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June 2, 2015

VIA E-MAIL AND
FIRST CLASS MAIL

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

Re: City of Dana Point's Comments to A-2236(a)-(kk), State Board Revised Draft Order dated April 24, 2015, In Re Petitions Challenging 2012 Los Angeles Municipal Separate Stormwater System Permit (Order R4-2012-0175)

Dear Ms. Townsend:

This letter constitutes the comments of the City of Dana Point ("City") to 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"). The City also incorporates by reference, and adopts as if separately stated herein, the comments on the LA MS4 Permit by the County of Orange ("County") that were submitted by the County on June 2, 2015. The County's comments are attached and incorporated herein as Exhibit A. Understanding that the State Board's Final Order on the LA MS4 Permit is intended to establish State Board policy and serve as guidance for other Regional Boards, the City submits the following comments. The State Board has requested that comments be confined to new additions or deletions as indicated in the Revised Draft Order, and the City accordingly has limited its comments to such revisions in the Revised Draft Order.

A. 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.*" (Permit, p. 27.) Part VI.C of the Permit, subsection 1.d, then provides that the "*Watershed Management Programs shall ensure that the discharges from*

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the Permittee's MS4: ... (iii) do not include non-storm water discharges that are effectively prohibited pursuant to Part III.A."

The revisions in the Revised Draft Order indicate 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 ("WMP") or Enhanced Watershed Management Plan ("EWMP"). According to the revisions to the Draft Order on page 52: "*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*" (Revised Draft Order, p. 52.)

The implication of this added language to the Revised Draft Order is that the City's good faith and robust efforts to control stormwater pollution to the maximum extent practicable within its jurisdiction can effectively be nullified by actions and events outside of the City's control. Specifically, ***any*** non-exempt non-storm water discharge (e.g., runoff) that touches a receiving water via the City's MS4 would be a violation of the Permit, irrespective of the City's enforcement of an approved Illicit Discharge Program, compliance with an approved WMP/EWMP program, or demonstrated attainment of receiving water limitations or waste load allocations in an approved total maximum daily load ("TMDL"). In short, it appears that a single "drop" of non-exempt, non-storm water to a receiving water through the City's MS4 would subject the City to an enforcement action or liability to a third party under the citizen suit provisions of the Clean Water Act ("CWA"). Throughout hilly southern Orange County, it is not reasonable to expect that the irrigation of thousands of residences and farms will ***never*** result in any water reaching the City's MS4—no matter how diligent the City's is in enforcing prohibitions on over-irrigation, and how extensive its efforts to conduct education and outreach. Gravity is one of those laws that is not open to legal interpretation. Water will, from time to time, run off of the hillsides of even the most diligent of MS4 Permittees. Was it really the intent of the drafters of the CWA to expose municipalities—and the taxpayers that support them—to third party liability via CWA Citizen suits every time that residents living on sloping parcels water their lawns, or every time that the owners of potable supply wells flush their lines? Strict liability imposed on public agencies for activities that they may have limited or no ability to control is a remedy that should be imposed sparingly and only after a finding of clear Congressional intent with regard to implementation of the CWA—intent that is completely lacking in this context.

Moreover, the newly added language would effectively make unnecessary all dry-weather TMDL interim and final waste load allocations since, under the Permit as proposed, 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 short, the new Permit language would override all dry weather WLAs, and convert them into "zero" WLAs. It seems unlikely that Congress intended to render Section 303 of the CWA superfluous by the inclusion of blanket bans in stormwater permits that would that have the effect of nullifying otherwise permissible WLAs contained in existing TMDLs.

