



December 8, 2009

*Via electronic mail*

Executive Officer David Gibson and Members of the Board  
California Regional Water Quality Control Board, San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123

**Re: Comments on Revised Tentative Order R9-2009-0002.**

Dear Mr. Gibson and Members of the Board:

We write with regard to changes made to the draft Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District within the San Diego Region, Tentative Order No. R9-2009-0002, NPDES No. CAS0108740 (“Tentative Order” or “Permit”) as part of the Additional Draft Updates & Errata released by the Regional Board on December 16, 2009 (“Errata”). While we support the Regional Board’s attempt to provide increased focus on, and increased monitoring of, dry weather, non-storm water discharges, we are concerned that the provisions for use of “numeric action limits” (“NALs”) as drafted in the Errata, do not fully support the Clean Water Act’s absolute prohibition against the discharge of non-storm water to the MS4 system. Based on our comments below, we suggest that the Regional revise the draft provisions to this end.

The federal Clean Water Act mandates that MS4 permits “include a requirement to effectively prohibit non-stormwater discharges into the storm sewers.” 33 U.S.C. § 1342(p)(3)(B)(ii); see 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). The Permit incorporates this requirement: “Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate National Pollutant Discharge Elimination System (NPDES) permit; or not prohibited in accordance with sections B.2 and B.3.” Permit at ¶ B.1.

To identify sources of non-storm water pollution or potential violations of Permit provisions, the Permit establishes quantifiable discharge goals for specific pollutants in the form of NALs. The Errata explains: “This Order includes action levels for pollutants in non-storm water, dry weather, discharges from the MS4 designed to ensure that the requirement to effectively prohibit all types of unauthorized discharges of non-storm water in the MS4 is being complied with.” Errata, at 1 (referencing Finding E.12). The revised language then sets forth a series of required actions that must be undertaken by a Copermittee in the event that monitoring detects an exceedance of a NAL. See Errata, at 3-4 (referencing Permit at ¶ C.2).

We presume, based on the above revised language, that the provisions are intended to support the goal of compliance with the Clean Water Act’s prohibition. In this regard, we fully support the Regional Board’s requirement of additional monitoring for pollutants in non-storm water discharges and the inclusion of required actions by Copermittees to investigate and eliminate any non-storm water discharges or non-storm water sources of pollution. However, the revised language, which does not require action to be taken for detections of pollutants in non-storm water discharges occurring below a specified NAL, confusingly suggests that the Permit allows for non-storm water discharges to occur or to contribute pollutants to the MS4 system so long as the pollution occurs at levels below the NALs. This would violate both the Clean Water Act’s absolute prohibition against non-storm water discharges to the MS4 under 33 U.S.C. § 1342(p)(3)(B)(ii), and the Act’s implementing regulations, which require that “where such discharges are identified by the municipality as sources of pollutants to waters of the United States,” in any amount, they must be addressed by the Copermittee. 40 C.F.R. § 122.26(d)(2)(iv)(B)(1).<sup>1</sup> The draft language does state that “neither compliance with NALs nor compliance with required actions following observed exceedances, excuses any non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s or any non-compliance with the prohibitions in Sections A and B of this Order.” Errata at 4 (referencing Permit at ¶ C.3). But the failure of the Permit to require action by the Copermittees for pollution observed at levels below the specified NALs has the potential to confuse Copermittees or other parties as to the obligations fixed by the Clean Water Act, which requires action to prohibit all discharges, regardless of the discharge’s pollutant load.

A clear example of the issues posed by the proposed language would be that, under the Clean Water Act, no amount of motor oil may be poured into the MS4 system, regardless of whether it causes pollution in an amount above or below the Permit’s NALs. Yet under the provisions for use of NALs, a Copermittee would not be required to investigate the source of resulting pollution if it occurred at levels less than those set by the Permit. Likewise, discharges from categories of non-storm water identified by the Permit

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<sup>1</sup> Critically in this regard, any amount of pollution from an exempt source is prohibited, regardless of whether it occurs at levels below the NALs. As a result, further action should be required of the Copermittees even for pollution occurring at levels below the NALs

as exempt such as foundation drains or residential car washing, which must be prohibited if they are identified as a source of pollution in any quantity, would not need to be investigated so long as the pollution did not exceed the NALs. Further, the proposed language states that “[a]n exceedance of a [numeric action level] does not alone constitute a violation of the provisions of this Order,” Errata, at 4 (referencing Permit at ¶ C.3), and that a Copermittee must only investigate the source of a dry weather exceedance in a “timely” manner, failing to establish any specific requirement for prompt compliance. Both of these clauses serve to obscure what is required by the Clean Water Act to be an absolute prohibition against non-storm water discharges, for which any allowance is a violation. Instead, these clauses allow for the Copermittee to determine on what pace such illicit discharge will be investigated and eliminated.

Despite longstanding requirements that Copermittees effectively prohibit the discharge of non-storm water,<sup>2</sup> pollution from non-storm water discharges persists as a significant problem for Orange County waters. To the extent that the Permit, and revised language in the Errata, seeks to implement provisions requiring increased monitoring and investigation of non-storm water discharges to the MS4, we support the Regional Board’s efforts in this regard; there is a clear need for further measures under the MS4 permit to reduce pollution sourced from dry weather, non-storm water sources. However, it must be made unconditionally clear that the provisions of the Permit do not authorize, in any fashion, the discharge of any amount of non-storm water to the MS4, or in the case of categories identified as exempt by the Permit, the discharge of any pollutant whatever. The August 12, 2009 draft of the Permit, though not adequately, at least minimally attempted to address this issue, stating “[c]ompliance with [numeric effluent limitations] provides an assessment of the effectiveness of the prohibition of non-storm water discharges and of the appropriateness of exempted non-storm water discharges.” Permit, at C.1. The revised Permit language should be further revised in order to more clearly state that regardless of any compliance or investigative action taken by the Copermittees, the purpose of the NALs is solely for monitoring intended to assess compliance with the Clean Water Act’s prohibition against non-storm water discharges and as a means of effectively prioritizing investigation of potential sources of non-storm water discharge, or of pollutants in non-storm water sources identified as exempt by the Permit. The provisions providing for monitoring and use of NALs must support the Clean Water Act’s requirements, not serve to confuse them.

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<sup>2</sup> Response to Comments V: Section X.5 of the Fact Sheet / Technical Report for Tentative Order No. R9-2009-0002 at 1, 20 (Nov. 18, 2009) (“This prohibition of non-storm water discharges has been in every MS4 permit to date”); Order No. R9-2002-0001, Permit No. CAS 0108740, at B.1 (“Each Copermittee shall effectively prohibit all types of non-storm water discharge into its Municipal Separate Storm Sewer System (MS4) unless such discharges are either authorized by a separate NPDES permit; or not prohibited in accordance with [exceptions]”).)

San Diego Regional Water Quality Control Board  
December 8, 2009  
Page 4

We thank the Regional Board for considering our comments. Please feel free to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Beckman". The signature is fluid and cursive, with the first name being the most prominent.

David S. Beckman  
Noah Garrison  
Natural Resources Defense Council