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File No. 55394.00008

February 13, 2015

VIA EMAIL (SANTAANA@WATERBOARDS.CA.GOV)

Santa Ana Regional Water Quality Control Board
Attn: Adam Fischer
3737 Main Street, Suite 500,
Riverside, CA 92501

Re: Comments on the Second Draft Orange County Municipal Separate
Storm Sewer System Permit, NPDES Permit No. CAS618030

Dear Mr. Fischer:

The City of Santa Ana (“City”) appreciates the Regional Water Quality Control Board’s (“Santa Ana Water Board”) release of a second draft of the Orange County Municipal Separate Storm Sewer System (“MS4”) Permit, Order No. R8-2015-0001 (“Second Draft Order”) and the opportunity to provide comments on the Second Draft Order. The comments in this letter focus on the revisions made to the Second Draft Order since the first draft was released. The City submitted comments in response to the first draft, and by submitting this comment letter, does not waive the comments previously submitted. The City is also aware that the County of Orange has prepared and submitted comments on the Second Draft Order. The City expresses its support for and joins in the submission of the County’s comments. The comments in this letter supplement the County’s comments, as well as the City’s comments on the first draft, and are intended to allow the City to continue working toward the common goal of improving water quality in the region.

1. INCLUDE FURTHER CLARITY ON COMPLIANCE PLANS FOR RECEIVING WATER LIMITATIONS

The City appreciates the revisions in Section IV.D to more closely conform the Second Draft Order with State Water Resources Control Board Resolution WQ 99-05 (“Resolution 99-05”). Resolution 99-05 includes a requirement that “permittees . . . promptly notify and thereafter submit a report to the Regional Water Board . . .” after determining that a discharge causes or contributes to an exceedance of a water quality standard. (Resolution 99-05.) The Second Draft Order does not include the requirement that permittees “promptly notify” the Santa Ana Water Board of the intent to prepare a compliance plan prior to submitting a draft plan to the Executive Officer. (Second Draft Order, Section IV.D.) This omission removes notification



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from the iterative process inconsistent with Resolution WQ 99-05. Including a notification requirement establishes a clear initiation point for the iterative process and clarifies plan submission deadlines.

Recommendation: Include a notification requirement in Section IV.D, consistent with Resolution 99-05, and make corresponding modifications to the Technical Report, as follows:

A. Second Draft Order Section IV.D

Upon a determination by a Co-permittee or the Executive Officer that a discharge is causing or contributing to the exceedance of an applicable water quality standard, the responsible Co-permittee(s) must promptly notify and thereafter submit a draft plan to the Executive Officer describing actions that will be taken to achieve compliance. A plan to achieve compliance with TMDL waste load allocations-related water quality-based effluent limits related to the exceeded water quality standard, and prepared according to Section XVIII of this Order, also satisfies this Provision.

B. Draft Technical Report Section XII.C

. . . To implement this “iterative process”, Section IV of this Order requires the Co-permittees to notify the Executive Officer of their intent to develop a compliance plan, development of a plan revising the storm water management program and its components to include additional BMPs, an implementation schedule and additional monitoring to address the exceedances; and implementing the revised storm water management program.

C. Draft Technical Report Section XII.O. The Technical Report’s description of the method of complying with the WQBELs incorporated into Section XVIII of the Second Draft Order omits reference to the notification requirement. Revise the description of the method of compliance as follows:

“(2) notifying the Executive Officer of the intent to develop a plan and thereafter implementing an approved plan that is designed to comply with final WQBELs”

2. REVISE TMDL SECTION TO PROVIDE FURTHER CLARITY ON COMPLIANCE PATHWAY

Consistent with TMDL requirements, Co-permittees have developed and implemented, or are in the process of developing and implementing compliance plans for several TMDLs in the Newport Bay watershed. The Executive Officer has reviewed and approved some of the plans and the Co-permittees are implementing approved plans. Where a TMDL provides for the



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development and implementation of a compliance plan in fulfillment of the TMDL requirements, the Second Draft Permit should reflect such provision. Where Co-permittees are in the process of developing a TMDL and/or an implementation plan, such as the current selenium TMDL for Newport Bay, participation in the TMDL and/or plan development should constitute compliance with the TMDL, as incorporated into the Second Draft Permit.

