CITY OF DANA POINT

CITY COUNCIL

Carlos N. Olvera
Mayor

John A. Tomlinson
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Richard A. Viczorek

September 14, 2015

Via Electronic Submission to sandiego@waterboards.ca.gov, Attn: Wayne Chiu

Honorable Henry Abarbanel, Chair
Honorable Board Members
Attn: Mr. Wayne Chiu
California Regional Water Quality Control Board
San Diego - Region 9
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

As the Mayor of the City of Dana Point, I write to express the City's serious concerns with certain aspects of the proposed amendments to San Diego Regional Water Quality Control Board ("Board") Tentative Order No. R9-2015-0100 (Tentative Order) amending Order No. R9-2013-0001, as amended by Order No. R9-2015-0001 ("Regional Permit"). I understand from my staff that the current revisions to the Regional Permit, if they are not amended to address the concerns raised in this letter, put the City of Dana Point (and other southern Orange County Cities) at risk of large unfunded liabilities without a meaningful path to obtain "compliance" with the Regional Permit (and by extension the Clean Water Act) for up to 18 months (and potentially longer). Of even greater concern, the open ended liability potentially created by the Regional Permit in its current form is likely to lead to litigation and piecemeal development of projects in response to specific federal court orders rather than a careful and collaborative process to develop and implement achievable watershed-wide water quality improvement plans ("WQIPs") for southern Orange County that will protect water quality within the City. I hope that the Board will seriously consider the City's comments provided in this letter and make revisions to the Regional Permit accordingly. I'd also ask that you carefully consider the comments provided by the legal counsel (attached to this letter as Exhibit A) in making needed changes to the Regional Permit prior to approval.

1. *The City is Already an Environmental Leader With a Strong Ethos for Clean Water*

I would not have sent this letter unless I was convinced the current approach advocated in the Regional Permit is likely to do more harm than good for the City's and Region's water quality improvements. I also realize that the City owes much of its success and economic prosperity to its high quality water resources and beaches. A clean environment is one of the things that draws people to the City of Dana Point. Dana Point citizens want clean water, but they also want regulations that achieve desired environmental outcomes in a reasonable manner, and at a cost that is proportional to benefits

received. The City's ethos of practical and proactive water quality regulation owes much to the City's former Mayor, Wayne Rayfield, a long-time advocate for ocean water quality, who served on the San Diego Regional Board from 2007 until 2012 and currently serves as the President of the Board for South Coast Water District, the City's main water and sewer agency. During Mr. Rayfield's tenure in City leadership, the City became a pioneer in efforts to eliminate stormwater pollution, and the City's extensive program to systematically improve and maintain water quality can be found on the City's website at www.danapoint.org/waterquality.

In addition to implementing source control management strategies and a robust illicit discharge control program, the City championed watershed-based management and elimination/diversion of dry weather discharges long before the City was directed to do so by the Regional Board. The City's approach to water quality is catalogued in the City's Strategic Plan (www.danapoint.org/index.aspx?page=54) and in the City's Guidance Document entitled "Protect Our Earth, Protect Our Ocean, a Paradigm for Water Quality." The Guidance Document is available online at www.danapoint.org/Modules/ShowDocument.aspx?documentid=3195, and it describes on pages 6-7 the City's 18 existing dry weather diversions that effectively capture most of the dry weather flows attributable to non-stormwater discharges of human origin within the City. These sanitary sewer diversion facilities were constructed at a cost of approximately 12 million dollars—primarily funded by City residents. The City also has pioneered innovative and extensive dry weather treatment Best Management Practices, such as the award-winning Salt Creek ozone Treatment Facility, bans on styrofoam and other types of plastics likely to wind up in City waters, a robust street sweeping program, and partnerships with local water districts to curb and eliminate excess irrigation that leads to runoff. Dana Point, as its Guidance Document and extensive list of water quality improvement projects can attest, is a City that is willing to do its share to address stormwater pollution and maximize water quality. Unfortunately, as addressed below, it does not appear that the Regional Permit (as proposed) is likely to lead to measurable water quality improvements within the City, only new costs and potential liabilities.

