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August 15, 2013

VIA EMAIL ONLY

Emel G. Wadhwani
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State Water Resources Control Board
P.O. Box 100
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Re: SWRCB/OCC File A-2236(a) through (kk)
Comments of County of San Diego

Dear Ms. Wadhwani:

The County of San Diego appreciates the opportunity to comment on the subject request from the State Water Resources Control Board (State Board) in the July 8 correspondence to interested parties regarding petitions for review of the Los Angeles Region MS4 Permit. We understand that the solicitation of comments is for the purpose of continuing the State Board's policy review of prior decisions on the important topic of Receiving Water Limitations language in MS4 Permits. We will generically refer to the issue of the significance of both receiving water limitations and discharge prohibitions language in MS4 Permits as the "RWL language issue" in our comments. The Los Angeles Region Permit and San Diego Region Permit have slightly different language in this regard. Please accept and consider the following comments by the County of San Diego.

The Need for RWL Permit Language Reform

Your Board agreed to review the RWL language in storm water permits after receiving comment on the impact of the 9th Circuit Court of Appeal holding in *NRDC v. County of Los Angeles et. al.* 673 F.3d 880 (9th Cir. 2011). By now, you have surely read and digested the August 8, 2013 9th Circuit opinion on remand from the U.S. Supreme Court. This holding monumentally increases the significance of your Board's consideration of the RWL language issue. We know your Board has already received comments from interested parties on the potential liability from third-party litigation created by the RWL language issue; we will not reiterate those comments here.

The County of San Diego respectfully asks your Board to consider the fundamental legal and logical inconsistency of including the typical RWL language in MS4 permits at all. By its very nature, a permit process as created by CWA §402 is intended to allow what would otherwise be prohibited, but under prescribed conditions. Congress created the separate maximum extent practicable (MEP) standard for MS4 systems because it recognized that vast, open, difficult-to-control MS4 systems would be challenged to meet CWA §301 water quality standards until far into the future. Against that premise, it is simply inconsistent to "permit" a discharge of storm water that is currently known to contain constituents that will cause or contribute to a violation of water quality standards, while simultaneously absolutely prohibiting that same discharge. That is the scenario created by including the current iterations of the RWL language in storm water permits.

The fundamental problem is that the RWL language creates an unrealistic prohibition. Post-*NRDC*, this is compounded by permittees throughout the state now having to struggle to find artificial compliance solutions for that unrealistic prohibition. The Los Angeles region's permit language is the most recent example. A similar approach was considered but not adopted in the new San Diego region permit. Because of this dilemma, comment should not be limited to the questions posed in the context of the Los Angeles' region's attempt to address a problem that need not exist. We assert that your Board should focus upon reforming or eliminating what creates the problem in such a way as to implement Congressional intent and move water quality efforts forward in a collaborative way.

In order to create a fair, reasonable permitting process for MS4 discharges, the language should either be removed or modified to reflect the unique realities of MS4 systems. To issue a permit every 5 years with provisions that place permittees in immediate violation of the permit is not a viable "permitting" process. It fosters

uncertainty, unproductive litigation, and frustration for well-intending municipal storm water programs working hard to achieve real, meaningful water quality improvement.

The RWL Language is Inconsistent with CWA §402's MEP Standard

CWA § 402(p)(3)(B)(iii) requires storm water permits to require controls to reduce discharges of pollutants to the maximum extent practicable. MEP is not defined in federal law or regulation, but the creation of a separate standard for MS4 permits means Congress did not require MS4s to strictly comply with CWA § 301. *Defenders of Wildlife v. Browner* 191 F. 3d 1159, 1166 (9th Cir. 1999). Your Boards' February 11, 1993 Memorandum of Chief Counsel affirms the intent of Congress in establishing the MEP standard in saying, "First, the requirement is to reduce the discharge of pollutants, rather than totally prohibit such discharge. Presumably, the reason for this standard (and the difference from the more stringent standard applicable to industrial dischargers in 402(p)(3)(A), is the knowledge that it is not possible for municipal dischargers to prevent discharge of all pollutants in storm water." Chief Counsel Memo, p. 2.

