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January 10, 2013

Catherine Hagan, Esq.
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

via Fed Ex

Re: Tentative Order R9-2013-0001

Dear Catherine:

On behalf of our client the County of San Diego, I am writing concerning some provisions in Tentative Order R9-2013-0001 that are of particular concern to the County. I respectfully ask that you review our legal position on those provisions as outlined below, and please call me to discuss if you have any questions or need further information to assist your review.

The Bacteria TMDL Resolution

The Tentative Order would incorporate elements and requirements from the Bacteria TMDL Resolution (Resolution R9-2010-0001) into the new MS4 permit for San Diego Region copermitees, including the County of San Diego. We specifically urge the San Diego Regional Board to not incorporate the Bacteria TMDL provisions in this permit renewal cycle. It is our legal position that your Board has the authority to decline the demands of other interested parties that this action be taken.

Reasons Not to Incorporate the Bacteria TMDL Into the Permit

From a recent summary by Regional Board (RB) staff, County of San Diego copermitees spend approximately \$119M per year on programs to improve water quality

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in the San Diego region. Those programs have improved water quality in general and at beaches in the region. With ever-increasing knowledge gained through trial and error, and with the Watershed Quality Improvement Plan concept expected to permit existing resources to be focused in more efficient and effective ways, San Diego copermittees expect to continue the march toward improved water quality using the current level of resources. The copermittees are continually working on ways to improve water quality and have done so for over two decades. As evident in our annual expenditure and work with experts, we are committed to improving water quality.

By RB staff estimates and as confirmed by San Diego copermittees, the implementation of the Bacteria TMDL in the next permit cycle would add a magnitude of additional costs to copermittee budgets that is unsustainable using existing methods for raising general fund monies and given California's legal constraints on taxation or fees. As your Board has heard, the range of additional cost attributable to the Bacteria TMDL alone is \$144M to \$272M per year, meaning billions of taxpayer dollars over the compliance period.

As presentations in the adoption process have shown, given the unique challenges associated with bacteria as a constituent in stormwater, the cost-benefit analysis dictates that implementing the Bacteria TMDL at this time, as written, would be bad public policy. Studies and experience show that any magnitude of controls for bacteria, up to and including disinfectant efforts, will not consistently achieve the Resolution's numeric standards, even with the expenditure of billions of dollars. So, the sensible, logical next step is to take a hard look at the standards and assumptions of the Bacteria TMDL and devise plans to improve water quality using existing resources and as realistically achievable with today's scientific methods.

Legal Authority to Not Incorporate the Bacteria TMDL Into the Permit

As you know in 1987, Congress declared its intent to chart a different course for improving water quality flowing from MS4 systems by enacting Clean Water Act § 402 (33 U.S.C. § 1342). In establishing the "maximum extent practicable" (MEP) standard of CWA § 402(p)(3)(B), Congress recognized and enacted a different standard than the technology based requirements of CWA § 301. The MEP standard is the legal standard for stormwater compliance.

In *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (1999) the Ninth Circuit held that the MEP standard of CWA § 402(p)(3)(B) *replaces* the requirements of CWA § 301(b)(1)(C) for MS4 dischargers. The *Browner* decision goes on to discuss the

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discretion vested in permitting authorities to either require strict compliance, or less than strict compliance, with water quality standards.

Our office believes that the November 12, 2010 EPA memorandum concerning the incorporation and use of numeric WQBELs in permits is not dispositive of this issue. As acknowledged in its March 17, 2011 letter, EPA is still considering whether to retain, reissue, or withdraw the 2010 memorandum. And, in the same letter, EPA acknowledges that the 2010 memorandum, "does not impose legally binding requirements on EPA, States, or the regulated community, nor does it confer legal rights or impose legal obligations on any member of the public."

With regard to the unique challenges associated with bacteria control, the science shows that consistent achievement of the Bacteria TMDL numeric standards is not possible, even with any level of expenditure. Therefore, imposing the 2010 Bacteria TMDL provisions as permit conditions would exceed the "maximum extent practicable" standard. Accordingly, we believe your Board is vested with the discretion to elect not to incorporate the Bacteria TMDL provisions at this time.

