



January 11, 2013

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via Electronic Mail
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RE: Comment – Tentative Order No. R9-2013-0001, Regional MS4 Permit
Place ID: 786088Wchiu
Monitoring Requirements Should Be Strengthened

Please accept these comments on behalf of the Coastal Environmental Rights Foundation (CERF), Environmental Health Coalition (EHC), and San Diego Coastkeeper (SDCK). These San Diego organizations act through community involvement, regulatory participation, and legal action to ensure the protection restoration of San Diego Bay, Mission Bay, and the region's coastal waters.

CERF, EHC and SDCK support and hereby join in the comments submitted by the Keepers (San Diego, Orange County, and Inland Empire), and specifically reiterate the need for more stakeholder input in the development of Water Quality Improvement Plans, especially the monitoring component. CERF submits this comment letter to specifically focus on the water monitoring requirements within the Regional MS4 Permit.

As the Regional Water Quality Control Board (Regional Board) is likely aware, the United States Supreme Court recently issued a very narrow opinion in *L.A. County Flood Control Dist. v. NRDC, Inc.*, 2013 U.S. LEXIS 597 (U.S. Jan. 8, 2013), reviewing a portion of the Ninth Circuit's decision in *NRDC, Inc. v. County of Los Angeles*, 673 F.3d 880 (9th Cir. Cal. 2011). The Supreme Court's ruling did not reach a portion of the Ninth Circuit's ruling related to the question of whether "exceedances detected at the instream monitoring stations are by themselves sufficient to establish the District's liability under the CWA for its upstream discharges." (*L.A. County Flood Control Dist*, 2013 U.S. LEXIS 597, 8-10).¹ (*NRDC, Inc.*, 673 F.3d at 901). Therefore, it remains to be seen whether the Ninth Circuit's admonishment to citizen complainants that they must "spotlight how the flow of water from an ms4 'contribute[s]' to a water-quality exceedance detected at the Monitoring Stations" will stand.

In light of this potential new evidentiary hurdle, and more importantly the longstanding requirement that all NPDES permits contain monitoring provisions sufficient to assess compliance, CERF urges the Regional Board to require more robust, frequent, and widespread monitoring in the Regional MS4 Permit. (See Permit Attachment F, Fact Sheet, p. F-16). As reiterated by the Ninth Circuit, "Congress intended the Clean Water Act to function by self-monitoring and self-reporting violations to avoid the necessity of lengthy fact-finding,

¹ Environmental citizen plaintiffs still believe the water-quality exceedance itself is enough to establish Clean Water Act liability.

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investigations, and negotiations at the time of enforcement.” (*Id.* at 896, quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64, reprinted in 1972 U.S.C.C.A.N. 3668, 3730).

Notwithstanding the aforementioned requirements, as amended from the previous, more expansive, administrative version of the permit, the current Regional MS4 Permit takes a more lax approach to monitoring. Pursuant to the proposed Regional MS4 Permit, the copermitees are not required to perform *any* transitional dry weather outfall monitoring, instead relying on field screening only. (D.2.a.(1)-(2)). In addition, the longterm monitoring plan for non-storm water persistent flow MS4 outfall discharge monitoring frequency is “at least semi-annually”, while it was a monthly requirement in the previous draft. Most significantly, the currently proposed Regional MS4 moved away from the grid system, whereby the copermitees would monitor at least one station in each cell containing a segment of the copermitees’ MS4. Now, copermitees will only have to monitor the ten highest priority non-storm water persistent flow outfalls. (D.2.b.(2)(b)).

This monitoring approach is insufficient for achieving the stated goal of informing copermitees about the “nexus between the health of receiving waters and the water quality condition of the discharges from their MS4.” (Permit, p. 33). Equally important are the Regional Board’s need to assess compliance and the public’s ability to stay informed of the copermitees’ compliance and progress:

The monitoring and assessment information that will be reported to the San Diego Water Board is necessary to determine if the Copermitees are making progress toward achieving compliance with the discharge prohibitions, receiving water limitations, and effluent limitations under Provision A of the Order. (Permit Attachment F, Fact Sheet, p. F-16).

Implementation of the monitoring and assessment requirements of Provision D will allow the Copermitees to demonstrate that the requirements of the CWA to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP are being achieved. (*Id.* at p. F-58).

The required semi-annual dry weather outfall monitoring does not adequately serve any of these functions. EPA *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters (NPS Management Guidance)* provides some insight on the need for more frequent sampling:

Coastal waters, estuaries, ground water, and lakes will typically have longer response times than streams and rivers. Thus, sampling frequency will usually be greater for streams and rivers than for other water resource types. Some parameters such as total suspended solids and fecal coliform bacteria can be highly variable in stream systems dominated by nonpoint sources, while nitrate levels may be less volatile in systems driven by baseflow from ground water. The highly variable parameters would generally require more frequent sampling, but parameter variability should be evaluated on a site-specific basis rather than by rule of thumb. (*NPS Management Guidance*, Chapter 8, section 5a.).

