COALITION FOR PRACTICAL REGULATION

"Cities Working on Practical Solutions"

May 29, 2008

Xavier Swamikannu
Los Angeles Regional Water Control Board
320 W. 4th Street, #200
Los Angeles, CA 90013-2343

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ROSEMEAD
SANTA FE SPRINGS
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SIERRA MADRE
SIGNAL HILL
SOUTH EL MONTE
SOUTH GATE
SOUTH PASADENA
VERNON
WALNUT
WEST COVINA
WHITTIER

Subject: Comments on Proposed Changes to the Waste Discharge Requirements for Municipal Separate Storm Sewer System Discharges Within the Ventura County Watershed Protection District, County of Ventura and the Incorporated Cities Therein (NPDES No. CAS004002)

Dear Mr. Swamikannu:

I am writing on behalf of the Coalition for Practical Regulation, an *ad hoc* group of more than 40 cities in Los Angeles County that have come together to address water quality issues. We thank Los Angeles Regional Water Quality Control Board for the opportunity to provide these comments regarding the Third Draft Ventura County MS4 Permit. Although our member cities are not in Ventura County, we are extremely interested in the process of creating a workable draft MS4 permit for Ventura County. We understand that representatives of USEPA Region IX met with the Executive Officers of the four Southern California Water Boards and that the Ventura Permit is likely to be used as a model for future MS4 permits in the region; in that sense, we are all stakeholders.

CPR appreciates the Regional Board's holding a two day Ventura County MS4 Program Permit Reissuance Coordination Meeting earlier this year in order to hear the views and concerns of Permittees and other interested parties. Following the February 27-28 coordination meeting, Ventura County Permittees and others in attendance had the impression that the Regional Water Board staff acknowledged and understood Permittee concerns and anticipated that staff would take steps to address them in the Third Draft Ventura Permit. A review of the Third Draft Permit, however, indicates that few substantial changes were made between the second and third drafts. In fact, despite all the efforts the Regional Board and staff have made to involve Permittees and interested parties throughout this process, staff has not made many significant changes since issuance of the First Draft Permit in early 2007. CPR supports the extensive comments provided by Ventura County Permittees, BIA, and others and would recommend that Regional Board members review comments on earlier drafts in relation to the Third Draft they have before them. Because there have been so few substantial changes to the Draft Permit, we incorporate our earlier comments on the First Draft and Second Draft by reference. At this time, CPR would like to provide comments and suggestions regarding

only a few of the key areas in the Third Draft Ventura County MS4 Permit that are still of significant concern:

- The prescriptive and overly restrictive nature of the Draft Permit;
- The inappropriate use of Municipal Action Levels (MALs) as numeric effluent limits rather than true action levels;
- The inappropriate use of Municipal Action Levels (MALs) to create an operational definition of maximum extent practicable (MEP);
- The inappropriate application of a watershed percentage of effective impervious area to individual projects;
- The definition of pre-developed condition (pre-development);
- The inclusion of a development construction program that unnecessarily duplicates many elements of the new Draft General Construction Permit under development by the State Water Board;
- The lack of emphasis on true source control, especially the sources of atmospheric pollutants; and
- The attempts in the Findings to deny that the Draft Permit contains unfunded mandates.

The Draft Permit Is Prescriptive and Overly Restrictive

A general concern of CPR is that the Third Draft Ventura County Permit is too complex, extremely prescriptive and overly restrictive. For instance, Parts IV.F and IV.G contain several tables telling local agencies which BMPs they should require of others and which BMPs they should use on public projects. To use alternative BMPs, the Permittees would have to petition the Executive Officer. In addition, the proposed restriction on construction grading for 197 days (198 during leap years) is excessive in a region with an average of less than 30 days of rainfall per year, with most of the rain concentrated during a two-month period. Further components of the Development Construction section, including specific requirements regarding turbidity control, monitoring, and determination of erosion potential, are also overly prescriptive and, in some cases, quite complex. Other examples of prescriptive and overly restrictive components of the Draft Permit are described below in discussions of specific elements of the Draft Permit. It would have been easier to evaluate the potential impacts of the prescriptive and restrictive elements of the Draft Permit and the reasoning behind some of the components of the Permit if the Fact Sheet referenced in Finding F.20 had actually been included with the Third Draft Permit that was made available for review and comment.

