

Before the
STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
1001 I Street, 22nd Floor
Sacramento, CA 95814

In the Matter of:)
)
Petitions of County of Orange and Orange County)
Flood Control District *et al*; Order No. R9-2015-) Water Code § 13320(a)
0100, an Order Amending Order No. R9-2013-) 23 C.C.R. § 2050 *et seq.*
0001, NPDES No. CAS0109266, 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)
)

**RESPONSE TO PETITIONS FOR REVIEW
SWRCB/OCC File A-2456(n)**

**COUNTY OF ORANGE &
ORANGE COUNTY FLOOD
CONTROL DISTRICT**

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May 16, 2016

The County of Orange and the Orange County Flood Control District (collectively, “County”) submit this Response to Petitions for Review of the California Regional Water Quality Control Board, San Diego Region’s (“Regional Board”) action adopting Order No. R9-2015-0100 (NPDES No. CAS0109266), which amended Order No. R9-2013-0001, as amended by Order No. R9-2015-0001. The County submitted a Petition for Review on December 18, 2015,¹ which has been accepted for review by the State Water Resources Control Board (“State Board”).

I. BACKGROUND OF PROCEEDINGS

On December 16, 2009, the Regional Board adopted Order No. R9-2009-0002, reissuing an individual NPDES permit to the Orange County Permittees (“2009 OC Permit”). Prior to the expiration of the 2009 OC Permit, and without the Orange County Permittees applying to be covered by an additional NPDES permit, the Regional Board adopted Order No. R9-2013-0001 on May 8, 2013 (“Initial Permit”). The Initial Permit was intended to be a region-wide permit regulating the stormwater discharges of San Diego, Orange and Riverside Counties. Although the Initial Permit included specific requirements for Orange County, only the San Diego Permittees were enrolled at that time. This is because the San Diego Permittees were covered individually under NPDES Permit R9-2007-00001, which 5-year term had expired. Upon the adoption of the Initial Permit, the County filed Petition A-2254(n) on June 7, 2013 (“2013 OC Petition”), which Petition is currently being held in abeyance.

¹ The Orange County cities also filed Petitions for Review on Order No. R9-2015-0100. The “Orange County Permittees,” as discussed herein, are the County of Orange, Orange County Flood Control District, City of Aliso Viejo, City of Dana Point, City of Laguna Beach, City of Laguna Hills, City of Laguna Niguel, City of Laguna Woods, City of Mission Viejo, City of Rancho Santa Margarita, City of San Clemente and City of San Juan Capistrano. It should be noted that, pursuant to Water Code section 13228 designation agreement between the San Diego and Santa Ana Regional Boards, MS4 discharges within the San Diego Regional Board’s jurisdiction from the City of Lake Forest will be regulated by the Santa Ana Regional Board after NPDES Permit No. CAS 618030 is reissued.

On May 20, 2014, the Orange County Permittees filed a Report of Waste Discharge pursuant since the County's 2009 OC Permit was set to expire on December 16, 2014. The Regional Board did not consider the Report of Waste Discharge. On February 12, 2015, the Regional Board adopted Order No. R9-2015-0001 ("Amended Permit"), enrolling the Orange County Permittees into the Permit. The Regional Board made little changes to the Initial Permit. On March 13, 2015, the County filed Petition A-2367 ("2015 OC Petition"), which Petition is currently being held in abeyance.

On November 18, 2015, the Regional Board adopted Order No. R9-2015-0100, amending the Permit to enroll the Riverside County Permittees ("Final Permit" or "Permit"). The Regional Board also added, among other things, Provision B.3.c, the "Prohibitions and Limitations Compliance Option" ("Alternative Compliance Option"). The Alternative Compliance Option allows permittees the option to use the implementation of the Water Quality Improvement Plan to demonstrate compliance with the requirements of Provisions A.1.a [prohibition on discharges from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters], A.1.c [subjecting discharges from MS4s to the waste discharge prohibitions in the Basin Plan], A.1.d [prohibition on discharges from MS4s to ASBS], A.2.a [prohibition on discharges from MS4s causing or contributing to the violation of water quality standards in receiving waters], and A.3.b [requiring compliance with certain WQBELs established for TMDLs]. On December 18, 2015, the County filed a Petition for Review of the Final Permit ("Petition"), (1) expressing its support for an Alternative Compliance Option, (2) seeking use of the Alternative Compliance Option during the development of the WQIP, and (3) challenging the Regional Board's authority to issue a region-

wide Permit covering stormwater discharges in Orange County. This Petition is currently before the State Board for review.

On or around December 18, 2015, the Orange County cities and the Riverside County Permittees also filed Petitions for Review of the Final Permit. The San Diego County Permittees did not file Petitions for Review of the Final Permit. Several San Diego County Permittees, however, previously filed Petitions for Review of the Initial Permit, which petitions are currently being held in abeyance.²

Petitions for Review on the Final Permit were also filed by the San Diego Coastkeeper and the Coastal Environmental Rights Foundation (collectively, “San Diego Environmental Petitioners”). Environmental groups with interests in Orange County waters did not file Petitions for Review of the Final Permit.

