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SUBJECT: SWRCB/OCC File A-2456 (A thru L); Petitions of San Diego Coastkeeper, et al., (Waste Discharge Requirements Order No. R9-2015-0100 [NPDES Permit CAS0109266], Municipal Regional Stormwater NPDES Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems Draining the Watersheds Within the San Diego Region) San Diego Regional Water Quality Control Board

Dear Mr. Mallory-Jones:

The California Stormwater Quality Association (CASQA) appreciates the opportunity to respond to the Petition filed by the San Diego Coastkeeper (Coastkeeper) and the Coastal Environmental Rights Foundation (CERF) challenging the San Diego Regional Water Quality Control Board's (San Diego Regional Water Board) adoption of a Municipal Regional Stormwater NPDES Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region (San Diego Permit). In addition, CASQA is providing limited comments on one issue raised in the Petitions filed by various MS4 permittees.

CASQA is a nonprofit corporation with approximately 2,000 members throughout California, including hundreds of local public agencies. About 300 CASQA members hold MS4 permits issued under state and federal law (referred to as National Pollutant Discharge Elimination System or NPDES permits and waste discharge requirements). CASQA has been an active participant in past proceedings before the State Water Resources Control Board (State Water Board) with respect to challenges associated with the Los Angeles County Municipal Separate Storm Sewer System (MS4) Permit (Order No. R4-2012-0175), which resulted in the adoption of State Water Board Order WQ 2015-0075.[1] On behalf of its membership, CASQA continues to be very interested in proceedings related to the issues addressed in Order WQ 2015-0075 as they are applied in other MS4 permits, including the San Diego Permit at issue in this proceeding.

[1] *In the Matter of Review of Order No. R5-2012-0175, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except from Long Beach* (Order WQ 2015-0075).

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In summary, CASQA disagrees with the allegations made by Coastkeeper that certain requirements in the San Diego Permit violate federal anti-backsliding requirements and that the San Diego Permit is inconsistent with State Water Board Order WQ 2015-0075. CASQA encourages the State Water Board to reject these allegations. Additionally, CASQA provides a response to the issue of interim compliance, which was raised in the petitions of MS4 permittees. With respect to the issue of interim compliance, CASQA supports the request of the MS4 permittees for a modification of the San Diego Permit to allow for a period of interim compliance while the alternative compliance pathway documentation is being prepared and submitted.

I. Coastkeeper Mischaracterizes Application of Water Quality Standards (WQS) to Municipal Stormwater Discharges

As a preliminary matter, CASQA finds it necessary to first respond to an incorrect characterization of the law included in the legal background section of Coastkeeper's petition. Specifically, Coastkeeper states, "[l]ike other NPDES permits, MS4 permits must ensure that discharges from storm drains do not cause or contribute to a violation of water quality standards." (Memorandum of Points and Authorities in Support of Petition, p. 6.) This statement fails to consider the words of the Clean Water Act (CWA) and long established law with respect to this issue. In the context of NPDES permits, the CWA does not strictly impose the WQS requirement on MS4 discharges.

Specifically, the CWA instead treats municipal stormwater discharges differently from other discharges.[2] It requires permits for municipal storm sewers to "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (33 U.S.C. § 1342(p)(3)(iii).) In establishing this requirement, Congress intentionally exempted MS4 discharges from strict compliance with WQS. (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1164.) While MS4s are required to reduce pollutants in the discharge to the maximum extent practicable (MEP), the water quality-based effluent limitations in section 301(b)(1)(C) of the CWA do not apply to MS4 permits. (*See Id*.) Rather, the permitting agency, i.e., the State Water Board and the regional water quality control boards (collectively, Water Boards), have the discretion, if they choose to exercise it, to impose requirements to meet WQS. (33 U.S.C. § 1342(p); *Defenders of Wildlife* at p. 1159.) And with that discretion, comes the discretion of which tools they choose to use to address WQS's (if at all) and the timetables on which they choose to use them. In accordance with this federal scheme, therefore, only the discretionary requirements imposed by the Water Boards to address WQS apply to MS4 dischargers and those may be limited in kind and timing.

[2] There are strong technical reasons why stormwater is different from other discharges. Among other things: (1) it has an open and natural origin; (2) it has unpredictable, highly variable flows and volumes, which at times will exceed the size capacity of any capture, treatment, harvest, and use system; (3) the sources of potential pollutants are ubiquitous and the types of potential pollutants are infinite; (4) the concentration of potential pollutants are usually relatively low, making the removal of pollutants from stormwater very difficult; and (5) the load of a potential pollutant generally comes from the relatively high volume of stormwater rather than the concentration of the potential pollutant.