Your Board would be justified to open a process to revisit and re-examine the Bacteria TMDL assumptions in the context of its basin planning process, instead of taking the irrevocable step of incorporating the TMDL into the permit and potentially wasting valuable taxpayer dollars that could better be spent on achievable water quality improvement goals.

Receiving Water Limitations (RWL) Language

As you know, the copermittees have expressed significant concerns about third-party liability risks resulting from the Ninth Circuit's interpretation of receiving water limitation language in the L.A. Region's stormwater permit. While we appreciate the State Water Resources Control Board's willingness to take comment and review those concerns, it may take several months for the State Board to act. The Tentative Order retains language similar to the problematic language reviewed in the *NRDC* case; this leaves the County and other copermittees immediately exposed to similar litigation from third parties for violations of water quality standards. We know that several various proposals to modify RWL language have been presented at state and local levels.

We suggest a simple solution consistent with Congress' intent in enacting CWA § 402 as discussed above: simply remove the RWL language in Provision A of the Tentative Order. Federal law does not require imposition of the receiving water limitations for MS4 systems. There is precedent for this action; a number of EPA issued

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stormwater permits throughout the country do not include this language. Your Board has the discretion under CWA § 402 and *Browner* to remove the language. If EPA does not consider the RWL language to be essential to its own MS4 permitting, it seems logical that your Board is not required to include it in the new permit.

State Water Board policy supports the iterative process approach to water quality improvement, and acknowledges that water quality standards for many pollutants from MS4s cannot be met immediately. Therefore it is unrealistic and at odds with the iterative process to enact a standard that puts the third-party lawsuit gun to the head of public entities diligently spending significant time and public money pursuing water quality improvement. The permit would still include its enforceable prescriptive requirements and the WQIP features that all parties believe will focus resources in each watershed in the most productive fashion. Over the past two decades, the region has developed the knowledge and skill set to improve water quality, but understands that only through an iterative process can true progress be made.

Removal of the RWL language would eliminate the inevitable jousting over modified language proposals and the uncertainty created by its retention in light of the *NRDC* ruling. Copermittees would simply be obligated to focus on permit condition compliance, including the tasks identified in approved WQIPs, subject to RB enforcement if appropriate. Removal of the language would not create a “free pass”; to the contrary, it would encourage effective water quality monitoring and reporting that might otherwise be discouraged by the specter of third party lawsuits like those filed in the *NRDC* and other cases.

Land Development Standards/Hydromodification Issues

County Counsel concurs with the legal concerns sent to your attention in the December 19, 2012 letter from the Office of the City Attorney of the City of San Diego. The letter points out potential constitutional issues with hydromodification requirements imposed in the Tentative Order. We urge you to recommend modifying the referenced provisions to avoid the potential consequences for copermittees outlined in the letter.

The County also urges the Regional Board to amend the Tentative Order to incorporate the approved hydromodification management plan (HMP) for San Diego County into the permit, and remove provisions of the Tentative Order that are inconsistent with the HMP. As you know, the HMP was developed at significant cost to copermittees, and has only recently been implemented. Therefore, scrapping key components and changing the baseline standard for redevelopment to the questionable “pre-development” standard without further study of the effectiveness of the HMP as

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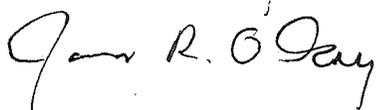
implemented is legally inconsistent with the premise upon which the HMP was required to be developed in the first instance. Our client is submitting a more comprehensive technical comment on the HMP issue for your review.

Other legal concerns with various Tentative Order provisions will be woven into the comprehensive written comments to be submitted by the County and copermittees. Because of the potential impact of the above provisions of the Tentative Order for our client, we urge you to review and revise your recommendations to the Regional Board. Our mutual goal should be a permit that realistically and responsibly advances the march toward improved water quality in the region using available existing resources. As always, thank you for your consideration.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By


James R. O'Day, Senior Deputy

JRO/tlm
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