The prescriptive nature of the Permit would limit the flexibility of the Permittees to creatively respond to water quality problems as they arise. We understand that the Ventura County Permittees have determined that, as written, the Third Draft Permit would cost approximately $600.00 per household per year to implement. Such a cost would be extremely difficult for local municipalities to afford without cutting other services, especially if there is not a further Constitutional Amendment to modify the

limitations imposed by Proposition 218. In light of widespread knowledge of the difficulties in raising fees for stormwater services after 218 and the Salinas Decision, it is difficult to believe that staff really thinks that "the local agency permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order."

Municipal Action Levels (MALs)

The continued misapplication of Municipal Action Levels (MALs) is the single most disturbing element of the Third Draft Permit. While staff did rewrite the description of Municipal Action Levels in Part 2 with the intent of clarifying the language, in actuality, the only significant change is in the definition of major outfalls. The basic misuse of the action level concept remains.

As proposed in the Third Draft Ventura Permit, the MALs are not action levels as intended by the State Water Board's Blue Ribbon Panel, but are inappropriate precursors to numeric effluent limits, which then become actual numeric effluent limits after three years. These limits will trigger the installation of BMPs that would be required to meet very strict performance standards based on a national database rather than on local conditions. As noted in Attachment C, "the treatment control BMP performance standards were developed from the median effluent water quality values of the 3 highest performing BMPs, per pollutant, in the stormwater BMP database." (See Attachment C, Tables 3 and 4.) The nationwide BMPs are based on very different regimes than those for Southern California, both in terms of hydrology and pollutant sources. Many other parts of the country have dramatically higher and more frequent levels of precipitation. Much of Southern California is semi-arid, with little rain and longer build-up periods before pollutants are washed off. Furthermore, many other parts of the country are rural and have fewer pollutant sources. Use of the national database as a basis for MALs would penalize Ventura County and potentially all of Southern California if the Ventura Permit were used as a model for the other pending permits.

The proposed application of MALs in the Third Draft Permit is inconsistent with the iterative process in State Water Board Order 99-05. As proposed, the MALs will trigger permit violations and enforcement actions, instead of triggering enhanced management measures as called for in the iterative process. CPR continues to support the use of quantifiable measures to assist Permittees with evaluating and enhancing their water quality programs, and we strongly encourage the Regional Board to use Municipal Action Levels as measures of achievement and triggers for more aggressive actions. This approach was suggested by the California Stormwater Quality Association (CASQA) in its draft White Paper, *Quantifiable Approach to Municipal Stormwater Program Implementation and Permit Compliance Determination*, and in their comment letter of October 15, 2007. As CPR stated in its letter commenting on the Second Draft Ventura Permit, application of this approach would be consistent with the Findings of the Blue

Ribbon Panel and could initiate the implementation of a consistent approach across California.

The Blue Ribbon Panel defined the concept of an Action Level as follows:

> "…the approach of setting an 'upset' value, which is clearly above the normal observed variability, may be an interim approach which would allow 'bad actor' catchments to receive additional attention. For the purposes of this document, we are calling this 'upset' value an Action Level because the water quality discharge from such locations are enough of a concern that most all could agree that some actions could be taken…"

The Regional Water Board staff has attempted to reinterpret the Blue Ribbon Panel's conclusions and has stated in Finding F12, in part:

> "The MALs were computed using the statistical based [sic] population approach, one of three approaches recommended by the California Water Board's Storm Water Panel in its report, 'The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities.' (June 2006)"

This reference to the Storm Water Panel (the Blue Ribbon Panel) diverges significantly from the actual Findings of the Panel, whose report stated (emphasis added):

> "For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit is **basically not possible**."

The misapplication of the action level concept would put municipalities and other agencies in a precarious position. They would be forced to install expensive BMPs to achieve performance standards that may not even be achievable in Southern California. Furthermore, they would be inappropriately exposed to mandatory minimum penalties. It is a mistake to include in the Permit requirements for BMPs based on nationwide monitoring data.

Despite requests by numerous Permittees and other interested parties, Regional Water Board staff has not made any substantial changes to the Part 2 Municipal Action Levels section of the Draft Permit, with the exception of adding language that states:

> "The absence of MAL exceedances does not give rise to a presumption that the permittee is complying with the MEP criteria."

Therefore, in this Draft Permit, the exceedance of an MAL will create a presumption that MEP is not being met, yet the absence of MAL exceedances does not give rise to a presumption of MEP compliance.