Recommendation: Revise Section XVIII.A.3 to incorporate compliance pathways established in existing TMDLs and participation in the development of plans as compliance with the Second Draft Order, as follows:

A Co-permittee may comply with WQBELs through any lawful means. Implementing an approved implementation plan, BMPs consistent with an approved plan, or a WQBEL compliance plan, as defined herein, constitutes compliance with this Order. Where an implementation plan, WQBEL compliance plan, or Time Schedule Order (TSO) is being developed, including the development of a TMDL for selenium in the Newport Bay and a corresponding implementation plan, a Co-permittee's participation in the development of such TMDL, plan or order constitutes compliance with this Order.

3. ELIMINATE STATEMENTS ASSERTING THAT AN MS4 CAN BE A RECEIVING WATER

Finding 13, the definition of “municipal separate storm sewer system,” and Section V of the Technical Report continue to improperly consider some MS4s to be waters of the United States. An MS4 cannot be a water of the United States under the statutory and regulatory structure of the Clean Water Act, even if the MS4 exhibits characteristics of a water of the United States. (33 U.S.C. §§ 1362, subds. (12), (14); 40 C.F.R. § 122.26, subd. (b)(8).) The Clean Water Act’s definition and treatment of the terms “navigable waters” and “point sources” create separate and distinct categories that do not overlap. (See, *Rapanos v. United States* (2006) 547 U.S. 715, 735.) Navigable waters are waters of the United States. (33 U.S.C. 1362(7).) A “point source” is a discernible, confined and discrete conveyance from which pollutants are or may be discharged into navigable waters. (33 U.S.C. 1362(14).) Writing for a plurality of the Supreme Court in *Rapanos*, Justice Scalia supported the distinction between these terms, stating, “[t]he definitions thus conceive of “point sources” and “navigable waters” as separate and distinct categories. The definition of ‘discharge’ would make little sense if the two categories were significantly overlapping.” (*Rapanos, supra*, 547 U.S. at p. 735.) Attempting to diminish the distinction between MS4s and waters of the United States by “applying the definition [of waters of the United States] to . . . storm sewers . . . [and] man-made drainage ditches . . . stretch[es] the term ‘waters of the United States’ beyond parody.” (*Rapanos, supra*, 547 U.S. at p. 734.) MS4s and waters of the United States cannot discharge into themselves. (*Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.* (9th Cir. 2013) 133 S.Ct. 710, 713.)



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Recommendation: Revise Finding 13, the definition of “municipal separate storm sewer system,” and Section V of the Technical Report to remove dual classification of MS4s and waters of the United States, as follows:

A. Finding 13

Runoff Discharges to Receiving Waters. The MS4s discharge runoff into lakes, reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within the Santa Ana Region. ~~Development generally makes use of natural drainage patterns and features to convey runoff. Rivers, streams and creeks in developed areas used in this manner and under the ownership and control of the Permittees are part of MS4s regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the rivers, streams and creeks in the developed areas of the Permittees’ jurisdictions are both an MS4 and receiving water.~~ Discharges of runoff from MS4s must occur through outfalls (point sources) into waters of the U.S. Outfalls do not include open conveyances connecting two municipal separate storm sewers. Outfalls also do not include pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the U.S. and are used to convey waters of the U.S. (40 C.F.R. 122.26(b)(9)).

B. Glossary

Municipal Separate Storm Sewer System (“MS4”) – A conveyance or system of conveyances designed to collect and/or transport urban runoff (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, ~~natural drainage features or channels, modified natural channels,~~ man-made channels, or storm drains): (i) Owned or operated by a State, city town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes; (ii) Designated or used for collecting or conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW)

C. Technical Report, Section V

In summary, MS4s are defined in 40CFR122.26(b)(8) as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)...designed or used for collecting or conveying storm water”. ~~Due to the broad inclusion of the definition, portions of MS4s in the permit area will include open channels that are~~



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~~waters of the U.S. In these cases, the channels are considered receiving waters whose beneficial uses must be protected.~~

Clean Water Act Section 502 defines a “discharge of a pollutant” and the term “discharge of pollutants” as “any addition of any pollutant to navigable waters from any point source” and “any addition of any pollutant to waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft”. The term “discharge”, as used in this Order, means the discharge of a pollutant. Discharges regulated by this Order occur through “outfalls” which are a point source at the point where a MS4 discharges to waters of the U.S. An outfall does not include open conveyances connecting two municipal separate storm sewers. An outfall does not include pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the U.S. and are used to convey waters of the U.S. (40 C.F.R. 122.26(b)(9).)

