Electronic Submission to sandiego@waterboards.ca.gov
Honorable Chairman Henry Abarbanel and Board Members
Attn: Mr. Wayne Chiu
San Diego Regional Water Quality Control Board
2375 Northside Drive, Suite 100
San Diego, California 92108

Dear Chairman Abarbanel, Honorable Board Members, and Mr. Chiu:

Subject: Comment Letter — Tentative Order No. R9-2015-0100 Place ID: 786088WChiu

I am writing at the direction of a unanimous City Council of the City of Laguna Beach (the "City") to urge you to make certain changes to the language being proposed by staff to the Regional Board as amendments to the City's Regional Permit. This is a matter of great importance to the City. Specifically, we are concerned that the proposed amendments create undue liability for the City during the interim period prior to the adoption of a water quality improvement plan, and creates strict liability for the City for third party actions that it cannot control.

First, let me assure you that the City Council is fully committed to aggressively pursuing improvements in water quality. As demonstrated by our past actions, Laguna Beach is a community where water quality is taken very seriously, and we generally support the actions of the Board to make our beaches and watersheds cleaner. We are a leader in efforts to protect and improve water quality through a vigorous source control program and active investigation and enforcement of illicit discharges. As one of many examples of the City's strong commitment to improving water quality, the City has broadly invested in urban stormwater diversion units. These costly diversion units collect dry weather runoff and divert it to the sanitary sewer system. To date, 25 urban water diversion units have been installed and divert approximately 83% of the City's urban drainage area (all of the areas where diversion is feasible). This aggressive approach to stormwater pollution prevention has earned the City a summer and winter dry weather "grade" from Heal the Bay of an "A" or higher at all beaches within the City.

We understand Board staff is proposing to amend the Regional Permit with revisions that would impose strict liability on cities for any non-attainment of water quality standards, no matter what the cause, and irrespective of the feasibility of achieving numeric standards (at all times) in a water body. While we applaud the efforts of the Board to improve water quality in

the region, there are several aspects of what is being proposed that are likely to have adverse consequences. Accordingly, the City Council respectfully asks you and your staff to carefully consider the comments and recommendations in this letter, as well as those provided by our legal counsel (Exhibit A), and to work with the City to develop a fair resolution of our concerns.

The Proposed Amendments Unequivocally Should Require Interim Compliance While the City Develops a Water Quality Improvement Plan ("WQIP"). The draft language requires the City to develop a WQIP as a practical vehicle for improving water quality on a watershed basis but appears to impose strict liability on the City for discharges while the WQIP is being developed. A watershed approach to water quality improvement makes sense, and the City is generally supportive of the WQIP concept. However, the proposed Regional Permit's departure from the previous best management practice ("BMP") based approach in favor of a strict liability regime that mandates immediate attainment of numeric water quality objectives (some of which may be lower than natural background levels) poses a severe compliance challenge for the City. Under the proposed amendment, the City will be potentially liable for a violation of the Regional Permit, and thus the Clean Water Act, every time it rains. While the City has already diverted the vast majority of dry weather flows to the sanitary sewer, it is not feasible (nor good for the environment) to divert all wet weather flows. Because of the extremely stringent standards for bacteria, nutrients, and metals—constituents that the City may have little to no ability to control—wet weather flows from the City's MS4 are likely, no matter what actions the City takes, to contain pollutants in excess of receiving water limitations. When exceedances occur, the City will face fines/penalties from the Board (and the likelihood of Clean Water Act citizen suits) whether the City caused exceedances of receiving water limitations or not. This is not a fair result, and arbitrarily imposing liability without culpability will not lead to cleaner water.

To be successful in improving water quality to the maximum extent within the City, the WQIP needs to be a deliberate, scientifically rigorous, and collaborative effort between all interested stakeholders ***that recognizes the need for interim and long term compliance by the City*** while the WQIP is developed and implemented. A hastily compiled plan, speedily prepared because of fear of immediate strict liability, will not be the sort of plan that will accomplish the Board's objectives or the needs of City residents. It will only lead to litigation and uncertainty for all involved. We urge you to add some form of interim compliance for southern Orange County agencies who aggressively pursue WQIP development and implementation.

