OC Public Works
Integrity, Accountability, Service, Trust
Shane L. Silsby, Director

June 2, 2015

VIA ELECTRONIC MAIL

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

Subject: Comments to A-2236(a)-(kk); In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order R4-2012-0175)

Dear Ms. Townsend:

The County of Orange and the Orange County Flood Control District ("County") submit the following comments on the April 24, 2015 Revised Draft Order ("Revised Draft Order") of the State Water Resources Control Board ("State Board") in connection with the various Petitions for Review of the Los Angeles MS4 Permit (Order No. R4-2012-0175, NPDES Permit No. CAS004001) ("LA MS4 Permit" or "Permit"). Understanding that the State Board's final Order on the LA MS4 Permit is intended to establish State Board policy and will serve as guidance for other Regional Boards, the County submits these comments. The State Board has requested that comments be confined to new additions or deletions as indicated in the Revised Draft Order, and the County accordingly has limited its comments to such revisions.

I. The County Supports the State Board's Direction to Regional Boards That the Seven Principles be Followed Absent a Specific Showing Based on Region-Specific or Permit-Specific Reasons

In its initial comments on the Proposed Order, the County commented that the State Board should mandate that all regional water boards include an alternative path to compliance in MS4 permits. The County commends the State Board's addition to the Revised Draft Order that regional water boards are to follow the seven principles unless the respective board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.[1] A statewide requirement to provide alternative compliance in Phase I

[1] Revised Draft Order, pg. 85, Conclusion 12.

MS4 permits reinforces the fact that it may takes years or decades to fully achieve water quality standards for some receiving waters while balancing the need to respect regional differences.

II. The State Board Should Clarify That Principle Three Provides Compliance During the Planning Phase of a Watershed Management Plan

Principle Three of the Revised Draft Order states that regional boards should "provide for a compliance alternative that allows permittees to achieve compliance with receiving water limitations over a period of time as described above . . ." As commented on above, the State Board has tentatively concluded that regional boards should follow the seven principles unless the regional board makes a specific showing that a region- or permit-specific reason exists not to. In light of Provision II.B.6 of the LA MS4 Permit, the County interprets Principle Three to mean that regional boards should provide compliance during the planning phase of a watershed management plan unless the respective board can make the required finding. In its expectation that regional boards follow the seven principles in the Revised Draft Order, it would be inconsistent with the notion that achieving compliance with receiving water limitations can take years or more if a permittee was deemed out of compliance until the watershed management plan was fully approved by the regional board, a process that can take two years or more.

The County is split between two regional boards, both of which are considering alternative compliance options. To avoid confusion among regional boards, the State Board should clarify then that Principle Three includes compliance during the planning phase of a watershed management plan.

III. It Is Impossible To Comply With The Revised Draft Order's Interpretation Of The Permit That Effectively Prohibits All Non-Exempt, Non-Storm Water Discharges From Entering A Receiving Water

With the exception of exempt and conditional exempt non-storm water discharges, Part III.A of the LA MS4 Permit requires each Permittee to "prohibit non-storm water discharges through the MS4 to receiving waters."[2] The Permit further provides that the "Watershed Management Programs shall ensure that the discharges from the Permittee's MS4: . . . (iii) do not include non-storm water discharges that are effectively prohibited pursuant to Part III.A."[3]

In response to the Environmental Petitioners comments on whether the Permit's compliance option may also constitute compliance with the non-stormwater discharge prohibition of the Permit, the Revised Draft Order attempts to clarify that a Permittee will not be deemed in compliance with the discharge prohibition provisions in Part III.A, even where the Permittee is in compliance with an approved watershed management plan. Specifically, the Revised Draft Order states:

[2] Permit, p. 27.

[3] Part VI.C.1.d.