The ultimate outcome of imposing an unachievable non-stormwater discharge prohibition will not be to improve water quality, but instead to increase litigation and costs incurred by public agencies in fighting enforcement actions and citizen suits, with Co-Permittees then potentially being subject to penalties under the CWA for actions of third parties that Co-Permittees may have limited or no ability to control. (*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."].) Because the Permit cannot require the impossible (see e.g., *Hughey v. JMS Dev. Corp.* (11th Cir. 1996) 78 F.3d 1523), the Draft Order should be revised to state that "*implementation [of control measures through the WMP/EWMP] shall constitute compliance with Section III.A.*"

B. A "ZERO" DISCHARGE LIMIT FOR NON-STORM WATER IS INCONSISTENT WITH CALIFORNIA LAW AND CREATES A DISINCENTIVE TO ROBUST COMPLIANCE.

Imposing a "zero" discharge limitation on non-exempt, non-storm water discharges is not required under the CWA, and therefore can only be imposed under the California Porter-Cologne Act when the factors set forth in California Water Code ("CWC") sections 13241, 13263 and 13000 have first been fully considered, and the Permit findings and terms have been developed consistent with these factors. The Revised Draft Order is thus deficient, in light of the lack of finding and determinations showing that the "zero" discharge limitation was developed in accordance with the factors and considerations required by State law.

Federal law only require that municipal storm sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable" ("MEP"), and specifically does not require that such dischargers comply with numeric effluent limits, including a "zero" discharge limit for non-exempt, non-storm water discharges. (*See, e.g. Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165; *also see Divers' Environmental Conservation Organization v. State Water Resources Control Bd.* (2006) 145 Cal.App.4th 246, 256.)

Although "non-stormwater" is required to be "effectively prohibited" from entering ***"into"*** the MS4, the CWA does not treat discharges ***"from"*** the MS4 any differently if the "pollutants" in issue arose as a result of a "storm water" versus a "non-stormwater" discharge. (33 U.S.C. § 1342(p)(3)(B)(iii).) Instead, under the CWA, regardless of the nature of the discharge, *i.e.,* be it "storm water" or alleged "non-stormwater," the MEP standard continues to apply. (*Id.*)

The only difference in the requirements to be imposed upon the municipalities between "storm water" and "non-stormwater," involves the need for municipalities to adopt and implement ordinances and to take appropriate enforcement actions in order to "effectively prohibit non-stormwater discharges into the" MS4. (See e.g., 40 CFR 122.26(d)(1)(3)(A) ["***use of ordinances***, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system"]; 40 CFR 122.26(d)(2)(i)(B) ["Prohibit ***through ordinance***, order or similar means, illicit discharges to the municipal separate storm sewer"]; 40 CFR. Sec. 122.26(d)(2)(iv)(B)(1)-(7) [requirements for management plan to include implementation of "ordinances" or other similar orders to prevent "illicit discharges" to the MS4].)

The attempt to impose a "zero" effluent limit of non-exempt, non-storm water to "receiving waters," rather than requiring stormwater agencies to adopt ordinances and take other appropriate enforcement measures to "effectively prohibit" non-storm water from entering its MS4 (33 USC § 1342(p)(3)(B)(ii)), exceeds federal law—and more importantly—demands the impossible, creating a disincentive for municipalities to go the extra mile to implement projects that improve water quality. If doing nothing, and going all out, both result in the same liability to environmental groups under the CWA for non-storm water discharges that cannot be fully controlled under all circumstances, there is understandably less incentive for a municipality to take aggressive steps to improve water quality over the short term. Either way the municipality will get sued and likely face a court ordered compliance plan. The effective "zero" effluent limit can only be imposed under the California Porter-Cologne Act when the factors set forth in California Water Code ("CWC") sections 13241, 13263 and 13000 have first been fully considered,[1] and the State Board

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[1] CWC sections 13241, 13263 and 13000 all directly or indirectly require a consideration of "economics," as well as whether the terms in question are "reasonably achievable," including a balancing of the benefit of the requirement versus the costs and other burdens of compliance, e.g., "the total values involved, beneficial and detrimental, economic and social, tangible and intangible" (CWC § 13000), the "water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area" (CWC § 13241), and the need to "take into consideration the beneficial uses to be protected" and the

should not require, as a matter of policy, what the Clean Water Act and CWC do not require (for the strong policy reasons discussed herein).

