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Via E-Mail [lwalsh@waterboards.ca.gov]

David Gibson
Executive Officer
San Diego Regional Water Quality Control Board
Sky Park Court
San Diego CA

Re: Comments on Administrative Draft San Diego Regional MS4 Permit

Dear Mr. Gibson,

The purpose of this letter is to submit limited legal comments[1] on the Administrative Draft Permit ("Draft Permit") issued by the San Diego Regional Water Quality Control Board ("Regional Board") on April 9, 2012. I am submitting these comments on behalf of the Cities of Aliso Viejo, Lake Forest, and Santee. Each City may ultimately be regulated under the Draft Permit, if adopted, and each City therefore has a significant interest in the Draft Permit's development. My limited legal comments on the Draft Permit follow.

I. THE RECEIVING WATER LIMITATIONS PROVISIONS IN THE DRAFT PERMIT NEED TO BE REVISED.

The current language in the Draft Permit (Provision A) might be interpreted to require strict compliance with the water quality standards established by the San Diego Basin Plan and with other receiving water limitations established by other specified documents. The State Board has determined that its mandatory receiving water limitations language "does not require strict compliance with water quality standards." Rather, it is State Board policy that compliance with water quality standards is "to be achieved over time, through an iterative approach requiring improved BMPs." (State Water Board Order WQ 2001-15.) Because, as discussed below, the current language in the Draft Permit has been interpreted by the Ninth Circuit in a manner that is not consistent with State Board policy, it must be revised.

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[1] The Draft Permit raises many other legal issues not addressed in this letter. Additional legal comments will be submitted if and when the Draft Permit is reissued for public review as a Tentative Order. We believe that a meeting with legal counsel for the Regional Board would be beneficial to address the limited issues expressed in this letter as well as the broader legal issues raised by the Draft Permit.

State Board policy is, and has been, that water quality standards are to be achieved over time through the iterative process. In State Board Order WQ 2001-15, *In the Matter of the Petitions of Building Industry Assoc. of San Diego County and Western States Petroleum Assoc.* (2001), the State Board explained, in the context of its review of the 2001 San Diego MS4 Permit, that:

> In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs.
>
> (*Id.*, at 7.)

The State Board's explanation that water quality standards were to be achieved over time through the iterative process was set forth in response to BIA's claim that the Ninth Circuit's decision in *Defenders of Wildlife v. Browner* rendered requirements in the San Diego County MS4 Permit unnecessary and contrary to the MEP standard. While retaining the requirement that the San Diego permit prohibit discharges that cause or contribute to violations of water quality standards, the State Board made clear that compliance with this requirement was to be achieved through the iterative process, and that the water quality standards themselves were not hard compliance targets. The State Board thus established a "middle ground" position where MS4 permits had to require compliance with water quality standards but where compliance was to be achieved over time in recognition of the unique nature of stormwater discharges. As the State Board explained:

> We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in

> compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.
>
> (*Id.*, at 8-9.)

The State Board's position on the receiving water limitations language has thus been consistent and clear: water quality standards are to be achieved over time through the iterative process.

Unfortunately, the Ninth Circuit Court of Appeals, in *NRDC v County of Los Angeles*, 673 F.3d 880 (9th Cir., 2011), interpreted the State Board's mandatory language in a manner inconsistent with State Board policy. The Ninth Circuit held that the State Board's mandatory language requires strict compliance with water quality standards and that such compliance was not modified by the iterative process. Because the language in the Draft Permit is modeled after the State Board's language, it must be revised in light of the Ninth Circuit's decision to align the language with the State Board's policy.

Several interested parties have submitted suggestions on how to revise the Draft Permit's language. These submittals include sample language prepared by the City of San Diego, the City of Dana Point, and the California Stormwater Quality Association ("CASQA"). The purpose of this letter is not to advocate for one of these suggested revisions over the others but to bring to the Regional Board's attention the importance of revising the existing requirements, and to remind the Regional Board that *existing* State Board policy is to allow municipal dischargers to attain compliance through the iterative process. The Regional Board should also consider delaying the reissuance of the Draft Permit until after the State Board completes its review of this issue. As the Regional Board is likely aware, the State Board will be holding a workshop on this issue on November 20th of this year.

II. "EFFECTIVELY PROHIBIT" DOES NOT REQUIRE AN ABSOLUTE PREVENTION OF DISCHARGES INTO THE MS4.

The Draft Permit misapplies the provision contained in 33 U.S.C. § 1342(p)(3)(B)(ii) that MS4 permits "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers" and needs to be revised. Section 1342(p)(B)(ii) is simple and straightforward. It requires that the Draft Permit include a single requirement that the dischargers shall effectively prohibit dischargers into their MS4. Compliance with this requirement can be attained through an ordinance, regulation or policy of the discharger that effectively prohibits discharges to the MS4. It is *not* an absolute prohibition such that the dischargers are in violation of their permit if any unauthorized discharge into their system occurs.

