit. One of the purposes of the comment period is to provide the agency with additional information upon which it may choose to revise the draft language. Where the character and issues raised by the tentative permit remain the same, however, and as is true here, there is no additional right to comment on those revisions. (See *Rybachek v. EPA*, (9th Cir. 1990) 904 F.2d 1276, 1286.)

The parties and interested persons will have an opportunity to comment on the revisions to the Tentative Order during the second portion of the hearing to be held on November 8, 2012. At that time, commenters will have an opportunity to orally address the Board with concerns or other comments regarding the revisions.

2) *Claim that responses to comments are inadequate*

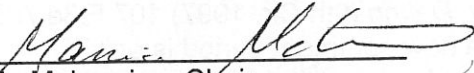
Federal regulations require that response to comments shall: (1) specify which provisions of the draft permit have been changed in the final permit decision, and the reasons for the change; and (2) briefly describe and respond to all significant comments on the draft permit raised during the public comment period. (40 C.F.R. § 124.17(a).) The responses to comments circulated by Board staff between October 23-26, 2012 provided responses to the significant written comments received on the Tentative Order during the public comment period. The responses to comments also specified which provisions were changed and why. Contrary to Mr. Tahir's assertion, Board staff adequately responded to the significant comments received. Further, the revisions to the Tentative Order made since June 6, 2012 are shown in the Revised Tentative Order circulated on October 18, 2012 and the Second Revised Tentative Order circulated on November 5, 2012, in track changes format to assist the public in identifying the revisions. The revisions were made by the Board's staff in response to written and oral comments received by the Board.

Mr. Tahir also provides a list of particular comments to which he believes were not responded to or the responses are not adequate. The Board's staff concluded that many of the comments noted by Mr. Tahir did not merit revisions to the Tentative Order. The responses to comments do, however, respond to each of the significant written comments that were received by the

Board by the submittal deadline of July 23, 2012, whether or not those comments resulted in a revision to the Tentative Order.

Board staff is directed to provide notice of this Order to all parties and interested persons.

IT IS SO ORDERED.



Maria Mehranian, Chair

11/7/2012
Date