The Use of Municipal Action Levels (MALs) to Create an Operational Definition of Maximum Extent Practicable (MEP) Is Inappropriate

During the February 2008 Ventura County MS4 Program Permit Reissuance Coordination Meeting, staff stated that, although in the Second Draft Permit MAL defined MEP, it would not do so in the Third Draft Permit. In fact, the Draft Permit contains a series of disconnected but cross-referenced definitions and statements that result in MEP being defined by Municipal Action Levels. Part 7 of the Permit defines MEP as:

> "**Maximum Extent Practicable (MEP)** - means the minimum required activities for
>
> implementation of storm water management programs to reduce pollutants in storm water. CWA § 402(p)(3)(B)(iii) requires that municipal permits 'shall 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.' Also, see State Board Order WQ 2000-11, page 20 and Browner decision (Defenders of Wildlife v. Browner (1999), 191 F.3d 1159)."

Subpart 4.A.2 states, "Each permittee shall, comply with the requirements of 40 CFR122.26(d)(2) and implement programs and control measures so as to reduce the discharges of pollutants in storm water to the MEP and achieve water quality standards." However, the convoluted functional definition is pulled together in Part 2, which states, "Continued exceedances after Year 3 of the operative MAL(s) shall create a presumption that the permittee(s) have not complied with the MEP provision in subpart 4.A.2, and have failed to implement adequate storm water control measures and BMPs to comply with the MEP criteria." Thus, staff has created a definition of **Maximum Extent Practicable** that is based on minimum required activities and has proposed a municipal action level approach that would create the presumption of non-compliance with MEP based on exceedances of the MALs.

Far more workable definitions for MEP, based on the 1993 State Water Board Attorney Elizabeth Jennings memo, have been identified and included in multiple MS4 permits.

The Elizabeth Jennings memo was also the basis of a definition of MEP contained in proposed California SB 1342 (2002), which defined MEP as follows:

> "The 'maximum extent practicable' standard means the maximum degree of pollutant reduction achievable through the application of practical, technologically-feasible, and economically achievable best management practices, including but not limited to, pollution control techniques and system design and engineering methods."

Five of the six points in the proposed SB 1342 definition of technologically feasible and economically achievable were derived from the Elizabeth Jennings memo.

> "Technologically feasible and economically achievable best management practices are those practices that satisfy all of the following criteria:
>
> (1) Demonstrate effectiveness in removing pollutants of concern.
>
> (2) Demonstrate compliance with subsection (p) of Section 1342 of Title 33 of the United States Code.
>
> (3) Demonstrate the support and acceptance of the public served by those best management practices.
>
> (4) Demonstrate a reasonable relationship between the cost of the best management practice and the pollution control result to be achieved.
>
> (5) Demonstrate technological feasibility to effect the intended pollutant removals, considering soils, geography, topography, water resources, and such other limiting physical conditions as may exist."

Rather than attempting to define MEP in this permit, the Los Angeles Regional Water Board should request the State Water Board to develop and adopt a statewide definition of MEP or recommend legislation that would do so. Such a definition should be based on the concepts contained in the 1993 Elizabeth Jennings memo.

The Application of Effective Impervious Area to Individual Projects Is Inappropriate

The New Development/Redevelopment Criteria section of the Planning and Land Development Program in the Third Draft Permit correctly outlines Low Impact Development (LID) measures that would reduce runoff volume through percolation, infiltration, storage, and/or evapo-transpiration. However, the section also inappropriately attempts to apply an Effective Impervious Area ratio developed through watershed research to individual project areas. This proposed requirement is not only highly prescriptive; it is wrongly applied and should be deleted from the Draft Permit.

The Definition of Pre-Developed Condition (Pre-Development)

The definition of pre-developed condition in the Third Draft Ventura Permit is excessive and unworkable. Part 7 of the Draft Permit defines pre-developed condition as:

> "native vegetation and soils that existed at a site prior to first development. The pre-developed condition may be assumed to be an area with the typical vegetation, soil, and storm water runoff characteristics of open space areas in coastal Southern California unless reasonable historic information is provided that the area was atypical."

It appears that staff is attempting to define a pre-development condition as the condition of an area prior to European settlement in California. Clearly, this standard is unrealistic and unattainable. The definition of pre-development should be rewritten to be consistent with the definition used in the State's new Draft General Construction Permit, in which pre-development refers to the condition of a site prior to the development of the specific permitted project on the site.