C. Compliance With CWC §§ 13267, 13225 & 13165 Does Not "Stand[] As An Obstacle To The Accomplishment Of The Full Purposes And Objectives Of [Federal Law]."

Under California law, before any monitoring, reporting, investigation and study requirements may be imposed upon a permittee, a cost/benefit analysis must be conducted and no such requirements can be imposed unless the Regional Board has first shown that the burden, including the costs of these requirements, "bear a reasonable relationship" to their need. (CWC § 13267(b).)

In addition to section 13267, section 13225(c) mandates that the regional boards similarly conduct a cost/benefit analysis before requiring a municipality, like the City, to investigate and report on technical factors involved with water quality control. (*See also* § 13165 [imposing this same requirement on the State Board where it requires a "local agency" to "investigate and report on any technical factors involved in water quality control; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained therefrom"].)

The Revised Draft Order suggests that CWC sections 13267, 13225 and 13165 "stand[] as an obstacle to the accomplishment of the full purposes and objectives of [Federal law]," and so, the Revised Draft Order cannot apply to the Permit's monitoring and reporting program. (Revised Draft Order, p. 72, fn 192.) However, in accordance with CWC section 13372(a), only those requirements "required under" the CWA and which are "inconsistent" with the other requirements of the Porter-Cologne Act outside of Chapter 5.5, may be avoided by the Regional Board in issuing an NPDES Permit.

The Revised Draft Order points to no federal law or regulatory requirement imposing the particular monitoring requirements imposed in the LA MS4 Permit. Nor does federal law prohibit the conducting of a "cost/benefit" analysis in the issuance of municipal stormwater permits.

"water quality objectives reasonably required for that purpose." (CWC § 13263(a).) Here, because there is nothing in the administrative record to show that such a "zero" limit is reasonably and economically achievable, the discharge prohibition requirements in the LA MS4 Permit, as discussed in the Revised Draft Order, are inconsistent with CWC sections 13241, 13263 and 13000.

Indeed, the MEP standard contemplates a cost/benefit analysis since the determination of what is practicable in a particular permitting context generally depends on the cost of implementing different best management practices or treatment technologies. (*See* 40 CFR § 122.26(d)(1)(vi)(A).) Thus, the requirements in CWC sections 13267, 13225 and 13165, as the duly enacted laws of this State, do not "stand as an obstacle" to federal law. Thus, the cost/benefit analyses required by these statutes must be conducted prior to imposing open-ended monitoring and investigation obligations on Permittees statewide.

D. CONCLUSION.

The City, though appreciative of the consideration that the State Board has accorded the issues of receiving water limitation feasibility and non-stormwater discharges, remains concerned that the Revised Draft Order has interpreted the LA MS4 Permit to require the City to perform tasks that are impossible to achieve and inconsistent with state law. Because of the procedural posture of the Revised Draft Order, and the statements the State Board has made regarding the precedential nature of the Revised Draft Order, the City is justifiably concerned with the potential for a binding regulatory order with the potential to place every urbanized stormwater agency in a perpetual state of non-compliance—no matter how much money is spent, and no matter how earnestly permittees such as the City work to reduce stormwater pollution. As such, the City respectfully requests that the Revised Draft Order and Permit be revised as requested herein, and in Orange County's comment letter at Exhibit A, prior to finalization of the LA MS4 Permit by the State Board.

Very truly yours,

RUTAN & TUCKER, LLP

Jeremy N. Jungreis

JNJ:nd
Enclosure

cc: Brad Fowler, Director of Public Works, City of Dana Point
Ryan Baron, Senior Deputy County Counsel, Orange County

EXHIBIT A

OC PublicWorks
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:

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[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 <u>any</u> 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 Baron

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.