Thus, the Petitioners to this proceeding are the Orange County Permittees, Riverside County Permittees and the San Diego Environmental Petitioners.

II. RESPONSE TO PETITIONS

The County responds to five issues raised in the petitions to this proceeding. They are as follows: (1) San Diego Environmental Petitioners lack standing to challenge the Final Permit as Applied to the Orange County Permittees; (2) the parties to the petitions for review further demonstrate why the discharges of the Orange County Permittees should be governed by an individual MS4 permit; (3) the State Board should uphold the Alternative Compliance Option because it contains rigor, transparency and accountability; (4) the Final Permit does not violate the anti-backsliding provisions of the Clean Water Act or federal regulations; and (5) the County supports the petitions of the Orange County cities Cities and Riverside County Permittees.

² The San Diego Permittees that filed petitions include the San Diego County Regional Airport Authority (A-2254a), City of Chula Vista (A-2254f), City of National City (A-2254g), County of San Diego (A-2254h), San Diego Unified Port District (A-2254o), and the City of San Diego (A-2254p).

A. San Diego Environmental Petitioners Lack Standing to Challenge the Permit as Applied to the Orange County Permittees

Water Code § 13320(a) states that an aggrieved person may petition the State Board to review a regional board's action or failure to act. One is considered "aggrieved" whose rights or interests are injuriously affected by a judgment or order.³ A party who is not aggrieved by a judgment or order has no standing to attack it on appeal.⁴ To demonstrate standing, a petitioner must show three requirements: (1) suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury is likely to be redressable by the requested remedy.⁵ Standing must be demonstrated separately for each type of relief sought.⁶ San Diego Environmental Petitioners cannot demonstrate that they meet these requirements as to the Orange County Permittees, and therefore lack standing to challenge the Alternative Compliance Option as to the County and other County specific provisions of the Permit.

1. There Is No Injury in Fact As to Orange County

In order to be an aggrieved person for purposes of standing, a party must have suffered an injury in fact. An injury must be immediate, pecuniary and substantial, and not nominal or a remote consequence of a judgment or order.⁷ The injury must also be particularized and undifferentiated, affecting the party in a personal and individual way.⁸ San Diego Environmental Petitioners cannot demonstrate these requirements. They did not suffer an injury in fact because

³ *El Dorado Irrig. Dist. v. State Water Res. Ctrl. Bd.* (2006) 142 Cal.App.4th 937, 977; *County of Alameda v. Carleson* (1971) 5 Cal. 3d 730, 737.

⁴ *Niles v. City of San Rafael* (1974) 42 Cal. App. 3d 230, 244.

⁵ *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560.

⁶ *Mayfield v. United States* (9th Cir. 2010) 599 F.3d 964, 969.

⁷ *Crook v. Contreras* (2002) 95 Cal. App. 4th 1194.

⁸ *Lujan v. Defenders of Wildlife* ("Lujan") (1992) 504 US 555, 560 n. 1.

(1) there is no assertion as to backsliding from permits governing Orange County discharges; (2) there is no assertion of an injury to Orange County waters; (3) organizational interests do not extend to protecting the quality of waters in Orange County, and members are not alleged to recreate in Orange County waters; and (4) there is no associational standing to bring claims on behalf of Orange County environmental organizations.

a. There Is No Assertion of Backsliding from Permits Governing Orange County Discharges

In order for the State Board to accept a petition for review, a party must state the *manner* in which the petitioner is aggrieved. In this case, San Diego Environmental Petitioners assert that earlier permits of the San Diego County Permittees contained receiving water limitations and effluent limits established by TMDLs that the San Diego Permittees had to strictly comply with.⁹ They further allege that the Final Permit weakened those standards through an impermissibly adopted Alternative Compliance Option that unlawfully “backslided” from earlier permit requirements.¹⁰ All of the assertions as to violating water quality standards and unlawful backsliding, however, are based on the San Diego County Permittees’ 2001 and 2007 permits and the 2013 Initial Permit.¹¹ There are no assertions as to Orange County or any of the permits that the County has been covered under.¹²

⁹ San Diego Environmental Petitioners, Petition for Review (“SD Env. Pet.”), pg. 5; San Diego Environmental Petitioners, Memorandum of Points & Authorities (“SD Env. Memo”), pp. 7-9.

¹⁰ SD Env. Memo at 15-24.

¹¹ San Diego Environmental Petitioners limit their challenge to “improperly adopted safe harbor provisions” that excuse compliance with the San Diego County Permittees’ 2007 Permit and the 2013 Receiving Water Limitations that apply to San Diego County. SD Env. Pet. at 3. “The Amended 2013 Permit, and the process the Regional Board followed in adopting it, were both flawed, and impermissibly weaken or ‘backslide’ from the requirements of the 2007 and Originally adopted 2013 San Diego MS4 permits.” SD. Env. Pet. at 2.