The State Water Board agreed wholeheartedly with this legal standard in Order WQ 2015-0075. (See, e.g., Order WQ 2015-0075, p. 10 ["MS4 discharges must meet technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency."].) The State Water Board further acknowledged that it has flexibility under the Porter-Cologne Water Quality Control Act (Porter-Cologne) to "decline to require strict compliance with water quality standards for MS4 discharges." (Order WQ 2015-0075, p. 11.) Coastkeeper's assertion is simply inconsistent with the governing law as well as with the State Water Board's previous determination. .

MS4 permit provisions that require compliance with WQSs (e.g., Discharge Prohibitions and Receiving Water Limitations) are *discretionary* provisions – i.e., they are not required by the CWA, the federal regulations, or Porter-Cologne. MS4 permits are, indeed, not subject to the same CWA requirements as other NPDES permits. Therefore, Coastkeeper's characterization regarding the application of WQS is inaccurate. Furthermore, because the application of WQS to municipal stormwater is discretionary, the Water Boards have the discretion to develop permitting programs and schemes that do not require strict compliance with WQS. The compliance provisions as related to development of Water Quality Improvement Plans of the San Diego Permit is a clear example of Water Board discretion, and is legal under the CWA, Porter-Cologne, and Order WQ 2015-0075.

II. Compliance Provisions in the San Diego Permit Do Not Violate Federal Anti-Backsliding Provisions

Coastkeeper further argues that adoption of the compliance provisions related to the development of Water Quality Improvement Plans (WQIPs) in the San Diego Permit violates federal anti-backsliding provisions. CASQA disagrees with these arguments for several reasons, including: (1) discharge prohibitions and receiving water limits (RWLs) are State-imposed requirements and as such are not final effluent limitations under the CWA or permit standards or conditions within the meaning of the United States Environmental Protection Agency's (EPA) regulations; (2) the compliance provisions that are expressly tied to WQIPs are not more lenient permit provisions than those that previously existed and also collectively constitute a rigorous compliance alternative; and (3) new information supports the need for this approach, as set forth in the San Diego Permit. Indeed, the compliance provisions included in the San Diego Permit are detailed pollutant-specific provisions that provide for an alternative compliance path for Discharge Prohibitions and RWLs for specific pollutant and waterbody combinations. (See San Diego Permit, p. 18, et seq.; see also San Diego Permit, Attachment A, pp. F-44 – F-47.) Such provisions are legal, and, contrary to Coastkeeper's allegations, comply with applicable laws, regulations, and policies.

A. Federal Anti-Backsliding Provisions Do Not Apply to Discharge Prohibitions and RWLs

As the State Water Board has already found, the federal anti-backsliding provisions under section 402(o) of the CWA and EPA regulations do not apply to Discharge Prohibitions and RWLs, which are discretionary provisions imposed by the San Diego Regional Water Board

pursuant to section 402(p) of the CWA. Accordingly, the Permit's compliance provisions do not violate federal anti-backsliding provisions.

1. The CWA Anti-Backsliding Provisions Do Not Apply Because Discharge Prohibitions and RWLs Are Not Effluent Limitations

Section 402(o) of the CWA (33 U.S.C. § 1342(o)) establishes anti-backsliding requirements that apply to "effluent limitations." This statute prohibits the reissuance or modification of a permit to include "effluent limitations" less stringent than "the comparable effluent limitations in the previous permit," unless certain exceptions are met. (33 U.S.C., § 1342(o).) According to the EPA, CWA anti-backsliding rules apply in two situations:

> The first situation occurs when a permittee seeks to revise a technology-based effluent limitation based on best professional judgment (BPJ) to reflect a subsequently promulgated effluent guideline that is less stringent. The second situation addressed by § 402(o) arises when a permittee seeks relaxation of an effluent limitation that is based upon a State treatment standard or water quality standard.[3]

While Coastkeeper argues that the term "effluent limitations" encompasses the Discharge Prohibitions and RWLs at issue here, that argument runs afoul of the actual text of section 402(o)(1):

> In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section [304(b)] of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section [301(b)(1)(C)] or section [303(d)] or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section [303(d)(4)] of this title. (33 U.S.C. § 1342(o)(1).)

