



September 13, 2012

San Diego Regional Water Quality Control Board  
9174 Sky Park Court,  
Suite 100,  
San Diego, CA 92123-4340  
Attn: Laurie Walsh, submitted via e-mail at [lwalsh@waterboards.ca.gov](mailto:lwalsh@waterboards.ca.gov)

Subject: Comment letter - Regional Municipal Separate Storm Sewer System  
(MS4) Storm Water NPDES Permit, Tentative Order No. R9-2012-0011

Dear Ms. Walsh and Regional Permit Team:

The City of Dana Point very much appreciated the opportunity to participate in the stakeholder focus meetings to help draft an effective, implementable, and practical MS4 Permit for our region (Regional Permit). The City enjoyed its participation in these meetings, meeting the San Diego Regional Water Quality Control Board (SDRWQCB) team and hearing your ideas and intent for the next iteration of the MS4 Permit while discussing some of the broad concepts and issues.

The City agrees that the Water Quality Improvement Plan (WQIP) and adaptive management approach are an improvement over the current permit and will help Copermittees to progress in their continuing efforts to manage runoff and improve water quality. The focus meeting process and transparency also infused some vigor and enthusiasm into the regulatory atmosphere. We look forward to the continued dialogue and closer working relationship with your staff so that we can work cooperatively to achieve our common goals in an efficient and effective manner.

The City worked with our Principal Permittee, the County of Orange, to develop the redline/strike out version and general comments that will be submitted on behalf of the Orange County Copermittees by the County of Orange, and support the suggestions contained therein.

It is understood that the intent of the comments submitted at this juncture are to address broad topics based on the SDRWQCB's guidance that we received during the focus workshops. Notwithstanding the recognition of the benefits and the progress

that has been made of this collaborative approach to draft the Regional Permit, there is concern that the Fact Sheet has not been made available during this process. In addition, the Report of Waste Discharge (ROWD), which represents the opportunity of the Copermittees to consider and apply experiential knowledge, appears largely irrelevant

by the regional permit approach to date. Therefore, it is not the intent of this submittal to provide lengthy legal and extremely detailed technical comments and the City reserves its right to comment independently or cooperatively on any specific issue(s) when the revised final complete Draft Tentative Order is released for public comment in the future.

In addition to the suggestions provided by the County of Orange, the City of Dana Point would like to emphasize the following:

1. Please strongly consider the receiving water language (as provided in the County redline / strikeout version) that supports meaningful programs, supports the historical interpretation of State Board Policy and supports an adaptive management strategy. The recent Ninth Circuit NRDC/L.A. decision has put the Copermittees into a difficult situation.

We believe that if the Copermittees are better able to adaptively manage their programs to focus their resources on those Best Management Practice (BMP) strategies and monitoring efforts that are identified in the approved Water Quality Improvement Plan (WQIP) as being most effective to address the watersheds priorities, overall progress to improving water quality will be improved.

Local government certainly recognizes the importance of attaining water quality standards. At the same time, however, it was recognized by your staff in Finding 19, that immediately realizing this goal at the moment of permit adoption is not possible at all times. Indeed, this reality is reflected by the many TMDLs across the State that specifically recognize that current water quality standards cannot be immediately attained and can only be addressed by regulation that supports implementation of an adaptive program over a period of time.

We also hope that the adaptive management approach will allow for flexibility to re-focus resources for special studies and/or technology improvements where it makes sense. We have a phenomenal resource base of scientists in our local regional that we can tap into; however we need the flexibility to re-allocate or refocus resources to get some of this work done. We have been successful at removing some of our beaches from bacteria 303(d) listing and a clear imperative to address our efforts in the San Juan Creek watershed at the beach with the greatest population use, Doheny State Park Beach.

The City of Dana Point recognizes the need to continue to make significant progress toward attainment of water quality standards. However, we also believe that no regulatory benefit accrues from the Regional Board establishing permit provisions that result in the potential of immediate non-compliance for

Copermittees. For these reasons, the City of Dana Point requests Receiving Water Limitations language, as supported by the California Stormwater Quality Association (CASQA), and as provided in the redline/ strikeout version provided by the County of Orange be incorporated in the permit. We strongly support this language because it will enable regulated entities to focus and prioritize their resources on critical water quality issues and achieve environmental outcomes that are meaningful to the communities we serve. Importantly, it will also help ensure that good faith compliance is not the subject of significant legal liability and lawsuits.

