County of San Diego

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Ryan Mallory-Jones
Attorney
Office of Chief Counsel
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

Re: SWRCB/OCC File A-2546(a)-(l)

Dear Mr. Mallory-Jones:

The County of San Diego ("County") appreciates the opportunity to respond to the Petition filed by the San Diego Coastkeeper ("Coastkeeper") and the Coastal Environmental Rights Foundation challenging the San Diego Regional Water Quality Control Board's ("San Diego Regional 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 Regional Permit").

In summary, the County responds to Coastkeeper's allegations that certain requirements in the San Diego Regional Permit violate federal anti-backsliding requirements, State Water Board Order WQ 2015-0075, and fail to respond to comments on anti-backsliding requirements. The County disagrees with such allegations and encourages the State Water Board to reject these claims.

I. COASTKEEPER MISCHARACTERIZES APPLICATION OF WATER QUALITY STANDARDS (WQS) TO MUNICIPAL STORMWATER DISCHARGES

As a preliminary matter, the County 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.[1] 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. (*Ibid.*) 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 regarding 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.

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.) Consistent

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[1] 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.

with this finding, the State Water Board needs to reject Coastkeeper's assertion as contained in their petition.

The important take-away is that 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 Regional 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 REGIONAL PERMIT DO NOT VIOLATE FEDERAL ANTI-BACKSLIDING PROVISIONS

A further point of Coastkeeper's flawed argument is that adoption of the compliance provisions related to the development of Water Quality Improvement Plans ("WQIPs") in the San Diego Regional Permit violates federal anti-backsliding provisions. THE COUNTY disagrees with these arguments for several reasons, including: (1) discharge prohibitions and receiving water limits ("RWLs") are unique inventions of the State 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 Regional Permit. Indeed, the compliance provisions included in the San Diego Regional 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 Regional Permit, p. 18, et seq.; see also San Diego Regional 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

The federal anti-backsliding provisions are applied under section 402(o) of the CWA or the EPA's regulations; however, neither applies to Discharge Prohibitions and

RWLs, which are discretionary provisions imposed by the San Diego Regional Water Quality Control Board (San Diego Regional Board). 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. Specifically, the federal anti-backsliding provisions prohibit 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).) The 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.[2]

While Coastkeeper attempts to take an expansive view of the term "effluent limitations" to encompass the Discharge Prohibitions and RWLs at issue here, it is important to note the actual text of section 402(o)(1), which circumscribes the application of the statute:

> 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).)

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[2] 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.

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 can anti-backsliding be 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, section 402(o) expressly does not apply to Discharge Prohibitions and RWLs adopted by the San Diego Regional Board within its discretion under section 402(p).

The State Water Board agrees with this legal characterization of the CWA statutory anti-backsliding provisions, and stated so 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.)

Thus, contrary to Coastkeeper's arguments, the statutory anti-backsliding provisions of CWA section 402(o) do not apply to the Discharge Prohibitions and RWLs in the San Diego Regional Permit. Coastkeeper's allegations must be rejected by the State Water Board

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

Coastkeeper claims 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).[3] 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, it is worth noting that the provisions in question at

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

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 RWLs do not fall within any of these categories.

Further, as explained above, Discharge Prohibitions and RWLs are the State's invention, not federal CWA effluent limitations.[4] 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 regulations in part 122, any and all references to "standards" relate back to the foregoing CWA sections. As indicated previously, the Discharge Prohibitions and RWLs at issue here were adopted under section 402(p)(3)(B) of the CWA, which is not included in section 122.2. Rather, the Permit provisions subject to 122.44(1) are applicable standards and limitations within the meaning of section 122.2. Thus, nothing in the regulations place Discharge Prohibitions and RWLs in the San Diego Regional Permit within the meaning of "standards."

Additionally, the term "conditions" is discussed in subpart C of the regulations, entitled "Permit Conditions." The conditions listed throughout the subpart have something in common – they are required conditions as described in the regulations. In contrast, the Discharge Prohibitions and RWLs provisions are *discretionary* and not required "conditions" outlined in the regulations or in the CWA.[5] Accordingly, the Discharge Prohibitions and RWLs are not a "condition" under the anti-backsliding provisions in section 122.44(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. Further, Order WQ 2015-0075 makes no findings to dispute the arguments presented here. Rather, Order WQ 2015-0075 finds that regardless of the application or inapplicability of the regulatory anti-backsliding provisions, exceptions to the anti-backsliding requirements applied in that case. While such a circumstance is true here as well (see arguments below), the County continues to

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[4] 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 Regional Permit, and generally, 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.

[5] 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.

believe for the reasons stated that the federal regulatory anti-backsliding provisions do not apply to Discharge Prohibitions and RWLs that are included in MS4 permits. Accordingly, the County requests the State Water Board make such a finding in response to the Coastkeeper petition so that this issue can be resolved.

3. Even if Federal Anti-Backsliding Provisions Apply, Exceptions to Anti-Backsliding Apply

Both the CWA and the federal regulations include exceptions to the anti-backsliding provisions, acknowledging that new information may lead to changed permit limitations, standards, or conditions. Thus, even if the anti-backsliding provisions could apply to the Discharge Prohibitions and RWLs in the Permit and the modifications are viewed as less stringent, neither of which is true, the new information exception would save the amendments.

The CWA states that a permit may be renewed, reissued, or modified to 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 WQIP provisions were added based on new information relating to 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 the information supports the position that significant investment and time is required to provide solutions for water quality challenges. The nature of the problem is largely created by the characteristic imperviousness of the developed environment. Controlling sources of pollutants and 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 REGIONAL PERMIT ARE CONSISTENT WITH AND COMPLY WITH ORDER WQ 2015-0075

Coastkeeper alleges that the compliance provisions at issue in the San Diego Regional 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 boards' discretion with respect to adopting alternative compliance programs that are 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 replete with terms that convey and maintain regional water board discretion. 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*.

Consistent with Order WQ 2015-0075, the San Diego Regional Board evaluated its program and compared its provisions to the principles from Order WQ 2015-0075. (See San Diego Regional Permit, pp. F-61 – F-63.) However, Coastkeeper still argues that the San Diego Regional 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 (5) require full compliance with TMDLs.

This argument fails for several reasons. The San Diego Regional Permit adequately addresses each of the seven principles in Order WQ 2015-0075 independently and in turn. (San Diego Regional Permit, pp. F-61 – F-63.) 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.)

Additionally, the argument that the WQIP provisions are not sufficiently rigorous and accountable insofar as they are different than those in the LA MS4 permit fails. 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. Second, 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.)

The San Diego Regional Permit contains significant requirements to ensure that it is consistent with principle 7. As explained in the San Diego Regional Permit, the pollutant-specific provisions contain public review processes for the development of the alternative compliance solutions proposed and for monitoring the results. The San Diego Regional Permit also requires that the WQIPs include goals and schedules to achieve compliance with RWL requirements. Further, transparency is achieved because all reports, plans, and other required submittals will be reviewed by the Water Quality Improvement Consultation Panel, as part of the public participation process for alternative compliance. Thus, contrary to Coastkeeper's allegations, the San Diego Regional Permit is fully consistent with Order WQ 2015-0075.

In summary, the Coastkeeper petition fails to raise any legitimate claims, and it must be rejected in its entirety. The County would like to thank the State Water Board for the opportunity to comment on this petition.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By 
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NTD/tlm
16-00134