> Implementation of control measures through the WMP/EWMP may provide a mechanism for compliance with Section III.A, which establishes the prohibition on non-storm water discharges, but such implementation does not constitute compliance with Section III.A. The several provisions stating that Permittees will be deemed to be in compliance with the receiving water limitations of the Los Angeles MS4 Order for implementing the WMP/EWMP specifically reference Section V.A of the Order, the receiving water limitations provisions, and not III.A.[4]

The County has concern with this added language in that it implies that any non-exempt, non-storm water discharge that touches a receiving water would be a violation of a MS4 permit, irrespective of a) the strength of the permittee's illicit discharge program, b) the permittee's compliance with an approved watershed management plan, or c) the permittee's compliance with applicable receiving water limitations or waste load allocations. The Revised Draft Order appears to state that a "single drop" of non-exempt, non-stormwater to a receiving water through the MS4 would subject a permittee to an enforcement action or liability to a third party under the citizen suit provisions of the Clean Water Act ("CWA").

Newly added footnote 187 to the Revised Draft Order is also concerning in that it also indicates that any non-exempt, non-stormwater discharge is a violation of a permit, providing as follows:

> We disagree that the phrasing of the non-storm water discharge prohibition in the Los Angles MS4 Order means that any dry weather discharges from the MS4 could be construed as a violation of the Clean Water Act. The effective prohibition directed by the Clean Water Act has been addressed in the Los Angeles MS4 Order through the extensive list of exceptions and conditional exemptions laid out in Part III of the Order.[5]

Discharge prohibition exceptions in most MS4 permits are not "extensive" as suggested by the State Board, and are even more limited in the County's MS4 permits than in the LA MS4 Permit. To the contrary, exceptions are limited to the following narrow categories: (1) discharges separately regulated by an NPDES permit, (2) discharges authorized by USEPA, (3) discharges from "emergency" firefighting activities, and (4) natural water flows. Moreover, although the list of conditional exemptions includes a broader range of discharges, including residential car washing and landscape irrigation, these exemptions are also limited.[6] It is clear that unless a Permittee can find a way to divert all non-exempt, non-storm water discharges from touching a receiving water, including, apparently those occurring during rain events, the

[4] Revised Draft Order, p. 52.

[5] Revised Draft Order, p. 69, fn 187.

[6] Permit, pp. 36-37.

Permittee will be in violation of the Permit. The Clean Water Act does not support such an interpretation, but allows Permittees to effectively prohibit non-stormwater discharges through rigorous implementation of their illicit discharge detection and elimination and other programs. If this interpretation is carried through by other regional boards, the result is an impossible position for MS4 permittees like the County.

In addition, the newly added language would effectively render all dry-weather Total Maximum Daily Load ("TMDL") interim and final waste load allocations unnecessary as no non-stormwater can be allowed to reach a receiving water, even if the interim or final dry weather waste load allocation ("WLA") is being met. In other words, footnote 187 could be read to override all dry weather WLAs, and convert them into "zero" WLAs.

The ultimate outcome of imposing an unachievable non-stormwater discharge prohibition will not be to improve water quality, but instead to increase litigation fees and costs in fighting enforcement actions and citizen suits, with the Permittees then being subject to excessive penalties under the CWA.[7] Due to these conflicts with federal law and that the Permit cannot require the impossible,[8] the Draft Order should be revised to state that "implementation [of control measures through the WMP/EWMP] shall constitute compliance with Section III.A."

The County appreciates the State Board allowing additional comments on the LA MS4 Permit. We respectfully request that the above issues be addressed so that there is clarity when other regional boards implement alternative compliance plans.

Very truly yours,

Richard Boon for

Chris Crompton
Manager, Water Quality Compliance
OC Environmental Resources

Ryan M.F. Baron
Senior Deputy County Counsel
Office of the County Counsel

[7] *See e.g., NRDC v. County of Los Angeles* (C.D. Cal. Mar. 30, 2015) 2015 U.S. Dist. LEXIS 40761 ["Defendants are liable for the 147 exceedances described in Defendants' monitoring reports, which the Ninth Circuit found were conclusively demonstrated to be Permit violations by Defendants' own pollution monitoring."].)

[8] *See e.g., Hughey v. JMS Dev. Corp.* (11th Cir. 1996) 78 F.3d 1523.