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October 20, 2009

FILE NO: 76268.000002

**VIA Hand Delivery and Electronic Mail**

Mr. Gerard J. Thibeault  
Executive Director  
California Regional Water Quality Control Board, Santa Ana Region  
3737 Main Street, Suite 500  
Riverside, CA 92501-3348

Dear Mr. Thibeault:

On behalf of the County of San Bernardino and the San Bernardino County Flood Control District (“SBCFCD”) (collectively “SBC”), this letter responds to EPA’s comment letter, dated September 9, 2009, and also represents further supplemental comments of SBC on Tentative Order No. R8-2009-0036 reissuing the Waste Discharge Requirements/National Pollutant Discharge Elimination System (“NPDES”) Permit No. CAS618036 (“Draft Permit”) for the SBCFCD, the County of San Bernardino, and the incorporated cities of San Bernardino County within the Santa Ana Watershed. SBC appreciates the Santa Ana Regional Water Quality Control Board’s (“Regional Board”) efforts in this matter, and the opportunity to submit these further supplemental comments.

As discussed in SBC’s previous comment letters dated September 9, 2009 (original comments) and September 16, 2009 (supplemental comments), which are incorporated by reference herein, SBC believes the numeric storm water effluent limits in the Draft Permit are inconsistent with California and federal law and policy, among other reasons (as further discussed below) for deleting such limits from the Draft Permit.

**Comment 1 — Federal and State Law and Policy Support the Use of BMPs Rather Than Numeric Effluent Limits**

**A. Federal Law and Policy**

Under the federal Clean Water Act (“CWA”), NPDES permits must include both technology-based and water quality-based effluent limitations (“WQBELs”). Under 40 C.F.R. § 122.44(d)(1), WQBELs are required when pollutants are discharged at levels which have a reasonable potential to cause or contribute to an exceedance of state water quality standards. In

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determining whether reasonable potential exists, the NPDES permit writer must use procedures which account for existing controls on point and non-point sources of pollution, the variability of the pollutant in the effluent, the sensitivity of species used in whole effluent toxicity testing and, where appropriate, the dilution of the effluent in the receiving water. 40 C.F.R. § 122.44(d)(1).

The CWA defines effluent limitations (including WQBELs) as “any restriction established by a State or the [Environmental Protection Agency (“EPA”)] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C. § 1362(11). As the court in *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal. App. 4th 1089 (“*CBE*”) held, under this broad definition, **WQBELs need not be numeric**. *CBE* at 1104-05. In particular, federal regulations expressly authorize WQBELs to be adopted as Best Management Practices (“BMP”) for storm water. 40 C.F.R. § 122.44(k) provides that BMPs may be used “to control or abate the discharge of pollutants when: . . . (2) authorized under section 404(p) of the [CWA] **for the control of storm water discharges**; (3) **numeric** effluent limitations are **infeasible**; or (4) the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the [CWA].” 40 C.F.R. § 122.44(k) (emphases added).

“[E]ssentially, 40 C.F.R. § 122.44(k)(2) allows permitting agencies to treat BMPs as the type of WQBEL appropriate for control of storm water discharges.” *Divers’ Env’tl Conservation Org. v. State Water Res. Control Bd.* (2006) 145 Cal. App. 4th 246, 257 (“*Divers*”). The *Divers* court found that “[BMPs] authorized by 40 C.F.R. 122.44(d)(1)(ii) are in fact WQBELs which a permitting authority may employ when it has found that storm water discharges may cause a receiving body to exceed state water quality standards.” *Id.* at 258. Though not in the specific context of storm water, federal Courts of Appeals have also concluded generally that the CWA does not mandate numeric effluent limitations where infeasible, *Citizens Coal Council v. U.S. EPA*, 447 F.3d 879, 895-896 (6th Cir. 2006), and that non-numeric BMPs constitute effluent limitations under the CWA. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 496-97, 502 (2nd Cir. 2005).

EPA regulations and policy endorse the use of BMPs, rather than numeric WQBELs, to regulate storm water discharges such as those in the Draft Permit. According to EPA’s *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 43761 (Aug. 26, 1996) (“*Interim Guidance for WQBEL in Storm Water Permits*”):

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Due to the nature of storm water discharges, and the typical lack of information on which to base numeric [WQBEL] . . . EPA will use an interim permitting approach for NPDES storm water permits. The interim permitting approach uses [BMPs] in first-round storm water permits and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.

