Date: January 11, 2013

TRANSMITTED VIA E-MAIL

To: Ms. Laurie Walsh
WRC Engineer
San Diego Regional Water Quality Control Board (SDRWQCB)
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

From: Roger E. Bütow Executive Director Clean Water Now

Re: Revised Administrative Draft San Diego Regional Municipal Separate Storm Sewer System (MS4) Permit: Tentative Order No. R9-2013-0001

Ms. Walsh

Clean Water Now (hereafter referred to as CWN) **was** prepared to submit extensive comments and provide proposed revisions in regards to the NPDES (MS4) Permit noted above by the determined deadline of today, January 11, 2013.

Instead, CWN supports the San Diego Building Industry of America (SDBIA) Coalition in their respectful request that the SDRWQCB remand the Tentative Order back to staff so that it may be revised in conformity and in resonance with the United States Supreme Court's 9-0 opinion handed down this past Tuesday, January 8, 2013. This Coalition generously shared their most recent draft dated January 10, 2013 and we also find ourselves in agreement with many of their other concerns and suggested revisions.

In light of numerous recent and related court decisions, we are going to place any further comments in abeyance pending more clarity. CWN feels that it would be precipitous, even futile to go any further in the ratification process for this particular regional permit. We definitely oppose placing it on the SDRWQCB agenda until such a time as the apparent disparities and discrepancies are reviewed then determined by legal counsel to be minor, major, real or false.

CWN has been in constant contact with the San Diego BIA personnel and with several other South Orange County MS4 Copermittees for the past 3 days regarding these decisions and their potential dissonance and some disarray for our regional regulatory oversight mechanisms.

Many of the **Findings** and other sections of the Tentative Order now appear to be in potential contradiction or conflict, inconsistent and/or incongruent. The only thing that CWN is certain of is the auspice, the aura and appearance of general uncertainty. Even if only seen as an emotional disequilibrium, the onus and burden should be placed squarely upon the SDRWQCB staff to cure, to at minimum remedy this by remanding it pending greater specificity and subsequent clarification. We do not feel that remanding is a form of over-reaction or exaggeration.

The amount of confusion over the short, mid and long-term ramifications alone is daunting, but it is rampantly clear that a great portion of the Tentative Order may be subject to subsequent revisions by the SDRWQCB, even aspects of appropriative and riparian water rights entitlements that need other State agencies input. As presently written, it appears fragile, vulnerable, and will be exposed to extensive legal challenges if sustained as drafted.

The **Total Maximum Daily Load** (TMDL) provisions are another critically important element of the Tentative Order that we perceive to be problematic in light of the recent legal renderings.

SDRWQCB staff repeatedly embraced and implemented **"Adaptive Management"** (AM) at the stakeholder focused group meetings that took place in 2012. Staff encouraged stakeholders to follow their lead and guidance, to integrate this well-known, successful business and corporate methodology. Integral in the AM process are **"Conflict Resolution"** prescriptions.

It should be noted that this emerging conflict is in part self-inflicted by the SDRWQCB staff as it disallowed protracted yet potentially fruitful discussions about the present conundrum. A basic assertion by the facilitator noted the inherently egalitarian nature of AM, plus respect for ALL opinions and concerns yet dialogue on this subject was arguably suppressed and stifled.

To the best of our recollection during the entire focused group process and SDRWQCB rollout, at each venue, at least one significant stakeholder requested staff to clarify the State's legal position and projections, its legal counsel's perceptions regarding subsequent ramifications if the US Supreme Court over-ruled the NRDC and Santa Monica Baykeepers.

"Adaptive management (AM) is a structured, iterative process of robust decision making in the face of uncertainty, with an aim to reducing uncertainty over time via system monitoring. In this way, decision making simultaneously meets one or more resource management objectives and, either passively or actively, accrues information needed to improve future management."

In our humble opinion, this **"What if"** scenario should have been discussed to a greater length and depth per AM than allowed by staff and the facilitator who basically discouraged it. Staff appeared to lean towards irrelevance at some of these venues and at others towards confidence that ultimately the 9th Circuit Court of Appeals determination would be sustained.

Another example of the **"What if"** speculation and significant doubt is embedded in the SDBIA pleadings regarding down-slope (declivity) relief and the nexus with certain water rights disputes. CWN would go further and introduce another random and chaotic by-product of the MS4 proposal, the Law of Unintended Consequences:

Stormwater capture and who may claim accompanying increases in groundwater production rights associated with causing increased percolation is currently a major topic in the Chino Groundwater Basin (Region 8, SARWQCB). This topic includes the question of whether increased groundwater production rights should be accorded where the capture is compelled by regulatory requirements such as MS4 permits.

Personally, I have some arguable expertise in this **"one-size-fits-all"** shortcoming in the MS4 proposal. I have been a general contractor and builder of both commercial and custom residential homes for some 40+ years in South Orange County. Onsite detention/retention of stormwater could create and/or exacerbate the very conditions that caused both of the slides, the significant and monolithic slope failures that occurred in Bluebird Canyon here in Laguna.

We are a predominantly clay-expansive soil region, subject to flocculation and de-flocculation determined by events out of our control. Droughts cycles followed by El Niños followed by yet more drought cycles create subterranean pocket, voids that make us prone to such catastrophic failures. We now require greater compaction and subterranean stabilization (caissons, etc.) during construction, but that translates into more difficulties regarding full compliance with this MS4. Here in Laguna Beach, we cannot serve the two masters, and the MS4 demands uniformity and coherence among ALL of the copermittees jurisdictions where it cannot be reasonably accomplished. Practicality seems missing.

