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November 2, 2012

Grant Destache, Chairman  
California Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4353

Re: Receiving Water Limitations Language (Provision A) in Draft Regional MS4 Permit

Dear Mr. Destache:

On November 13, 2012, the San Diego Regional Board will hold a workshop on the proposed Regional MS4 Permit. A major policy issue for the Regional Board to consider at the workshop is how the Permit should address compliance with water quality standards in receiving waters. Consistent with the Clean Water Act and prior decisions of the State Board, such compliance for MS4 discharges should be achieved over time, through an adaptive management approach. However, the 9th Circuit Court of Appeal has recently interpreted receiving water limitations language similar to that proposed in Provision A as requiring strict and immediate compliance with water quality standards. To respond to this recent interpretation of similar language, the Regional Board should realign Provision A to reflect the original policy goal of compliance through an adaptive management approach.

The purpose of this letter is to stress that the Regional Board has the discretion to make the policy decision to realign the language of Provision A to reflect the adaptive management approach. For the following key legal reasons, the Regional Board has this authority:

- It is settled law that the Clean Water Act does not require MS4 discharges to strictly comply with water quality standards. (Defenders of Wildlife v. Browner)

(9th Circuit) 191 F.3d 1159.) In 1987, when Congress created the MS4 permitting system, it expressly treated MS4 discharges differently than all other MS4 discharges. As Courts have affirmed, Congress unambiguously decided that strict compliance with water quality standards was not required for MS4 discharges.

- The State Board has developed standard receiving water limitations language and has expressly interpreted that language as not requiring strict compliance with water quality standards. (State Board Order 2001-15.) To the contrary, the State Board has explained that “compliance is to be achieved over time, through an iterative approach requiring improved BMPs.”
- Other MS4 permits issued by U.S. EPA directly or approved by U.S. EPA have employed the adaptive management approach as the basis for compliance with water quality standards. These permits have not required strict and immediate compliance with water quality standards for MS4 discharges.

Because the Clean Water Act does not demand that MS4 discharges strictly comply with water quality standards, and because the State Board has confirmed that compliance is to be achieved over time through the iterative process, the Regional Board should revise Provision A to realign the language with this policy approach. In light of the unique nature of MS4 discharges, as recognized by Congress, strict and immediate compliance with water quality standards is generally not feasible or appropriate.

Although the State Board has scheduled a November 20, 2012 workshop to discuss the receiving water limitations language, the Regional Board should provide policy direction on this issue now. It is requested that the Regional Board provide direction to staff to revise the language of Provision A to reflect the adaptive management approach as the basis for compliance. It is also requested that the Regional Board provide direction to staff to work with the State Board to support State Board language based on the adaptive management process. Addressing this issue now is particularly important for the Regional Permit because a failure to address the issue will undermine the value and acceptability of the watershed-based approach reflected in the Permit. The innovative approach taken in the Permit may be undermined entirely by the rigid language in Provision A. To support and allow dischargers to embrace the watershed-based approach, Provision A must be realigned with the adaptive management process.

Mr. Destache

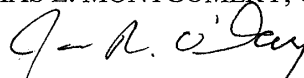
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We ask that this letter be provided to the full Board in advance of the workshop. It has been authored and signed below by our office and by counsel on behalf of the City of San Diego and City of Santee.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By

  
James R. O'Day, Senior Deputy

JAN I. GOLDSMITH, City Attorney, City of San Diego

By

Heather Stroud, Deputy City Attorney

CITY OF SANTEE

Shawn Hagerty  
BEST BEST & KRIEGER LLP

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