Your Board's precedential Order WQ 2001-15 recognizes that the *Browner* decision allows the issuance of municipal storm water permits that do not require strict compliance with water quality standards. However, the Order declines to adopt an approach that would have aligned permit language with reality. The rationale for declining to adopt language consistent with reality should be altered by the 9th Circuit's *NRDC* decisions. It is no longer solely within the province of the Regional Boards to issue absolute prohibitions but elect not to enforce them while an iterative process is pursued between the Regional Boards and permittees. Ironically, Regional Boards electing not to enforce the absolute prohibition opens the door to third parties to sue to enforce, as in *NRDC*. Therefore, if the iterative process is to be alive and the path to an ever-evolving MEP standard is the goal, your Board must revisit its policy on the RWL language.

More recently, your Board's Caltrans Permit fact sheet (Order 2012-0011 DWQ) recognized the infeasibility of setting numeric effluent criteria for municipal BMPs and urban discharges. Caltrans Fact Sheet, p. 10. The same finding should be made on the infeasibility for MS4 discharges to not cause or contribute to violations of water quality standards. Recognizing and modifying RWL language in regional permits on this basis is essential to the continuing evolution of the regulator-permittee relationship, as collaborators in the march to improved water quality.

San Diego County representatives' discussions with State Board staff last fall focused on finding ways to "redesign" programs to allow flexibility to local governments to design targeted approaches to the most pervasive problems in particular watersheds, while providing some means for Regional Boards to measure progress, followed by periodic adjustments based upon experience. Improved science, basin plan updating, and holistic approaches to water quality achievement were emphasized. The County endorses these concepts, and generally endorsed the Water Quality Improvement Plan features of the San Diego Region Permit (R9-2013-0001).

Requiring permittees to design, obtain approval and implement a long range water quality plan for a region that reflects the maximum extent practicable standard should be the goal and, if followed, be compliance with the permit. The RWL language does not move this process forward; it impedes it. The potential diversion of funds defending suits, paying fines and having a program re-designed involuntarily by the federal judiciary undermines a process that should remain within the province of regulators and regulated entities.

Response to Questions Posed

Your Board's directive to interested parties posed two questions in the context of the Los Angeles Region's MS4 Permit provisions:

1. Is the watershed management program/enhanced watershed management program alternative contained in the Los Angeles Ms4 Permit an appropriate approach to revising receiving water limitations in MS4 permits?

2. If not, what revisions to the watershed management program/enhanced watershed management program alternative of the Los Angeles MS4 Permit would make the approach a viable alternative for receiving water limitations in MS4 permits?

Question 1 Response

A watershed-based program for addressing pollutants in storm water that is designed by permittees but fine-tuned and approved collaboratively between the Regional Board and permittees is an appropriate approach to an iterative process that recognizes and allows for focused efforts to address the most significant pollutants in the watershed. For that reason, San Diego County endorsed the San Diego Region's WQIP approach in the recently renewed San Diego Permit. However, the unrealistic retention of absolute prohibitions in RWL language provides no value to that process, as discussed above, and

undermines the MEP standard of CWA §402 that Congress enacted in recognition of the unique nature of MS4 systems.

Question 2 Response

For the reasons stated above, the RWL language should be removed, as an inconsistent, currently unachievable standard that places permittees in violation of newly issued permits from day one. Alternative or replacement language is unnecessary, if the intent of your Board is that proceeding with an approved "strategic compliance program" or watershed management program will conform to the MEP standard. Under this scenario, compliance with the permit will be implementing and following the prescriptions of the approved program.

Provisions should be included that provide mechanisms for appropriate scientific demonstrations of challenges with an approved feature of a program, or reduction of a particular pollutant level; such that alternative actions could be proposed and approved to keep the iterative/adaptive management approach moving forward toward continual improvement of water quality objectives. A continual, interactive dynamic between regulators and regulated entities would appropriately implement what should be an evolving MEP standard in a way that we believe Congress intended.

Conclusion

The County of San Diego understands that the positions expressed in this comment letter will be characterized by some as proposing a retreat in storm water regulation and enforcement. We view our position as positive and, if adopted, a better reflection of Congressional intent and the MEP standard. We urge your Board to fix a problem not intentionally created, but now desperately in need of change.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By James R. O'Day, Senior Deputy

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