2. *Areas of Concern and Recommendations for Improvement*

a. The City Needs Interim Compliance While it Develops the Required WQIP for Southern Orange County. Dana Point supports in principle the WQIP concept as a practical vehicle for solving difficult water quality problems on a watershed-wide basis. The County and City staff have already demonstrated success in working collaboratively with other southern Orange County stakeholders, public and private, as evidenced by the South Orange County Watershed Management Area (SOCWMA), and will build on this experience and success to develop a scientifically defensible plan and associated projects that have the potential for enhanced protection of City waters. However, the proposed Regional Permit's departure from the previous best management practice ("BMP") based iterative approach to water quality improvement in favor of a strict liability framework during WQIP development is likely to pose severe compliance challenges for the City—making it far more difficult to adopt a collaborative problem solving posture.

Under the current language proposed by Board staff, 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 (at great expense), it is not feasible to do so during wet weather due to sanitary sewer facility capacity and cost, and indeed trying to do so would risk drying up existing beneficial uses in San Juan Creek and other drainages within the City (indeed the drought has had a severe effect on riparian habitat in some locations—a condition that removing all runoff from the City MS4s could exacerbate). Because the San Diego Board has some of the most stringent water quality objectives in the state for bacteria, nutrients, and other contaminants that are in many cases caused by natural processes, it is likely that wet weather discharges from the City's MS4, at least some of the time, will contain pollutant concentrations in excess of the very stringent receiving water limitations contained in the San Diego Basin Plan. When that happens, if the Regional Permit is not amended, the City will presumably be strictly liable to third parties under the CWA—notwithstanding that any exceedances may have little or no nexus to controllable pollution within the City's boundaries. This is not a fair outcome, and we believe that it is not what Congress intended when it required regulation of municipal stormwater under the CWA in 1987.

It is my understanding that other Regional Boards around the state are also developing alternative compliance options ("ACOs") that would avoid the potentially harsh results associated with exceedances of receiving water limitations described in the last paragraph. Under the approach sanctioned by the State Water Resources Control Board ("State Board") in June of this year, municipal stormwater permittees that agree to participate in development of a WQIP, or a WQIP like plan for improving water quality, are deemed to be in compliance during the preparation and implementation of the WQIP if the permittee otherwise complies with the terms and timelines of its MS4 Permit (and the WQIP once it is developed/approved). The ACOs proposed in the current version of the Regional Permit, on the other hand, would leave the City strictly liable for any exceedance of basin plan standards (whether the result of City culpability or not), even as the City continues to aggressively implement its water pollution prevention efforts—leaving it vulnerable, potentially on a permanent basis, to third party lawsuits for any random exceedance even as it aggressively implements its robust clean water program.

Fundamentally, the City is most concerned with the current framework because it mandates the development of expensive projects and the City's extensive regulation of the day to day behavior of City residents where such actions may do very little to actually achieve water quality objectives (since impairment in the San Diego Region may be a result of non-point sources of pollution or non-controllable sources), while at the same time providing no assurances that the City will ever obtain compliance during and after WQIP development. At minimum, the current proposed ACOs proposed in the Regional Permit would have the City out of compliance with the Regional Permit, and subject to increasingly frequent CWA litigation, for a period of up to two years while the WQIP is in development, and this assumes that the Regional Board quickly acts to approve a southern Orange County WQIP. To be successful in improving water quality and maximizing the likelihood of obtaining numeric water quality objectives, the WQIP needs to be a data intensive and collaborative effort between the City, environmental advocates, the Regional Board and all of the other south Orange County stormwater permittees (and recycled water producers—who themselves may contribute significant loading to area streams). The WQIP, in order to obtain the reductions in non-point source pollution that are likely to be required, will have to be creative—with opportunities for offsets and other "credits" that provide compliance to municipal dischargers in exchange for undertaking projects that reduce or eliminate non-

point sources of pollution that the dischargers did not cause. The WQIP for southern Orange County, if it is to be effective, will not be a plan that can be developed quickly, or in a vacuum. Thus, the ability of the City to have interim compliance while working with its neighbors to develop a scientifically rigorous and effective WQIP—a plan that will accomplish what it was intended to do—becomes all the more important.

