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SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: May 16, 2016

SUBJECT: SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD RESPONSE TO PETITIONS OF SAN DIEGO COASTKEEPER AND COASTAL ENVIRONMENTAL RIGHTS FOUNDATION; CITY OF RANCHO SANTA MARGARITA; CITY OF LAGUNA HILLS; COUNTY OF ORANGE & ORANGE COUNTY FLOOD CONTROL DISTRICT; CITY OF DANA POINT; CITY OF LAGUNA BEACH; CITY OF MISSION VIEJO; CITY OF LAGUNA NIGUEL; RIVERSIDE COUNTY FLOOD CONTROL & WATER CONSERVATION DISTRICT ET AL; CITY OF SAN CLEMENTE; CITY OF SAN JUAN CAPISTRANO; AND CITY OF ALISO VIEJO [ORDER NO. R9-2015-0100, AN ORDER AMENDING ORDER NO. R9-2013-0001, NPDES NO. CAS0109266, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT AND WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION], **SWRCB/OCC FILE A-2456(a)-(I)**

As invited by the State Water Resources Control Board (State Water Board) in its letter dated March 15, 2016, the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) submits this response to the above-referenced petitions for review of *Order No. R9-2015-0100, An Order Amending Order No. R9-2013-0001, NPDES No. CAS0109266, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region*, adopted by the San Diego Water Board on November 18, 2015.¹ The San Diego Water Board submitted the electronic Administrative Record of the proceedings for this matter, together with a printed copy of the Administrative Record Index, to the State Water Board with this response by hand-delivery on May 16, 2016.

¹ The San Diego Water Board sought and was granted an extension of time in which to submit both its response to the petition and the record for the San Diego Water Board's action on April 4, 2016.

Although the petitions challenging adoption of Order No. R9-2013-0001 and Order No. R9-2015-0001 are being held in abeyance,² the San Diego Water Board takes this opportunity to respond to some of the contentions raised in those petitions due to the overlapping issues. This response may also hereafter refer to Order Nos. R9-2013-0001, R9-2015-0001, and R9-2015-0100 as the "San Diego Regional MS4 Permit" or "Permit," collectively. Likewise due to the overlapping issues, the electronic Administrative Record (AR) submitted to the State Water Board with this response also includes the records of proceedings for Order Nos. R9-2013-0001 and R9-2015-0001.

SUMMARY RESPONSE

With few exceptions, the contentions raised in the petitions are identical or substantively similar to written comments submitted during the San Diego Regional MS4 Permit initial adoption (Order No. R9-2013-0001) and amendments processes (Order Nos. R9-2015-0001 and R9-2015-0100). In some cases, contentions raised in earlier petitions were addressed when the Permit was amended by Order Nos. R9-2015-0001 or R9-2015-0100. In most cases, the Fact Sheet/Technical Report for the San Diego Regional MS4 Permit provides discussion of the San Diego Water Board's rationale for supporting its position or decision that petitioners contest (see AR-024147-024288).

The San Diego Water Board has already responded to those comments that are identical or substantively similar to the contentions raised by the petitioners prior to the adoption of the San Diego Regional MS4 Permit (see AR-008386-008643) and prior to each amendment (see AR-017145-017276 and AR-021535-021606). In most cases where the petitioners repeat contentions previously submitted in written comments to the San Diego Water Board, they do not explain why the San Diego Water Board's responses were not adequate. Instead, the petitioners only continue to disagree with the San Diego Water Board's position, response, or decision.

The San Diego Water Board disagrees with all the contentions raised by the petitioners. The San Diego Water Board maintains that all the comments and recommendations submitted by the petitioners were appropriately and adequately considered by the San Diego Water Board, and the San Diego Regional MS4 Permit is consistent and complies with all applicable laws, regulations, and policies. The San Diego Water Board respectfully urges the State Water Board to uphold the San Diego Regional MS4 Permit in its entirety.