¹² References to injuries are only as to “The 2001, 2007 and Original 2013 San Diego County MS4 Permits.” SD Env. Memo at 7-9 and 14. “Importantly the 2007 Permit contained Receiving Water Limitations, which required permittees to comply with water quality standards.” *Id.* at 7. “Specifically, the Amended 2013 Permit creates safe harbors by deeming a Permittee to be in compliance with the Permit’s RWLs (which were required by the 2001, 2007, and Original 2013 Permits), if they develop a WQIP and perform a safe harbor analysis.” *Id.* at 14.

b. There Is No Assertion of an Injury to Orange County Waters

In addition, San Diego Environmental Petitioners do not assert an injury to any Orange County waters. The two alleged injuries are limited to San Diego County waters: 1) “bacteria, metals, and other pollutants” discharged “at unsafe levels to rivers, lakes, and beaches in San Diego County” which has damaging effects on human health, aquatic ecosystems, aquatic animals, and plant life;¹³ and (2) “San Diego County’s high rate of urbanization and persistent water quality problems . . . exacerbate[] problems of stormwater volume, rate, and pollutant loading” that violate water quality standards.¹⁴ And, as previously analyzed in the County’s Petition for Review, the County is not interconnected with San Diego County, and does not discharge to a shared watershed.¹⁵ Therefore, an injury asserted as to waters of San Diego County would not cause an injury to waters of Orange County.

c. San Diego Environmental Petitioners Have No Organizational Interests in Orange County

In order for an organization to suffer an injury in fact and challenge a governmental decision or order, the organization must have more than a cognizable interest. The law requires that the party seeking review “be himself among the injured.”¹⁶ An organization can assert standing based on generalized interests, but it must also allege an injury to particular, individualized interests.¹⁷ An organization’s mere interest in a problem, no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is

¹³ SD Env. Pet. at 5.

¹⁴ *Id.*

¹⁵ County Memorandum of Points & Authorities, pp. 15-25.

¹⁶ *Sierra Club v. Morton* (1972) 405 US 727, 734-735 (holding that there was no standing for an environmental organization that pled a cognizable organizational interest in conservation, but did not assert an individualized harm to itself or its members).

¹⁷ *Summers v. Earth Island Inst.* (2009) 555 U.S. 488 (holding that an organization’s members could not obtain an injunction against the U.S. Forest Service for timber sales and fire rehabilitation activities because it failed to allege that a particular sale or fire impeded the members enjoyment of the forest).

not sufficient by itself to render the organization “adversely affected” or “aggrieved” to justify review for legal wrong because of an agency action.

San Diego Environmental Petitioners state that they are “non-profit environmental organizations that have a direct interest in protecting the quality of San Diego County’s aquatic health and resources, including San Diego Bay, the San Diego River, the Pacific Ocean, and other San Diego area waters . . .”¹⁸ Their petition further states that both the San Diego Coastkeeper and the Coastal Environmental Rights Foundation represent “members who live and/or recreate in and around the San Diego area . . .”¹⁹ San Diego County Environmental Petitioners’ interests are limited to San Diego County where its members recreate. No facts are asserted that the organizations’ interests extend into Orange County or that its members recreate in Orange County waters. Thus, there is no organizational standing to challenge the Final Permit as to the Orange County Permittees.

d. There is No Associational Standing to Challenge the Permit on Behalf of Orange County Environmental Organizations

Lastly, San Diego Environmental Petitioners lack standing to challenge the Final Permit on behalf of any Orange County organizations or individuals with interests or whose members recreate in Orange County waters. The law is clear that appeals may be taken only by aggrieved parties, and a party cannot assert error that injuriously affected only non-appealing parties.²⁰ Orange County groups independent of the San Diego Environmental Petitioners provided written

¹⁸ SD Env. Pet. at pg. 4.

¹⁹ *Id.* The Petition further states that the two organizations and are dedicated “to the protection of coastal natural resources . . . in and around San Diego County.” *Id.* Petitioners’ members “recreate in and the waters to which the Amended 2013 Permit regulates . . . and are impacted by pollution in stormwater runoff . . . which restrict the ability of residents and visitors in San Diego County . . .” *Id.* “Members directly benefit from San Diego County waters in the form of recreational swimming, surfing,” etc. *Id.* at 4-5.

²⁰ *Estrada v. RPS, Inc.* (2005) 23 Cal. App. 4th 976.

comments on the adoption of the Initial Permit, but did not file petitions for review on any of the three Orders by the Regional Board.²¹

2. Any Injury Is Not Caused by the Regional Board's Action and Cannot be Redressed by the State Board

An injury must be based on a causal nexus between the injury and the conduct complained of.²² As analyzed above, San Diego Environmental Petitioners did not allege injuries to Orange County waters, only that certain actions of the Regional Board caused or will cause a violation of water quality standards in San Diego County. Even assuming that an injury occurred, there is no causation, as none of the Regional Board's actions as to the Orange County Permittees affect San Diego County waters. That is, any Alternative Compliance Option utilized by the County would only apply to and affect Orange County waters. Without causation, there is no reasonable degree of assurance that the denial of an Alternative Compliance Option as to the County would actually redress any alleged injuries to San Diego County waters.

