

November 19, 2014

By E-Mail and Delivery

Laurie Walsh, P.E.
California Regional Water Quality Control Board, San Diego region
2375 Northside Drive, Suite 100
San Diego, CA 92108

Subject: Comment – Tentative Order No. R9-2015-0001, Regional MS4 Permit, Place ID: 658018Lwalsh.

Dear Ms. Walsh:

The County of Orange, as Principal Permittee of the Orange County Stormwater Program, appreciates the opportunity to provide comments on *Tentative Order No. R9-2015-0001, An Order Amending the Regional Municipal Separate Storm Sewer (MS4) Permit for the San Diego Region (Order No. R9-2013-0001)* issued on September 18, 2014. The south Orange County Permittees (hereinafter, Copermittees) were involved in the development of these comments and the Cities of Aliso Viejo, Dana Point, Laguna Hills, Laguna Niguel, Lake Forest and Mission Viejo have directed that they be recognized as concurring entities on this letter.

We acknowledge the significant efforts of Regional Board staff to continue to collaboratively engage with the Copermittees and key stakeholders in the further development of a fifth term permit municipal stormwater permit for south Orange County. We also recognize that Tentative Order No. R9-2015-0001 incorporates a number of changes directly in response to specific recommendations made in our Report of Waste Discharge. The Tentative Order, however, still presents key issues of significant concern including the attainability of the proposed Prohibitions and Limitations provisions.

This letter is a summary of five overarching concerns with the Tentative Order and Regional Permit. Attachment A includes a more detailed discussion of these concerns in addition to providing you with comprehensive technical and legal comments on outstanding issues with the Tentative Order. Attachment B consists of proposed redlines to the Tentative Order consistent with the comments made in Attachment A. In addition to these comments, the Copermittees by this reference incorporate 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 Copermittees during the various workshops, hearings, and meetings relevant to the adoption of Order R9-2013-0001 and Tentative Order R9-2015-0001. The Copermittees reserve the right to provide further comment as applicable.

I. The State of the Environment

The Fact Sheet / Technical Report discuss the statutes, regulations, plans and policies that establish the regulatory and evidentiary basis for the Regional Permit. It omits, however, the numerous environmental quality monitoring programs that have been undertaken over many years, and is silent on the environmental rationale for the stormwater mandate. The Findings include a single paragraph on "Water Quality Effects." In contrast, our Report of Waste Discharge included a comprehensive *State of the Environment* discussion that has since been published as a standalone report, summarizing the results of long term monitoring and special studies related to swimming safety and aquatic ecosystem health. The report's findings have significant implications for the structure of the Tentative Order and the compliance framework for stormwater and its future management in south Orange County. Based on the successes of the Orange County Stormwater Program, there is little justification for much of the Tentative Order.

Bacteria: Bacterial contamination of coastal waters in south Orange County is very low during dry weather, as a direct result of the Copermittees' targeted and comprehensive control actions, and beach report card grades are now consistently high. While contamination is more prevalent in wet weather, the annual percentage of A grades for wet weather on the Heal The Bay Report Card has reached 70 percent in recent years. Achieving further reductions in wet weather contamination will be a challenge as bacterial contamination in wet weather arises from a much wider range of sources compared to dry weather. Also, limitations in current monitoring methods make it difficult to determine if human fecal contamination, a significant health threat, is actually present.

Total Dissolved Solids (TDS) and Nutrients: TDS and Nutrients consistently exceed Basin Plan Objectives in wet and dry weather and create the potential for detrimental impacts on aquatic ecosystems. TDS is suspected as a causal factor in poor macroinvertebrate community condition. Nutrient impacts, such as excessive macroalgal growth, are not prevalent in south Orange County streams in spite of exceedances of regulatory thresholds for bio-stimulatory substances. For both constituents, the principal source is unlikely to be urban in nature and instead can be identified as a consequence of marine sedimentary formations characteristic of the area and their overlying saline soils. The key to effective future management efforts will therefore be to determine the environmental significance, if any, of the urban sources of TDS and nutrients. The permit should recognize this current uncertainty and not mandate on-site retention of runoff in the first instance where it may exacerbate the exfiltration of shallow groundwater with elevated TDS and nutrients.

Toxicity: Toxicity occurs sporadically in streams and creeks in south Orange County. It occurs at low levels and at different locations and different times and varies unpredictability across test species. In dry weather, aquatic toxicity is encountered in open (undeveloped) areas at levels equivalent to those in urban areas. This pattern

suggests that dry weather toxicity is not caused by urban sources of pollutants. There is a greater prevalence of toxicity in wet weather and pesticides are implicated as the principal source of this toxicity. Pesticide use, however, presents a moving target for management efforts due to the continuous introduction of new products. Moreover, the regulation of pesticide use is exclusively within the jurisdiction of state and federal agencies and not the role of MS4s.