The City understands that most of the other Regional Boards around the state appear intent on providing ACOs for municipal dischargers that include some form of interim compliance while watershed based plans are in development. The San Diego Board should follow suit. Failure to provide interim compliance is fundamentally unfair for Cities like Dana Point that are already aggressively combatting stormwater pollution. The City would rather work collaboratively with the Regional Board (and the City's neighbors), as a full partner in the development of a robust WQIP that will result in significant and meaningful reductions in water pollution throughout southern Orange County. However, the current Regional Permit language that imposes strict liability for exceedances of water quality objectives—exceedances that appear inevitable no matter what action the City takes or doesn't take—will, because of the likelihood of liability to third parties , push the City away from collaborative efforts and towards a more defensive posture associated with litigation defense. This outcome is not good for the Regional Board, the City, or for southern Orange County watersheds. I accordingly ask you to strongly consider adding to the Regional Permit a mechanism for interim compliance for southern Orange County agencies who aggressively pursue WQIP development and implementation. It is the right thing to do, and the Regional Board can only gain by providing such a provision.

b. *It is Unfair to Impose Strict Liability for Non-Stormwater Discharges to the MS4 Where Nuisance Flows Are Diverted, and the Permittee Is Aggressively Implementing Its Illicit Discharge Program:* As the SWRCB acknowledged in its recent LA MS4 precedential order, preventing all non-stormwater runoff into an MS4 system can be a nearly impossible standard to meet at times since third parties—such as residents watering their lawns in a reasonable manner— may cause at least some incidental runoff to enter the City's MS4. Other Regional Boards have determined that permittees are in compliance with the CWA's direction to "effectively prohibit" all dry weather discharges when the City is implementing its illicit discharge prevention program and diverting, where feasible, residual "nuisance" flows to the sanitary sewer prior to entering a stream or the ocean. However, the Regional Permit in proposed paragraph E.2 of the Regional Permit, would arguably impose liability on the City even where: (1) all or most dry weather flows are diverted before the water reaches a Water of the State; (2) the discharge to the MS4 resulted from actions that the City may have very limited ability to control (such as sewer spills that are the responsibility of separate sewer agencies and runoff from irrigation of the steep slopes that predominate in Dana Point); (3) the City was fully implementing its illicit discharge prevention program. I respectfully ask that the Board direct its staff to work with the City to develop clarifying language, such as that recommended by our legal counsel in Exhibit A, that explains liability for non-stormwater discharges entering the MS4 is only appropriate when discharges are the result of culpability on the part of the City.

The City has other concerns that are reflected in Exhibit A, all of which the City incorporates herein by reference and formally requests that the Board consider. The City also reincorporates and reiterates here all of the comments it previously made on prior iterations of the Regional Permit and the

comments provided by the County of Orange submitted under separate cover. However, resolution of the issues discussed in this letter would go a long way towards resolving the City's concerns with the Regional Permit on a permanent basis.

I thank you for your consideration, and I look forward to a productive dialogue between our respective staffs that produces a win-win outcome for the City, the Regional Board and water quality in the San Diego Region.

Sincerely,

Carlos N. Olvera
Mayor

Attachment: Exhibit A

CC: David Gibson, Executive Officer, SDRWQCB
Patrick Munoz, Jeremy Jungreis, Rutan & Tucker LLP
Doug Chotkevys, Brad Fowler, Lisa Zawaski, Dana Point
Orange County Copermittees

Exhibit A

RUTAN
RUTAN & TUCKER, LLP

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

September 14, 2015

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

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[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. 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.

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 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-

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[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 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 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.

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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 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

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