B. The Parties to the Petitions for Review Further Demonstrate Why the Discharges of the Orange County Permittees Should Be Governed By an Individual NPDES Permit

The issue of standing in this proceeding is more than just a legal objection.²³ The lack of standing by San Diego Environmental Petitioners further demonstrates why the Orange County Permittees should be covered under an individual permit.

At the time the Initial Permit was adopted, the County was still covered under the 2009 OC Permit. The County testified at the adoption proceedings that the Orange County Permittees

²¹ The Orange County organizations that provided written and/or oral comments on the Initial Permit were the Orange County Coastkeeper, Clean Water Now and the South Laguna Civic Association.

²² *Lujan* at 560.

²³ The County acknowledges that San Diego Environmental Petitioners may have alleged facts sufficient to have standing on non-County aspects of the Permit, and that the State Board may take up issues on its own review.

were left out of staff's considerations on the Initial Permit.²⁴ The Initial Permit also sought to incorporate the bacteria TMDL as to San Diego County and adopt provisions for low impact development and hydromodification. These provisions were not in the 2007 San Diego Permit, but were included in the 2009 OC Permit. Thus, it was the County's opinion that the Initial Permit was essentially a San Diego County permit, and changes by the County had been foreclosed. The County further asserted, among other things, that it was not interconnected to the surrounding counties, did not drain into a shared watershed and did not share characteristics common to the other counties, and thus a region-wide Permit could not be imposed.²⁵ The County also supported the alternative compliance option proposed at that time.²⁶ However, on the recommendation of the Executive Officer, the Regional Board voted to adopt the Initial Permit without a compliance option. Moreover, the Regional Board did not remove the County from the region-wide permit.

Upon the enrollment of the County in the Amended Permit in 2015, the County again asserted a basis for being regulated under an individual permit.²⁷ The County provided evidence of the improved State of the Environment in Orange County and why the Regional Board could provide an Alternative Compliance Option solely to the Orange County Permittees.²⁸ Again, the Regional Board declined to issue an individual permit and voted against alternative compliance.

²⁴ Presentation of Orange County Permittees re Order No. R9-2013-0001 ("2013 OC Presentation"), slide 3 (Apr. 10, 2013); Transcript of Adoption Hearing re Order No. R9-2013-0001 ("2013 Transcript"), Comments of Mary Anne Skorpanich and Richard Boon, Apr. 10 vol. 1, pp. 143, 151, 172 and 191 (Apr. 10, 2013).

²⁵ 2013 OC Presentation at slides 30-35; 2013 Transcript, Comments of Ryan Baron, vol. 1, pp. 167-167 (Apr. 10, 2013).

²⁶ 2013 Transcript, Comments of Richard Boon, May 8 part 1, pp. 38-42 (May 8, 2013).

²⁷ County Comments re Order No. R9-2015-0001, Attachment A, pp. 1, 3-7 (Nov. 19, 2014); Transcript of Adoption Hearing re Order No. R9-2015-0001, Comments of Mary Anne Skorpanich and Ryan Baron, pp. 32-66 (Feb. 11, 2015).

²⁸ *Id.*

The Regional Board finally approved the Alternative Compliance Option at the adoption of the Final Permit. The San Diego County Permittees, however, have not sought to utilize Provision B.3.c.²⁹ They submitted WQIPs to the Regional Board in accordance with Provisions B and D of the Permit, but did not avail themselves of alternative compliance. When the Regional Board accepted the WQIPs, it found that Provisions B and D had been satisfied, but made no comment on alternative compliance.³⁰

The outcome of this is that a party with an interest in San Diego waters is challenging the potential use of the Alternative Compliance Option by San Diego Permittees that did not apply for it. The County is now forced to defend its use of the Alternative Compliance Option against stakeholders with no interest in Orange County. This is more than just a procedural quirk in the adjudicatory process; however, it further demonstrates why a region-wide Permit is inappropriate. Normally, a party to a permit proceeding must have party status to participate in the adjudicatory process of a permit. In this case, persons and organizations that would otherwise not be able to invoke party status, now have potential standing to challenge Orange County specific provisions. This undermines the adjudicatory process by allowing any broad-based interest group to challenge the Permit. It effectively turns the adjudication into a rulemaking.

C. State Board Should Uphold the Alternative Compliance Option Because It Contains Rigor, Transparency and Accountability

The Alternative Compliance Option is robust and rigorous. In lieu of utilizing a BMP-based iterative process to meet receiving water limitations and other TMDL-specific limits, the

²⁹ It should be noted that San Diego Environmental Petitioners cite to San Diego County Permittees' water quality improvement plans as evidence of lacking objective requirements. SD. Env. Pet. at 30, fn. 58. This evidence is not part of the administrative record.

³⁰ See County's Request for Official Notice filed herewith this Response.