4. RETAIN “BACKGROUND” AND “NATURAL” IN FINDING 2 AND SECTION IV.D.3

The Second Draft Order’s modifications to Finding 2 replaced the phrase “background or naturally occurring pollutants or flows” with “non-anthropogenic pollutants or flows[.]” The terms “background” and “natural” loadings are technical terms and should not be replaced in their entirety by the term “non-anthropogenic.” (40 C.F.R. § 130.2, subds. (e), (g), (i).)

Recommendation: Include the terms “background” and “naturally occurring” in Finding 2 and Section IV.D.3.h, as follows:

A. Finding 2

Regulated Sources and Activities. This Order regulates the discharge of pollutants from anthropogenic sources in urban runoff from MS4s or activities within the jurisdiction and control of the Co-permittees. Except as noted in Finding 8 below, this Order authorizes discharges of urban runoff from MS4s subject to the conditions and provisions herein. This Order is not intended to obligate the Co-permittees to address background, naturally-occurring, or non-anthropogenic pollutants or flows in receiving waters.

B. Section IV.D.3.h

provide evidence, acceptable to the Executive Officer, that the source of pollution is background, naturally-occurring, or non-anthropogenic, or that the cause of pollution is not within the jurisdiction or control of the Co-permittees.



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5. RESTORE RECOGNITION OF LIMITATION ON MUNICIPAL AUTHORITY

Co-permittees' ability to enter private property and conduct inspections of stormwater facilities is limited by the United States Constitution, California's Constitution, and state and federal law. The Second Draft Order eliminates four references to this limitation, and requires Co-permittees to maintain legal authority that is adequate to enter, inspect, and gather evidence from industrial, construction, and commercial establishments. (Second Draft Order, Sections VI.C [general legal authority requirement]; VIII.B [construction inspection]; IX.B [industrial inspection]; X.B [commercial inspection].) Intentionally deleting reference to these limitations may imply that Co-permittees must have authority to enter private property in all circumstances. (See *Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n* (1983) 461 U.S. 190, 220 [deletion of language in the drafting history may demonstrate consideration and rejection of the deleted proposition].) Restoring the original language eliminates this potential confusion.

Recommendation: Restore the original language in Sections VI.C, VIII.B, IX.B, and X.B, recognizing the constitutional and statutory limitations on municipal authority, as follows:

A. Section VI.C

Each Co-permittee must secure and maintain legal authority, to the extent allowed by State and Federal Law, and subject to limitations on municipal action under the constitutions of the state of California and the United States, that is adequate to enter, inspect, and gather evidence (including pictures, video, samples, statements, and documents) from industrial, construction, and commercial establishments to determine compliance with ordinances, permits, conditions, and other requirements of the Co-permittees related to the control of discharges of pollutants to their MS4s.

B. Section VIII.B

Each Co-permittee must inspect construction sites in their inventory, subject to limitations on municipal action under the constitutions of the State of California and the United States. Each Co-permittee must have written policies and procedures that describe how inspections and related enforcement actions are carried out. Inspections and related enforcement actions must be carried out in a manner that enforces compliance with applicable ordinance(s), plans, permits, or other requirements related to the control of discharges of pollutants to their MS4s.

C. Section IX.B



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Each Co-permittee must inspect industrial sites in their inventory, subject to limitations on municipal action under the constitutions of the State of California and the United States. Each Co-permittee must have written policies and procedures that describe how inspections and related enforcement actions are carried out. Inspections and related enforcement actions must be carried out in a manner that consistently enforces compliance with applicable ordinance(s), plans, permits, or other requirements related to the control of discharges of pollutants to their MS4s.

D. Section X.B

Each Co-permittee must inspect commercial sites in their inventory, subject to limitations on municipal action under the constitutions of the State of California and the United States. Inspections must occur according to written processes and procedures, and in a manner to enforce compliance with ordinance(s), plans, permits, WQMPs, or other requirements related to the control of discharges of pollutants to their MS4s.

CONCLUSION

Thank you for the opportunity to comment on the Second Draft Permit and for your willingness to accommodate the City's request for regulation by a single regional water board. The City is committed to improving water quality in the region and provides these comments with the intent to participate in developing a permit that accomplishes this goal.

Sincerely,

J. G. Andre Monette
of BEST BEST & KRIEGER LLP

cc Tyrone Chesanek