The plain language of section 402(o)(1) limits the anti-backsliding provisions to "effluent limitations" imposed under specific provisions in the CWA. Only if an "effluent limitation" is based on the specific enumerated provisions is anti-backsliding triggered. As noted above, the Discharge Prohibitions and RWLs provision were adopted by the Water Boards within the discretion afforded to them in section 402(p) of the CWA – a provision that is *not* listed in section 402(o)(1). Accordingly, the anti-backsliding provisions in section 402(o) expressly do not apply to the Discharge Prohibitions and RWLs adopted by the San Diego Regional Water Board in the San Diego Permit.

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[3] EPA (1989) Memorandum on Interim Guidance on Implementation of Section 402(o) Anti-Backsliding Rules for Water Quality-Based Permits by James R. Elder, Director, Office of Water Enforcement and Permits at p. 1.

This analysis has already been adopted by the State Water Board in Order WQ 2015-0075: "The receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the Clean Water Act rather than under section 301(b)(1)(C), and are accordingly not subject to the anti-backsliding requirements of section 402(o)." (Order WQ 2015-0075.)

Consistent with the State Board's previous findings and the law, the statutory anti-backsliding provisions of CWA section 402(o) do not apply to the Discharge Prohibitions and RWLs in the San Diego Permit.

2. The EPA's Regulatory Anti-Backsliding Provisions Also Do Not Apply to Discharge Prohibitions and RWLs

Coastkeeper argues that even if RWLs are not "effluent limitations" under the statutory anti-backsliding provisions, the Permit's Discharge Prohibitions and RWLs provisions violate EPA's anti-backsliding regulations because they are "standards" or "conditions" within the meaning of title 40 of the Code of Federal Regulations section 122.44(l).[4] However, when this anti-backsliding regulation is read in context with other regulations in the same chapter, the meanings of "standard" and "condition" do not apply to the Discharge Prohibitions and RWLs provisions at issue here.

Coastkeeper improperly characterizes section 122.44(l)(1). This provision states that, subject to paragraph (l)(2) and certain circumstantial changes, "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." Setting aside the fact that Discharge Prohibitions and RWLs are not "effluent limitations, standards, or conditions," the provisions in question at issue here are not interim provisions. Therefore, the cited anti-backsliding regulations do not apply. Moreover, even if these regulations apply to final amended or revised standards or conditions, the Discharge Prohibitions and RWLs do not fall within any of these categories.

As explained above, the Permit's Discharge Prohibitions and RWLs are State-imposed requirements, not federally required CWA effluent limitations.[5] Additionally, Discharge Prohibitions and RWLs are not "standards" or "conditions" under EPA's regulations. Section 122.2 defines "[a]pplicable standards and limitations," limiting the term to certain categories of requirements "under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA." Throughout the remainder of the Part 122 regulations, all references to "standards" relate back to the foregoing CWA sections. As discussed previously, the Discharge Prohibitions and RWLs here were adopted under section 402(p)(3)(B) of the CWA, which is not referenced in

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[4] All citations in this subsection refer to title 40 of the Code of Federal Regulations, unless otherwise noted.

[5] The federal regulations define "effluent limitation" to mean, "any restriction imposed by the Director on quantities, discharge rates and concentrations of 'pollutants,' which are 'discharged' from 'point sources' into 'waters of the United States,' . . . ." (40 C.F.R. § 122.2.) The Discharge Prohibitions and RWLs in the San Diego Permit are narrative statements that do not constitute an actual numeric restriction on quantity, rate and concentration of pollutants that may be discharged by the MS4.

section 122.2. Thus, the Discharge Prohibitions and RWLs in the San Diego Permit are not "standards" as set forth in section 122.44(l).

The Discharge Prohibitions and RWLs also are not "conditions" within the meaning of the regulatory anti-backsliding provisions. Throughout subpart C of the regulations (which includes section 122.44(l)) the conditions listed have something in common – they are required conditions as described in the regulations. By contrast, the Discharge Prohibitions and RWLs provisions are *discretionary* and are not required "conditions" outlined in the regulations or in the CWA.[6] Accordingly, the Discharge Prohibitions and RWLs are not a "condition" under the anti-backsliding provisions in section 122.4(l), which is also located in subpart C.

