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February 13, 2015

VIA EMAIL (SANTAANA@WATERBOARDS.CA.GOV)

California Regional Water Quality Control Board, Santa Ana Region
Attn: Adam Fischer
3737 Main Street, Suite 500
Riverside, CA 92501

Subject: Comments on the Second Draft Orange County Municipal Separate Storm Sewer System Permit (Tentative Order No. R8-2015-0001, NPDES Permit No. CAS618030)

Dear Mr. Fischer:

The City of Lake Forest ("City") appreciates the opportunity to review and comment on the California Regional Water Quality Control Board, Santa Ana Region ("Santa Ana Water Board") second draft of the Orange County Municipal Separate Storm Sewer System ("MS4") Permit, Order No. R8-2015-0001 ("Second Draft Order"). Since the City already provided comments on the first public draft of the MS4 Permit released in May 2014, the comments in this letter focus on the Second Draft Order. However, the City does not waive the comments previously submitted in response to the first draft of the MS4 Permit. The City is also aware that the County of Orange has prepared and submitted comments on the Second Draft Order. The City expresses its support for and joins in the submission of the County's comments. The comments in this letter supplement the County's comments, as well as the City's comments on the first draft, and are intended to allow the City to continue working toward the common goal of improving water quality in the region.

1. INCLUDE LANGUAGE TO IMPLEMENT THE DESIGNATION AGREEMENT

The Cities of Lake Forest, Laguna Hills, and Laguna Woods are located partially within the jurisdictions of the Santa Ana Water Board and the California Regional Water Quality Control Board, San Diego Region ("San Diego Water Board"). As a result, these cities have experienced significant administrative and financial burden having to comply with two different MS4 permits that is not contributing to greater overall water quality improvements in either region. Written requests for designation of a single regional water board to regulate matters pertaining to



permitting of Phase I MS4 discharges were submitted by the cities to the Santa Ana Water Board and the San Diego Water Board. In an effort to address these concerns, the Santa Ana Water Board and the San Diego Water Board are entering into an agreement whereby the Santa Ana Water Board is designated to regulate the entire jurisdiction of the City of Lake Forest, including those areas located within the San Diego Water Board's jurisdiction; and the San Diego Water Board is designated to regulate the entire jurisdictional area of the Cities of Laguna Hills and Laguna Woods, including those areas of each City located within the Santa Ana Water Board's jurisdiction. These designations should be reflected within the language of the Second Draft Order.

Recommendation: Specific modifications to the Second Draft Order are as follows:

A. Fact Sheet Section V

DESIGNATION OF A REGIONAL WATER BOARD

Regional Water Board Designation. The Cities of Laguna Hills, Laguna Woods, and Lake Forest (Cities) are located partially within the jurisdictions of both the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) and the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board). Written requests for designation of a single Regional Water Board to regulate matters pertaining to permitting of Phase I MS4 discharges were submitted to the Santa Ana Water Board by the City of Laguna Hills by letter dated March 12, 2014, the City of Laguna Woods by letter dated September 8, 2014, and the City of Lake Forest by letters dated January 14, 2013 and April 4, 2014. The City of Lake Forest requested designation of the Santa Ana Water Board, and the Cities of Laguna Hills and Laguna Woods requested designation of the San Diego Water Board. Water Code section 13228 specifies the circumstances that allow, and the process for, designation of a Regional Water Board.

Factual Considerations. The Santa Ana Water Board and San Diego Water Board establish generally consistent requirements for MS4 discharges to meet the technology-based standard of reducing pollutants in the discharge to the maximum extent practicable (MEP), a related iterative process to ensure MS4 discharges meet receiving water quality standards, and non-storm water discharges to be effectively prohibited from entering the MS4. However, due to the unique nature of watersheds and water quality issues in the Santa Ana Region and San Diego Region, MS4 permit requirements between the two Regional Water Boards may also vary to address region specific pollutant discharges and watershed conditions. The Cities of Laguna Hills, Laguna Woods, and Lake Forest report that management and implementation of municipal programs to comply with two different MS4 permits creates a significant administrative and financial burden that is not contributing to greater overall water quality improvements in either region.