The Development Construction Program Unnecessarily Duplicates the New Draft General Construction Permit

The Development Construction Program in the Third Draft Permit includes detailed instructions that duplicate requirements in the new General Construction Permit currently under development by the State Water Board. Furthermore, the requirement for inclusion of local stormwater pollution prevention plans (SWPPPs) could be interpreted as an attempt by the Regional Water Board to transfer some of the responsibility for enforcing the General Construction Permit to local government.

The Draft Permit Fails to Address True Source Control, Especially the Sources of Atmospheric Deposition Water Pollutants

We would like to thank Regional Board staff for continuing to recognize the adverse impacts of aerial deposition on water quality by keeping Finding B.19 in the Third Draft Permit. Atmospheric deposition and other multi-media problems demand multi-agency planning and policy coordination, and this indicates that staff is aware of that fact. Inclusion of this Finding is a good start; however, we were surprised and disappointed that staff removed the sentence, "The Los Angeles Regional Water Board will coordinate with the South Coast Air Quality Management District, the California Air Resources Board, and other governmental agencies to address multimedia sources of pollution that may contribute to pollution of surface waters."

Stormwater permittees are caught in a regulatory/authority bind. The combination of directly connected impervious areas and atmospheric deposition of pollutants, in effect, produces a "perfect storm" that dramatically impacts water quality control. The reality is that water boards can regulate permittees, but do not have regulatory control over some of the major pollutant sources, such as the sources of atmospheric deposition. Removing all pollutants at the end of storm drains would be extremely costly – on the order of many billions of dollars for the Region. Together, we must go after the true sources of the pollutants discharged from the atmosphere onto to our watersheds.

The Water Boards and the regulated community need assistance from the Air Boards to tackle this problem. The Air Boards need to acknowledge that water pollution is one of the public welfare effects that need to be addressed in regulating sources of atmospheric pollution. Municipalities would like to work with the Regional Board to develop a strategy to stimulate more action by the Air Boards. We will not be able to achieve clean water until atmospheric deposition is controlled.

Permittees in the Los Angeles River Watershed are developing an atmospheric deposition project related to the Los Angeles River Metals TMDL. It is a two-year project that involves paired measurements of atmospheric deposition and storm flow. Local governments will be contributing an estimated $1.5 million to fund this research project. Meanwhile, during the process of research and enlisting the Air Boards to engage with the Water Boards to address the problem of the impacts of atmospheric deposition, we once again request that the Board include in the Ventura Permit language similar to that used by the Santa Ana Regional Board in its Order No. R8-2002-0010:

> "16. The permittees may lack legal jurisdiction over storm water discharges into their systems from some State and Federal facilities, utilities, and special districts, Native American tribal lands, waste water management agencies and other point and non-point source discharges otherwise permitted by the Regional Board. The Regional Board recognizes that the permittees should not be held responsible for such facilities and/or discharges. Similarly, certain activities that generate pollutants present in storm water runoff may be beyond the ability of the permittees to eliminate. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear and leaching of naturally occurring minerals from local geography."
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> (Source: Santa Ana Board Order No. R8-2002-0010 – Waste Discharge Requirements for the County of Orange, Orange County Flood Control District and the Incorporated Cities of Orange County Within the Santa Ana Region Areawide Urban Storm Water Runoff Orange County.)

The Finding That the Draft Permit Does Not Contain Unfunded Mandates Is Inaccurate

Findings E.7 and F.24 of the Draft Permit are inaccurate assertions that the Draft Permit does not contain unfunded mandates. Finding E.7 of the Third Draft Permit is an expansion of Finding E.10 in the Second Draft Permit that asserts that the Order "does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section(6) of the California Constitution" because the Order implements "federally mandated requirements" under Section 402 of the Clean Water Act. Finding E.7 should not be adopted as a matter of good public policy and is otherwise objectionable on several grounds.

First, as CPR stated in its October 15, 2007 comment letter, the Board has no regulatory jurisdiction to make this Finding. The issue of whether a mandate is an unfunded state mandate is within the exclusive jurisdiction of the Commission on State Mandates (Government Code § 17551 and §17552. See also *Lucia Mar Unified School District v. Honig* [1988] 830, 837, [the question must be decided by the Commission on State Mandates "in the first instance."]) Since the Finding would carry no weight, it is not clear why the Regional Board would include such a Finding, particularly when it has never done so in the past.