Because the RWLs are not effluent limitations, conditions, or standards, the anti-backsliding federal regulations do not apply. This analysis is consistent with this Board's findings in Order WQ 2015-0075. CASQA submits for the reasons stated that the federal regulatory anti-backsliding provisions do not apply to the Discharge Prohibitions and RWLs in the San Diego Permit, or other MS4 permits. Accordingly, the State Water Board should reject the Coastkeeper's arguments on regulatory anti-backsliding.

3. Even if Federal Anti-Backsliding Provisions Applied, There are Applicable Exceptions

Both the CWA and regulatory anti-backsliding provisions include exceptions, including that new information may justify less stringent permit limitations, standards, or conditions. Thus, even if the anti-backsliding provisions arguably applied to the San Diego Permit's Discharge Prohibitions and RWL provisions, the new information exception would apply.

The CWA states that a permit may be renewed, reissued, or modified to include a less stringent effluent limitation if "information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) which would have justified the application of a less stringent effluent limitation at the time of permit issuance." (33 U.S.C. § 1342(o)(2)(B)(i).) The federal regulations similarly allow less stringent conditions, standards, or limitations when new information would have justified the application of different permit conditions at the time of issuance. (40 C.F.R. §§ 122.44(l)(1), 122.62(a)(2).)

The San Diego Water Board added the alternative compliance pathway WQIP provisions based on new information relating to the region's MS4s' efforts to achieve compliance with WQS over time. Due to the nature of stormwater discharges and the difficulty of removing pollutants from such discharges, alternative compliance pathways are needed to further the process towards compliance. Municipalities have compiled many years of monitoring data, and those data support the position that significant investment and time is required to provide solutions for water quality challenges. The nature of the problem is largely exacerbated by the general imperviousness of the developed environment. Controlling sources of pollutants and

[6] While section 122.44(k) mentions best management practices (BMPs) "to control or abate the discharge of pollutants when . . . (2) [a]uthorized under section 402(p) of the CWA for the control of storm water discharges," it does not change the analysis. CWA section 402(p)(3)(B)(iii) requires controls to reduce the discharge of pollutants to the MEP, including BMPs, but allows the state to require other provisions it determines appropriate for the control of municipal stormwater discharges. The RWLs fall within the latter discretionary provision.

reconstructing the built environment towards restoration of more natural hydrologic processes is tied to the development cycle and will require years to complete. Further, for example, programs targeting public behavior modification require time to reach maximum effectiveness.

The compilation and examination of monitoring data and other information assist the ambitions and rigorous WQIP provisions toward meeting WQS. The new information supports the need for the alternative compliance pathway to further improvements in water quality and ultimately meet WQS for the identified constituents in the specified waterbodies. Accordingly, even if the anti-backsliding provisions were applicable, the exception to anti-backsliding applies.

III. The Compliance Provisions in the San Diego Permit Are Consistent With and Comply With Order WQ 2015-0075

Coastkeeper alleges that the compliance provisions at issue in the San Diego Permit fail to meet the principles established in Order WQ 2015-0075, and in particular, fail to comply with principle 7, which states that alternative compliance paths should "have rigor and accountability." (Order WQ 2015-0075, p. 52.) As a fundamental matter, Coastkeeper does not characterize or quote Order WQ 2015-0075 correctly. Coastkeeper omits essential language that clearly indicates that the State Water Board left to individual regional water boards' significant discretion with respect to adopting alternative compliance programs designed to address RWLs compliance. The complete language is as follows:

> We direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase 1 MS4 permits going forward. *In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach*, but believe that such variations must nevertheless be guided by a few principles. We expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit specific reasons. (Order WQ 2015-0075, p. 51, emphasis added.)

Notably, the State Water Board's direction to the regional water boards is consistent with an approach that provides discretion to the regional water boards. For example, regional water boards are to "*consider* the WMP/EWMP approach," be "*guided* by a few principles," and are expected to follow the principles *unless a given principle is not appropriate*.