Regional Water Board Agreement. In an effort to address the concerns of the Cities, the Santa Ana Water Board and the San Diego Water Board have entered into an agreement whereby the Santa Ana Water Board is designated to regulate the entire jurisdictional area of the City of Lake Forest, including those areas located within the San Diego Water Board's jurisdiction; and the San Diego Water Board is designated to regulate the entire jurisdictional areas of the Cities of Laguna Hills and Laguna Woods, including those areas of each City located within the Santa Ana Water Board's jurisdiction. Under the terms of the agreement the City of Lake Forest will be required to retain and continue implementing the prohibition of over-irrigation discharges identified in section 15.14.030 of the City Municipal Code for regulating storm water quality throughout its jurisdiction, which was established during the permit term of Order No. R9-2009-0002. The City of Lake Forest will also be required to actively participate in the development and implementation of the Aliso Creek Watershed Management Area Water Quality Improvement Plan required pursuant to the San Diego Water Board's Regional MS4 Permit, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001. Under the terms of the agreement, any Total Maximum Daily Load (TMDL) and associated MS4 permit requirements issued by the Santa Ana Water Board or the San Diego Water Board which include the Cities of Laguna Hills, Laguna Woods, or Lake Forest as a responsible party, will be incorporated into the appropriate MS4 permit by reference. Enforcement of the applicable TMDL would remain with the Regional Water Board which has jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San Diego Creek/Newport Bay TMDLs and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL.

Periodic Review of Regional Water Board Agreement. The basis supporting the Cities of Laguna Hills, Laguna Woods, and Lake Forest requests to designate a specific Regional Water Board for regulatory oversight of MS4 discharges may change under future conditions and circumstances. Therefore, the Santa Ana Water Board will periodically review the effectiveness of the agreement during each MS4 permit reissuance. Based on this periodic review the Santa Ana Water Board may terminate the agreement with the San Diego Water Board or otherwise modify the agreement subject to the approval of the San Diego Water Board.

B. Table 1 Footnote

The entire jurisdiction of the City of Lake Forest, including those areas located in the San Diego Region, will be regulated by the Santa Ana Water Board. The

entire jurisdiction of the City of Laguna Hills and the City of Laguna Woods, including those areas located in the Santa Ana Region, will be regulated by the San Diego Water Board. These designations are subject to the terms of the

agreement between Santa Ana Water Board and the San Diego Water Board and become effective on the later effective date of this Order or the effective date of San Diego Water Board Tentative Order No. R9-2013-0001, as amended by Order No. R9-2015-0001.

C. New Finding 2

Regional Water Board Designation. The Cities of Laguna Hills, Laguna Woods, and Lake Forest are located partially within the jurisdictions of the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) and the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) and are subject to regulation by both Regional Water Boards. Pursuant to CWC section 13228, the Cities of Laguna Hills, Laguna Woods, and Lake Forest submitted written requests that one Regional Water Board be designated to regulate each of the Cities. The Santa Ana Water Board and the San Diego Water Board have entered into an agreement dated January XX, 2015, whereby the Santa Ana Water Board is designated to regulate the entire jurisdictional area of the City of Lake Forest, including those areas located within the San Diego Water Board's jurisdiction, and the San Diego Water Board is designated to regulate the entire jurisdictional areas of the Cities of Laguna Woods and Laguna Hills, including those areas of each City located within the Santa Ana Water Board's jurisdiction, on the effective date of this Order or San Diego Water Board Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, whichever is later. The agreement provides that the City of Lake Forest will be required to retain, and continue implementation of, its over-irrigation discharge prohibition in Section 15.14.030 of the City Municipal Code for regulating storm water quality throughout its jurisdiction. The City of Lake Forest will also be required to actively participate during development and implementation of the Aliso Creek Watershed Management Area Water Quality Improvement Plan required pursuant to San Diego Water Board Order No. R9-2013-0001, as amended by Order No. R9-2015-0001. Each Regional Water Board retains the authority to enforce provisions of the Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee (Water Code section 13228 (b)). Under the terms of the agreement, any TMDL and associated MS4 permit requirements issued by the Santa Ana Water Board or San Diego Water Board which include the Cities of Laguna Hills, Laguna Woods, or Lake Forest as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement of the applicable TMDL will remain with the Regional Water Board which has jurisdiction over the targeted impaired water body.

Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San Diego Creek/Newport Bay TMDLs and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL. The Santa Ana Water Board will periodically review the effectiveness of

the agreement during each MS4 permit reissuance. Based on this periodic review the Santa Ana Water Board may terminate the agreement with San Diego Water Board or otherwise modify the agreement subject to the approval of the San Diego Water Board.

D. Appendix A Footnote

The City of Lake Forest must also comply with the TMDL for Indicator Bacteria, Project 1 – Twenty Beaches and Creeks in the San Diego Region per Attachment E of San Diego Water Board Order No. R9-2013-0001, as amended by Order No. R9-2015-0001 and any revisions thereto.

2. INCLUDE FURTHER CLARITY ON COMPLIANCE PLANS FOR RECEIVING WATER LIMITATIONS

The City appreciates the revisions in Section IV.D to more closely conform the Second Draft Order with State Water Resources Control Board Resolution WQ 99-05 (“Resolution 99-05”). Resolution 99-05 includes a requirement that “permittees . . . promptly notify and thereafter submit a report to the Regional Water Board . . .” after determining that a discharge causes or contributes to an exceedance of a water quality standard. (Resolution 99-05.) The Second Draft Order does not include the requirement that permittees “promptly notify” the Santa Ana Water Board of the intent to prepare a compliance plan prior to submitting a draft plan to the Executive Officer. (Second Draft Order, Section IV.D.) This omission removes notification from the iterative process inconsistent with Resolution WQ 99-05. Including a notification requirement establishes a clear initiation point for the iterative process and clarifies plan submission deadlines.

Recommendation: Include a notification requirement in Section IV.D, consistent with Resolution 99-05, and make corresponding modifications to the Technical Report, as follows:

A. Second Draft Order Section IV.D

Upon a determination by a Co-permittee or the Executive Officer that a discharge is causing or contributing to the exceedance of an applicable water quality standard, the responsible Co-permittee(s) must promptly notify and thereafter submit a draft plan to the Executive Officer describing actions that will be taken to achieve compliance. A plan to achieve compliance with TMDL waste load allocations-related water quality-based effluent limits related to the exceeded water quality standard, and prepared according to Section XVIII of this Order, also satisfies this Provision.

B. Draft Technical Report Section XII.C

. . . To implement this “iterative process”, Section IV of this Order requires the Co-permittees to notify the Executive Officer of their intent to develop a compliance plan, development of a plan revising the storm water management program and its components

to include additional BMPs, an implementation schedule and additional monitoring to address the exceedances; and implementing the revised storm water management program.

- C. Draft Technical Report Section XII.O.** The Technical Report's description of the method of complying with the WQBELs incorporated into Section XVIII of the Second Draft Order omits reference to the notification requirement. Revise the description of the method of compliance as follows:

“(2) notifying the Executive Officer of the intent to develop a plan and thereafter implementing an approved plan that is designed to comply with final WQBELs”

3. REVISE TMDL SECTION TO PROVIDE FURTHER CLARITY ON COMPLIANCE PATHWAY

Consistent with TMDL requirements, Co-permittees have developed and implemented, or are in the process of developing and implementing compliance plans for several TMDLs in the Newport Bay watershed. The Executive Officer has reviewed and approved some of the plans and the Co-permittees are implementing approved plans. Where a TMDL provides for the development and implementation of a compliance plan in fulfillment of the TMDL requirements, the Second Draft Permit should reflect such provision. Where Co-permittees are in the process of developing a TMDL and/or an implementation plan, such as the current selenium TMDL for Newport Bay, participation in the TMDL and/or plan development should constitute compliance with the TMDL, as incorporated into the Second Draft Permit.

Recommendation: Revise Section XVIII.A.3 to incorporate compliance pathways established in existing TMDLs and participation in the development of plans as compliance with the Second Draft Order, as follows:

A Co-permittee may comply with WQBELs through any lawful means. Implementing an approved implementation plan, BMPs consistent with an approved plan, or a WQBEL compliance plan, as defined herein, constitutes compliance with this Order. Where an implementation plan, WQBEL compliance plan, or Time Schedule Order (TSO) is being developed, including the development of a TMDL for selenium in the Newport Bay and a corresponding implementation plan, a Co-permittee's participation in the development of such TMDL, plan or order constitutes compliance with this Order.