2. Additionally, and as an alternate, the City of Dana Point strongly supports the revisions shown via track changes in **Attachment A** to this letter, for Section A of the Draft Permit regarding adaptive management.
3. Regarding monitoring, please consider a less prescriptive, flexible, question-driven monitoring and assessment program that can be adapted to provide meaningful answers to our programs. We feel that the monitoring should focus on the watershed and constituents of concern. Our previous dry weather monitoring program was effective and functional and provided a diagnostic tool to support the ID/IC program requirements.

Although perhaps ideal in an ideal world, it is not practical to take samples every quarter mile. Even a one time effort would be prohibitively expensive and lead to a plethora of unanswerable queries. We have an existing and effective process to investigate exceedances and are learning more each year as technology is advanced. The City has installed numerous Best Management Practices (BMPs), such as diversions and treatment systems, to address runoff pollution at nearly every outlet to the ocean in priority areas in order to make improvements in the short term, while we continue to address long term goals and solutions.

4. Please also strongly consider the need for reasonable, feasible and meaningful hydromodification and development requirements, based on science, practice and experience. We ask for the flexibility to be able to allow for biofiltration and regional, offsite mitigation options that will work effectively in the real world. There was consensus at the workshops that a much larger benefit may be achieved with regional programming in certain circumstances. We hope that the Hydromodification Workshop that was held on August 30 in San Diego provided some additional insight as to the challenges and unknowns that exist at this time. We hope to be able to work together to craft effective requirements, based on what is known so as to avoid going in the wrong direction, requiring large investments without correlated benefits.

We respectfully ask that the Board staff understand that we believe the implementation of this permit does in fact include some unfunded mandates. To state in the Findings that "the local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this order" is misleading given the provisions of California Proposition 218. The voters have the authority. Please acknowledge this by referring to Proposition 218.

Thank you for your time, effort and investment in this stakeholder process to develop the next iteration of the MS4 Permit in our Region. If you have any questions regarding the above, please do not hesitate to contact Lisa Zawaski at 949-248-3584.

Respectfully,

A handwritten signature in black ink, appearing to read "Brad Fowler". The signature is written in a cursive style with a long, sweeping underline that extends across the width of the signature.

Brad Fowler, P.E.  
Director of Public Works & Engineering Services  
City of Dana Point

cc: C. Crompton, R. Boon, County of Orange  
Lisa Zawaski, City of Dana Point  
Orange County Copermittees

**Attachment A:** Suggested Changes to Section A

**ATTACHMENT A**

**SUGGESTED CHANGES TO SECTION A**

## II. PROVISIONS

**THEREFORE, IT IS HEREBY ORDERED** that the Copermittees, in order to meet the provisions contained in division 7 of the CWC and regulations adopted thereunder, and the provisions of the CWA and regulations adopted thereunder, must each comply with the following:

### A. PROHIBITIONS AND LIMITATIONS

The purpose of this provision is to describe the conditions under which ~~storm water and~~ non-storm water discharges into ~~and from the~~ MS4s are to be effectively prohibited or limited, and to describe how pollutants in discharges from the MS4, whether from storm-water or non-storm water, are to be reduced to the maximum extent practicable (MEP). The goal of this provision is to address the impacts of MS4 discharges so that such discharges do not impair water quality and designated beneficial uses of waters of the state. This goal will be accomplished through implementation of control measures that effectively prohibit non-storm water discharges into the Copermittees' MS4s, and reduce pollutants in ~~storm water~~all discharges from the Copermittees' MS4s to the MEP. The process for ~~determination of~~determining compliance with the Discharge Prohibitions (A.1), Receiving Water Limitations (A.2), and Effluent Limitations (A.33, including effluent limitations derived from the TMDL requirements - Attachment E) is defined in Provision A.4.