The Regional Permit Should not Impose Strict Liability Where the City Fully Implements a Robust Illicit Discharge Prevention Program and Diverts All Feasible Dry Weather Flows. The Regional Permit amendments would create what amounts to a ban on runoff into the MS4 when it is not raining (except for separately authorized discharges). Unfortunately, as the State Water Board recently acknowledged in its LA MS4 decision, preventing all runoff into an MS4 system can be nearly impossible since third parties—such as residents watering their lawns in a

reasonable manner—may nevertheless cause at least some incidental runoff to enter the MS4. The City has limited ability to stop third party sewage spills or other third party actions (e.g., washing of vehicles) that may result in small amounts of runoff entering the MS4 when it is not raining (even where the City is fully implementing and enforcing its illicit discharge program). The City will follow the Clean Water Act and "effectively prohibit" all dry weather discharges to receiving waters with its illicit discharge prevention program and diversion of dry weather flows. What the City cannot do is guarantee that runoff or illicit discharges never reach the City's MS4 (as the amended permit can be read to require). Please strongly consider revising the Regional Permit to eliminate any inference of strict liability where the City fully implements its illicit discharge program by adding the clarifying language recommended by our legal counsel.

Thank you for considering our requests. Our staff is available to assist in crafting language to address City concerns while facilitating the Board's continued improvement of water quality. If you have any questions please feel free to contact our Director of Water Quality, David Shissler at (949) 497-0328.

Sincerely,

Bob Whalen, Mayor

CC: David Gibson, Executive Officer, SDRWQCB
Jeremy Jungreis, Rutan & Tucker, LLP

RUTAN
RUTAN & TUCKER, LLP

Jeremy N. Jungreis
Direct Dial: (714) 338-1882

September 14, 2015

EXHIBIT A

VIA ELECTRONIC MAIL

Mr. Wayne Chiu
Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108
sandiego@waterboards.ca.gov

Re: Comments of the Cities of Dana Point and Laguna Beach on Proposed Tentative Order No. R9-2015-0100, Place ID: 786088

Dear Mr. Chiu:

This letter, which supplements and augments the letters submitted concurrently by the Mayors of the Cities of Dana Point and Laguna Beach, constitutes the further legal and technical comments of the Cities of Laguna Beach and Dana Point (the "Cities") to proposed amendments to San Diego Regional Water Quality Control Board ("Board") Order No. R9-2013-0001 (as amended by Order No. R9-2015-0001), proposed as Tentative Order No. R9-2015-0100 (the "Regional Permit"). The Cities also incorporate by reference, and assert as if separately stated herein, the comments submitted by the County of Orange ("County") on September 14, 2015, and the previous comments on the Regional Permit submitted by, or on behalf of, the City of Dana Point.[1]

The Cities appreciate the efforts of Regional Board staff to collaboratively engage the Permittees and other stakeholders in workshops where a variety of views on the question of receiving water limitations ("RWLs"), and how they should be achieved, were expressed. This manner of comment and stakeholder participation worked well in allowing all viewpoints to be expressed with sufficient time for vigorous discussion of issues with the Regional MS4 Permit. The Cities are hopeful that the issues addressed in this letter can be resolved via further

[1] The Cities by this reference incorporate, to the maximum extent allowed by law, all prior letters, comments, reports, presentations, oral and written testimony, data, communications, and other evidence made by, on behalf of, and in support of the County of Orange during the various workshops, hearings, and meetings relevant to the adoption of Order No. R9-2013-0001, as amended by Order No. R9-2015-0001 and Tentative Order No. R9-2015-0100. The Cities reserve the right to provide further comment as applicable.

productive dialogue prior to the approval hearing for the Regional Permit scheduled for November 18.

1. LEGAL CONCERNS WITH RECEIVING WATER LIMITATIONS AND ALTERNATIVE COMPLIANCE OPTIONS.

a. IT IS LIKELY IMPOSSIBLE, AND CERTAINLY NOT "PRACTICABLE," TO COMPLY WITH ALL OF THE DISCHARGE PROHIBITIONS IN THE REGIONAL PERMIT UNDER ALL CIRCUMSTANCES

Part II.A.2 (a) of the Regional Permit strictly prohibits discharges of municipal stormwater to Waters of the U.S. that do not meet all water quality objectives—notwithstanding that such discharges may in fact control pollutants to the "maximum extent practicable," and notwithstanding that exceedances of numeric objectives in the San Diego Basin Plan may be the result of factors that the Cities have no ability to control. In other words, as currently drafted, the Regional Permit will impose strict liability on the Cities for regulatory requirements that will, in some cases, be impossible to meet,[2] no matter how robust or aggressive the WQIP ultimately developed. Imposing strict liability on the Cities and thereby subjecting them to CWA Citizen Suits and Regional Board enforcement every time it rains,[3] when there is no realistic possibility of ever achieving the currently applicable numeric RWLs, is inconsistent with both state and federal law. Neither requires municipal stormwater permittees, who unlike private businesses do not have the option to "go out of business" (or otherwise shut down non-compliant stormwater facilities), to achieve the impossible, or to control what MS4 permittees have no ability or authority to control. (*See* CA Civ. Code, § 3531 ["The law never requires impossibilities"]; CA

