

December 2, 2016



**VIA E-MAIL AND**  
**FIRST CLASS MAIL**

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State Water Resources Control Board  
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Re: Cities of Dana Point and Laguna Beach Comments on A-2456 - December 6 Board Item [Own Motion Order]

Dear Ms. Townsend:

On behalf of the Cities of Dana Point and Laguna Beach (collectively, "Cities"), I write to provide comments to the State Water Resource Control Board ("State Board") upon the State Board's proposed "Own Motion Order" ("Proposed Order"). The Proposed Order pertains to the State Board's review of the San Diego Regional Water Quality Control Board ("SDRWQCB") November 18, 2015 approval of the San Diego Regional MS4 Permit (Petition SWRCB/OCC File No. A-2456 (e) and (f)).<sup>1</sup>

On March 15, 2016, the State Board issued a Notice ("March 15 Notice") that the Cities' petitions, along with the petitions submitted by the County of Orange, and seven other southern Orange County cities (collectively, the "OC Co-Permittees"), were complete and consolidated for State Board review. The March 15 Notice also "activated" the petitions of the Cities (and other OC Co-Permittees) that were initially held in an abeyance status.<sup>2</sup>

<sup>1</sup> On May 8, 2013, the SDRWQCB adopted Order No. R9-2013-0001 ("2013 Regional Permit") regulating municipal separate storm sewer systems ("MS4") discharges within the watersheds of the "San Diego Region." Order No. R9-2013-0001 was amended and readopted by the SDRWQCB on February 11, 2015 via Order No. R9-2015-0001 ("First Amended Permit") which brought southern Orange County under the Regional Permit, and on November 18, 2015 by Order No. R9-2015-0100 ("Second Amended Permit") which brought southern Riverside County under the Regional Permit. The State Board accepted review of all of the petitions filed in response to the Second Amended Permit.

<sup>2</sup> The State Board agreed by letter of February 17, 2016 to hold the petitions of both Cities on the Second Amended Permit in abeyance.

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On November 4, 2016, the State Board issued a subsequent Notice (“November 4 Notice”) indicating that the State Board had not completed its review of the OC Co-Permittee petitions, and would not likely review the OC Co-Permittees petitions until such time as the State Board completed its review of certain petitions filed in the Los Angeles Region. Because the State Board’s review would not finish prior to the 270-day deadline imposed on the State Board by Cal. Code Regs., tit. 23, § 2050.5 (b), the State Board has proposed reviewing the OC Co-Permittee petitions (and other petitions filed on the Second Amended Permit) on its own motion, thereby preventing these petitions from being deemed denied by operation of law on December 9, 2016 upon the expiration of the 270 day review period. The Proposed Order memorializes the State Board’s proposed course of action described in the November 4 Notice.

The Cities support the Proposed Order subject to the following observations:

1. The Cities’ Petitions on the Second Amended Permit should be returned by the State Board to an abeyance status—per the request submitted by the Cities concurrently with this letter—until such time as the State Board (a) issues an order dismissing the Cities’ petitions, or (b) issues an order that resolves all of the issues raised in the Cities’ petitions on their merits. The Cities reserve the right to remove their petitions from abeyance at their discretion.

2. The November 4 Notice and the Proposed Order create uncertainty on which issues raised in the OC Co-Permittees petitions, if any, will ultimately be reviewed by the State Board. The timeframe for such review, if review occurs, is also left open by the Proposed Order. It is this uncertainty, and the desire of the Cities to avoid any issue raised in their respective petitions from being prematurely deemed denied by operation of law, that led to the Cities’ request to place their petitions back into an abeyance status. In order to address this uncertainty, the State Board should clarify in the Proposed Order which issues raised by the OC Co-Permittees the State Board intends to actively review, and when the State Board envisions conducting such review.

3. The Cities believe that all of the issues raised in their petitions are of vital importance, and they therefore respectfully request that the State Board review (on the State Board’s own motion per Cal. Code Regs., tit. 23, § 2050.5 (c)), and resolve, all of the issues raised in the manner requested in the Cities’ petitions. The Second Amended Permit goes above and beyond the requirements of federal law in a multitude of ways. Of particular concern, the Second Amended Permit imposes the mandate that the OC Co-Permittees achieve numeric effluent limitations (“NELs”) in receiving waters that drain the OC Co-Permittees MS4s, a permit requirement imposed in violation of state and federal law, and a mandate which appears impossible to consistently achieve no matter how much money the OC Co-Permittees are mandated by the SDRWQCB to expend. Exacerbating the problem, the SDRWQCB has refused to provide interim compliance to the OC Co-Permittees that would shield them from third party citizen suit liability while the OC Co-Permittees develop the Water Quality Improvement Plans (“WQIPs”) that the SDRWQCB has ordered the OC Co-Permittees to develop. These issues are of critical public importance and require rapid resolution by the State Board.

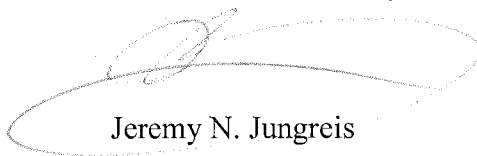
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4. As referenced in footnote 1, the SDRWQCB implemented its Regional Permit in three stages between May 2013 and November 2015, readopting the revised Regional Permit with each new amendment. Several of the Co-Permittees petitioned the Regional Permit at all three stages of the Regional Permit's development. However, the State Board has not activated the petitions filed on the 2013 Regional Permit and the First Amended Permit, and petitions on those permit iterations remain in abeyance. In order to eliminate future confusion on which petitioned issues have been resolved by any subsequent State Board order, and in order to avoid piecemeal litigation, the Cities strongly recommend that the State Board clearly resolve *all petitions* pertaining to the Regional Permit (whether filed in 2013 or 2015) when the State Board ultimately takes action on its own motion.

Thank you for the opportunity to comment on the Proposed Order. Please do not hesitate to contact me with any questions, and thank you for your attention to this matter.

Very truly yours,

RUTAN & TUCKER, LLP



Jeremy N. Jungreis

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