



January 21, 2015

Chair Felicia Marcus and Board Members  
c/o Ms. Janine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
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Sacramento, CA 95812-0100  
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*Sent via email*

**Re: Comments to A-2236(a)-(kk)**

Dear Chair Marcus and Board Members:

Thank you for the opportunity to comment on the Los Angeles MS4 Draft Order (“Order”). San Diego Coastkeeper is a non-profit organization working to protect and restore the San Diego region’s bays, beaches, watersheds, and ocean. Orange County Coastkeeper is a non-profit organization dedicated to promoting and restoring water resources that are drinkable, fishable, swimmable, and sustainable. Inland Empire Waterkeeper’s (hereinafter collectively referred to as “Coastkeeper”) mission is to protect and enhance the water quality of the Upper Santa Ana River Watershed through programs of advocacy, education, research, restoration and enforcement.

Coastkeeper wishes to express our full support of the comments being submitted by Los Angeles Waterkeeper, Natural Resource Defense Counsel, and Heal the Bay on the Draft Order, and incorporates those comments herein by reference. Because the Draft Order includes some language that would have repercussions and consequences outside of the Los Angeles (“LA”) region, Coastkeeper believes it is important for these comments to represent those members and interests of ours outside of Los Angeles County on which this Draft Order would have an impact.

While the Conclusion of the Order (p. 48-49) states that it directs all regional boards to “consider” the WMP/EWMP approach, it reads very much like a directive for each Regional Board to implement the approach in a locally-appropriate way. As our organizations and others in the San Diego Regional Board’s jurisdiction have already had a healthy broad stakeholder discussion on the safe harbor issue during the adoption of the 2013 San Diego Regional permit (“2013 permit”), the issues now before the State Board are familiar to us. Discussions are ongoing in the Santa Ana region, which is considering the adoption of the 2015 Orange County MS4 permit, with an anticipated joint San Bernardino County and Riverside County permit to be released later this year.

Coastkeeper would like to respectfully caution the State Board on using information and processes gained from permit development (however long overdue) in one region and extrapolating that reasoning and interpretation to other regions, as this Draft Order does. Below



we briefly explore the justifications put forth by the Board in the hopes to express why they do not apply outside of the LA region.

### Anti-Backsliding:

Application of a safe harbor that weakens the applicability of Receiving Water Limitation (“RWL”) language to the San Diego region would fail to meet minimum federal requirements and would constitute a violation of the Clean Water Act’s anti-backsliding provisions. The Clean Water Act and associated Federal Regulations, specifically, 40 CFR 122.44(l)(1), provide that except in a narrow set of enumerated circumstances, “when a permit is renewed or reissued, interim effluent limitations, standards, or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit.”

The draft order’s comments make slight mention of why the LA permit *may* not violate anti-backsliding, but then without discussing the justification in detail the Draft Order simply states that justification isn’t necessary because an exception allowing for backsliding exists in this case. The Draft Order itself appears to base the bulk of its acceptance that the safe harbor does not constitute backsliding on the LA Regional Board’s Response to Comments document, wherein an argument was made that an exception to backsliding exists. The Draft Order includes little analysis as to whether anti-backsliding actually applies (and importantly, the Draft Order does not find that anti-backsliding provisions *do not* apply here), and instead focuses its attention on finding that an exception to backsliding exists in the case of this permit.

#### *Supporting Water Board Rationales: Paradigm Shift, Prioritization, and Lessons Learned*

The LA Regional Board’s Response to Comments upon which the State Board’s justification hinges, in turn, states that an exception exists, “if the circumstances on which the previous permit was based have materially and substantially changed since the time the previous permit was issued and would constitute cause for permit modification or revocation or reissuance under 40 CFR section 122.2. Like section 122.41(l), section 122.62 includes new information not available at the time the previous permit was issued as a cause for modification” (p. 51 of Response). The Response then goes on to justify an exception based largely upon the differences between the 2001 and 2012 permits, a paradigm shift towards treated stormwater as an asset, and information gained during that substantial 10-plus year time frame.

In stark contrast, no such large time gap between permits and no such large-scaled paradigm shifts or information downloads have occurred between any two MS4 permits in southern California’s other regions. Our regions have continually evolved their MS4 permits using lessons learned, and what resulted have been a series of permits aimed at integrated water management approaches and watershed-wide planning. So while we disagree with the Draft Order and the LA Regional Board that an exception to anti-backsliding exists in LA based on those lessons learned and shifts in thinking, it is even more plain to us that the justification for any such exception does not apply to regions outside of LA.

