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November 13, 2012

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 "I" Street, 24th Floor
Sacramento, CA95814



**Subject: County of Orange Comment Letter
Municipal Stormwater Permits, Receiving Water Limitations Workshop**

Dear Ms. Townsend:

The County of Orange appreciates the opportunity to provide comment on the issue of municipal stormwater permit receiving water limitations language, which is the subject of a State Board workshop to be held on November 20, 2012. The County urges the State Board to revise the current receiving water limitations language being used within most state issued stormwater NPDES permits. Revision of the language is necessary because of the way it has been interpreted by the 9th Circuit Court of Appeals in *NRDC v. County of Los Angeles*. In that case, the Court of Appeals applied a strict standard for any exceedance detected through mass emissions monitoring by requiring immediate compliance with water quality standards. The County, and municipalities throughout the State, are concerned that the 9th Circuit's decision is contrary to prior State Board orders allowing compliance through the iterative process. The State Board is in the unique position to modify receiving waters limitations language to clarify that compliance can be achieved through implementation of the iterative process.

The County has been actively implementing a stormwater quality program since 1990. Annually, the Orange County Permittees collectively spend over \$100 million in meeting our permit obligations. The 2012 Heal the Bay Beach Water Quality Report Card rated the County's beaches as "excellent" with 94% of the County's beaches receiving an A or B grade (89% were A) and the wet weather grades bested the five year average by 15%. Additionally, there were 10 consecutive months (June 21, 2011 to April 6, 2012) when Orange County did not have any beach closures; an unprecedented length of time without a closure. During this time, prior State Board decisions (WQ 99-05, WQ 2001-15) and numerous Regional Board NPDES permits have used the iterative process as the primary means for coming into compliance whereby municipalities would work in cooperation with a regional board to identify actions and opportunities for addressing exceedances. The 9th Circuit's decision, however, circumvents the iterative process, and leaves municipal stormwater programs vulnerable to third party enforcement where one exceedance could expose a municipality to liabilities under the Clean Water Act, regardless of a municipality's good faith efforts to address an exceedance. Strict liability litigation has not only been brought in the *NRDC v County of Los Angeles* case, but also against the City of Stockton and the City of Malibu.

The County of Orange respectfully requests the State Water Board reaffirm its policy to allow municipal permittees to comply with water quality standards over time by using best management practices supplemented by the iterative process, and revise the existing receiving water limitations language consistent with an iterative process approach. The County believes the first step to developing revised language is to first develop guiding principles for the language. These guiding principles would work to align the receiving water limitation language with the Board's accepted iterative process policy and provide assurance to the Board and interested third parties that agency actions to address water quality issues are effective and timely. The County therefore supports the guiding principles that are being suggested by the California Stormwater Quality Association and other municipalities. These include the following:

The receiving water limitations language must identify an iterative process that:

- Applies to all significant exceedances of water quality.
- Provides enough specificity and accountability so municipalities understand their responsibility.
- Acknowledges that all pollutants cannot be addressed equally. Municipalities, and the State alike, are under constant pressure to prioritize financial resources. This pressure is evident in practically all aspects of public service, from police to fire to the environment. Thus, a municipality cannot afford, financially or politically, to address all stormwater issues simultaneously.
- Guides regional board staff (and others) to assess whether the Permittees are, in good faith, implementing the iterative process.
- Given the wide diversity and complexity of pollutants, sources and BMPs, the process must provide a mechanism for the MS4 and the State to agree on a practical implementation plan to satisfy the Permit provision.
- Establishes enough rigor to assure that progress will be made in addressing problematic discharges and protecting water quality.
- Pollutants in stormwater discharges that are subject to TMDLs must be prioritized over pollutants that have sporadic and minimal impacts on receiving water. Similarly, the frequency and severity of the impact must be addressed in a prioritized manner.
- Where a discharge involves an exceedance of a water quality standard that is the subject of a TMDL and/or involves an exceedance of any effluent limitation based on a TMDL, the Permittee shall be considered in compliance with all TMDL-related requirements, including the underlying water quality standards for the TMDL, if the Permittee is timely and in good faith implementing the applicable MEP-compliant control measures developed in the TMDL provisions of the permit.

The receiving water limitations language must provide Permittees with assurances that should they in good faith implement the iterative process, Permittees will not be subject to strict liability enforcement. This approach does not lessen receiving water limitations provisions or create a safe harbor, as the receiving waters limitations are still enforceable.

In closing, the County believes the State Board should address this untenable vulnerability that we are facing and we are greatly appreciative of your efforts to do so. Without your action to change the current language, agencies such as ours and others across the State will find themselves defending law suits as opposed to protecting and enhancing water quality.

Please direct any questions regarding this letter to Richard Boon at (714) 955-0670 or Chris Compton at (714) 955-0630.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Mary Anne Skorpanich', written over a horizontal line.

Mary Anne Skorpanich, Manager
OC Watersheds

c: Ignacio G. Ochoa, Interim Director of OC Public Works
Tony Olmos, Assistant Director of OC Engineering
Orange County Permittees