---

[2] As Regional Board staff is aware, some of the existing water quality objectives in the San Diego Basin Plan which give rise to the receiving water limitations referenced in Section II.A.2, may be at or below natural background levels, or be set at levels so low that they cannot be achieved without diverting all of the water in the MS4 to a reverse osmosis ("RO") treatment plant—thereby in most cases removing the water from the watershed altogether and changing its composition in ways that could be harmful to the watershed if reintroduced post-treatment (*See, e.g.*,http://news.stanford.edu/news/2015/september/arsenic-mystery-solved-090215.html [Stanford study showing association between rising arsenic levels and water treated with RO]. Even with RO treatment, it still would not be possible to reliably meet the current default San Diego Basin Plan standard for total nitrogen in surface waters of 1 part per million. (*See, e.g., U.S. v. Eastern Municipal Water District* Case. No. CV 04-8182 (C.D. Ca 2010) (noting infeasibility of meeting 1 ppm total nitrogen standard required for NPDES issuance).

[3] (*See, e.g., NRDC v. County of Los Angeles* (C.D. Cal. Mar. 30, 2015) 2015 U.S. Dist. LEXIS 40761 ["Defendants are liable for the 147 exceedances described in Defendants' monitoring reports, which the Ninth Circuit found were conclusively demonstrated to be Permit violations by Defendants' own pollution monitoring."].)

Civ. Code, § 3526 ["No man is responsible for that which no man can control"]; *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1162; *Hughey v. JMS Dev. Corp.*, (11th Cir. 1996) 78 F.3d 1523, 1527-29; *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, (2d Cir. 1993) 12 F.3d 353.)

The *Hughey* case referenced above is material to the scenario faced by the Cities with regard to the Regional Permit. In *Hughey*, the Plaintiff sued Defendant JMS for an alleged failure to obtain a storm water permit for the discharge of storm water from its construction project. The Plaintiff argued JMS had no authority to discharge any quantity or type of storm water from the project, i.e. a "zero discharge standard." until JMS had first obtained an NPDES permit. (*Id.* at 1527.) JMS did not dispute that storm water was discharged from its property and that it had not obtained an NPDES permit (allegedly in contravention of 33 U.S.C. § 1311), but claimed it was not in violation of the Clean Water Act because the Georgia Environmental Protection Division, the NPDES permitting authority, was not yet able to issue such permits. As a result, it was impossible for JMS to comply. (*Id.)* The Eleventh Circuit Court of Appeal held that the CWA does not require a permittee to achieve the impossible, finding that "Congress is presumed not to have intended an absurd (impossible) result." (*Id.* at 1529.) Specifically, the 11th Circuit found that: "***Congress could not have intended a strict application of the zero discharge standard in section 1311 (a) when compliance is factually impossible***. The evidence was uncontroverted that whenever it rained in Gwinnett County some discharge was going to occur; nothing JMS could do would prevent all rain water discharge. . . Lex non cogit ad impossibilia: The law does not compel the doing of impossibilities.") (*Id.*)

b. **IT IS PARAMOUNT THAT THE REGIONAL PERMIT PROVIDE INTERIM COMPLIANCE**

The ultimate outcome of imposing an unachievable discharge prohibition during the preparation and implementation of WQIPs will not be to improve water quality, but instead to increase litigation and costs incurred by public agencies in fighting enforcement actions and citizen suits, an opportunity not lost on entrepreneurial plaintiffs' attorneys. As the Regional Board is aware, the State Water Resources Control Board ("SWRCB") issued WQ 2015-0075 (hereinafter LA MS4 Order) in June of 2015. The LA MS4 Order is a precedential order that provides an alternative compliance option ("ACO") to permittees that would at least permit the Cities to remain in compliance with the CWA notwithstanding the current inability to demonstrate current attainment of all water quality standards in receiving waters at all times. Under the approach approved by the SWRCB, a city that agrees to participate in the development of the LA Regional Board's equivalent of a WQIP is deemed to be in compliance during the preparation of the WQIP if the city otherwise complies with the terms and timelines of its MS4 Permit. The "in compliance" status remains for as long as the city continues to diligently perform its obligations under the ACO in furtherance of projects and management actions that

result in the ultimate achievement of water quality objectives (which the LA Regional Board admitted would likely take decades in some cases). The ACO proposed in the current version of the Regional Permit, on the other hand, would hold the Cities strictly liable immediately for any exceedance (whether the result of the Cities' culpability or not), even as the Cities continue to spend substantial sums to develop projects that reduce pollution.

