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GOVERNORMATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

California Regional Water Quality Control Board, San Diego Region

May 2, 2013

The Honorable Shirley Weber
California State Assembly
State Capitol, Room 5158
Sacramento, CA 95814

In reply refer to / attn:
786088:DGibson

Dear Assembly Member Weber:

Subject: Request For Public Hearing Delay on Tentative Order No. R9-2013-0001, Regional Municipal Separate Storm Sewer Systems (MS4) Permit

Thank you for your April 4th letter to Tomas Morales, Chair of the San Diego Regional Water Quality Control Board (San Diego Water Board) requesting a delay of the San Diego Water Board's April 10 and 11, 2013 public hearing, to consider the adoption of the National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region (Regional MS4 Permit). Chairman Morales has asked me to respond on his behalf.

Your letter, which was cosigned by nine other members of the Legislature, requested that the San Diego Water Board delay hearing the permit, due to concerns regarding (1) the pending action by the State Water Resources Control Board to address receiving water limitations (RWL) language in response to a recent court decision and (2) the costs associated with the incorporation of Bacteria Total Maximum Daily Loads (TMDLs) into the Regional MS4 Permit. Your letter also expresses concern that the stakeholders had less than two weeks to review the document before the scheduled April 10th and 11th public hearing.

Chairman Morales carefully considered your request. Chairman Morales ultimately decided, however, to proceed with the scheduled public hearing on April 10th and 11th, but also to continue the public hearing until the San Diego Water Board's May 8, 2013 meeting to allow for more time to discuss the outstanding issues, proposed requirements, and potential changes to the Regional MS4 Permit.

Together with the Copermittees, environmental organizations, building industry organizations, and interested persons, the San Diego Water Board has put considerable effort into developing a Regional MS4 Permit that will jointly cover municipal Copermittees in San Diego, southern Riverside and southern Orange Counties. The proposed Regional MS4 Permit would shift the MS4 permitting paradigm from the current prescriptive action-based regulatory approach of the MS4 permits to an environmental outcome-based approach, with a focus on

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measuring and achieving improvements in MS4 discharges and receiving water quality. We believe that this approach will provide the Copermittees with greater flexibility for meeting the permit requirements, while at the same time better achieving improvements in water quality. A key feature of the Regional MS4 Permit is that it provides an adaptive management pathway for the Copermittees to select and address the highest priority water quality issues through an iterative process. The San Diego Water Board believes the proposed adaptive management permit provisions hold great promise and will allow the Copermittees more flexibility to deploy resources to achieve goals that will yield the greatest water quality improvements. The regional approach offers the opportunity to better achieve regulatory consistency, as well as maximum efficiency and economy of resources for both the San Diego Water Board and the Copermittees.

This Regional MS4 Permit was developed over a two-year period through a participatory approach designed to actively engage key stakeholders. This transparent and comprehensive stakeholder participation process included 4 public workshops, over 60 meetings and presentations, and extensive opportunities for stakeholders to review various drafts of the proposed Regional MS4 Permit and to provide written and oral comments. The San Diego Water Board staff carefully considered the comments that it received and significantly revised the draft permit over the two-year period in response to the comments received. The two main issues identified in your April 4th letter, RWL language and incorporation of Bacteria TMDLs, were extensively discussed and commented on during the permit development process. As a result, the Regional MS4 Permit has gone through many substantial revisions over this time period and now incorporates many stakeholder recommendations on the issues you and many others raised throughout the permit.

Receiving Water Limitation Language

The latest version of the Regional MS4 Permit contains RWL language that is mandated by State Water Resources Control Board (State Water Board) precedential Order WQ 99-05 and has been included in San Diego Water Board MS4 permits, and many other MS4 Permits throughout the State, since 2001. We understand that some public entities in the San Diego Region covered by these MS4 permits feel the language may leave them vulnerable to San Diego Water Board enforcement action(s) and citizen suit litigation, if they are shown to be causing or contributing to an exceedance of water quality standards. However, I would note that this same language which has been in MS4 permits since 2001 has not resulted in undue San Diego Water Board enforcement action(s) or citizen suits for RWL exceedances within the San Diego Region.

