



Indian Wells
(760) 568-2611

Irvine
(949) 263-2600

Los Angeles
(213) 617-8100

Ontario
(909) 989-8584

BEST BEST & KRIEGER
ATTORNEYS AT LAW

655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300 | Fax: (619) 233-6118 | www.bbklaw.com

Riverside
(951) 686-1450

Sacramento
(916) 325-4000

Walnut Creek
(925) 977-3300

Washington, DC
(202) 785-0600

Rebecca Andrews
(619) 525-1392
rebecca.andrews@bbklaw.com
File No. 55452.02300

September 14, 2015

VIA E-MAIL [SANDIEGO@WATERBOARDS.CA.GOV]

David Gibson, Executive Officer
c/o Wayne Chiu
San Diego Regional Water Quality Control Board
2375 Northside Drive, Suite 100,
San Diego, CA 92108

Re: Comment - Tentative Order No. R9-2015-0100, Place ID:786088WChiu

Dear Mr. Gibson and Mr. Chiu:

Best Best & Krieger represents the City of San Clemente (“City”). The City submits the following comments on the California Regional Water Quality Control Board, San Diego Region (“SDRWQCB”), Tentative Order No. R9-2015-0100 (“Tentative Order”) amending Order No. R9-2013-0001, NPDES No. CAS010266, as amended by Order No. R9-2015-0001, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4) Draining the Watersheds within the San Diego Region (“MS4 Permit”). The City is committed to improving and sustaining water quality in the San Diego region and has undertaken extensive efforts to further these goals. The City is aware that the County of Orange has prepared and submitted comments on the Tentative Order. The City would like to express its support for the County’s comment letter and join with the County in the submission of those comments. The comments in this letter supplement the County’s letter and are intended to allow the City and other Co-permittees to continue working toward the common goal of improving water quality in the region.

1. THE CITY SUPPORTS INCORPORATION OF THE ALTERNATIVE COMPLIANCE PATHWAY FOR PROHIBITIONS AND LIMITATIONS

The City appreciates the efforts of SDRWQCB staff to develop an alternative compliance pathway for incorporation into the MS4 Permit. MS4s face special challenges in attaining water quality objectives and immediate compliance with many of the objectives is not feasible. An alternative to strict compliance is consistent with the Ninth Circuit Court’s recognition that the Clean Water Act “does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)” regarding limitations. (*Defenders of Wildlife v. Browner* (9th Cir. 1999)



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191 F.3d 1159, 1165.) The WQIP process establishes a rigorous, flexible and transparent pathway for compliance with Provisions A.1.a, A.1.c, A.1.d, A.2.a, and A.3.b. The City joins with other Co-Permittees in expressing its support for an alternative compliance pathway.

2. CLARIFY PROVISION A TO STATE THAT COMPLIANCE WITH PROVISION B.3 CONSTITUTES COMPLIANCE WITH PROVISIONS A.1.a, A.1.C, A.1.D, A.2, AND A.3.b OF THE MS4 PERMIT

The City is concerned that the prohibitions and limitations in Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b, as currently written, may be interpreted independent of the alternative compliance pathway in Provision B.3. The Ninth Circuit Court's decision in *Los Angeles County Flood Control District v. NRDC* interpreted an MS4 permit as a contract, with each provision as a stand-alone requirement. A stand-alone reading of the prohibitions and limitations, without any reference to the compliance pathway provision may expose the Co-Permittees to unintended liability, despite our rigorous efforts to successfully implement the alternative compliance pathway. The City joins with Co-Permittees in requesting the simple solution of adding language to Provision A that clarifies intent of the alternative compliance pathway is to create an alternative means of complying with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b. In other words, the City requests adding language in Provision A simply referencing and linking the alternative compliance pathway in Provision B.

3. INCLUDE THE WQIP PLANNING PROCESS IN THE ALTERNATIVE COMPLIANCE PATHWAY

In light of the direction from the State Water Resources Control Board ("State Board"), the alternative compliance pathway should be extended to include the WQIP planning phase. The alternative compliance pathway currently begins after the WQIP has been completed and is being implemented. It does not extend to the WQIP planning process. The Permit establishes a structure, with timelines over two years, for the WQIP planning process. During the planning process, Co-Permittees will, among other activities, identify water quality priorities, identify and prioritize known and suspected sources of pollutants and stressors, identify potential strategies to improve water quality, create an integrated monitoring and assessment program, and develop stormwater action levels and non-stormwater action levels into the WQIP. Each of these steps, and others, including the public participation process, occurs on a schedule and requires a substantial investment of time and resources.

Even though the City will participate in a Water Quality Improvement Plan and anticipates meeting all Permit-established planning requirements, the City and other Co-Permittees remain open to liability for prohibitions and limitations violations, especially from third parties, during the planning process. The ultimate goal of the planning process is to create a WQIP designed to address prioritized water quality conditions. If the City is forced to divert funds away from the



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planning process to defend a third-party lawsuit during the planning period, such diversion will impede the City’s ability to develop a thorough WQIP and undercuts the ultimate goal of the Permit.

Recognizing the need for a long-term approach to addressing water quality conditions, the State Board directed regional boards to “incorporate an ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during full implementation of the compliance alternative.” (State Water Resources Control Board, Order WQ 2015-0075, p. 52.) With direction from the State Board to create a space and time for Co-Permittees to come into compliance with receiving water limitation without being in violation of the Permit, it is imperative that the Board extend the Permit’s alternative compliance pathway to the planning phase. Because the planning process is integral to addressing water quality conditions, the City joins with the Co-Permittees in requesting that the alternative compliance pathway include the WQIP planning process.

4. REVISE ANNUAL MILESTONE REQUIREMENT TO INCLUDE MEANINGFUL MILESTONES (PROVISION B.3.c.(1)(a)(vii), B.3.c.(1)(d), B.3.c.(2)(c), B.3.c.(2)(d) and footnote 9)

The Tentative Order’s alternative compliance pathway requires Water Quality Improvement Plans to set annual milestones for each numeric goal. These milestones must build on previous milestones and lead to the achievement of a final numeric goal. While improvements to water quality may be more difficult to attain in the absence of clear goals and milestones, an artificial annual milestone for each goal does not account for the complicated and long-term nature of the strategies designed to attain water quality objectives. Further, requiring annual milestones for every water body – pollutant combination restricts the Co-Permittees’ ability to prioritize water quality conditions and dedicate limited resources to the highest priority milestones. In order to establish meaningful milestones over time, the milestones should be developed as part of the adaptive management process. The City therefore joins with the Co-Permittees in requesting a revision to the annual milestone requirement in Provisions B.3.c.(1)(a)(vii), B.3.c.(1)(d), B.3.c.(2)(c), B.3.c.(2)(d) and footnote 9.

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The City is grateful for SDRWQCB staff's efforts in drafting a fair and workable alternative compliance pathway. We believe that with the minor modifications requested in this comment letter and those of the County on behalf of the City and other Co-Permittees, the City will be a position to move forward with confidence in attaining water quality improvements in the region.

Sincerely,

A handwritten signature in cursive script that reads "Rebecca Andrews".

Rebecca Andrews
for BEST BEST & KRIEGER LLP

cc: Mary Vondrak, City of San Clemente