To illustrate, the San Diego MS4 permits have since 2001 incorporated the RWL language of Order 99-05. In fact, the San Diego region has adopted several iterations of MS4 permits since 2001, including one in 2007 and another in 2013. The Santa Ana region has adopted at least



six MS4 permits since 2001, a full two cycles for each county with a third cycle nearing adoption for Orange County. Each of these has gradually evolved to include the paradigm shift included in Los Angeles' permit, as well as the lessons learned via the iterative process and its monitoring and assessment. Low impact development provisions have been included since 2007 in the San Diego permit and 2009 in the Orange County permit, and on-site capture, as well as incentives and direction towards capture and use, exist. Further, San Diego's newest permit includes provisions for on-site capture and infiltration for development projects over a certain threshold and it stresses integrated water management approaches that address water quality and supply for our borderline arid region. In addition to the capture and use provisions of those permits, watershed-wide planning efforts aimed at prioritization of waterbodies or pollutants also already exists in our permits. Thus, both the San Diego and Santa Ana regions have already adopted permits that include a paradigm shift towards treating stormwater as an asset rather than a liability.

The most recent San Diego 2013 MS4 permit also incorporates a framework, utilizing Water Quality Improvement Plans (WQIPs) and an adaptive management process, to achieve RWLs in our region. WQIPs include prioritization of watershed conditions and pollutants, and contain numeric interim and final goals aimed at achieving RWLs. Unlike the LA permit, however, our permit does not include safe harbor allowing compliance with the process of WQIP development and implementation to excuse a permittee from compliance with RWLs.

Importantly, the RWL provisions have remained in place throughout these processes and permitting schemes that included the paradigm shifts, watershed planning, and prioritization plans. Certainly the reasoning behind the LA exception, if applicable at all, is not applicable to regions outside of LA, and any directive to include a safe harbor in robust permits that include watershed-based planning and integrated water management would run afoul of the anti-backsliding provisions of the Clean Water Act. Quite simply, since the San Diego permit has already been updated to include the paradigm shift, already contains prioritization and plans for meeting RWL requirements, and has chosen *NOT* to have a safe harbor, any relaxing of the conditions of the permit would not be as stringent as our existing permit, and thus would constitute backsliding under the Clean Water Act.

It is equally important to note that after receiving comments on all sides of the issue during permit adoption the Region 9 Water Board chose not to include a proposed safe harbor provision in the 2013 permit.

From a practical perspective relative to the direction of water supply in stormwater management, the San Diego region, which includes coastal south Orange County, differs in some important and substantial ways from its neighbor up north. First, while Los Angeles has the ability to utilize groundwater basins for infiltration and groundwater aquifer recharge for local water supply production, the San Diego region does not have available to it the larger underground basins for such storage. So, while our region's permit incentivizes and strives for more water supply from stormwater runoff, it may very well be that solutions to our continuing and serious water quality issues come in the form of more traditional source and treatment control technologies (such as on-site capture, infiltration, and retention) that have been part of the repertoire of stormwater management for some time.



### *Supporting Water Board Rational: TMDL Incorporation into MS4 Permits*

To an equally large degree the justification for allowing a safe harbor is based on the development, monitoring, and analysis of 33 TMDLs in Los Angeles, coupled with paradigm shift. In fact, in justifying the exception the LA Regional Board mentions the importance of its TMDLs toward the achievement of fishable, swimmable, drinkable waters in LA when it says, “the majority of pollutants of concern from the Los Angeles County MS4 are addressed by the 33 TMDLs that are included in the Permit,” (p. 37, Response to Comments), and it recognizes the prioritization of TMDLs as highest priority issues (p. 40, Response to Comments). The San Diego region, in contrast, has only a handful of TMDLs. The San Diego region remains much more reluctant to develop new TMDLs and instead will often look towards alternatives to TMDLs. Two instances where TMDL alternatives have been developed in just the last few years are in Oceanside’s Loma Alta Slough (for nitrate impairment), and the Tijuana River Valley (for impairments of sedimentation and trash. In these instances, our Regional Board has elected for processes or procedures that do not have the stricter interim and final milestones and deadlines for achieving receiving water limitations and objectives that are found in TMDLs. And, our own regional permit includes Water Quality Improvement Plans that aim to prioritize and address pollutants within the Region and those WQIPs contain interim and final measurable benchmarks to show progress of meeting the goals of achieving RWLs. Without the RWLs kept in place, however, no enforcement mechanisms would exist for the Regional Board or citizens of our region if the WQIPs fail to meet the goals of the Clean Water Act. This regional variation makes it all the more imperative that the RWLs be kept and no safe harbor provided.

