



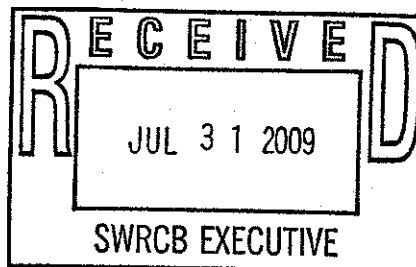
Bryan Speegle, Director

OC Watersheds  
2301 North Glassell Street  
Orange, CA 92865

Telephone: (714) 955-0600  
Fax: (714) 955-0639

July 31, 2009

Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814



**Re: Comments on Draft Order, SWRCB/OCC File A-1780; August 4, 2009 Board Meeting**

Dear Ms. Townsend:

On behalf of the County of Orange ("County"), I am providing comments on the State Water Resources Control Board's above-referenced proposed Order (SWRCB/OCC File A-1780) ("Order"). The County of Orange supports the Petitioners, the County of Los Angeles and Los Angeles County Flood Control District, in this matter and also shares the concerns raised separately by the California Stormwater Quality Association (CASQA). As proposed, the Order would affirm the incorporation of dry weather TMDLs into the municipal separate storm sewer system ("MS4") permit for the County of Los Angeles as provided in the Los Angeles Water Board Order R4-2006-0074 (the "Permit modification").

Issues addressed in the proposed Order (or raised in Petitioners' Petition but not addressed in the proposed Order) (the "TMDL issues") potentially are relevant to the incorporation of TMDLs in the MS4 permits covering the County of Orange. The County requests that these comments in support of the Petitioners be placed in the record of this action and also be forwarded to the chair and members of the State Board prior to the August 4th hearing date. The following municipalities are co-permittees with the County of Orange and join in these comments: the cities of Aliso Viejo, Anaheim, Brea, Buena Park, Cypress, Fountain Valley, Huntington Beach, Irvine, La Palma, Laguna Hills, Laguna Niguel, Laguna Woods, Mission Viejo, Placentia, Rancho Santa Margarita, San Clemente, Santa Ana, and Seal Beach.

The County wishes to comment on five issues:

First, the confusion over whether the contested TMDL provisions apply to stormwater discharges (as opposed to only non-stormwater discharges) should be addressed and clarified. The proposed Order says that it is the Los Angeles Water Board's stated intention to limit the provisions to non-stormwater discharges. The Order also states that the challenged provisions "do not apply to storm water flows," and that the permit modification "is limited to non-storm water discharges." However, the Order also

provides that liability may attach under the provisions for discharges during or as the result of a rainfall event of less than 0.1 inch. While such a rainfall event might not result in a significant discharge of stormwater, the discharge nonetheless would be related to a precipitation event. We suggest that the Order be revised to clarify that the contested TMDL provisions do not apply to stormwater discharges by simply omitting the last sentence in the last full paragraph on page 7.

The distinction between stormwater discharges and non-stormwater discharges is important because of the separate standards applicable to each. The Clean Water Act provides that MS4 permits include a requirement to effectively prohibit non-stormwater discharges *into* the MS4. For discharges *from* the MS4 (regardless of the source), the Clean Water Act requires that MS4 permits require controls to reduce the discharge of pollutants to the maximum extent practicable, the so-called MEP standard. The Clean Water Act does not impose a separate standard on the discharge of non-stormwater from the MS4 as compared with the discharge of stormwater from the MS4. The discharge of any pollutant from the MS4 is subject to the MEP standard.

Second, compliance with the contested TMDL provisions should be by means of an iterative BMP approach. Use of an iterative approach is extremely important; in many cases the sources of pollutants are not under the permittees' control and reliable control technologies are not always available. Municipalities should not be burdened with the threat of civil penalty actions or citizens' suits if initial attempts to meet the TMDL waste load allocations ("WLAs") are unsuccessful. The most appropriate management approach is an iterative one employing BMPs and monitoring to demonstrate compliance.

Not only is an iterative BMP approach most appropriate, but it is the approach mandated by the State Board and U.S. EPA. State Board Order WQ 99-05 provides required language for all future MS4 permits. In relevant part the language provides that "permittees shall comply with Discharge Prohibitions [ ] and Receiving Water Limitations [ ] through" an iterative BMP process. This language applies to discharges that cause or contribute to exceedances of water quality standards or objectives. Because the contested TMDL provisions apply to discharges that cause or contribute to exceedances of the applicable bacteria objectives, they must be subject to an iterative BMP process.

Third, the County urges the State Board to require that, before a Regional Board incorporates a TMDL into an MS4 permit, the Regional Board make a finding that compliance with the TMDL's WLAs are subject to maximum extent practicable standard applicable to all discharges from the MS4. Such a finding is legally required and is especially important because the MEP standard may not have been considered when the TMDL was developed and adopted. A TMDL's consistency with the MEP standard must be considered prior to its incorporation into an MS4 permit.

Fourth, the State Board should reject the joint liability provision found in the Permit modification. It is fundamentally unfair to hold one city responsible for discharges from

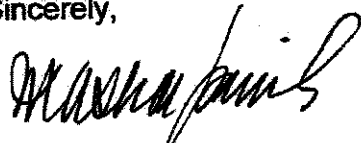
other jurisdictions over which it has no control. In addition, this provision is inconsistent with both the Porter-Cologne Water Quality Act and the Clean Water Act, which apply liability only to a discharger's own discharges, not those of others.

Finally, the State Board should omit the last paragraph of Section II of the proposed Order. Because, as acknowledged by the State Board, the issue before the State Board concerns only non-stormwater discharges, the State Board's *dicta* regarding TMDL implementation and stormwater discharges is not relevant.

In conclusion, the County urges the State Board to revise the proposed Order consistent with the above comments and with Petitioners' Petition and remand the Permit modification back to the Los Angeles Water Board. We also support CASQA's call for a broader dialogue on non-stormwater discharges.

Thank you for your attention to this matter. Please contact Richard Boon at (714) 955-0670 or Chris Crompton at (714) 955-0630 if you have any questions on these comments.

Sincerely,



Mary Anne Skorpanich  
Director, OC Watersheds Program

cc: Orange County NPDES Permittees