Option allows the Orange County Permittees to be in compliance based on implementation of a comprehensive watershed management plan that (1) establishes interim and final numeric targets for priority pollutants; (2) creates implementation strategies with milestones and schedules to meet those targets; and (3) provides for a transparent process that includes stakeholder review and input.³¹ The structure of Provision B.3.c was based on the alternative compliance pathway in the Los Angeles Permit. Its approach complies with the principles set out by the State Board, and includes all of the essential elements that justified the Los Angeles approach – (1) milestones and compliance deadlines, and (2) rigor and accountability.

1. Alternative Compliance Option Requires Finite Goals, Strategies and Compliance Schedules

The 2009 OC Permit used a BMP-based approach to water quality that relied on the iterative process to attain water quality standards. The requirements of the 2009 OC Permit were Regional Board driven, requiring the completion of specific actions for all waterbodies and the filing of numerous reports detailing those actions. Certain specified actions were required despite the pollutant priority for a waterbody.³² All waterbodies were treated equally. Based on new information and new approaches to water quality attainment, the Final Permit shifts the old paradigm to a new permitting approach that focuses instead on water quality outcomes, not on what actions were achieved in the reporting cycle.³³

The Final Permit gives responsibility to the permittees to identify in their jurisdictional runoff management programs what the highest priority water quality conditions are in the watershed, both for waterbodies covered by TMDLs and non-TMDL receiving water limitations. Provision B.1 requires a comprehensive plan to be developed to address those high priority

³¹ Final Permit, Provision B.3.c.

³² Final Permit, Fact Sheet (“Fact Sheet”), pg. F-15.

³³ Responses to Comments Received on Tentative Order No. R9-2015-0100 (“RTC”), pg. 39.

concerns, and that the plan contain goals and strategies to measure progress and improvements toward those priorities.³⁴ Provision B.2 requires permittees to address priority waterbodies and pollutants based on criteria found at 40 CFR 122.26(d)(1)(iv)(C) and (C)(1)-(9). Provision B.2.d requires identification of suspected sources and stressors, such as (1) the land uses that may contribute toward impacts to receiving waters, (2) the locations of MS4s that can convey and discharge runoff and pollutants to receiving waters, (3) other sources that discharge into the permittees' MS4s and receiving waters, and (4) other information and data that can help the permittees evaluate the relative importance of or contribution from those sources toward the highest priority water quality conditions.³⁵

In developing a watershed management plan, permittees that avail themselves of the Alternative Compliance Option are required to establish clear, concrete and finite goals, strategies and schedules. The plan must be comprehensive and include intergovernmental coordination. Final numeric goals must be established that demonstrate that water quality standards will be protected. Interim goals, based on measureable criteria or indicators, must also be established that demonstrate progress toward achieving the final numeric goals. Unlike the compliance option in the Los Angeles permit, goals can be broader than traditional numerics³⁶ – such as increased acreage for habitat, efforts to increase species, retrofitting and stream restoration – so long as the goals show that the plan is developed to “restore and protect water quality standards of receiving waters.”³⁷ In addition to developing goals, the plan must contain strategies and schedules to attain the interim and final targets. This includes a fairly rigorous

³⁴ Fact Sheet at F-16.

³⁵ *Id.* at F-54 and F-55.

³⁶ These goals might not otherwise be required of a permittee absent the voluntary undertaking of an Alternative Compliance Option. *Virginia Dept. of Transportation v. EPA*, No. 1:12-CV-775, slip op., 2013 WL 53741 (E.D. Va. Jan. 3, 2013) (holding that only TMDL pollutants could be regulated under the Clean Water Act).

³⁷ Fact Sheet at F-56 and F-57.

requirement to meet certain projected milestones on an annual basis throughout the term of the Permit. And, in addition to implementing the plan, permittees are required to continue implementing other aspects of the Permit, such as monitoring and assessment, construction inspection, review of projects for compliance with low impact development standards, imposing hydromodification and other controls on priority development projects, and identifying permanent structural BMPs both regional and site specific.³⁸

2. Alternative Compliance Option Contains Rigor and Accountability

In addition to requiring milestones and compliance deadlines consistent with WQ 2015-075, the Alternative Compliance Option also contains significant rigor and accountability. The permittee must “reasonably and quantitatively” demonstrate that it can achieve the interim and final numeric goals within the proposed schedule. Adaptive management must be incorporated to ensure that the permittees evaluate progress on achieving WQBELs and other TMDL-specific limitations. The quantitative analysis must be updated as needed. As more information is collected through monitoring and assessment, the goals, strategies, schedules and quantitative assurance must be updated if data shows that the plan should be modified. The Regional Board ultimately retains the ability to require modification of the plan or deem the permittee out of compliance if it no longer accepts the plan’s rationale and recommendations. This new process ensures against the “endless compliance loop” argued by San Diego Environmental Petitioners because it requires the County to continuously evaluate the results and allows the Regional Board discretion at any time to request changes or be deemed out of compliance.³⁹

San Diego Environmental Petitioners contend that the Alternative Compliance Option is inconsistent with the WQ 2015-075 because it “contains no requirement to conduct modeling or

³⁸ *Id.* at F-58.