² See Order No. R9-2013-0001, NPDES No. CAS0109266, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region, adopted by the San Diego Water Board on May 8, 2013 (SWRCB/OCC File A-2254(a)-(p)), and Order No. R9-2015-0001, An Order Amending Order No. R9-2013-0001, NPDES No. CAS0109266, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region (SWRCB/OCC File A-2367(a)-(i)), adopted by the San Diego Water Board on February 11, 2015. The San Diego Water Board recognizes that the petitions in SWRCB/OCC Files A-2254 and A-2367 remain in abeyance but is responding to some of the earlier contentions because many petitioners incorporated their earlier arguments in comments on Order No. R9-2015-0100 or in petitions in SWRCB/OCC File A-2456(a)-(l). The San Diego Water Board reserves the right to more fully respond to any of those petitions should the State Water Board decide to review them.

CONTENTIONS AND RESPONSES

The petitioners raise a number of contentions that are technical, legal, and/or procedural in nature. Many contentions are common to multiple petitions. With very few exceptions, the contentions have been fully addressed by the San Diego Water Board in responses to written comments submitted by the petitioners during the adoption and amendment processes of the San Diego Regional MS4 Permit (see AR-008386-008643, AR-017145-017276, and AR-021535-021606) and/or in the Fact Sheet/Technical Report for the Permit (see AR-024147-024288). The San Diego Water Board takes this opportunity, however, to respond to contentions not previously addressed in full to assist the State Water Board in its review.

Contention 1: The San Diego Water Board failed to incorporate wasteload allocations consistent with applicable TMDLs in the San Diego Regional MS4 Permit. (Petitioner A-2456(a))

Response: The petitioner contends that the alternative compliance pathway for receiving water limitations included in the San Diego Regional MS4 Permit creates a "safe harbor" from complying with wasteload allocations (WLAs) of applicable TMDLs and therefore fails to incorporate WLAs that are consistent with applicable TMDLs. The San Diego Water Board disagrees.

The San Diego Water Board resolutions and technical reports for the TMDLs that have been adopted for the San Diego Region are included in the AR (see AR-025873-029121). The WLAs of applicable TMDLs are expressed as water quality-based effluent limitations (WQBELs) in Attachment E to the San Diego Regional MS4 Permit (see AR-024089-024146). The compliance dates for achieving the WQBELs are also in Attachment E to the Permit. The WQBELs and compliance dates are consistent with the assumptions and requirements of the WLAs established in the TMDLs adopted by the San Diego Water Board.

Provision A.3.b of the Permit requires each Copermittee to comply with the applicable WQBELs established for the TMDLs in Attachment E, pursuant to the applicable TMDL compliance schedules.

The Copermittees for each Watershed Management Area identified in Table B-1 are required to develop a Water Quality Improvement Plan (Plan). Provisions B.3.a.(2)(a)(i) and (b)(i) of the Permit require the Copermittees to incorporate the final and interim TMDL compliance dates for any applicable TMDLs in Attachment E in each Plan. Provisions B.3.a.(1)(a) and (b) require the Copermittees to incorporate the WQBELs for applicable TMDLs in Attachment E as numeric goals to be achieved in each Plan. Provision B.4.c requires the Copermittees to implement the monitoring and assessment requirements of the TMDLs in Attachment E to confirm WQBELs are achieved by the compliance dates. Provision B.6.a requires the Copermittees to implement the Plan to achieve the WQBELs by the compliance dates.

Compliance with Provisions B.3.a.(1)(a) and (b), B.3.a.(2)(a)(i) and (b)(i), B.4.c, and B.6.a of the Permit is the pathway required to achieve and remain in compliance with the WQBELs of the applicable TMDLs in Attachment E. Failure to achieve and remain in compliance with the WQBELs by the compliance dates is a violation of Provision A.3.b.