#### 1. Discharge Prohibitions

- a. Except as ~~provided for in Provisions A.1.e or A.4,~~otherwise permitted herein, discharges from MS4s in a manner causing, ~~or threatening to cause,~~ a condition of pollution, contamination, or nuisance in waters of the state are prohibited.
- b. Non-storm water discharges into MS4s are effectively prohibited, unless such discharges are either authorized by a separate NPDES permit, or the discharge is a category of non-storm water discharges or flows that must be addressed pursuant to Provisions E.2.a.(1)-(5) of this Order.
- c. Discharges from MS4s are subject to all ~~waste discharge prohibitions in the Basin Plan, included in Attachment A to this Order,~~applicable waste discharge prohibitions in the Basin Plan.
- d. Storm water discharges from the City of San Diego's MS4 to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's MS4 to the Heisler Park ASBS are authorized under this Order subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012 applicable to these discharges, included in Attachment A to this Order. All other discharges from MS4s to ASBS are prohibited, unless authorized by a ~~subsequent Order~~separate order.
- e. ~~For discharges associated with water body pollutant combinations addressed in a TMDL~~

~~in Attachment E of this Order, the affected Copermitees shall achieve compliance as outlined in Attachment E (Total Maximum Daily Load Provisions).~~

## 2. Receiving Water Limitations

- a. Discharges from MS4s must not ~~have a reasonable potential to~~ cause or contribute to the violation of water quality standards in any receiving waters, including but not limited to all applicable provisions contained in the list below ~~including any modifications, unless the Regional Board determines, to the extent they remain in effect and are operative, unless~~ such discharges are being addressed by the Copermitee(s) through the ~~process~~processes set forth in this Order (including Provision A.4 below and Attachment E – the TMDL Provisions):

- (1) The San Diego Water Board’s Basin Plan, including beneficial uses, water quality objectives, and implementation plans;
- (2) State Water Board plans for water quality control including the following:
  - (a) Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays and Estuaries (Thermal Plan), and
  - (b) The Ocean Plan, including beneficial uses, water quality objectives, and implementation plans;
- (3) State Water Board policies for water and sediment quality control including the following:
  - (a) Water Quality Control Policy for the Enclosed Bays and Estuaries of California,
  - (b) Sediment Quality Control Plan which includes the following narrative objectives for bays and estuaries:
    - (i) Pollutants in sediments shall not be present in quantities that, alone or in combination, are toxic to benthic communities, and
    - (ii) Pollutants shall not be present in sediments at levels that will bioaccumulate in aquatic life to levels that are harmful to human health,
  - (c) The Statement of Policy with Respect to Maintaining High Quality of Waters in California (State Water Board Resolution No. 68-16).
- (4) Priority pollutant criteria promulgated by the USEPA through the following:
  - (a) National Toxics Rule (NTR)<sup>1</sup> (promulgated on December 22, 1992 and amended on May

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<sup>1</sup> 40 CFR 131.36

4, 1995), and

(b) California Toxics Rule (CTR)<sup>2,3</sup>

~~b. For Receiving Water Limitations associated with a waterbody pollutant combination addressed in a TMDL in Attachment E of this Order, the Copermittees shall achieve compliance as outlined in Attachment E (Total Maximum Daily Load Provisions).~~

### 3. Effluent Limitations

a. Technology and Water Quality Based Effluent Limitations (including Effluent Limitations based on TMDLs).

Each Copermittee shall reduce pollutants in ~~stormwater~~ discharges from the MS4 to the maximum extent practicable (MEP<sup>4</sup>).

~~b. Water Quality Based Effluent Limitations (WQBELs) This Order establishes WQBELs consistent with the assumptions and requirements of all available TMDL waste load allocations assigned to discharges from the respective MS4s. Each Copermittee shall comply with applicable WQBELs as established for the TMDLs in Attachment E to this Order, pursuant to the applicable TMDL compliance schedules. It is understood that compliance with this requirement will be achieved through the use of MEP-compliant best management practices (BMPs) or other controls that are consistent with the MEP standard.~~