4. ELIMINATE STATEMENTS ASSERTING THAT AN MS4 CAN BE A RECEIVING WATER

Finding 13, the definition of “municipal separate storm sewer system,” and Section V of the Technical Report continue to improperly consider some MS4s to be waters of the United States. An MS4 cannot be a water of the United States under the statutory and regulatory structure of the Clean Water Act, even if the MS4 exhibits characteristics of a water of the United States. (33 U.S.C. §§ 1362, subds. (12), (14); 40 C.F.R. § 122.26, subd. (b)(8).) The Clean Water Act's

definition and treatment of the terms “navigable waters” and “point sources” create separate and distinct categories that do not overlap. (See, *Rapanos v. United States* (2006) 547 U.S. 715, 735.) Navigable waters are waters of the United States. (33 U.S.C. 1362(7).) A “point source” is a discernible, confined and discrete conveyance from which pollutants are or may be discharged into navigable waters. (33 U.S.C. 1362(14).) Writing for a plurality of the Supreme Court in *Rapanos*, Justice Scalia supported the distinction between these terms, stating, “[t]he definitions thus conceive of “point sources” and “navigable waters” as separate and distinct categories. The definition of ‘discharge’ would make little sense if the two categories were significantly overlapping.” (*Rapanos, supra*, 547 U.S. at p. 735.) Attempting to diminish the distinction between MS4s and waters of the United States by “applying the definition [of waters of the United States] to . . . storm sewers . . . [and] man-made drainage ditches . . . stretche[s] the term ‘waters of the United States’ beyond parody.” (*Rapanos, supra*, 547 U.S. at p. 734.) MS4s and waters of the United States cannot discharge into themselves. (*Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.* (9th Cir. 2013) 133 S.Ct. 710, 713.)

Recommendation: Revise Finding 13, the definition of “municipal separate storm sewer system,” and Section V of the Technical Report to remove dual classification of MS4s and waters of the United States, as follows:

A. Finding 13

Runoff Discharges to Receiving Waters. The MS4s discharge runoff into lakes, reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within the Santa Ana Region. ~~Development generally makes use of natural drainage patterns and features to convey runoff. Rivers, streams and creeks in developed areas used in this manner and under the ownership and control of the Permittees are part of MS4s regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the rivers, streams and creeks in the developed areas of the Permittees’ jurisdictions are both an MS4 and receiving water.~~ Discharges of runoff from MS4s must occur through outfalls (point sources) into waters of the U.S. Outfalls do not include open conveyances connecting two municipal separate storm sewers. Outfalls also do not include pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the U.S. and are used to convey waters of the U.S. (40 C.F.R. 122.26(b)(9)).

B. Glossary

Municipal Separate Storm Sewer System (“MS4”) – A conveyance or system of conveyances designed to collect and/or transport urban runoff (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, ~~natural drainage features or channels, modified natural channels,~~ man-made channels, or storm drains): (i) Owned or operated by a State, city town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm

water, or other wastes; (ii) Designated or used for collecting or conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW)

C. Technical Report, Section V

In summary, MS4s are defined in 40CFR122.26(b)(8) as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)...designed or used for collecting or conveying storm water”. ~~Due to the broad inclusion of the definition, portions of MS4s in the permit area will include open channels that are waters of the U.S. In these cases, the channels are considered receiving waters whose beneficial uses must be protected.~~

Clean Water Act Section 502 defines a “discharge of a pollutant” and the term “discharge of pollutants” as “any addition of any pollutant to navigable waters from any point source” and “any addition of any pollutant to waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft”. The term “discharge”, as used in this Order, means the discharge of a pollutant. Discharges regulated by this Order occur through “outfalls” which are a point source at the point where a MS4 discharges to waters of the U.S. An outfall does not include open conveyances connecting two municipal separate storm sewers. An outfall does not include pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the U.S. and are used to convey waters of the U.S. (40 C.F.R. 122.26(b)(9).)

5. RETAIN “BACKGROUND” AND “NATURAL” IN FINDING 2 AND SECTION IV.D.3

The Second Draft Order’s modifications to Finding 2 replaced the phrase “background or naturally occurring pollutants or flows” with “non-anthropogenic pollutants or flows[.]” The terms “background” and “natural” loadings are technical terms and should not be replaced in their entirety by the term “non-anthropogenic.” (40 C.F.R. § 130.2, subds. (e), (g), (i).)