Additionally, the Santa Ana region possess at least 133 pollutants on 51 303d listed water quality limited segments in its jurisdiction with only 18 TMDLs in the implementation phase. The reluctance of the Regional Board to move timely with the development and implementation of TMDLs have allowed water bodies to languish in their impairment. Some of these TMDLs are technical TMDLs established by USEPA nearly 15 years ago still without an implementation plan. USEPA promulgated the Selenium TMDL for San Diego Creek, Lower Newport Bay, and Upper Newport Bay in 2002. The Regional Board issued a short-term groundwater discharge permit to dischargers in 2004 with Selenium effluent limitations based on CTR criteria and a deadline. Currently, dischargers are on their second Time Schedule Order with an anticipated compliance deadline tentatively planned for the 2030’s. The environmental organizations working with dischargers and the Regional Board on addressing Selenium through a working group withdrew in protest over the perpetually delayed compliance deadlines. Arguments that, as the State Board states, “TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region,” ring hollow when regions outside of the LA region have so few TMDLs and the implementation of TMDLs can be measured in decades.

Finally with respect to time allowances, the appropriate way for our regions (that don’t have the suite of TMDLs present in LA) to address those issues is through the MS4 permit and Time Schedule or other Orders that include interim and final milestones for compliance rather than an excuse from RWLs.

Without the definitive requirements of TMDLs, Coastkeeper and its members are left with just one way to measure whether our MS4s are meeting, or will meet, the requirements of the CWA.



That measure is the Clean Water Act itself, and the receiving water limitations provisions of the permits under the Act.

To date, zero third party lawsuits have been filed in San Diego for MS4 noncompliance. And yet while the new permits for LA and for San Diego region contain “carrots” to incentivize certain plans and programs aimed at meeting RWLs and water quality standards, the San Diego permit has maintained the “stick” of enforcement actions when and where necessary to ensure RWLs will be achieved. Without TMDLs or other time-certain measures, it is vital to our success that third-party enforcement actions regarding RWLs not be read out of existence. So much good has come from citizen involvement in the improvement of our waters, Coastkeeper thinks that foreclosing the possibility of citizen suits is inappropriate and unwelcome. Our efforts towards the development and implementation of our existing permit that aims to jointly address source control and water supply production are longstanding and remain ongoing. The San Diego region, stakeholders, and Regional Board have worked tirelessly to develop a permit that is robust, thoughtful, and forward looking, and one that incorporates both the carrot and the stick to incentivize moving forward in an earnest and meaningful way.

#### Prioritization and Unintended Consequences:

Like the LA permit, the Region 9 permit calls for prioritization of waterbodies and pollutants through its WQIPs. It is recognized that throughout the implementation of these prioritization plans, permittees will focus resources towards those water bodies or constituent pollutants designated as highest priorities. In doing so, it is also possible, if not expected, that dedicating enough resources towards particular focus areas to make a real difference in achievement of RWLs and TMDLs will result in the reallocation of resources away from lower priority watersheds or pollutants. In such instances, “orphaned” watersheds are likely to result. While the safe harbor is professed to allow an excuse from RWLs so long as permittees are focusing and working hard on priority issues, an unintended consequence of it would be to allow permittees to escape enforcement actions related to waterbodies it has shifted resources away from and lower priorities. The result would be degradation of a lower prioritized water body. Only by maintaining the strict RWL standards without a safe harbor can we be sure lower priority water bodies are adequately protected under the Clean Water Act. As the permit calls for prioritization of watershed issues, the compliance with a *process*, rather than a *standard*, could very well lead to degradation of water quality in a lower-priority or “orphaned” watershed or sub-watershed. Without receiving water limitations as the clear standard, Coastkeeper and our many members are left with no clear way to ensure degradation of waterbodies that are not prioritized does not occur.

#### Transparency:

The Draft Order maintains that the full transparency of the WMP/EWMP process is sufficient to allow proper oversight and public input into watershed planning to the extent that a safe harbor is not detrimental. Based on the experience of Coastkeeper in our regions, we believe the Order overestimates the resources and abilities of environmental and watershed organizations statewide to monitor the development and adequacy of the plans.

The San Diego permittees are currently developing their watershed-wide cross-jurisdictional plans (WQIPs) required under the Region 9 permit, which in many ways are analogous to the WMP/EWMPs of the LA permit. Our region contains 11 watersheds, including one that crosses



an international border and several of which cross military lands under federal jurisdiction. Each of these 11 draft watershed plans is lengthy, highly technical in many ways, detailed, and will only gain in length as the plans and deliverables are due to the Regional Board. Besides the limited staff at Coastkeeper that has done so it is very unlikely that any member of the public has attempted to review in detail each of the 11 watershed draft plans to date.

The lesson, we believe, is that while the Draft Order stresses that the development of alternatives to RWLs is a transparent process with opportunity for public input and oversight, the Order overestimates the resources of environmental and watershed organizations to monitor the development of these plans.

Quite simply put, the most transparent and legally-supported measuring stick for compliance is compliance with RWLs themselves, both in the Region 9 permit and all permits throughout California.

Thank you for the opportunity to comment on the Los Angeles Draft MS4 Order. Please feel free to contact us with any questions or for additional feedback. We look forward to working with you toward development of a meaningful and effective approach to stormwater management in our region.

Sincerely,

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