

August 15, 2013

Ms. Emel G. Wadhvani  
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State Water Resources Control Board  
Office of Chief Staff Counsel  
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via e-mail to: [ewadhvani@waterboards.ca.gov](mailto:ewadhvani@waterboards.ca.gov)

Subject: SWRCB/OCC File A-2236(a) Through (kk): Responses to Questions Concerning Receiving Water Limitations

Dear Ms. Wadhvani:

The County of Orange and the Orange County Flood Control District (collectively, “County”) submit the following comments regarding the State Water Board’s July 8, 2013 request for comment on the watershed management program/enhanced watershed management program alternative contained in the Los Angeles MS4 permit. Specifically, the State Water Board asked whether the program alternative in the LA permit was a good approach to revising the receiving water limitations in MS4 permits, and if not, what revisions to the program alternative would make the approach viable. In short, the County believes that a compliance option is desperately needed by stormwater programs statewide and that while the LA permit approach is a starting point, it does not go far enough to resolve the real compliance issues facing MS4s, as discussed below.

Improving water quality and achieving compliance with receiving water limitations is one of the highest priorities for the County. The County and its 34 cities have been governed by two MS4 permits since 1990, and operate robust and successful urban runoff programs that have been recognized for the significant progress that has been made in addressing pollutants and priority water quality issues. For example, Heal the Bay now accords Orange County’s beaches some of its highest accolades,<sup>1</sup> and in Orange County’s inland streams there is a demonstrable systemwide decline in bacteria concentrations in dry weather. On a statewide basis, the County through the California Stormwater Quality Association (CASQA) have

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<sup>1</sup> Heal the Bay. 2012-13 Beach Report Card. Available at:  
[http://www.healthebay.org/sites/default/files/pdf/beachreportcard/BRC\\_2013\\_WEB.pdf](http://www.healthebay.org/sites/default/files/pdf/beachreportcard/BRC_2013_WEB.pdf)

supported source control efforts that will solve both a principal regulatory challenge, which is copper from brake pads (Senate Bill 346), and a principal environmental threat, which is pyrethroid related toxicity (California Department of Pesticide Regulation Surface Water Protection Program).

While the County has made significant progress in managing urban runoff, it is recognized that a number of constituents represent more intractable challenges requiring MS4 permittees to engage in cutting edge environmental research where it is simply too soon to conceive of a means of achieving the receiving water objective. For example, for constituents like selenium, there is not a proven best management practice that helps the County achieve its interim and final numeric limits under its TMDL. In addition, the County's MS4 permits require that the timing and volume of rainfall runoff be managed with a goal of restoring pre-development hydrology. And although low impact development and hydromodification controls are required in land development, the incorporation of these principles is only beginning and these are long term endeavors that will occur over many permit terms as development and redevelopment occurs and with the limitations imposed by soil types, groundwater levels, geotechnical considerations, pre-existing contamination and other constraints.

The County has indeed been successful in improving water quality, but like other regulated MS4 jurisdictions, it has taken time to get there through long term education, trials and testing of best management practices, and breakthroughs in scientific research. The ills of the urbanized environment cannot be corrected overnight or even in a five year permit term. Municipalities must be given a framework that will provide time to diligently and rigorously study priority pollutants and fund, plan and implement the projects and programs to reduce those pollutants. MS4s must be given the opportunity to try new techniques, and in some cases fail and learn from those techniques so that BMPs can be established and improved over time. MS4 dischargers are faced with the variability of rainfall, differing topography and urban landscape and a wide range of pollutants and pollutant sources that are not faced by industrial dischargers. Compliance with receiving water limitations should be met through diligent and rigorous efforts to reduce pollutants, and not simply through meeting a numeric effluent limitation. An iterative approach not only reflects the reality and practice of stormwater management, but is more likely to result in water quality improvements than the status quo receiving water limitations language because the iterative process encourages collaboration between permittees to implement regional projects and obtain needed funding for those projects.

The State Water Board through Orders WQ-1999-05 and 2001-15 has long outlined such an approach whereby stormwater management plans can be designed to achieve compliance with water quality standards over time. The 9th Circuit Court of Appeals, however, has recently ignored the policy of the State and Regional Water Boards and turned the iterative approach on its head by imposing strict liability for any MS4 outfall that exceeds receiving water standards

at any time irrespective of a city or county's diligent and rigorous efforts to avoid exceedances through implementing BMPs.<sup>2</sup> The NRDC case essentially took every receiving water standard in a basin plan, Ocean Plan, and any other water quality control plan, and turned those standards into de facto effluent limitations.<sup>3</sup> The 9th Circuit has also dispensed with any cause or contribute analysis for a finding of liability, and under the most recent NRDC opinion, an MS4 is liable for exceedances that it did not cause or contribute to and for exceedances that it cannot control. The 9th Circuit has essentially ignored the State Board's authority to enact water quality policy for receiving water limitations, and has given the State Board no deference in its interpretation as to what constitutes compliance.