EPA also noted that “[i]n cases *where adequate information exists* to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits *as necessary and appropriate.*” *Id.* (emphasis added). However, in the absence of such information (as is the case in the Draft Permit), BMPs are the only justifiable approach.

In discussing why scientifically valid numeric WQBELs are difficult to derive for storm water discharges, EPA explained that such discharges “are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex.” EPA, *Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 57,245, 57,246 (Nov. 6, 1996). EPA further explained that:

[T]he existing methodologies for deriving numeric [WQBEL] were designed primarily for process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in receiving waters. Using these methodologies, limitations are typically derived for each specific outfall to be protective of low flows in the receiving water. Because of this, permit writers have not made widespread use of the existing methodologies and models for storm water discharge permits.

*Id.*

EPA’s conclusions in 1996 remain true today. Indeed, as recently as September 2008, in the Fact Sheet for its reissued Storm Water Multi-Sector General Permit for Industrial Facilities (“Multi-Sector General Permit”),<sup>1</sup> EPA stated: “At this time, it is generally not

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<sup>1</sup> *Final NPDES General Permit for Stormwater Discharges from Industrial Activities*, 73 Fed. Reg. 56,572 (September 29, 2008).

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feasible for EPA to calculate numeric effluent limitations” due to the “highly intermittent” and variable nature of storm water. Fact Sheet for Multi-Sector Permit, at 39. The same analysis is true, if not more so, for municipal storm water dischargers.

Most significantly, EPA affirmed the appropriateness of the BMP-based approach in guidance on establishing wasteload allocations (“WLA”) for storm water as part of the Total Maximum Daily Load process. *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (“*Establishing TMDLs Memo*”), EPA Office of Water, November 22, 2002. In that guidance, EPA stated that WQBELs for storm water discharges that implement TMDLs may be expressed in the form of BMPs. *Id.* at 2; *id.* at 4 (citing *Interim Guidance for WQBEL in Storm Water Permits* for support of BMP rather than numeric effluent limits); *id.* at 5 (“The policy outlined in this memorandum affirms the appropriateness of an iterative, adaptive management BMP approach, whereby permits include effluent limits (e.g., a combination of structural and non-structural BMPs) that address storm water discharges, implement mechanisms to evaluate the performance of such controls, and make adjustments (i.e., more stringent controls or specific BMPs) as necessary to protect water quality”). EPA further stated that it “recognizes that the available data and information usually are not detailed enough to determine [WLA] for NPDES-regulated storm water discharges on an outfall-specific basis.” *Id.* at 4. Thus, EPA concluded that BMPs are an appropriate means of regulating storm water discharges, even in situations where the receiving waters are listed as impaired under CWA section 303(d).

As demonstrated in the EPA guidance, federal law and policy continue to recognize that application of numeric storm water effluent limits is infeasible. EPA’s September 9, 2009 letter implies that, under the *Establishing TMDLs Memo*, numeric effluent limits must be imposed unless the permit’s administrative record contains “technical documentation demonstrating that specific BMPs would achieve the WLAs.” See September 9, 2009 letter at pp. 2-3. That is not what the 2002 memorandum requires at all. Rather, the *Establishing TMDLs Memo* requires only that “a discussion of the BMP selection and assumptions needs to be included in the permit’s administrative record, including the fact sheet...” The *Memo* also provides that the “[p]ermitting authorities may require the permittee to provide supporting information, such as how the permittee designed its management plan to address the WLA(s).” *Establishing TMDLs Memo*, at p. 5. The *Memo* also recommends that “permits require collecting data on the actual performance of the BMPs” during the permit period, as a basis for revising BMPs in the future. *Id.* This requirement is contained within the TMDL implementation plans, as no TMDLs were adopted when the current MS4 NPDES permit was adopted.

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**B. California Law and Policy**

For the same reasons as those relied on by EPA, when the State Board issued its own general permit for industrial storm water discharges, the State Board determined that:

it is not feasible at this time to establish numeric effluent limitations. This is due to the large number of discharges and the complex nature of storm water discharges. This is also consistent with the US EPA's August 1, 1996 "Interim Permitting Approach for Water Quality Based Effluent Limitations in Storm Water Permits" . . . [BMPs] to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges are appropriate where numeric effluent limitations are infeasible, and the implementation of BMPs is adequate to achieve compliance with BAT/BCT and with water quality standards.