³⁹ Fact Sheet at F-48.

any equivalent assessment [to the RAA], and lacks any of the criteria and requirements identified by the State Board.”⁴⁰ This contention is without merit. The Regional Board addressed these complaints in its response to comments on the Final Permit, stating that the approach is actually “well defined” and more “transparent” than that urged by the environmental community.⁴¹ The Regional Board noted, for example, that an RAA requires computer modeling, which in turn relies on various assumptions in developing its equations: “Many of the variables in the equations will be based on assumptions, and members of the public may not know or understand how those variables may impact the results.”⁴² By contrast, the Alternative Compliance Option requires “an analysis with ‘clearly stated assumptions’ which must go through a public participation process that allows the public to review and provide comments on the analysis methodology and the assumptions included in the analysis.”⁴³ Indeed, non-modelling approaches, such as trend analyses, may in certain instances provide a higher level of assurance and certainty than model-based approaches.

The WQIP and modifications to the WQIP are also subject to extensive public review. The County is required to develop a publicly available and noticed schedule of opportunities for the public to review the WQIP and provide comment. The permittees are also required to form a water quality consultation panel that contains members of Regional Board staff, the development community and the environmental community.⁴⁴ Such review would include consideration of the proposed control measures, deadlines for achievement of final limitations and the quantitative analysis that supports the WQIP. This public process will vet the proposed WQIP

⁴⁰ SD Env. Pet. at 30.

⁴¹ RTC at 35.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Provision F.1.a.(1)(b).

and facilitate revisions to strengthen the programs as needed, thereby providing assurance that the approved WQIP will achieve the water quality targets.⁴⁵

D. Final Permit Does Not Violate the Anti-Backsliding Provisions of the Clean Water Act or Federal Regulations

In Order WQ 2015-075, the State Board concluded that a watershed-based approach to alternatively complying with receiving water limitations and other TMDL-specific limits did not violate federal anti-backsliding laws. The State Board examined the provisions of the Clean Water Act and EPA regulations and found the following:

- Strict compliance with water quality standards is discretionary and is not required by federal or state law;
- A watershed management plan approach is not derived from an effluent limitation guideline;
- Receiving water limitations are imposed under CWA 402(p)(3)(b), not 301(b)(1)(C), and thus do not trigger the anti-backsliding requirements under CWA 402(o);
- Federal exceptions to backsliding apply because of new information in Los Angeles County that resulted in:
 - A new understanding that “time to plan, design, fund, operate and maintain [best management practices (BMPs)] is necessary to attain water quality improvements, and these BMPs are best implemented on a watershed scale; and
 - A paradigm shift in the last decade from viewing stormwater as a liability to viewing it as a regional asset.

The State Board further concluded that all regional water boards should be informed by the new information in Los Angeles County, and directed them to consider an alternative compliance approach. The County believes that the State Board properly decided this matter. The State Board should preclude re-litigating this issue and again find that the Alternative

⁴⁵ WQ 2015-07 at 37.

Compliance Option approach in the Final Permit does not unlawfully backslide from the 2009 OC Permit or the 2013 Initial Permit.

1. San Diego Environmental Petitioners Should Be Precluded from Re-Litigating Anti-Backsliding

San Diego Environmental Petitioners should be precluded from challenging the Final Permit on anti-backsliding grounds because the State Board has previously addressed this issue in a precedential order. If a hearing is held on the petitions,⁴⁶ the State Board should exclude further argument on the issue.

Order WQ 2015-075 is a precedential adjudication that established a statewide policy on the use of watershed management plans for compliance with receiving water limitations and other TMDL-specific limits. It directed all regional water boards to consider alternative compliance consistent with certain principles set forth in the Order. Agency adjudicatory decisions that become precedent guide future conduct in the same way as if a rule were promulgated under the rulemaking power.⁴⁷ Thus, the alternative compliance approach set forth in WQ 2015-075 is an adjudicatory rule (and policy) that should be able to be relied upon by the Regional Board and the Orange County Permittees. San Diego Environmental Petitioners do not offer any facts or explanation as to why the State Board should overrule its prior precedent.⁴⁸ Absent changing circumstances or reasoned decision-making as to why the State Board should

⁴⁶ 23 CCR § 2050.5(b).

⁴⁷ See *NLRB v. Wyman-Gordon Co.* (1969) 394 U.S. 759, 765-66; see also *Pacific Gas & Elec. Co. v. Federal Power Comm'n* (D.C. Cir 1974) 506 F.2d 33, 38. These cases discuss the role of precedent in adjudications. Although different from judicial precedent, adjudicatory rules and policies provide a guide to action that can be relied upon in future cases.