### 4. Compliance with Discharge Prohibitions, Receiving Water Limitations, and Effluent Limitations

a. Each Copermittee must comply with the discharge prohibitions (A.1), receiving water limitations (A.2), and effluent limitations (A.3, including effluent limitations developed based on TMDLs) of this Order through timely implementation of strategies, control measures and other actions as specified in Provisions B and E, and Attachment E (TMDLs) of this Order, ~~including any modifications~~. The Water Quality Improvement Plans described in Provision B shall be designed to achieve compliance to the MEP standard with the discharge prohibitions, receiving water limitations, and all effluent limitations. If the Regional Board Executive Officer approves the Water Quality Improvement Plans Plan and subsequent updates as described in Provision B and F.1, and the ~~Regional Board Executive Officer determines they are~~ the plan is being implemented in a timely and good faith manner ~~that provides reasonable assurance of attaining the prohibitions and limitations~~

<sup>2</sup> 65 Federal Register 31682-31719 (May 18, 2000), adding Section 131.38 to 40 CFR

<sup>3</sup> If a water quality objective and a CTR criterion are in effect for the same priority pollutant, the more stringent of the two applies, unless a previous regulatory action (i.e., TMDL) has specified otherwise.

<sup>4</sup> This requirement does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants in ~~stormwater~~ discharges to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer). Runoff treatment must occur prior to the discharge of runoff into receiving waters per Finding ~~8~~ Error! Reference source not found.



~~described above through acceptance of the annual reports required by Provision F.3.b, such determination constitutes, such implementation of the plan shall constitute~~ compliance with Provisions A.1, A.2, and A.3.

- ~~1. Except as provided in Parts A.4.3, A.4.4, and A.4.5 below, discharges from the MS4 for which a Permittee is responsible shall not have reasonable potential to cause or contribute to an exceedance of any applicable water quality standard.~~
- ~~2. Except as provided in Parts A.4.3, A.4.4, and A.4.5, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.~~

~~3.~~ b. In instances where discharges from the MS4 for which the permittee is responsible ~~(1)~~ causes or contributes to an exceedance of any applicable water quality standard or effluent limitation, or causes a condition of nuisance in the receiving water; ~~(2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) and~~ the constituent pollutant(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order (such as specific scheduled actions in a Water Quality Improvement Plan), the Permittee shall comply with the following iterative procedure:

~~a. 1.~~ 1. Submit a report to the ~~State or Regional Water Board (as applicable)~~ Executive Officer that:

- i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of the applicable water quality ~~objectives~~ objective, discharge prohibition or effluent limitation including the magnitude and frequency of the exceedances.
- ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4 such that non-MS4s sources can be pursued).
- iii. Describes the strategy and schedule for implementing ~~best management practices (BMPs)~~ MEP-compliant BMPs and other MEP-compliant controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of any applicable water quality standard, discharge prohibition or effluent limitation, or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted ~~in A.4.3. ii~~ above.

- iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.
- v. Includes a methodology(ies) that will assess the effectiveness of the BMPs to address the exceedances.
- vi. This report may be submitted in conjunction with the Annual Report unless the ~~State or Regional Water Board~~Executive Officer directs an earlier submittal.

~~b.2.~~ Submit any modifications to the report that are required by the State of Regional Water Board Executive Officer and that are consistent with the MEP standard within 60 days of notification from the Executive Officer. The report is deemed approved within 60 days of its submission if no response is received from the ~~State or Regional Water Board~~Executive Officer.

~~e.3.~~ Implement the actions specified in the report in accordance with the acceptance or approval of the Executive Officer, including the implementation schedule ~~and any modifications to this Order~~.

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~~d. As long as the Permittee has complied~~c. Compliance with the procedure set forth above for the subject pollutant or pollutants shall constitute compliance with the applicable discharge prohibition, receiving water limitation or effluent limitation (including the applicable TMDL) in issue, and ~~is implementing the actions,~~ the Permittee does not have to repeat the same procedure for continuing or recurring exceedances ~~of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.~~

~~4. For Receiving Water Limitations associated with waterbody pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Attachment E (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by an applicable pollutant specific provision of this Order, the Permittees shall achieve compliance as outlined in Part A.4.3 of this Order.~~

~~5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of any applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts A.4.1 and A.4.2 above, unless it fails to implement the requirements provided in Parts A.4.3 and A.4.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.~~

2.

The information developed pursuant to A.4.34.b must be incorporated into the Water Quality Improvement Plans and/or the jurisdictional runoff management programs, as needed.