II. Prohibitions and Limitations Provisions

The proposed Prohibitions and Limitations provisions in the Tentative Order do not provide the Copermittees with the necessary compliance pathway needed to ensure innovation and progress. Although there is flexibility in the water quality management plans, without some form of compliance path, the Copermittees remain strictly liable for any exceedance. This was not the intent of Congress or the EPA under the Clean Water Act and has not been the intent of the State Water Board under Orders 1999-05 and 2001-15.

The required linkage between implementing control programs and the prohibitions and limitations provisions is created if the Tentative Order is modified to affirm an adaptive management process as the basis for compliance. The adaptive management or iterative process is and has been a fundamental tenet of MS4 programs, as envisioned by USEPA, State Water Board Order 99-05 and later reconfirmed in Order WQ 2001 15 (BIA Order), and is the mechanism by which the Copermittees can and should demonstrate compliance. The County strongly supports this approach which we believe is technically necessary given the major findings both in our *State of the Environment Report* and in the recent American Society of Civil Engineers (ASCE) publication – *Pathogens in Urban Stormwater Systems*. The Regional Board has discretion with receiving water limitations language beyond what is required to be included by Order 99-05, and the County envisions the Water Quality Improvement Plan (WQIPs) being the foundation for the required iterative BMP-based compliance approach for the discharge prohibitions and limitations provisions.

III. TMDL Incorporation

The Regional Board has adopted two Basin Plan Amendments to establish Total Maximum Daily Loads (TMDLs) where the Copermittees are assigned wasteload allocations: (1) Indicator Bacteria in Baby Beach in Dana Point Harbor and (2) Indicator Bacteria, Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek).

There are several fundamental and substantive discrepancies between the adopted TMDL Basin Plan Amendments and the provisions of the Tentative Order. These inconsistencies negate the Basin Plan Amendment process that occurred to establish the TMDLs, and clearly contradict the Board's intent for how the TMDLs would be incorporated into the MS4 Permit. The Tentative Order should be revised to ensure that the TMDLs are properly incorporated as mass-based WLAs and not as concentration-based limits and that BMP-based compliance is established for the TMDL provisions. The Tentative Order should also provide an explicit re-opener provision to ensure that any revision to a TMDL is included in the adopted Order.

IV. Complementary Watershed and Jurisdictional Planning

The WQIP framework allows for the identification and development of a program built around the highest priority water quality conditions and constraints within a specific watershed. The WQIP also allows for the integration of all program elements and focuses the efforts on the highest priorities for each watershed through the customization of actions and strategies. If positioned correctly, the WQIP is the necessary next step in making the Tentative Order and corresponding compliance programs truly strategic, adaptive, and optimally supportive of the *Practical Vision (Resolution No. R9-2013-0153)*.

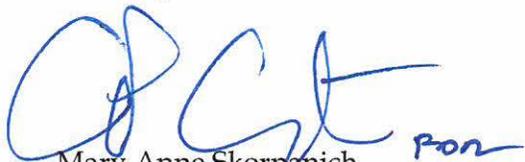
The County believes the Tentative Order provisions—especially Provision E, JRMP—deviate from the strategic and adaptive approach to the “one-size fits all” approach. For example, the Existing Development provisions dictate that specific BMPs that must be implemented, regardless of the high priority water quality concerns within a watershed. These provisions become “additive” instead of “prioritized” and are not supportive of the overarching WQIP. The Tentative Order needs to be modified so that the WQIPs and related Jurisdictional Runoff Management Plans can be streamlined and focus on the highest priorities within each watershed.

V. Regional Permit

The Permittees understand that the regional nature of the permit is one of the defining features of our fifth term permit renewal and that this permitting approach is supported by the members of the Regional Board. Nonetheless, it must also be noted that the Regional Board does not have the legal authority to include Orange County in a Regional Permit because there is no system-wide, jurisdiction-wide, or common watershed basis to do so.

Thank you for your attention to our comments. Please contact me directly if you have any questions. For technical questions, please contact Chris Crompton at (714) 955-0630 or Richard Boon at (714) 955-0670. For legal questions, please contact Ryan Baron at (714) 834-5206.

Sincerely,



Mary Anne Skorpanich
Deputy Director, OC Public Works Department
OC Environmental Resources

Attachments: A - Detailed Comments
B - Redline Version of the Tentative Order

Cc: (Electronic copies only)

David Gibson, San Diego Regional Board

Tony Felix, San Diego Regional Board

South Orange County Permittees

Orange County Technical Advisory Committee

Tony Olmos, Orange County Public Works

Todd Snyder, County of San Diego

Jason Uhley, Riverside County Flood Control and Water Conservation District

Andrew Kleis, City of San Diego