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March 22, 2013

David W. Gibson, Executive Officer  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, California 92123-4340

**VIA HAND DELIVERY**

Re: Public Hearing to Consider Adoption of Tentative Order R9-2013-0001  
NPDES No. CAS01092662

Dear Mr. Gibson:

On behalf of the County of San Diego, we formally object to the "Hearing Procedures and Order of Proceedings" dated March 15, 2013 and received on March 18, 2013. We find this document does not comply with the provisions of the California Government Code, California Code of Regulations and the Code of Federal Regulations applicable to this NPDES Permit adoption proceeding. Specifically, we call to your attention the following:

- 1. Proposed Limitation on Written Comments.** Your Board has issued a notice of public hearing on the permit adoption, certainly appropriate given the level of interest in this proceeding. However, in purporting to ban additional written comment, you would violate 40 C.F.R. § 124.12(c), which provides that, "The public comment period under §124.10 shall automatically be extended to the close of any public hearing under this section." This provision applies to state permit proceedings. Because we understand significant changes will be made to the prior draft permit as a result of public comment and testimony at your November workshop, a refusal to permit additional written comment for the record will violate procedural due process by not accepting written comment for the administrative record on those substantive permit changes.

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2. **Proposed Ban on Raising New Issues at the Hearing.** Under well-established legal precedent, parties to an administrative proceeding must raise and address all issues for review by an administrative body or court in the proceeding, or risk being deemed to have waived those issues. It is very likely that the anticipated changes in the draft permit will present new issues for the County that must be addressed in this proceeding. Your purported ban on “new” issues could effectively deprive the County of its right (and obligation) to present objections to the provisions of the revised Tentative Order at the hearing. We believe this rule would also violate procedural due process rights and the above-cited C.F.R. provisions.
3. **Conducting an Informal Proceeding.** California Government Code § 11513(b) provides that parties shall have certain rights as specified therein. Those rights are not being provided in your planned hearing procedures and restrictions. The March 15, 2013 notice’s stated procedures and limitations, and intention to proceed informally in what is clearly an adjudicative proceeding, appears to conflict with the provisions of Division 3 of Title 23 of the California Code of Regulations (see 23 C.C.R. § 648 et seq.).

Accordingly, on behalf of the County of San Diego, we respectfully request that this proceeding be conducted under formal hearing procedures. We make this timely request pursuant to 23 C.C.R. § 648.7 and Gov’t Code §§ 11445.20 and 11445.30.

We respectfully submit that the “Order of Proceedings” time limitations are understated because of parties’ rights to present witnesses, exhibits, and conduct cross-examination. Given the likelihood that a permit this controversial will be appealed or otherwise challenged, it is imperative that your procedures provide our client with its opportunity to confront witnesses and otherwise create a complete record, including any additional written comments it may have on the Tentative Order.

At this point in time, without having seen the Tentative Order, and assuming that the formal hearing request from the County will be granted, we respectfully request that the County of San Diego be allotted two hours for presentation of its witnesses, evidence and summary statements. This request may be modified by the County, dependent upon the Tentative Order provisions and whether or not the proceedings are continued to a later date to permit time for coordination of presentations among the parties.

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If, however, the County's request for formal hearing procedures is not granted, and your Board still intends to proceed informally and with the limitations described, the County of San Diego still requests its own block of time of at least 30 minutes for its presentation under that format, in addition to participating with other co-permittees as already allotted.

We continue to object to the fact that our client has yet to see the provisions of the Tentative Order as of today, 19 days before a hearing on a lengthy, complex and controversial permit. Your staff has requested co-permittees to coordinate and consolidate presentations within the blocks of allotted time. That seems logical and desirable, but it is going to be impossible given the extremely short window you are creating to review and react to the Tentative Order, whenever it is issued.

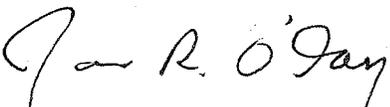
We request that you revise your procedure and order of proceedings to comply with applicable provisions of law and regulation, as well as practical realities. Given the County's formal hearing request, and the need to better define the parameters of the adoption hearing procedures, the County requests that you postpone the April 10 and 11 dates in order to properly conduct the proceeding at least at the May meeting or some other later date. We suggest using the April 10 regular meeting to discuss hearing procedures with designated parties, and to try to reach a consensus on the conduct of the eventual hearing.

Thank you in advance for considering the above objections and request.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By

  
James R. O'Day, Senior Deputy

JRO/tlm  
12-00802

cc: Wayne Chiu, P.E., (via E-mail)  
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