Perhaps more significantly, the approach proposed in the Regional Permit is, from what the Cities have learned, different from the approach currently being considered by other Regional Board in the state, in that the WQIP provides no interim compliance of any kind while the WQIP is in development (a period of 18 months in Orange County assuming no extensions are granted), and indeed the proposed ACO provides no compliance to any MS4 until such time as all of the watersheds within southern Orange County can demonstrate to a level of certainty that implementation of the WQIP will actually result in the complete achievement of all numeric water quality objectives—a task in and of itself that, as previously referenced, may not be physically possible in some locations for certain naturally occurring constituents such as bacteria, nutrients and metals. To be successful in improving water quality to the maximum extent within the Cities, the WQIP needs to be deliberate, scientifically rigorous, and a collaborative effort between the Cities, concerned citizens, the Regional Board and all of the other south Orange County stormwater permittees.

The current version of the Regional Permit would make such an effort difficult to achieve. All of the Orange County Co-Permittees, being currently out of compliance (and unlike the San Diego County permittees having no draft plan already completed), and facing CWA citizen suits at any time during plan development, will be forced to rush to develop a plan that may have little chance of being funded (Prop 218 and Prop 26 limitations) or implemented, while at the same time Co-Permittee funds that would otherwise go to collaboratively developing scientifically validated projects with immediate water quality benefits will need to be held back to facilitate ability to defend against filed by environmental groups seeking to impose strict liability. Meanwhile, the Regional Board will presumably have less and less influence over the process of improving water quality as collaborative efforts break down and decisions about water quality projects, improvement plans, and pertinent timelines, shift to Federal Judges and environmental plaintiffs rather than the Regional Board. All sides would benefit from a carefully tailored interim compliance option that ensures rapid preparation of the WQIP while also ensuring the WQIP effort is not rendered superfluous by Federal Court decisions and consent decrees that may impose disparate and conflicting obligations on different permittees throughout the San Diego Region.

c. THE REGIONAL PERMIT SHOULD PROVIDE FOR THE DEVELOPMENT OF SITE SPECIFIC OBJECTIVES

The impossibility/impracticability of ever attaining RWLs in San Diego Region watersheds could be mitigated by specific reference in the Regional Permit to the potential development of site specific objectives that would potentially be attainable while also ensuring full protection of existing beneficial uses in southern Orange County. However, the San Diego Regional Board Staff has historically resisted stakeholder efforts to develop attainable site specific objectives for bacteria, nutrients and toxics, and has not offered the possibility of site specific objective development as a potential mechanism for the Cities to obtain long term compliance in conjunction with WQIP development. Taken to its logical conclusion, the Regional Board's current position on strict liability of MS4s for non-attainment of existing numeric objectives could result in development moratoria, and inability of local water agencies to undertake any kind of significant recycled water project requiring storage or conveyance of recycled water (or otherwise resulting in increased nutrient or salinity loading to southern Orange County streams).

San Juan Creek, which has been discussed as a potential site for a large scale indirect potable reuse ("IPR") project to recharge the depleted San Juan Groundwater Basin (classified as a surface water by the SWRCB), is already listed as being impaired for total nitrogen and phosphorous according to the 2012 SWRCB 303 (d) list. Since RO cannot reliably take recycled water below 1 ppm total nitrogen, and the 303 (d) listing indicates that there is no current assimilative capacity in San Juan Creek, it is unclear how such a project could ever be permitted by the Regional Board—notwithstanding the San Diego Region's dire need for additional local water supplies, and the Regional Board's desire to curtail existing ocean outfall discharges whenever practicable. Accordingly, the Cities, both of whom could benefit from the development of additional recycled water supplies in the Region, recommend that the Regional Permit and Staff Report specifically acknowledge the potential wisdom of developing site specific objectives in concert with the mandated WQIP development—even where site specific development may extend the period required to complete the WQIP process.

2. <u>DISCHARGES OF NON-STORMWATER SHOULD NOT GIVE RISE TO LIABILITY UNDER THE PERMIT WHERE THE PERMITTEE IS FULLY IMPLEMENTING ITS ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM</u>.