State Board Order No. 97-03-DWQ, *NPDES General Permit/Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities* (April 17, 1997); see State Board Order WQ 2001-15, *In the Matter of the Petitions of Building Industry Ass'n of San Diego County and Western States Petroleum Ass'n*, at 7 (Nov. 15, 2001) (declining to require strict compliance with water quality standards through numeric effluent limits, because "an iterative approach, which focuses on timely improvement of BMPs, is appropriate").

In 2006, the State Board commissioned an expert panel to address the feasibility of setting numeric pollutant limits for storm water discharges. The panel's final report, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* (June 19, 2006) ("Panel Report"), observed that

It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges. However, it is possible to select and design them much more rigorously with respect to the physical, chemical and/or biological processes that take place within them, providing more confidence that the estimated mean concentrations of constituents in the effluents will be close to the design target.

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Panel Report, at 8. Further, the Panel Report observed that “[i]t will take a substantial research effort, including data gathering on well-designed BMPs, to develop design criteria for the removal of pollutants with confidence intervals that enable us to make reliable estimates of the median and variance of the effluent concentrations to be expected from the various types of BMPs. Until this is done, *it will be very difficult to assign legally enforceable numerical effluent limitations to any particular BMP.* *Id.* at 6-7. Since the Panel Report was issued in 2006, there have been no technological advances or increased understanding regarding the variability in the frequency and duration of storm water discharges to warrant imposing numeric storm water effluent limits in the Draft Permit. Indeed, unlike the Regional Board, it appears that other regional boards consider BMPs to be appropriate controls for storm water discharges to TMDL-listed waterbodies.<sup>2</sup>

**C. LA County MS4 Order Does Not Support Imposing Numeric Effluent Limits in the Draft Permit California Law and Policy**

Despite such federal and State authority, the Regional Board asserts that a recent State Board decision<sup>3</sup> supports imposing numeric effluent limits in the Draft Permit. In the *LA County MS4 Order*, the State Board recognized the validity of federal and State law and policy regarding imposing numeric effluent limits for storm water (described above in Sections I.A and I.B), but found that such authority did not apply to the type of discharge at issue in *LA County MS4 Order*.

The State Board held that although the challenged TMDL-based numeric effluent limits were part of LA County’s storm water discharge permit, such provisions did not, in fact, apply to storm water discharges. Rather the numeric effluent limits applied to “non-storm water discharges which occur during summer dry weather.” *LA County MS4 Order*, at 8. Under LA

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<sup>2</sup> In a July 2008 presentation, the San Francisco Regional Water Quality Control Board noted that WQBEL may be narrative, and indicated that numeric effluent limits are inappropriate when implementing controls to satisfy TMDL WLA. *TMDLs, Wasteload Allocations, and California Stormwater NPDES Permits*, Tom Mumley, Statewide TMDL Program Manager, San Francisco Regional Water Quality Control Board, at 12.

<sup>3</sup> State Board Order WQ 2009-0008 *In the Matter of the Petition of County of Los Angeles and Los Angeles County Flood Control District* (August 4, 2009) (“*LA County MS4 Order*”).

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County's MS4 permit,<sup>4</sup> "Summer Dry Weather" is defined as "Dry Weather days occurring from April 1 through October 31 of each year," and significantly, "Dry weather day" is further defined as "those days *with less than 0.1 inch of rainfall*, and occurring more than three days after a Rain Day." LA County MS4 Permit, at 59 (emphasis added). The Water Board concluded that because these particular effluent limits applied only during those days when there is essentially no rainfall (*i.e.*, less than 0.1 inches), such limits apply to non-storm water discharges. See *LA County MS4 Order*, at 9. The Water Board recognized the "Clean Water Act requires MS4 permit requirements to effectively prohibit *non-storm water discharges*," and therefore, the numeric effluent limits were permissible. *Id.* (emphasis added). In short, the *LA County Order* established no precedent — and in no way deviated from — federal and State law regarding imposing numeric storm water effluent limits in NPDES permits.

Here, the Draft Permit imposes numeric effluent limits for storm water discharges to implement (i) the Middle Santa Ana River ("MSAR") Watershed Bacteria Indicator TMDL ("MSAR Bacteria TMDL")<sup>5</sup>, and (ii) the Big Bear Lake Nutrient TMDL Dry Hydrological Conditions ("Big Bear Nutrient TMDL")<sup>6</sup> — neither of which apply to non-storm water discharges. The MSAR Bacteria TMDL establishes fecal coliform and *E. coli* WLAs for dry and wet weather conditions, but the WLA for dry weather conditions apply to rainfall events. Unlike LA County's MS4 permit, the dry weather WLAs apply from April 1 to October 31 with no corresponding limitation on the amount of rain during such time period. MSAR Bacteria TMDL, at 4. Similarly, the total phosphorus WLA in the Big Bear Lake Nutrient TMDL is not limited to periods of no rainfall. Under the Big Bear Lake Nutrient TMDL, "Dry hydrological conditions" is defined as "the conditions observed from 1999-2003; that is, average tributary inflow to Big Bear Lake ranging from 0 to 3,049 [acre-feet], average lake levels ranging from 6671 to 6735 feet and *annual precipitation* ranging from 0 to 23 inches." Big Bear Lake TMDL, at 5 (emphasis added). Thus, the total phosphorus WLA applies to