⁴⁸ The general rule is that an agency cannot reconsider a final adjudicatory decision unless the agency has statutory authority to do so. *Olive Proration Program Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Comm'n* (1941) 17 Cal. 2d 204, 208-10.

depart from its prior order, the arguments of the San Diego Environmental Petitioners would result in an arbitrary outcome.⁴⁹

Collateral estoppel can preclude a litigant in court from re-litigating an issue identical to an issue decided in a prior proceeding. Review of the Final Permit is judicial in nature,⁵⁰ and thus the State Board can preclude issues as a matter of procedure.⁵¹ The issue of whether a watershed management plan approach violates anti-backsliding laws has been necessarily decided in a final decision of the State Board on the merits. The arguments made by the San Diego Environmental Petitioners are identical to those made by the environmental petitioners in Order WQ 2015-075.⁵² If duplicative anti-backsliding challenges to future MS4 permits are allowed, it would frustrate the economy of the petition process by causing unnecessary expenditure of time and resources by the County and other petitioners to this proceeding (*e.g.*, consultant and attorney's fees) in defending against the challenge. Identical attempts to challenge State Board precedent without new evidence are vexatious and should be precluded.⁵³

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⁴⁹ See *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. Of Trade* (1973) 412 U.S. 800, 808; *Trump Plaza Assoc. v. NLRB* (D.C. Cir. 2012) 670 F.3d 1112, 1120; *CBS Corp. v FCC* (3d Cir. 2011) 663 F.3d 122.

⁵⁰ *Pacific Lumber Co. v. State Water Res. Cntl. Bod.* (2006) 37 Cal. 4th 921, 944.

⁵¹ The factors that must be met include: 1) the issue sought to be precluded from re-litigation is identical to the issue decided in the former proceeding; 2) the issue was actually litigated in the former proceeding; 3) the issue was "necessarily decided" in the former proceeding; 4) the decision in the former proceeding was final and on the merits; and 5) the party against whom issue preclusion is sought is the same as, or in privity with, a party to the former proceeding. *Lucido v Super. Ct.* (1990) 51 Cal. 3d 335, 341. Preclusion, however, is not automatic and the propriety of it depends on whether its application will further the public policies of preserving the integrity of the administrative process, promoting economy and protecting parties from harassment by vexatious litigation. *Id.* at 770-71.

⁵² SD Env Pet. Memo at 15, fn 25 (citing Letter from Jon M. Capacasa, Director Water Protection Division, EPA Region III to Jay Sakai, Maryland Department of the Environment, re: Specific Objection to Prince George's County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068284). This EPA staff letter has been cited by numerous organizations as EPA authority on anti-backsliding. The State Board has correctly opined that the letter has no regulatory effect. WQ 2015-075 at 20, fn. 70.

⁵³ In a different proceeding with similar issues, environmental petitioners in the Bay area have also challenged the Bay area MS4 permit on backsliding grounds, clearly showing that this issue is attempting to be re-litigated statewide. The State Board has also taken up review of that permit. Petition for Review A-2455(l), San Francisco Baykeeper (Dec. 18, 2015).

2. The Final Permit Did Not Backslide From Prior County Permits

San Diego Environmental Petitioners assert that prior permits require compliance with water quality standards and that the Alternative Compliance Option relaxes those standards by allowing additional time to come into compliance with numeric limits.⁵⁴ This argument assumes that water quality standards must be met immediately. The 2009 OC Permit, however, did not require immediate compliance with receiving water limitations. It stated that the permittees' obligations were less stringent than the obligations of non-governmental dischargers who were issued NPDES permits for stormwater discharges (*i.e.*, immediate compliance with numeric permit limits).⁵⁵ Based on precedential Order 99-05, the 2009 OC Permit did require compliance with applicable water quality standards, but compliance "was to be achieved through an iterative approach requiring the implementation of increasingly more effective BMPs."⁵⁶ If an exceedance occurred, the permittee was required to take certain actions to report on, monitor and assess the exceedance, and then modify the BMPs, monitoring and implementation schedule.⁵⁷

The Regional Board has attempted to move away from this approach.⁵⁸ The goal of the region-wide Permit is to replace the prior permitting system of "completing certain actions" with

⁵⁴ SD Env. Pet. Memo at 15.

⁵⁵ 2009 OC Permit at 3.

⁵⁶ 2009 OC Permit at 25 ("Consistent with most MS4 permits in CA that specify certain minimum control measures and incorporate an iterative process that requires increasingly more effective control measures if the water quality objectives are not met.").

⁵⁷ Provision IV.2 of the Receiving Water Limitations section states, "The DAMP and its components shall be designed to achieve compliance with receiving water limitations. It is expected that compliance with receiving water limitations will be achieved through an iterative process and the application of increasingly more effective BMPs. The permittees shall comply with Sections III.2 and IV.1 of this order through timely implementation of control measures and other actions to reduce pollutants in urban runoff in accordance with the DAMP and other requirements of this order, including any modifications thereto." Provision IV.3 further states, "If exceedance of water quality standards persist, notwithstanding implementation of the DAMP and other requirements of this order, the permittees shall assure compliance with Sections III.2 and IV.1 of this order by complying with the following procedure . . ." which provision goes on to describe the reporting and BMP implementation procedure for addressing exceedances. Final Permit at 35-36.