Recommendation: Include the terms “background” and “naturally occurring” in Finding 2 and Section IV.D.3.h, as follows:

A. Finding 2

Regulated Sources and Activities. This Order regulates the discharge of pollutants from anthropogenic sources in urban runoff from MS4s or activities within the jurisdiction and control of the Co-permittees. Except as noted in Finding 8 below, this Order authorizes discharges of urban runoff from MS4s subject to the conditions and provisions herein. This Order is not intended to obligate the Co-permittees to address background, naturally-occurring, or non-anthropogenic pollutants or flows in receiving waters.

B. Section IV.D.3.h

provide evidence, acceptable to the Executive Officer, that the source of pollution is background, naturally-occurring, or non-anthropogenic, or that the cause of pollution is not within the jurisdiction or control of the Co-permittees.

6. RESTORE RECOGNITION OF LIMITATION ON MUNICIPAL AUTHORITY

Co-permittees' ability to enter private property and conduct inspections of stormwater facilities is limited by the United States Constitution, California's Constitution, and state and federal law. The Second Draft Order eliminates four references to this limitation, and requires Co-permittees to maintain legal authority that is adequate to enter, inspect, and gather evidence from industrial, construction, and commercial establishments. (Second Draft Order, Sections VI.C [general legal authority requirement]; VIII.B [construction inspection]; IX.B [industrial inspection]; X.B [commercial inspection].) Intentionally deleting reference to these limitations may imply that Co-permittees must have authority to enter private property in all circumstances. (See *Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n* (1983) 461 U.S. 190, 220 [deletion of language in the drafting history may demonstrate consideration and rejection of the deleted proposition].) Restoring the original language eliminates this potential confusion.

Recommendation: Restore the original language in Sections VI.C, VIII.B, IX.B, and X.B, recognizing the constitutional and statutory limitations on municipal authority, as follows:

A. Section VI.C

Each Co-permittee must secure and maintain legal authority, to the extent allowed by State and Federal Law, and subject to limitations on municipal action under the constitutions of the state of California and the United States, that is adequate to enter, inspect, and gather evidence (including pictures, video, samples, statements, and documents) from industrial, construction, and commercial establishments to determine compliance with ordinances, permits, conditions, and

other requirements of the Co-permittees related to the control of discharges of pollutants to their MS4s.

B. Section VIII.B

Each Co-permittee must inspect construction sites in their inventory, subject to limitations on municipal action under the constitutions of the State of California and the United States. Each Co-permittee must have written policies and procedures that describe how inspections and related enforcement actions are carried out. Inspections and related enforcement actions must be carried out in a manner that enforces compliance with applicable ordinance(s), plans, permits, or other requirements related to the control of discharges of pollutants to their MS4s.

C. Section IX.B

Each Co-permittee must inspect industrial sites in their inventory, subject to limitations on municipal action under the constitutions of the State of California and the United States. Each Co-permittee must have written policies and procedures that describe how inspections and related enforcement actions are carried out. Inspections and related enforcement actions must be carried out in a manner that consistently enforces compliance with applicable ordinance(s), plans, permits, or other requirements related to the control of discharges of pollutants to their MS4s.

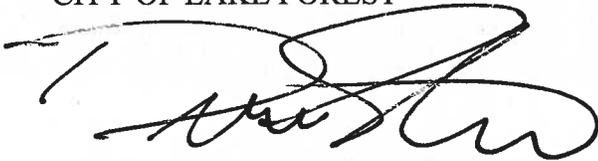
D. Section X.B

Each Co-permittee must inspect commercial sites in their inventory, subject to limitations on municipal action under the constitutions of the State of California and the United States. Inspections must occur according to written processes and procedures, and in a manner to enforce compliance with ordinance(s), plans, permits, WQMPs, or other requirements related to the control of discharges of pollutants to their MS4s.

CONCLUSION

Thank you for the opportunity to comment on the Second Draft Permit and for your willingness to accommodate the City's request for regulation by a single regional water board. The City is committed to improving water quality in the region and provides these comments with the intent to participate in developing a permit that accomplishes this goal.

Sincerely,
CITY OF LAKE FOREST



Devin Slaven, CPSWQ, QSP/QSD
Environmental Manager