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<sup>4</sup> Order No. 01-182, Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles, and the Incorporated Cities Therein, Except the City of Long Beach (NPDES Permit No. CAS004001), modified by Resolution No. R4-2006-0074 ("LA County MS4 Permit").

<sup>5</sup> Resolution No. R8-2005-0001, Resolution Amending the Water Quality Control Plan for the Santa Ana River Basin to Incorporate Bacterial Indicator Total Maximum Daily Loads (TMDLs) for the Middle Santa River Watershed Waterbodies, Santa Ana Regional Water Quality Control Board (August 26, 2005).

<sup>6</sup> Resolution No. R8-2006-0023, Resolution Amending the Water Quality Control Plan for the Santa Ana River Basin to Incorporate a Nutrient Total Maximum Daily Load (TMDL) for Dry Hydrological Conditions for Big Bear Lake, Santa Ana Regional Water Quality Control Board (April 21, 2006).

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rainfall events when the total annual rainfall is below 23 inches. Because the numeric effluent limits for the fecal coliform and E. coli (MSAR Bacteria TMDL) and total phosphorous (Big Bear Lake Nutrient TMDL) in the Draft Permit apply to storm water discharges, the State Board's analysis in the *LA County MS4 Order* is irrelevant to the Draft Permit. Any reliance by the Regional Board on the *LA County MS4 Order* to justify imposing numeric effluent limits in the Draft Permit is inappropriate and misplaced.

## **Comment 2 — BMPs are Appropriate WQBEL for TMDL-listed Waterbodies**

### **A. Effluent limitations must be “consistent with,” but not identical to, WLA in TMDLs**

Under section 303(d) of the CWA, states are required to identify those water segments where technology-based controls are insufficient to implement the applicable water quality standards. *See* 33 U.S.C. § 1313(d)(1)(A). Once a segment is identified as water quality limited, the state is further required to establish TMDLs.<sup>7</sup> 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7. For segments of waterbodies listed as impaired under Section 303(d), each NPDES permit must include “[e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, *consistent with* the assumptions and requirements of any available [WLA].” 40 C.F.R. § 122.44(d)(1)(vii)(B) (emphasis added). EPA's position is that “[w]hile 40 C.F.R. § 122.44(d)(1)(vii)(B) requires ‘consistency,’ it does not require that the permit limitations that are adopted in a final NPDES permit be *identical* to any of the WLAs that may be provided in a TMDL.” *See In re City of Moscow, Idaho*, NPDES Appeal #00-10, 10 E.A.D. 135, 148 (EPA Envtl. Appeals) (emphasis added) (allowing for more conservative limitation in the NPDES permit than set forth in the TMDL); *see also* preamble of the Multi-Sector General Permit, 65 Fed. Reg. 64,746, 64,792 (Oct. 30, 2000) (“Effluent limitations must be consistent with (*but not identical to*) wasteload allocations in TMDLs”) (emphasis added).

In its *Establishing TMDLs Memo*, EPA determined that TMDL WLA can be expressed in the form of BMPs without violating the consistency requirement set forth in 40 C.F.R. § 122.44(d)(1)(vii)(B). *Establishing TMDLs Memo*, at 2. According to EPA, if BMPs “adequately implement the WLAs, then additional controls are not necessary.” *Id.*, at 2. Based on EPA policy and guidance, application of BMPs in the Draft Permit to implement TMDL

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<sup>7</sup> A TMDL is the sum of WLAs for point sources discharging into the impaired segment, and load allocations (“LA”) for nonpoint sources and natural background.

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WLA would be appropriate and consistent with the WLA for fecal coliform, E. coli and total phosphorus set forth in the MSAR Bacteria TMDL and Big Bear Lake Nutrient TMDL.