The alternative compliance pathway to receiving water limitations, included in the Permit as Provision B.3.c, does not supersede the requirements of Provisions A.3.b, B.3.a.(1)(a) and (b),

B.3.a.(2)(a)(i) and (b)(i), B.4.c, and B.6.a. The requirements under Provision B.3.c of the Permit are optional and may be implemented, at each Copermittee's discretion, as an alternative pathway of being deemed in compliance receiving water limitations.

The requirements of Provision B.3.c must also to be incorporated into the Water Quality Improvement Plan. A Copermittee that has elected to implement the alternative compliance pathway allowed under Provision B.3.c is still required to incorporate the interim and final WQBELs and compliance schedules in Attachment E to the Permit. There is nothing under Provision B.3.c that allows a Copermittee to alter the compliance schedule requirements established by the TMDLs in Attachment E. Failure to achieve the WQBELs by the compliance dates is a violation of Provision A.3.b even if a Copermittee has elected to implement Provision B.3.c. Thus, the alternative compliance pathway under Provision B.3.c does not provide a "safe harbor" from comply with the WLAs of applicable TMDLs.

The San Diego Water Board respectfully urges the State Water Board to confirm that the alternative compliance pathway under Provision B.3.c in the San Diego Regional MS4 Permit does not provide a "safe harbor" from comply with the WLAs of applicable TMDLs in the San Diego Region.

Contention 2: The San Diego Water Board failed to adequately consider the petitioners' Report of Waste Discharge and lacks the authority to impose a San Diego region-wide MS4 permit on the petitioners. (Petitioners A-2456(b)-(d), (g)-(h) and (j)-(l))

Response: The San Diego Water Board responded to this contention when the petitioners submitted their written comments during the proceedings for Order No. R9-2013-0001 (see AR-008436-008437) and Order No. R9-2015-0001 (see AR-017173-017174, AR-17179, and AR-017273-017274).

While the petitioners may be correct that the south Orange County Copermittees do not have MS4s that directly interconnect with Riverside County and San Diego County MS4s, it is important to point out that they discharge into and from the shared San Diego Basin (i.e. a watershed) that discharges to the Pacific Ocean. Because of the southward littoral currents in the San Diego Region, pollutants in storm water discharges into the Pacific Ocean from the South Orange County MS4s are connected to and can impact the water quality of the Pacific Ocean where the Riverside County and San Diego County MS4s discharge to the Pacific Ocean. In addition, discharges into San Mateo Creek in south Orange County commingle with discharges to San Mateo Creek from southwestern Riverside County prior to discharging to the Pacific Ocean. Because of the common watershed and the connection between MS4 discharges in the Pacific Ocean, the San Diego Water Board maintains that it has the authority to adopt a San Diego region-wide MS4 permit that includes the MS4s of south Orange County. Such a determination is also consistent with the definition of the jurisdictional boundaries of the San Diego Region³ and falls within the broad discretion afforded to permitting authorities to issue system-wide permits including to an entire geographical area, recently recognized by the State Water Board. (See State Water Board Order WQ 2015-0075, p. 74, fn. 213). In any event, petitioners' argument that the region-wide permit constrains their flexibility and disregards unique circumstances of south Orange County and the maturity of its municipal storm water

³ The San Diego Water Board's jurisdictional boundaries comprise: "all basins draining into the Pacific Ocean between the southern boundary of the Santa Ana region and the California-Mexico boundary." (Cal. Wat. Code § 13200, subdivision (f).)

programs is entirely misplaced. While the San Diego Regional MS4 Permit contains permit provision applicable region-wide, Copermittees develop Water Quality Improvement Plans that allow the Copermittees to focus on the most pressing water quality issues in a watershed and thereby make meaningful progress towards attaining water quality standards in surface waters that receive storm water and non –storm water discharges. In the Plans, the Copermittees describe numeric goals related to the highest priorities, and strategies to achieve the goals within specified schedules. The Copermittees also implement an integrated monitoring and assessment program to determine progress, adapting strategies and measures in the Plan as necessary. The Copermittees can conduct this type of adaptive management on their own initiative without waiting for direction from the San Diego Water Board.