The Cities understand the desire of the Regional Board to prohibit discharges of non-stormwater "dry weather" or "nuisance" flows to the MS4. Such flows may, at times, contain significant amounts of pollutants that impair beneficial uses, so diversion of such flows where feasible makes sense. And that is precisely what both Cities have done in their respective service areas with the installation of dry weather flow diversion units that divert nuisance flows whenever feasible.[4] However, language in Section E.2 can be read to hold the owner of the MS4

[4] Dry weather diversions may be infeasible within the Cities where inadequate sewer line or wastewater treatment plant capacity exists, where the flows are a mix of non-stormwater runoff

strictly liable under the Regional Permit where non-permitted discharges enter the MS4 and the owner of the MS4 did not otherwise prevent them from occurring. Indeed, it is often difficult for an MS4 operator to even identify the source of the broad universe of what the Regional Permit defines as illicit discharges on a given day (e.g., numerous houses in a neighborhood may be the cumulative cause of small amounts of runoff entering an MS4 with the "source" of the "non-stormwater discharge" varying each day according to residential irrigation patterns).[5] As the SWRCB acknowledged in footnote 133 of its recent decision in the LA MS4 Decision, Order No. WQ 2015-0075 , "[w]e recognize that even the most comprehensive efforts to address unauthorized non-storm water discharges may not eliminate all such discharges."

Because of the apparent intention of some environmental groups, as evidenced by recent Federal Court filings initiating Clean Water Act citizen suits (and seeking strict liability for alleged violations of MS4 permits), to impose liability on cities who are otherwise fully implementing their illicit detection programs (and diverting non-stormwater flows, whenever feasible, to the sanitary sewer),[6] the Cities urge the Regional Board to clarify that it does not intend to impose liability on MS4 permittees who are not otherwise complicit or culpable in dry weather flows entering the MS4 (and subsequently a Water of the U.S.). Accordingly, the Cities respectfully request that the Regional Board amend Section II.E.2 of the Regional Permit to read as follows:

"Each Copermittee must implement a program to actively detect and eliminate illicit discharges and improper disposal into the MS4, or otherwise require the discharger to apply for and obtain a separate NPDES permit. Compliance with the terms of this Provision E.2 shall constitute compliance with the requirement under Provision A.1.b to "effectively prohibit" non-storm discharges into the MS4, provided the Copermittee is in full compliance with all requirements in this Provision E.2 or is otherwise working diligently to address any identified deficiency. The illicit discharge detection and elimination program must be implemented in

---

and rising groundwater, or where the geography or hydrology of the location makes installation of the units impracticable to install or maintain.

[5] It will also be very difficult for the Cities to determine on any given day what volume of dry weather (and wet weather) discharges are derived from separately permitted activities, or activities that fall outside of the CWA altogether such as agricultural return flows. To the extent that such identification is even physically possible, it may nevertheless be impossible for the Cities to determine which sources of dry weather flows are benign and which ones contain pollutants above RWLs.

[6] On at least two occasions within the past six months, the environmental group California River Watch has sued MS4 operators for allegedly violating the prohibitions on municipal stormwater discharges that exceed RWLs, and for allegedly permitting non-stormwater discharges to enter the MS4 from non-permitted sources. The concerns expressed herein regarding third party liability associated with the Regional Permit are far from theoretical.

RUTAN
RUTAN & TUCKER, LLP

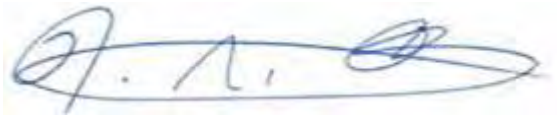
accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include, at a minimum, the following requirements . . ."

It would also be beneficial for the Regional Board to clarify the definition of "discharges from potable water sources" in Section II.E.2.a (3)(f). Potable water used for residential irrigation that runs off in small quantities (and not otherwise invoking an issue of wasteful water use) would potentially be appropriate for exclusion from treatment as an illicit discharge (allowing permittees to focus on illicit discharges with significant water quality ramifications). However, as currently drafted, it is not clear whether "potable discharges" are intended to include runoff derived from turf or ornamental plant irrigation.

Thank you for the opportunity to comment. Both Cities look forward to working with Regional Board staff to develop language that will address the concerns expressed herein.

Very truly yours,

RUTAN & TUCKER, LLP



Jeremy N. Jungreis

JNJ:nd