Thus, the proposed semi-annual monitoring frequency is unlikely to capture the variability of most inland receiving waters and many parameters.

The EPA further recognizes that *monthly* sampling is suitable to detect the annual pattern of changes with time. (*Id.*). Indeed, the original administrative version of the permit contained a monthly monitoring requirement. This more appropriate frequency was replaced with the current semi-annual monitoring provision apparently in response to comments by the San Diego copermittees.² The copermittees' reasoning, however, provides little justification for this change. The copermittees relied in part on their poor results in detecting and eliminating illicit discharges through the current permit's monitoring requirements. (San Diego Copermittee Supporting Documentation and Rationale for Alternative Provision II.D Monitoring and Assessment Requirements ("Supporting Rationale"), September 14, 2012, p. 26). The copermittees' inability to detect and eliminate non-storm water flows is more likely an enforcement issue rather than a monitoring problem. Indeed, if the copermittees need more data in order to trace the source of the non-storm water flow, *more* monitoring should be required, not less.

The copermittees also point to the effectiveness of their industrial and commercial inspections to justify less frequent monitoring. However, their own data shows that from 2009 to 2011, no ICIDs were detected, and therefore none were stopped. Rather than representing an effective ICID detection program, this data shows that inventoried commercial and industrial uses are not the source of ICIDs. In other words, this constitutes an exercise in the process of elimination, not detection.

Lastly, the copermittees argue the complaint process is the most effective means of detecting and eliminating ICIDs, and therefore should be relied upon more heavily. While CERF, EHC and SDCK applaud the copermittees for their success in complaint responses, and in ICID elimination as a result, the fact remains that dry weather flows continue, and copermittees have failed to adequately determine their source and effectively eliminate them. This is evident in the copermittees data. In response to dry weather monitoring, only 174 site visits were made, while the successful complaint procedure resulted in 939 visits – five times more visits. (*Id.* at p. 27). It appears copermittees are simply not *using* the dry weather monitoring data. Rather than reward the copermittees for their failure, the Regional Board should require more data in order to enable to copermittees to more effectively trace dry weather flows to their source.

² The copermittees argued: "The approach outlined in the Administrative Draft Tentative Order would generate a great deal of water quality data for dry weather flows and identify some IC/IDs. However, since the purpose of the program is to eliminate dry weather flows and IC/ID flows entirely, there is little value to collecting extensive dry weather water quality data for MS4 sites. Very little of the water quality data collected would support assessment of the stated program management objective to effectively prohibit non-storm water discharges to the MS4s." (San Diego Copermittee Comments on Tentative Order No. R9-2012-0011, September 14, 2012, p. 31, emphasis added).

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Importantly, while the copermittees focus on the ICID detection and elimination aspect of dry weather monitoring, of equal importance is the compliance aspect. More frequent monitoring is integral to demonstrating active compliance with the prohibition against non-storm water flows in the MS4.

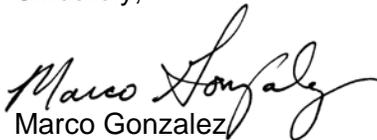
In addition to lax dry weather monitoring, the current permit requires minimal wet weather monitoring, as the copermittees are to monitor wet weather MS4 outfalls at “an **appropriate frequency** to identify sources of pollutants in storm water discharges from the MS4s causing or contributing to the highest priority water quality conditions...”. (D.2.c.(2), emphasis added). As has been the case historically, when given the option copermittees will monitor as *infrequently* as possible.

Further, as provision B.4. of the Regional MS4 Permit requires, at a minimum, that Water Quality Improvement Plans (WQIPs) include the requirements of Provision D as part of the water quality improvement monitoring and assessment program for the WQIPs, it is very likely the copermittees will do no more monitoring than required in Provision D.³ Thus, if the public, the Regional Board, and the copermittees are to truly assess compliance and the success of their iterative approach, the Regional MS4 Permit itself must require more monitoring.

We urge the Regional Board to reconsider its revised monitoring requirements in the draft Regional MS4 Permit in light of the stated goals of the monitoring program, and the potential compliance and enforcement issues that may result if adequate monitoring is not made part of the new permit.

Thank you in advance for your consideration of our comments. Should you have any questions, please feel free to contact us directly.

Sincerely,



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³ Monitoring for TMDLs and ASBS is also required, but these provisions only apply to those copermittees where TMDLs have been adopted and ASBS are located. (See Attachment E).