⁵⁸ Fact Sheet at F-16 and F-32,33.

an approach that allows permittees to focus their efforts on goals and outcomes that improve water quality.⁵⁹ The same water quality standards are required to be met, but can be complied with using the more rigorous WQIP process of Provision B.3.c. This process does not relax standards or allow for any more time to meet numeric limits than what was required by the 2009 OC Permit. It requires a permittee to develop and implement comprehensive efforts to attain water quality through goals, milestones, strategies, schedules and adaptive management, rather than passively reacting to exceedances through reports and BMP modifications.

Additional arguments by the San Diego Environmental Petitioners are that no new information has been ascertained and there have been no substantial or material changes since the prior permit.⁶⁰ It is further asserted that watershed management plans have been utilized in prior permits and are therefore not new.⁶¹ Both the State Board and Regional Board, however, have recognized that it may take years of technical efforts to meet water quality standards and that new permitting approaches, focused on establishing local responsibility for robust watershed management initiatives, are needed. The Regional Board has moved to this approach.

3. Alternative Compliance Option Is More Stringent Than the 2009 OC Permit or Approach Recommended by San Diego Environmental Petitioners

The Alternative Compliance Option in the Final Permit has been vetted since 2012 in numerous comments and stakeholder workshops. It has been considered by the Regional Board in three separate adoption hearings. Although the Regional Board appears to have begrudgingly approved it, staff testimony and response to comments indicate that it is intended to be more robust and more rigorous than the Los Angeles compliance option. With limited adjustment, the

⁵⁹ Fact Sheet at F-17 and F18.

⁶⁰ SD Env. Pet. Memo at 19-21.

⁶¹ *Id.*

County generally supports the Option, but asks that the State Board extend it to the development of the WQIPs.

The Alternative Compliance Option is more stringent and protective of water quality standards than the strict liability/ enforcement approach recommended by the San Diego Environmental Petitioners. The approach, in effect, requires the Orange County Permittees to establish TMDLs and time schedule order-like implementation measures for every priority waterbody/pollutant combination in the County's watershed. The Orange County Permittees would effectively take on the State's responsibility for establishing numeric targets and implementation schedules. Instead of the Regional Board specifying the manner of compliance, a permittee that avails itself of the Option would design all aspects of implementation and be required to quantitatively justify the plan. The Final Permit requires TMDL-like and time schedule order-like measures to be developed within two years of enrollment in the Permit. The ability to develop rigorous goals, strategies and schedules in a collapsed time period is questionable. The process as a whole, though, avoids the lengthy TMDL and basin planning process by having the dischargers set interim and final TMDL-like targets and strategies, rather than federal or state regulators taking years or decades to promulgate the same targets and plans through the regulatory process.⁶² Setting numeric and schedules for every priority pollutant and taking that responsibility out of the hands of the State achieves the goals established by the State Board's precedential order – to maximize the likelihood of achieving receiving water limitations.⁶³

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⁶² WQ 2015-075 at 31.

⁶³ WQ 2015-075 at 32-33.

E. The County Supports the Petitions of the Orange County Cities and Riverside County Permittees

The County supports the petitions filed by the Orange County cities. Specifically, the County concurs with the arguments raised by the Cities of Dana Point and Laguna Beach (“Cities”) that it is impracticable to strictly and immediately comply with all of the discharge prohibitions and receiving water limitations in the Final Permit.⁶⁴ To require such strict and immediate compliance is beyond the extent of the maximum extent practicable standard and federal and state law. The Cities also contend that the Regional Board failed to consider the costs of complying with numeric effluent limits in accordance with Water Code § 13241 and *City of Burbank v. State Water Resources Control Board*.⁶⁵ The County raised the same issues in its 2013 OC Petition (abeyance).⁶⁶ Although the County has not activated its petition on these issues, the Cities’ arguments demonstrate the unlawfulness of failing to provide for a compliance pathway during the development of the WQIP due to the infeasibility of achieving certain numeric limitations within the term of the Permit.

The County also supports the petition filed by the Riverside County Permittees. Riverside’s petition provides additional reasoning as to why the State Board should provide alternative compliance during the development of the WQIPs and why the two counties should be covered by individual NPDES permits.

III. CONCLUSION

For the reasons set forth herein and in the County’s Petition for Review, the State Board should deny standing to San Diego Environmental Petitioners as to Orange County Permit issues and prevent re-litigating the issue of anti-backsliding. The State Board should also direct the

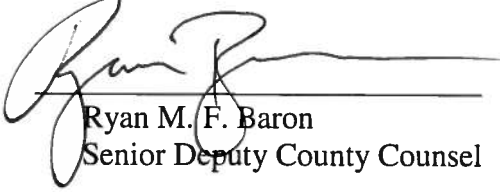
⁶⁴ City of Dana Point and City of Laguna Beach, Petitions for Review (Dec. 18, 2015)

⁶⁵ (2005) 35 Cal.4th 613, 627.

⁶⁶ 2013 OC Petition at 2.

Regional Board to enroll the Orange County Permittees in an individual MS4 permit containing an Alternative Compliance Option that provides for compliance during the development and implementation of the WQIP.

Respectfully submitted,



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