Second, it is not clear why, as a matter of policy, the Regional Board would want to make such a Finding. Contrary to the stance this proposed Finding reflects, the Regional Board should be assisting the permittees in obtaining funds to implement the Permit's programs - not limiting the funds. More funds make implementing more programs possible. It is not clear why the Regional Board would adopt a Finding that makes less funding available to permittees to implement the programs called for by the Permit.

Third, the proposed Finding raises the same issue raised unsuccessfully by counsel for the Regional Board in the recent *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898. In that case, the Regional Board argued to the Court of Appeals that an MS4 Permit (there, the 2001 Los Angeles County MS4 Permit) "is federally required . . . to implement the Clean Water Act's mandates" (150 Cal.App.4th at 916 [citing Attorney General's letter to the court]). The Court of Appeals did not accept this argument, noting that "[w]e are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitutes federal mandates under all circumstances" and that "the existence of a federal, as contrasted with a state, mandate is not easily ascertainable" (150 Cal.App.4th at 914).

Fourth, even if the Regional Board were qualified to determine that the Order represented an exclusively federal mandate and thus not subject to article XIIIB, Section 6, the reasoning set forth in Finding E.7 is faulty. None of the cited cases supports the Finding: that the provisions of an MS4 permit are an exclusive federal, and not state, mandate. In

the only case to attempt to grapple with that question, *County of Los Angeles, supra,* the Court of Appeals declared itself to be "skeptical" with respect to the issue.

Fifth, even if a program were required in response to a federal mandate, a subvention of state funds may be in order. For example, Government Code § 17556(c) provides that if a requirement is mandated by federal law or regulation, but the [state] "statute or executive order mandates costs that exceed the mandate in that federal law or regulation," a subvention of funds is authorized. Also, as held in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577-78, even if the costs were mandated to implement a federal program, if the "state freely chose to impose the costs upon the local agency as a means of implementing" that federal program, "the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."

Finally, Finding E.7 asserts that provisions in the Order that implement TMDLs are also federal mandates. While it is true that the effluent limitations in the TMDL must be reflected in the Order, the manner in which the TMDL is implemented is not a federal mandate, but is left up to the State. For example, the Regional Board could determine that a series of BMPs are sufficient to reach the waste load allocations in the TMDL, or it could impose the waste load allocations as numerical limits that were required to be met. Thus, as with the other aspects of the Order, implementation of TMDLs is not necessarily a federal mandate, immune from a required subvention of state funds.

As a matter of policy, Finding E.7 should not be included in the permit. In any event, such a Finding would be gratuitous. The Regional Water Board is not the agency that is authorized to address this issue. Furthermore, The California Department of Finance is not the agency that is charged with or has the jurisdiction to determine whether a permit provision is an unfunded mandate or whether such a permit provision is mandated by Federal law. Any finding by the Department of Finance carries no weight. Accordingly, Finding F. 24 also should be deleted.

RECOMMENDATIONS

CPR recommends that the Regional Water Board direct staff to make the following changes to the draft permit before it is re-circulated and brought back to the Board for approval:

- Modify the Municipal Action Levels to be true action levels designed to set "upset" values, which are clearly above the normal observed variability and would allow "bad actor" catchments to receive additional attention.
- Refrain from attempting to define MEP in this permit and request the State Water Board to develop and adopt a statewide definition of MEP or recommend legislation that would do so.

- Eliminate the prescriptive elements of the Development Construction Program, the requirement for Local Storm Water Pollution Prevention Plans, and any duplication of requirements that are in the State's Draft General Construction Permit due to be adopted this Fall.
- Eliminate the October 1 – April 15 prohibition on grading and instead, require enhanced erosion and sediment control during January and February when most of the heavy rains occur.
- Within the Planning and Land Development Program, eliminate the requirement to reduce the percentage of Effective Impervious Area to less than 5 (or any) percent of total project area, and focus on implementation of Low Impact Development and the development of sound hydromodification control criteria during this permit cycle, while planning to implement permanent hydromodification controls during the next permit cycle.
- Eliminate Findings E.7 and F.24.

Thank you again for the opportunity to submit these comments on the Third Draft Ventura Permit. CPR will submit additional comments after Regional Board staff provides us with a list of the specific BMPs from the nationwide database used in computing the MALs and developing the performance standards in Attachment C.

Sincerely,

Larry Forester
Council Member
Signal Hill