Coastkeeper argues that the San Diego Permit does not: (1) require more than a good-faith engagement in the iterative process in order to constitute compliance; (2) establish ambitious, rigorous, and transparent alternative compliance pathways; (3) require the use of multi-benefit regional projects for stormwater capture, filtration, and reuse; (4) include "rigor and accountability" in safe harbors; and (4) require full compliance with TMDLs. These claims fail for several reasons. This is apparent from the San Diego Regional Water Board's own evaluation of consistency of its alternative compliance program with the principles set forth in Order WQ 2015-0075.[7] The San Diego Regional Water Board's evaluation clearly finds that the San Diego Permit adequately addresses each of the seven principles in Order WQ 2015-0075

[7] See San Diego Permit Fact Sheet, pp. F-61 – F-63.

independently and in turn. It also requires that alternative compliance analyses must quantitatively demonstrate that the alternative will achieve numeric TMDL goals. (*Id.* at pp. F-62 – F-63.)[8]

Similarly, the argument that the WQIP provisions are not sufficiently rigorous and accountable insofar as they are different than those in the LA MS4 permit is of no merit. Order WQ 2015-0075 does not require or mandate that alternative compliance paths need to be the same as those approved in the LA MS4 permit. Order WQ 2015-0075 does *not* state that the only path to meeting the rigor and accountability test from principle 7 is through a program that is essentially the same as that in the LA MS4 permit. Rather, Order WQ 2015-0075 requires transparency, verification of assumptions, and implementation of adaptive management. (Order WQ 2015-0075, p. 52.)

Moreover, the San Diego Regional Water Board has set forth a rigorous and accountable path for permittees to follow in developing their WQIP. A permittee utilizing the alternative compliance pathway must first develop a "comprehensive set of numeric goals and schedules that will demonstrate" that the receiving water limitation and other requirements of the Permit "will be achieved in a specified period of time."[9] These goals and schedules, and other aspects of the alternative compliance effort, are subject to public review and San Diego Regional Water Board approval.[10] Moreover, the copermittees are further required to specify annual milestones to be achieved each year, expressed as metrics "which are expected to build upon previous milestones and lead to the achievement of the final numeric goals."[11]

Additionally, the copermittees must conduct an analysis demonstrating that implementation of water quality strategies identified under Provision B.3.b. will achieve numeric goals within established schedules.[12] The analysis must "reasonably" and "quantitatively" demonstrate that the strategies can achieve the goals within the schedule.[13] This is exactly the type of rigor required by this Board in Order WQ 2015-0075.

Thus, contrary to Coastkeeper's allegations, the San Diego Permit is fully consistent with Order WQ 2015-0075.

[8] As noted in Section IV of our comments, however, the San Diego Regional Water Board should, to be fully consistent with Order WQ 2015-0075, have provided for an interim compliance status for permittees preparing alternative compliance pathway documentation.

[9] Permit Fact Sheet at F-60.

[10] The Permit establishes a Water Quality Improvement Consultation Panel in which stakeholders are able to review and comment upon elements of the WQIP. The Panel must include as Panel members a representative of the San Diego Regional Water Board, a representative of the environmental community and a representative of the development community. Permit Provision F.1.a.

[11] *Id.*

[12] *See* Permit at Provision B.3.b(3); Fact Sheet at F-60.

[13] Fact Sheet at F-61.

IV. The State Water Board Should Require Amendment of the San Diego Permit to Provide Copermittees With the Option of Obtaining Interim Compliance Status While Preparing Their WQIPs

Petitions filed by MS4 permittees challenge the San Diego Permit because it fails to provide interim compliance status for the copermittees while they are proceeding in good faith to develop their WQIPs, which are required for alternative compliance. This failure is inconsistent with the State Water Board's previous findings in Order WQ 2015-0075, and is inconsistent with other major MS4 permits adopted by the Los Angeles and San Francisco Bay regional water boards, which have included alternative compliance pathways in their MS4 permits.

CASQA agrees with the MS4 petitioners that interim compliance is essential to meet the requirements of the State Water Board's seven principles for alternative compliance pathways set forth in Order WQ 2015-0075. In particular, that Order's principle number 3 expects regional water boards to incorporate an alternative compliance path that "allows permittees appropriate time to come into compliance . . . during *full implementation* of the compliance alternative." (emphasis supplied). When read with other portions of Order WQ 2015-0075, CASQA believes that this principle means that alternative compliance should apply during the WQIP planning and development period. The time for compliance should commence from the start of the WQIP process, not its culmination possibly over two years in the future.

Finally, we note that the provision of interim compliance is consistent with the CASQA model alternative compliance pathway language presented to the State Water Board during the Los Angeles County permit proceedings, and which was referenced in Order WQ 2015-0075.

CASQA would like to thank the State Water Board for the opportunity to comment on the petitions. Feel free to contact me with any questions at (408) 720-8811, ext. 1.

Sincerely,

Jill Bicknell, Chair
California Stormwater Quality Association

cc: CASQA Board of Directors and Executive Program Committee