We strongly believe in the engineering project maxim expressed via an acronym metric: **SMART: "S**pecific**, Me**asurable**, A**chievable **R**ealistic and **T**imely. Compliance in Laguna Beach is neither achievable nor realistic, and perhaps impossible to implement, putting us in chronic violation hence prone to fines by the SDRWQCB. And to impose, to initiate and assertively pursue the retrofitting elements of the Tentative Order's demands would make my city vulnerable to massive, mind-boggling private litigation. Ironically, it would also not **be** smart.

IF the US Supreme Court and other related decisions have no significance or bearing on this Tentative Order, need not result in remanding, then the SDRWQCB staff should mass broadcast, that is widely transmit that legally justifiable position to its stakeholder master list. Memorialize, that is codify it in some discernible and defensible manner. CWN had hoped that the AM process would streamline, would in essence triage and winnow to fast-track approval without rancor or post-ratification litigious challenges.

At the focused meetings we were only given non-binding verbal responses and assurances about the LA County case by staff without benefit or the immediate feedback via SDRWQCB legal counsel presence. The SDRWQCB should then publicize that legally tenable/defensible brief via mass media and post prominently their reasoning at the SDRWQCB website.

IF it is of **any** significance that might require revisiting or reopening, then reconvene the stakeholder focused group, appropriately confirm and acknowledge the US Supreme Court decision as a **"game-changer."** If it is, that should trigger a subsequent draft process with revisions and/or editing: Then, and only then, should staff proceed accordingly.

It is far better to delay, to get the Tentative Order aligned, to deal with potential irregularities leading to endless post-adoption legal challenges preemptively and hopefully summarily (immediately) than to let it move forward as is. In this case, **"One size fits none."**

We would also add our voice, our support, to the SDBIA proposal that such a regional permit ignores the impossibility of such a water quality management document to what I consistently pointed out at focused meetings as the equivalent to Einstein's Unified Field Theory research. He never succeeded in creating one equation or series of theoretical equations that explained everything in the Universe.

It would be better to create MS4s by apparent identifiably unique topographical/geo-morphological characteristics or watershed-by-watershed bases. It was intended to cut down on staff's invaluable entanglement time, yet we feel it will only increase demands and burdens on budgets, including the copermittees. The **"case-by-case basis"** concept **sounds** reasonable, but this could readily de-evolve into innumerable side-bar intrigues and endless negotiations.

This MS4 tries, attempts, to accomplish the noble goals of both the Clean Water Act and Porter-Cologne Water Quality Control Act in a singularity. CWN does not believe that is possible. Laguna Beach isn't an anomaly, we believe that other steep terrain copermittees will find themselves in similar conundrums and community disputes, some having gross sum $$$ litigious expenditure impacts unaddressed in the permit.

The very morass, the uncertainty that AM was supposed to attenuate, reduce or obviate has occurred. We, as stakeholders, bought into AM as our primary negotiation tool during meetings. In lieu of more time to professionally analyze the ramifications of the US Supreme Court decision, we feel that it is impossible at this time to properly assess what deserves serious consideration and possible mid-course corrections.

We have a rule on construction sites: **"Measure twice, cut once."** Many times, if the material is expensive and/or the potential adverse $$$ impacts of error considerable, we measure or gauge numerous times in proactive, pre-emptive anticipatory avoidance.

The SDRWQCB can do the same. It was the intent of the MS4 focused meetings to at least minimize and un-complicate subsequent challenges, not to protract in a continuous, post-mortem loop. Instead, the US Supreme Court decision, in conjunction with other-related ongoing legal proceedings in California, seems poised to expand and create interminable contention.

One determination of the Order regarding **Priority Development Projects** (PDP) is that ALL hillside development in Laguna Beach will necessitate, will force the City into imposing such stringent categorization and compliance oversight on its construction industry and pass the increases on to parcel owners. Compliance would equate to fiscal suicide.

These multiple development or redevelopment designations will be impossible to implement on the broad-swath, grand scale suggested, and when added to non-hillside projects laughingly, absurdly unaffordable and unobtainable.

We have been repeatedly told that funding is not a legal issue for the SDRWQCB. But if Laguna and other copermittees cannot afford the implementation necessary to achieve compliance, then this Order will create a revolving door of staff meetings and violation hearings. Even bankrupt areas already fiscally impaired, depressed and distressed.

What happened to Economically Feasibility and Technological Possibility as reasonable, fair metrics? What good does it do to demand unachievable compliance standards?

Let's remand it, retract and revise if necessary, thus getting it done right the first time when finally placed on the SDRWQCB docket. As the present, highly prescriptive existing permits under the SDRWQCB jurisdictional domain don't expire or need renewal soon, are in place until a subsequent one is ratified, what's the hurry, the rush?

Otherwise, putting it in historical perspective regarding previous MS4 Permits, it'll be like the movie **"Groundhog Day,"** or as Yogi Berra exclaimed **"déjà vu all over again."** This happened back in 2002 when due to extensive legal appeals by the South Orange County copermittees, CWN was forced to spend precious internal funds to represent itself plus the Sierra Club and the Surfrider Foundation at the SWRCB hearing in Sacramento.

Litigation over this will only line the pockets of consultants and attorneys, including those aligned with eco-NGOs .This Order will expand that emerging compliance cottage industry tremendously, and should therefore be prophylactically remanded as soon as possible.

CWN sincerely believes that this remanding and return could be accomplished in 90-120 days at most and does not constitute stalling nor is it unreasonable. We're certain that the dominant majority of the stakeholders would support this front-loaded revisitation and refinement to the Order as opposed to back-end dissolution, un-subsided disorder and jumbled chaos.

Respectfully submitted,

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CLEAN WATER NOW is an innovative, science-based organization committed to solution-oriented collaboration as a means of developing safe, sustainable water supplies and preserving healthy ecosystems.