The need for the State Board to clarify its prior Orders and provide direction to the Regional Boards to adopt a watershed management approach is clearly evidenced by events in the recent adoption of the San Diego MS4 permit. The San Diego MS4 permit is a region-wide permit that attempts to regulate San Diego, Riverside and Orange Counties in an unprecedented fashion.<sup>4</sup> The San Diego permit not only applies to one of the largest land areas in the country with varying topographies, soil types, climates, watersheds and discharge patterns, but it attempts to do so under a one size fits all approach in such areas as hydromodification and low impact development. Throughout a dozen public workshops, Regional Board staff advocated for a "try and fail" approach where municipalities could engage in an iterative process to comply with the permit's numeric effluent limitations. At one point, the permit contained a rigorous compliance option supported by EPA that could have been utilized after certain watershed modeling had been performed demonstrating that achievement of watershed goals could be met through established schedules.<sup>5</sup> After three days of public hearings on the permit, the Regional Board Executive Officer recommended against the iterative approach for no other reason other than that the permittees were not ready,<sup>6</sup> even after acknowledging that the permittees were already out of compliance prior to the permit being adopted and that compliance could not be achieved within the five-year permit term.<sup>7</sup> Upon this recommendation, members of the Regional Board voted against a compliance option.<sup>8</sup>

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<sup>2</sup> *Natural Resources Defense Council v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011), *rev'd on other grounds* by 133 S. Ct. 710 (2013); *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. Aug. 8, 2013) \_\_\_ F.3d \_\_\_ [Dock. No. 10-56017]. Unlike products liability law or the federal Oil Pollution Act of 1990 dealing with oil spills, the concept of strict liability for MS4s is not embedded in the Clean Water Act or Porter Cologne. Therefore, the State Board was correct in allowing for an iterative based approach to compliance.

<sup>3</sup> *NRDC*, 673 F.3d at 892 (holding that the receiving water limitations provision "prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere").

<sup>4</sup> The County and many other permittees have petitioned the State Board for review of its unlawful terms including the impossibility of compliance and the lack of any watershed management program.

<sup>5</sup> San Diego Regional Water Quality Control Board Draft Tentative Order R9-2013-0001 § II.B.3.c (Mar. 27, 2013); Transcript vol. I, 14:16-17 (May 8, 2013). It is not clear from the record why Regional Board staff recommended against the compliance option, only that the time was not right.

<sup>6</sup> Transcript vol. II, 88:22-23, 25; 89:1 (May 8, 2013).

<sup>7</sup> Transcript vol. II, 75:15-19.

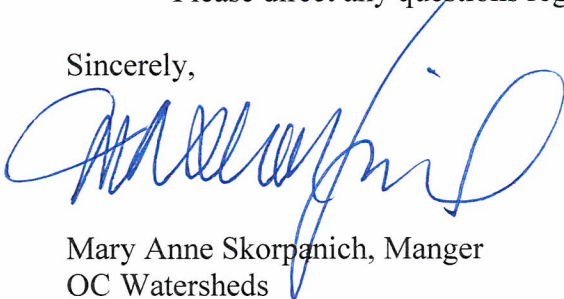


The adoption of the San Diego MS4 permit without a compliance option or other iterative approach was an abuse of discretion that could be corrected by the State Board mandating water quality improvement plans to form the basis of a compliance approach as is the case in the LA MS4 permit.

For the reasons set forth herein, the County supports the watershed management approach in the LA MS4 permit and the general approach recommended by CASQA. Specifically, the County supports voluntary participation by MS4 permittees; watershed management plans prepared on a watershed or jurisdictional basis; the prioritization of pollutant water body combinations; schedules for meeting interim milestones and final targets; and adaptive management to allow adjustment of BMPs. However, the County believes that the LA permit does not provide MS4 dischargers with adequate protections and urges the State Board to go further. Diligent and rigorous implementation of BMPs should comply not only with receiving water limitations and discharge prohibitions, but given the 9th Circuit's misinterpretation that all standards are de facto effluent limitations, compliance should be received for interim and final WQBELs derived from waste load allocations in adopted TMDLs and for portions of watersheds or subwatersheds served by BMPs designed to retain all non-stormwater discharges and all stormwater discharges up to the 85<sup>th</sup> percentile, 24 hour design storm. In addition, the State Board should include a procedure for adoption of alternative compliance when a permittee demonstrates that it is unable to develop sufficient BMPs to achieve timely compliance with one or more receiving water limitations, discharge prohibitions, or interim or final WQBELs due to technical infeasibility or hardship. Lastly, in the instance where a permittee fails to meet a requirement or a date for its achievement of an approved watershed management program, a permittee should have the ability to cure a compliance deficiency or the ability to follow an adaptive management process to sure such deficiency.

Please direct any questions regarding this letter to Chris Crompton at (714) 955-0630.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mary Anne Skorpanich".

Mary Anne Skorpanich, Manger  
OC Watersheds

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<sup>8</sup> Transcript vol. II, 100:8-9; 101:6-7; 103:2-9.