The San Diego Water Board respectfully urges the State Water Board to confirm that the San Diego Water Board has the authority to adopt a region-wide NPDES permit to regulate storm water discharges from Phase I MS4s in Orange County, Riverside County, and San Diego County within the San Diego Region.

Contention 3: The San Diego Water Board denied the Copermittees' due process rights in adopting and amending the San Diego Regional MS4 Permit. (Petitioners A-2254(a)-(n), and A-2367(a), (b), and (d)-(i))

Response: The petitioners contend that the review and comment periods for the adoption of the San Diego Regional MS4 Permit (Order No. R9-2013-0001) and the first amendment (Order No. R9-2015-0001) were unreasonably short. The San Diego Water Board disagrees.

The review and comment period was adequate and in excess of what federal and state law requires. Tentative Order No. R9-2013-0001 was released to the public on October 31, 2012 to review and provide comments until January 11, 2013 for a seventy-one (71) day public comment period. Tentative Order No. R9-2015-0001 was released to the public on September 18, 2014 to review and provide comments until November 19, 2014 for a sixty (60) day public comment period. Federal regulations implementing the Clean Water Act only require that the San Diego Water Board provide thirty days for public comment.⁴ California Water Code section 13167.5 also prescribes a notice and public comment period of at least thirty days prior to the adoption of waste discharge requirements, including NPDES permits. Therefore, the petitioners were provided with more time than federal and State law requires.

As a result of the public review and comment period, the San Diego Water Board received thousands of pages of comments on the Tentative Orders (see AR-006562-008382 and AR-016145-017140). The extensive nature of the comments submitted by the petitioners also demonstrates that the petitioners had sufficient time to review and comment on the Tentative Orders.

The San Diego Water Board held an extensive 9-month public participation process that began on April 2, 2012 and ended October 24, 2012 before the Tentative Order No. R9-2013-0001 was released on October 31, 2012 for public review and comment. (See AR-009470-009476 for a summary of the public participation process.). In addition, the San Diego Water Board held multiple days of public Board workshops (November 13, 2012 and December 12, 2012) and held multiple days of public hearings (April 10-11, 2013 and May 8, 2013) before adopting the San Diego Regional MS4 Permit (Order No. R9-2013-0001).

⁴ 40 CFR section 124.10(b).

The San Diego Water Board held a public meeting prior to releasing the first amendment to the San Diego Regional MS4 Permit (Tentative Order No. R9-2015-0001). The San Diego Water Board also held a public Board workshop (October 8, 2014) and held a public hearing (February 11, 2015) before adopting the first amendment to the San Diego Regional MS4 Permit (Order No. R9-2015-0001). (See AR-019280 for a summary of the public participation process for Order No. R9-2015-0001.)

The San Diego Water Board made every effort to provide the petitioners a reasonable and meaningful opportunity to review and comment on the Permit, as well as participate in the Permit development process. These efforts far exceeded the minimum requirements of State and federal law, which require only a single 30-day comment period.

Petitioners also take issue with the fact that they were not provided with enough time to review revisions to the Tentative Orders or written responses to comments. Petitioners also contend that the changes to the San Diego Regional MS4 Permit prior to the public hearing, requiring a new public notice and comment period. Neither was required prior to commencement of the hearing.