**B. EPA's *Establishing TMDLs Memo* Reflects Current EPA Policy Regarding TMDL WLA in Storm Water Discharge Permits**

In its September 9, 2009 comment letter, U.S. EPA Region 9 fails to address the explicit requirement under 40 C.F.R. § 122.44(k) that any numeric effluent requirement be feasible, and appears to question the validity of EPA's *Establishing TMDLs Memo*. In particular, Region 9 suggests that the Regional Board is justified in ignoring state and federal law and policy regarding the infeasibility of imposing numeric effluent limits to storm water discharges, if the Regional Board does not include technical documentation showing that BMPs are adequate to achieve the WLA. EPA Region 9 letter, p. 2-3. According to Region 9, numeric effluent limits are appropriate in the Draft Permit because "this draft permit does not provide technical documentation demonstrating that specific BMPs would achieve the WLAs. Thus, the draft permit is consistent with EPA's guidance that a permitting agency may use numeric effluent limits where the record does not demonstrate that non-numeric BMP controls will be sufficient to implement WLA." *Id.*, at 3. The Regional Board's failure to provide any analysis of the feasibility of numeric storm water effluent limits does not negate federal and State law and policy regarding imposing such limits in NPDES permits. Region 9 has referenced no legal authority to support such an assertion.

In its *Establishing TMDLs Memo*, EPA specifically "recognize[d] that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, **only in rare cases will it be feasible** or appropriate to establish numeric effluent limits for municipal and small construction storm water discharges . . . . Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and the numeric effluent limits will be used **only in rare instances**." *Establishing TMDLs Memo*, at 4 (emphasis added). Region 9 provides no rationale or justification for *why* the Regional Board should find that the circumstances of the Draft Permit are so unique or rare as to warrant imposing numeric storm water effluent limits.

In addition, Region 9's comments imply that EPA's position regarding infeasibility of numeric effluent limits has changed since *Establishing TMDLs Memo* was written. Contrary to Region 9's position, U.S. EPA recently released its *TMDLs to Stormwater Handbook* ("*TMDL Handbook*"),<sup>8</sup> which reiterates the appropriateness of BMPs as TMDL WLA. Indeed, the

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<sup>8</sup> *TMDLs to Stormwater Permit Handbook*, U.S. EPA Office of Water, November 2008.

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*TMDL Handbook* references the *Establishing TMDLs Memo* as a document that “clarifies existing EPA regulatory requirements for, and provides guidance on, establishing WLAs for stormwater discharges in TMDLs approved or established by EPA.” *TMDL Handbook*, at 15; *id.* at 133 (quoting multiple sections of the *Establishing TMDLs Memo*); *id.* at 137 (emphasis added) (“Permit writers might determine that BMPs are not an appropriate way to express effluent limitations and might choose to develop numeric effluent limitations **as a feasible and appropriate way** to incorporate TMDL provisions into the permit.” Based on EPA’s continued reliance on its *Establishing TMDLs Memo* as relevant guidance, the Regional Board should disregard Region 9’s letter to the extent that it suggests otherwise.

**C. MS4 Permits for Ventura and Orange Counties Do Not Support Imposing Numeric Effluent Limits in the Draft Permit**

**1. Ventura County MS4 Permit**

The Regional Board and EPA have indicated that the Ventura County MS4 Permit<sup>9</sup> and the Orange County MS4 Permit<sup>10</sup> support imposing numeric storm water effluent limits in the Draft Permit. The Ventura County MS4 Permit does not expressly impose such effluent limits, but rather requires each permittee to “attain the storm water WLAs incorporated into this Order **by implementing BMPs** in accordance with the TMDL Technical Reports, Implementation Plans, or as identified as a result of TMDL special studies specified in the Basin Plan Amendment.” Ventura County MS4 Permit, at 86 (emphasis added).

Perhaps the Regional Board believes that the Municipal Action Levels (“MAL”) contained in the Ventura County MS4 Permit support the numeric effluent limits contained in the Draft Permit. MALs were established in the Ventura County MS4 Permit to “identify subwatersheds requiring additional [BMPs] to reduce pollutant loads and prioritize implementation of additional BMPs.” Ventura County MS4 Permit, at 33. The LA Regional Water Quality Control Board (“LA Regional Board”) had originally applied the MALs as end-of-pipe effluent limits, which would have subjected permittees under the Ventura County MS4

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<sup>9</sup> Tentative Order 09-xxx, Ventura County Municipal Separate Storm Sewer System Permit, Los Angeles Regional Water Quality Control Board (May 7, 2009).