As your letter suggests, the State Water Board is aware of the concerns that have been raised by stakeholders regarding the RWL language and is evaluating the issue on a statewide level. We don't believe, however, that it is necessary to delay the San Diego Water Board's consideration of the Regional MS4 Permit pending the outcome of the State Water Board's discussions of the RWL issue. We expect those discussions on the RWL issue will likely continue for some time, and it will be some time before the State Water Board determines



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whether to make changes to the RWL language or Order WQ 99-05. In the meantime, at the request of the State Water Board, we have included a specific re-opener provision in the Regional MS4 Permit to allow for changes if the State Water Board directs changes to the RWL language. In addition, the Regional MS4 Permit includes an alternative compliance option for the Copermittees, which, if properly implemented, would constitute compliance with the RWL and actually address the concerns raised by the public entities referenced in your letter. The permit language clearly states that the Copermittees will be in compliance with RWL if the specific set of requirements of the Regional MS4 Permit are incorporated and implemented as part of an accepted Water Quality Improvement Plan.

The court case to which your letter refers--- Los Angeles County Flood Control District v. Natural Resources Defense Council-- has been remanded by the United States Supreme Court to the United States Ninth Circuit Court of Appeals. The issue before the Ninth Circuit Court is limited in scope and the Court may not act on this case for many months. To the extent that a ruling in this case would affect MS4 permit requirements, the San Diego Water Board can address any necessary changes by reopening the Regional MS4 Permit consistent with the provision of the draft Regional MS4 Permit that allows for modifications based on judicial decisions.

Total Maximum Daily Loads

Your letter also indicates concerns that have been raised by public entities that will be impacted by the Bacteria TMDL requirements regarding the costs of meeting those requirements. Federal regulations require that NPDES permit conditions be consistent with the assumptions and requirements of adopted TMDLs. The San Diego Water Board's draft Regional MS4 Permit is designed to comply with federal requirements.

The process for developing the Bacteria TMDLs involved extensive opportunities for public participation, review and comment, as well as scientific peer review. The proceedings included consideration of the dischargers' ability to comply with the TMDL, development of appropriate compliance time schedules, economic considerations (e.g., costs to implement and comply with the TMDLs) and compliance with the appropriate provisions of the California Environmental Quality Act. The load allocations and compliance schedules established in the Bacteria TMDLs were developed as an amendment to the San Diego Water Board's *Water Quality Control Plan for the San Diego Basin* (Basin Plan) in 2008 and 2010 and are in fact duly adopted regulations of the San Diego Water Board. Furthermore, these TMDLs were approved by State Water Board, the California Office of Administrative Law, and the United States Environmental Protection Agency.

I would note that the upper range of cost estimates provided by stakeholders during the Bacteria TMDL process incorrectly assumed that compliance requirements found in the permit would necessitate the construction of new wastewater treatment facilities throughout the region. This is not the case. In response to comments on the draft Regional MS4 Permit, however, we have added an explicit re-opener provision to the Regional MS4 Permit that will

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allow for changes to TMDL requirements, if the TMDLs are changed by the San Diego Water Board in the future. We also have added language to the TMDL requirements of the Regional MS4 Permit that clarify methods and provide flexibility for the Copermittees to demonstrate compliance.

Timing of Hearing

The latest revised Regional MS4 Permit, provided two weeks prior to the public hearing on April 10 and 11, did not include significant changes. Modifications were made in response to comments from the Copermittees and other stakeholders, to clarify specified provisions of the Regional MS4 Permit and to provide stakeholders more flexibility to comply with the requirements. Stakeholders have had extensive opportunity to review and comment on the Regional MS4 Permit. Most of the requirements, including the RWL language and inclusion of the Bacteria TMDLs, have been available for review and comment since an administrative draft of the Regional MS4 Permit was issued over one year ago on April 9, 2012. However, to allow for more time to discuss the outstanding issues, proposed requirements, and potential changes, the San Diego Water Board continued the public hearing, opened on April 10 and 11, until the May 8, 2013 Board meeting.

We sincerely appreciate the importance of the concerns expressed in your letter of April 4, 2013 regarding the pending NPDES permit for the largest discharge of wastes in the San Diego Region. Over 450 impaired water body-pollutant combinations have been identified throughout the region and nearly all urban streams are rated as Poor or Very Poor for biological condition. Attaining the objectives of the Clean Water Act remains a significant challenge and the San Diego Water Board very carefully considers the economic effects resulting from its permitting of these discharges. The approach of the new Regional MS4 Permit is to achieve a scientifically based, environmental outcomes focused, adaptive management program for storm water throughout the region that is likely to realize meaningful improvement in the health of our waters as well as cost efficiencies.

If you have further questions or concerns, please feel free to contact me at (858) 467-4837 or by email at dgibson@waterboards.ca.gov or James Smith, Assistant Executive Officer at (858) 467-2732 or email at jsmith@waterboards.ca.gov. In the subject line of any response, please include the reference number **786088:DGibson**.

Respectfully,



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Executive Officer
San Diego Water Board

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