Pursuant to federal regulations, the San Diego Water Board is "only required to issue a response to comments when a final permit is issued."⁵ Also, there are no federal regulations that suggest revisions to a draft permit, however significant, require an additional public comment period. In fact, section 124.14(b) of title 40 of the Code of Federal Regulations (40 CFR) grants discretion to the USEPA Regional Administrator to either "reopen or extend the comment period," "prepare a new draft permit, appropriately modified," or both, "if any data information or arguments submitted during the public comment period ... appear to raise substantial new questions concerning a permit." Although not directly controlling on the State's authority, 40 CFR section 124.14 illustrates that USEPA views the decision to reopen the comment period as discretionary, even if the comments raise substantial new questions concerning the draft permit. Though the comments may trigger a significant number of modifications to the draft permit, as was the case with the San Diego Regional MS4 Permit, a new comment period is permissible but not required.⁶

State law also does not require a new notice and comment period if revisions are made to the draft permit. California Water Code section 13167.5 explicitly states that a Regional Water Board is not required "to provide more than one notice or more than one public comment period prior to the adoption of waste discharge requirements"

No new comment period is required when changes to a draft permit are within the scope of the noticed permit and are responsive to comments and information received.⁷ "If that were the case, an agency could 'learn from the comments on its proposals only at the peril of' subjecting itself to rulemaking [here, permitting] without end. Instead, renewed notice is required only if the final rule [here, permit] cannot be viewed as a 'logical outgrowth' of the initial proposal."⁸ This

⁵ 40 CFR section 124.17

⁶ See, e.g., *In re Dominion Energy Brayton Point, L.L.C.* (Feb. 1, 2006) NPDES Appeal 03-12, 2006 WL 3361084 (12 E.A.D. 490).

⁷ State Water Board Order WQ 2012-0013 (*Sacramento Regional Wastewater Treatment Plant*), pp. 39-40.

⁸ *First American Discount Corp. v. Commodity Futures Trading Com'n* (D.C. Cir. 2000) 222 F.3d 1008, 1015 (quoting *International Harvester Co. v. Ruckelshaus* (D.C. Cir. 1973) 478 F.2d 615, 632 n. 51) (internal citations omitted); see also *Natural Resources Defense Council v. EPA* (9th Cir. 2002) 279 F.3d 1180, 1186-88.

"logical outgrowth" rule originated in the context of administrative rulemaking. Even a substantial variation does not necessitate a new comment period so long as the final regulation is "in character with the original proposal."⁹ Analogously, in a permit proceeding, a new comment period is only required if the revised permit is essentially a *new* draft permit because the revisions are not the logical outgrowth of or in character with the permit as initially proposed. Here, the revisions to Tentative Order Nos. R9-2013-0001 and R9-2015-0001 were the direct consequence of the written and oral comments received. The revisions to the Tentative Orders addressed particular comments and did not fundamentally alter the character of the Tentative Orders.

The purpose of the notice and comment requirements is not to lead to the absurd result that agency proceedings are subject to a new round of comments with every substantive revision. That result is particularly absurd where the agency has already provided a lengthy process to inform the public and solicit early input during permit development. One of the purposes of the comment period is to provide the agency with additional information upon which it may choose to revise draft language. Where the character and issues raised by the draft permit remain the same, however, as was true here, there is no additional right to comment on those revisions.¹⁰

Therefore, the public review and comment period, as well as the hearing procedures, established by the San Diego Water Board were consistent with the Clean Water Act, the Administrative Procedure Act, and due process principles. The process established by the San Diego Water Board was transparent, fair, and exceeded legal requirements. The San Diego Water Board respectfully urges the State Water Board to confirm that the petitioners were not denied their due process rights before the San Diego Regional MS4 Permit was adopted and amended.

CONCLUSION

For all of the foregoing reasons, the San Diego Water Board respectfully urges the State Water Board to uphold Order No. R9-2013-0001, as amended by Order Nos. R9-2015-0001 and 2015-0100, in its entirety.

cc: Distribution List for SWRCB/OCC File A-
2456(a)-(l)

⁹ *Hodge v. Dalton* (9th Cir. 1997) 107 F.3d 705, 712 (quoting *Rybachek v. EPA* (9th Cir. 1990) 904 F.2d 1276, 1288).

¹⁰ See *Rybachek v. EPA* (9th Cir. 1990) 904 F.2d 1276, 1286.