<sup>10</sup> Tentative Order No. R8-2009-0030, The County of Orange, Orange County Flood Control District, and the Incorporated Cities of Orange County Areawide Urban Storm Water Runoff, Santa Ana Regional Water Quality Control Board (April 30, 2009).

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Permit to enforcement actions for violations of such limits. However, the LA Regional Board amended the first draft of the Ventura County MS4 Permit

[d]ue to a number of factors, including the variability of stormwater, *the regulatory scheme of applying numeric values as effluents has not been promoted by US EPA or the State Board at this time.* Federal regulations support a regulatory scheme that is based on BMP implementation to achieve a standard of Maximum Extent Practicable (“MEP”) . . . The Tentative Order incorporates MALs in accordance with the Blue Ribbon Panel Recommendations. MALs can be very useful in identifying areas that require additional BMPs. Through the extensive stakeholder-meetings Board Staff conducted, MALs were developed that are contained in the Tentative Permit. Thus, from the first draft of the-permit to the Tentative Order, MALs have changed from being expressed as effluent limits to being expressed as benchmarks for taking action to implement additional BMPs.

LA Regional Board, Response to Comments on the Tentative Order (02-24-09), Ventura County Municipal Storm Water Discharge Permit, at 43-44 (emphasis added). The LA Regional Board noted that it has discretion to go beyond MEP should it find it to be necessary to achieve water quality, but declined to do so. *Id.* at 44.

## 2. Orange County MS4 Permit

SBC recognizes that the Orange County MS4 Permit imposes numeric effluent limits for storm water based on TMDL WLA. Orange County MS4 Permit, at 79 (“Based on the TMDLs, effluent limits have been specified to ensure consistency with the wasteload allocations.”). Like the Draft Permit, the Orange County MS4 Permit notes the technological and economic infeasibility of imposing numeric effluent limits to storm water discharges, but does not provide any justification for why such effluent limits are feasible there. Given the lack of any supporting justification, the Orange County Permit is contrary to federal and State law and policy, and does not provide any precedent for the Draft Permit.<sup>11</sup>

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<sup>11</sup> SBC notes that the permittees under the Orange County MS4 Permit recently filed a petition with the State Board challenging several of the Orange County Permit conditions, including the existence of numeric storm water effluent limits as TMDL WLA. *In the Matter of Petition of County of Orange and Orange County Flood Control District for Review of Action by the California Regional Water Quality Board, Santa Ana Region, in Adopting Order No. R8-2009-0030, NPDES Permit No. CAS618030*, at 8 (June 22, 2009).

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**Comment 3 — Regional Board has not Provided Justification for Imposing Numeric Effluent Limits in the Draft Permit**

As discussed above, “[w]hen a non-numeric water quality-based effluent limit is imposed, the permit’s administrative record, including the fact sheet when one is required, needs to support that the BMPs are expected to be sufficient to implement the WLA in the TMDL.” *Establishing TMDLs Memo*, at 2 (citing 40 C.F.R. §§ 124.8, 124.9 & 124.18). As the State Board recently stated, “[w]hether a future municipal storm water permit requirement appropriately implements a storm water [WLA] will need to be decided based on *the regional water quality control board’s findings* supporting either the numeric or non-numeric effluent limitations contained in the permit.” *LA County MS4 Order*, at 10-11 (emphasis added).

Despite the Regional Board’s apparent support of the use of BMPs to implement TMDL WLAs, the Draft Permit contains — without any feasibility analysis or supporting justification — numeric effluent limits for fecal coliform, E. coli and total phosphorus. Draft Permit, at 44, 46. Given the lack of any such findings by the Regional Board, BMPs are appropriate and should be incorporated into the Draft Permit as TMDL WLAs.<sup>12</sup>

**Comment 4 — The Regional Board Failed to Consider the Cost of Compliance with Numeric Limits**

In *City of Burbank v. State Water Resources Control Board* (2005), 35 Cal. 4th 613, the State Supreme Court interpreted the preemptive effect of the federal CWA on certain requirements of the California Water Code. Under section 13241 of the Water Code, regional boards must consider economic factors (among a list of enumerated factors) when establishing water quality objectives in basin plans. Water Code section 13263 in turn requires permit writers to take into consideration the requirements of section 13241. The CWA, on the other hand, precludes consideration of economic factors in establishing WQBELs in NPDES permits. To reconcile these federal and state provisions, the Court concluded that federal preemption is limited to actions that are required by federal law. Where states (or regional

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<sup>12</sup> Under the Draft Permit, the compliance date for the MSAR Bacteria TMDL for dry weather conditions is December 31, 2015, and for wet weather conditions is December 31, 2025. The compliance date for the Big Bear Lake Nutrient TMDL is December 31, 2015. However, the Draft Permit (once it is adopted) will expire in 2014, prior to the compliance date for both TMDLs. It is inappropriate and unnecessary to include such numeric effluent limits prior to the compliance date.