This issue was also addressed by the State Board in Order No. WQ-2001-15, *In the Matter of the Petitions of Building Industry Assoc. of San Diego County and Western States Petroleum Assoc.* (2001). The State Board clarified that discharges into the MS4 are allowed, and are to be controlled through the use of BMPs and other control techniques. The State Board held:

> An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States. (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."
>
> We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. . . [T]he specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters. It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.
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> (*Id.*, at 9-10.)

The State Board's decision in the *BIA* matter makes clear that the Clean Water Act does not include a blanket prohibition on discharges of non-stormwater into the MS4. Of course, source control and illicit discharge detection play a vital role in an effective MS4 program. However, to the extent the Draft Permit would hold the dischargers liable in the event that any discharge into the MS4 occurs, the Draft Permit exceeds the requirements of the Clean Water Act.

To avoid this outcome, the text of Section II.A of the Draft Permit needs to be revised to remove prohibitions on discharges into the MS4. These references need to be replaced with a requirement and acknowledgement that non-exempt, non-stormwater discharges into the MS4 are to be effectively prohibited by the dischargers, meaning that the dischargers must adopt ordinances and implement programs to control such discharges.

III. THE CLEAN WATER ACT'S GOALS ARE NOT AN INDEPENDENT SOURCE OF AUTHORITY TO REGULATE MS4 DISCHARGES

Section 101 of the Clean Water Act (33 U.S.C. § 1251) states the goals and the national policy of the Clean Water Act. Section 1251 states:

> The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of his Act
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

These goals are a cornerstone of the Clean Water Act. They play a key role in the development of water quality standards across the United States. They are not, however, an independently enforceable requirement that may be imposed upon municipal dischargers in their NPDES permits. To the contrary, compliance with the Clean Water Act, and its stated goals, is to be attained through compliance with the permitting and water quality planning programs contained in the Act itself. For MS4 permits, the program is set forth in Section 402(p)(3)(B)(i)-(iii). This portion of the Act, and not the overarching goals of the Act, provides the regulatory structure in which the Regional Board must operate.

The Courts have made it very clear that the goals of the Act are not an independent source of regulatory authority. For example, in *National Wildlife Federation v. Gorsuch* (D.C. Cir. 1982) 693 F.2d 156, the Court held that the general goals of the Act did not trump express provisions of the Act or provide separate regulatory authority. The Court noted that "[c]aution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision." The Court further noted that "it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal. Read as a whole, the Clean Water Act shows not only Congress' determined effort to clean up our polluted lakes and rivers but also its practical recognition of the economic, technological, and political limits on total elimination of all pollution from all sources."

That the goals of the Act do not provide an independent basis for regulation applies with even greater force in the context of MS4 permits. As the Ninth Circuit expressly held in the *Browner* decision (discussed more fully below), the MEP standard applicable to MS4 permits is a "lesser standard" than the standard applicable to other NPDES dischargers. It is thus particularly important to apply the standard adopted by Congress for MS4 discharges, and not to augment that standard by reference to the goals of the Act.

Despite this legal authority, the Draft Permit seeks to directly apply these goals to the dischargers through, among other things, the discharge prohibitions and water quality improvement plan requirements. These aspects of the Draft Permit would require the dischargers to seek restoration opportunities as a matter of permit compliance. Regional Board staff has stated that these requirements are necessary to meet the goals set forth in Section 1251. Nowhere does the Clean Water Act impose the policy statements of Section 1251 directly onto MS4 dischargers.

The NPDES program is a technology based program designed to limit the discharge of pollutants into the waters of the United States. (*Defenders of Wildlife v. Browner* 191 F.3d 1159, 1163 (9th Cir. 1999).) The relevant standard that must be applied to MS4 discharges is the maximum extent practicable standard set forth in 33 U.S.C. § 1342(p). (*Id.*, at 1166-67.) Moreover, the Clean Water Act "unambiguously" does not require MS4 discharges to comply strictly with water quality standards or other more stringent limitations that apply to other NPDES dischargers. (*Id.*, at 1164.) This would include the stated goals set forth at Section 1251, or the water quality standards adopted to achieve those goals. (*Id.*)

For these reasons, the Draft Permit's reliance on the goals of the Clean Water Act as a source of authority to impose restoration or other requirements not required by Section 402(p)(3)(B) on the Co-permittees is misplaced and needs to be revised consistent with the MEP standard. Ultimate achievement of the goals of the Act is a shared value. However, the manner in which those goals are to be achieved has been established by Congress through the MS4 program.

CONCLUSION

We appreciate the opportunity to submit these limited legal comments on the Draft Permit and would be happy to work with the Regional Board and its legal counsel on resolving these and other legal issues. If you have any questions on these comments, please do not hesitate to contact me.

Very truly yours,

Shawn Hagerty
of BEST BEST & KRIEGER LLP

cc: Mr. Devin E. Slaven (via e-mail)
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