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boards) are acting to impose WQBELs or other requirements that are *more stringent* than those required by federal law, state law mandates consideration of economic factors. *City of Burbank*, 35 Cal. 4th at 627-628.

As discussed above, the CWA does not require imposing numeric limits for storm water discharges. Thus, the numeric limits imposed by the Regional Board the Draft Permit are more stringent than the limitations required by federal law, i.e., BMPs. Following *City of Burbank*, the Regional Board should have complied with the Water Code requirements to consider economic effects, including “the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permit . . . .” *Id.* at 620. The Regional Board has not done so, thereby acting in a manner contrary to California law and the State Supreme Court’s ruling in *City of Burbank*. To engage in the proper analysis, the Regional Board must consider evidence that compliance with the numeric storm water limits in the Draft Permit is infeasible and not cost-effective (*see, e.g.*, SBC September 9, 2009 comments, pp. 10-11). Since the Draft Permit imposes numeric storm water effluent limits — which go beyond the BMPs required by federal law — the Regional Board is in violation of the Water Code by failing to consider compliance costs before adopting such more stringent requirements.

**Comment 5 — Anti-backsliding Provisions May be Implicated by Imposing Numeric Effluent Limits**

Once final TMDL-based effluent limits are imposed, section 303(d) limits revising such restrictions unless (1) the cumulative effect of all such revised effluent limitations based on the TMDL will assure the attainment of water quality standards, or (2) the designated use that is not being attained is removed. 33 U.S.C. 1313 § 303(d)(4)(A). As discussed in its September 9, 2009 comments, SBC is concerned that because the fecal coliform, E. coli and total phosphorus WLAs are expressed as numeric effluent limits, the anti-backsliding provisions of section 402(o) of the CWA may preclude adoption of less stringent limits even if the underlying water quality objectives are changed.

EPA’s interpretation of the CWA is that the antibacksliding requirements of section 402(o) of the CWA do not apply to revisions to effluent limitations made *before* the scheduled date of compliance for those limitations. U.S. EPA, Waster Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California (California Toxics Rule), 65 Fed. Reg. 31682, 31704) (May 18, 2000). Such interpretation is consistent with case law evaluating whether interim permit limits are subject to anti-backsliding analysis under section 402(o) of the Act. *See Communities for a Better Env’t. v. State Water Res. Control Bd.* (2005) 132 Cal. App. 4th 1313, 1331-32 (finding that an interim effluent limitation that

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allowed an increase in discharge limitations did not violate the CWA's antibacksliding provision because "the proper comparison is between the final permit limits and the previous final limits that they replace."); *see also* State Board Compliance Schedule Policy, Response to Comment I.9 (noting that a permitting authority must address the antibacksliding proscription in section 402(o) of the CWA for final, not interim, limits).

However, as further elaborated in SBC's prior comment letters, it is far from clear, based on the current state of the law, whether the anti-backsliding provision would act to preclude subsequent modifications to the Draft Permit making numeric effluent limits less stringent.

#### **Comment 6 – Implications of Imposing Numeric Effluent Limits (“NELs”) for Watershed Stakeholders**

SBC has described the legal rationale for supporting the BMP approach and for using Regional Board discretion not to incorporate NELs into the Draft Permit in three comment letters and in several meetings with Regional Board staff in the past three months. SBC's final comment describes some of the likely implications, for the stakeholders in the watershed, of incorporating NELs into the Draft Permit.

**Task Force Impacts.** The Regional Board has been supportive of what has become known as the “Task Force Approach” to addressing water quality problems in the Santa Ana River Watershed. These include the Nitrogen/TDS Task Force, the Big Bear TMDL Task Force, the MSAR TMDL Task Force, and the Water Quality Standards Task Force (“SWQSTF”). These Task Force efforts are a collaborative approach that has been strongly supported by the Regional Board. This strong support has even been memorialized in Resolution R8-2008-018, which stated that the Task Forces had developed “consensus-driven and scientifically superior and defensible...products,” and that they had been “enormously successful”. If the Regional Board chooses to impose NELs in the Draft Permit, SBC is concerned that the effectiveness of these Task Forces will be significantly compromised. In this event, the MS4 Permittees will be faced with a compliance paradigm based solely on the NELs. Since the MS4 Permittees are key stakeholders, it is likely that Task Force participation will significantly curtailed.

In a NEL compliance paradigm, the regulated dischargers' priorities will by necessity be turned to either, 1) funding, designing, and permitting the most effective water quality treatment strategy in an attempt to demonstrate that their respective discharges comply with the NELs, or 2) allocating all available resources to challenge the NELs. The only apparent treatment scenario is to divert and treat all non-compliant flows. Scientific studies suggest that

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even this strategy will not result in compliance in all cases, due to environmental growth of bacteria. The process of litigation will not improve water quality, and MS4 Permittees would not be motivated to participate in Task Forces, or to invest significant resources in treatment strategies, until the litigation was settled. SBC does not wish to pursue either of these courses of action, as they will be counterproductive in the long term.

Unless the antibacksliding rules described in Comment 5, above, are determined not to apply, the work of the SWQSTF will be of little use. Implementation of the proposed Basin Plan Amendment depends on the ability of the MS4 Permittees to effectively revise recreational use classifications for selected water bodies, and then apply the appropriate water quality objectives to the reclassified areas. If implementation scenarios, such as those provided in our original comments, are not allowed because of antibacksliding rules, then there will be little incentive for the stakeholders to continue participation in the SWQSTF.

**Regional Board Staff Credibility.** As discussed in several recent discussions with Regional Board TMDL staff (July 23, August 6, and August 26, 2009) the MSAR and Big Bear Lake TMDL Task Force members have been assured, over the course of developing these TMDLs, that the TMDL targets were not intended to be placed in the MS4 Permits as NELs. Rather, Regional Board TMDL staff assured the stakeholders that the MS4 Permit compliance standard was based on a BMP approach. These assurances are significant because stakeholders based their level of accord with the proposed, and then adopted TMDLs, on expected approaches to implementation. As a result, stakeholders raised fewer, and less vigorous, objections to the proposed TMDLs due to the understanding that there would be future opportunities to work through implementation issues. The imposition of NELs in the term of the Draft Permit is inconsistent with previous Regional Board TMDL staff advice, and undermines the cooperative efforts completed to date. There is some documented evidence of these assurances and the Regional Board's intent to implement the TMDLs through a BMP approach. For example, the Big Bear TMDL (Basin Plan Amendment: Attachment to Resolution R8-2006-0023, Section 1.A) states "A weight of evidence approach will be used to assess compliance with the TMDL, which means that **data pertaining to all the numeric targets will be evaluated and non-compliance with one target will not automatically imply non-compliance with the TMDL.**" (emphasis added). This Basin Plan language simply cannot be supported if NELs are incorporated into the Draft Permit.

Without follow-through on key assurances, stakeholders, including SBC, will be reluctant to work as openly and cooperatively with Regional Board staff on future issues. The end result will be less trust and less effective watershed management. An instructive example is the recent determination within the selenium TMDL implementation effort for Newport Bay.

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As Regional Board is well aware, enforcement, in the form of Time Schedule Orders, are pending for the affected dischargers under the Newport Bay Selenium TMDL. The stakeholders based their acceptance of the adopted implementation approach on regulatory assurances that such enforcement would be avoided if they followed their plan.

**NELs in the Draft Permit Require Permittees to file an Appeal.** The SBC is concerned that the incorporation of NELs in the Draft Permit would leave the Permittees no option but to appeal the permit to protect their interests. The Permittees could only preserve the right to challenge NELs and the antibacksliding issue through an appeal. The implementation standard of MEP may also be at stake, and would merit an appeal, among other possible issues. TMDL issues such as the use of pollutant trading approaches, proper CEQA analysis, and the cost and attainability of the NELs may also be part of the rationale for an appeal. The SBC urges the Regional Board to revise the Draft Permit to obviate the need for any such appeals and the associated resource commitments that would be incurred by all parties.

## **CONCLUSION**

For the reasons set forth above, SBC requests that the Regional Board amend or revise the Draft Permit to (1) delete numeric storm water effluent limits, (2) impose BMPs designed to meet the WLAs for the relevant TMDL -listed waterbodies, and (3) require BMP practices that are (i) tailored to meet the TMDL WLA, (ii) monitored to assess their effectiveness, and (iii) revised as necessary over the course of the permit term.

Sincerely,

*Chris M. Amantea /s/*

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