



SAN BERNARDINO COUNTY STORMWATER PROGRAM

A Consortium of Local Agencies

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San Bernardino County Flood Control District

February 12, 2009

10(NPD)-2.02

Mr. Gerard J. Thibeault, Executive Officer
California Regional Water Quality Control Board, Santa Ana Region
3737 Main 20 W. 4th Street, Suite 500
Riverside, CA 92501-3348

RE: Orange County MS4 Draft Permit Comments

Dear Mr. Thibeault:

Thank you for the opportunity to provide comments on the draft MS4 NPDES Permit for the County of Orange within the Santa Ana River Watershed (draft Permit). The San Bernardino County Municipal Stormwater Program is providing these preliminary comments in the event that the Regional Board may incorporate some of the various elements of Orange County's draft Permit into the forthcoming renewed MS4 Permit for San Bernardino County.

Regional/Programmatic Concerns

Renewed Permits Should Build Upon Existing Permits and Programs

It had been our understanding that the renewed permit would use our Report of Waste Discharge (ROWD) and Regional Board recommendations from the MS4 program evaluations as a starting point to develop the new San Bernardino County MS4 Permit. However, since submitting our ROWD in October 2006, we have had numerous opportunities to interact with Regional Board staff and stakeholders in our Permit area, and to discuss the terms of the draft Permit. In recent months, we have become concerned about the direction of ongoing discussions and negotiations to develop and revise permit requirements and language for Orange County's draft Permit. While we share many of the same concerns as the Orange County stakeholders, there are substantial differences in our respective watershed areas that affect MS4 program implementation. These differences include the presence of ocean beaches in Orange County, with their economic and social benefits and susceptibility to stormwater impacts; differences in property values and the related tax base; the disparate potential for urban growth; and differing receiving water types and uses. In addition, the Santa Ana River watershed is hydrologically divided by Prado Dam so that downstream (reaches 1 and 2) and upstream (reaches 3, 4, 5, and 6) areas require different management approaches. Since the completion of the Seven Oaks Dam, the flow and sediment regime of Reaches 4 and 5 (and to a lesser extent Reach 3) of the Santa Ana River are now significantly controlled by the presence and operation of the dam. The purpose of this comment is not to fully describe these differences, but to reinforce our belief that these differences must be considered when developing the San Bernardino County MS4 Permit.



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We also understand that the draft Ventura County MS4 Permit has been vigorously discussed among stakeholders in recent months, and that the revised draft is being evaluated by the Natural Resources Defense Council and the USEPA. It appears that there is a strong desire from these groups to have more specificity and consistency among all the California MS4 Permits, and that there is an expectation that requirements adopted in the Ventura MS4 Permit should also be included in the Orange County MS4 Permit and that these requirements will ultimately be inserted into the San Bernardino County and Riverside County MS4 permits in their turn. We are concerned that decisions made with regard to Orange County's permit may establish fixed precedents for our MS4 permit without due consideration of unique local conditions.

Current and Expected Economic Constraints

The San Bernardino County Permittees share the economic concerns of the Orange County Permittees, as presented at the Regional Board meeting of November 21, 2008. Local governments are losing revenue and instituting severe budget reduction actions, such as furloughs and layoffs. We are uncertain of the duration and magnitude of the ongoing economic downturn, but it appears certain that significant staffing and expenditure constraints will continue for another year or more. While we understand that there are regulatory and statutory requirements to ensure compliance with the federal Clean Water Act, we suggest the Regional Board consider phased permit implementation, or prioritize the required programs for implementation based on available resources or economic indicators. The prospect of significant increases in program implementation costs that would be required to comply with the draft Permit contrasts sharply with the current California State budget limitations and the State's recent directive to suspend funding under water quality and conservation-based grant programs.

Specific Comments

Findings in the Draft Permit

Finding 3. We support a definition of maximum extent practicable (MEP) that includes consideration of a variety of factors, including technical and fiscal feasibility (see Footnote 2). We do not agree with the position espoused by others commenting on Orange County's draft Permit that MEP is an iterative process that imposes a continuing obligation *until water quality standards are achieved*. Such an interpretation effectively nullifies the meaning of the phrase "maximum extent practicable." It is possible for MS4 Permittees to be in full compliance with the federal Clean Water Act (CWA) and their MS4 Permits, even if water quality standards are not being attained, provided pollutants are reduced to the maximum extent practicable.

Finding 5. Despite this statement that the permit does not constitute an "unfunded mandate," there are some elements of the draft permit that are more stringent than the CWA and, therefore, constitute an unfunded mandate. This is especially true where the State of California elects to impose more restrictive water quality standards than are required by federal law. For example, federal law does not require the E. coli objective to provide a level of risk protection equal to 8 illnesses per 1000 swimmers. EPA has stated that this is a state risk management decision and it will accept higher E. coli objectives (up to 10 illnesses per 1000 swimmers). Similarly, federal law does not require more restrictive E. coli objectives to be applied to limited contact recreation, such as wading and fishing. That, too, is a state risk management decision. Therefore, the incremental cost of complying with more stringent water quality objectives than required by the CWA is an unfunded mandate.

Finding 8. We strongly support this finding that the permit is not intended to address background or naturally occurring pollutants or flows. This finding seems to conflict with some of the discharges listed in the draft Permit (Section III.3.i), including "irrigation from agricultural sources," and "rising groundwaters and natural springs." Agricultural flows are not regulated under the NPDES program and natural springs are, of course, naturally occurring.

Finding 10. We strongly support this finding. However, we suggest that Finding 10 actually contains two separate, but essential concepts: first, that permittees lack legal jurisdiction over a variety of entities that may generate pollutants; and second, that there are pollutant-generating activities that are beyond the ability of the permittees to eliminate. Therefore, we request that Finding 10 be stated as two distinct findings. This is important because, whereas jurisdictional issues may be overcome in some cases through administrative or legal means, control of some pollutant sources involves solving technical problems.

Finding 21. We support this finding. However, we suggest further clarification of the definition of pollutant "polishing" to protect our unfettered ability to rely on natural treatment systems to improve stormwater quality. As written, the finding also contains an apparent conflict between 40 CFR 131.10(a) (prohibits designating a waterbody for waste transport) and the stated "federal authorization under Sections 404 and 401 of the CWA (in that the 404 Permit/401 Certification may be required for waste treatment or conveyance). We suggest that there should also be a finding allowing transport of waste, where appropriate, to implement regional treatment strategies.

Finding 42. This finding requires Watershed Action Plans for 303(d) listed waters without an approved TMDL. This requirement is contrary to the assurances given by Regional Board staff that merely "listing" a segment did not impose any new obligations on Permittees. It is inappropriate to require remediation or mitigation without first adopting a formal TMDL.

Finding 61. We suggest further clarification of the role of the LID Manual. For example, the manual should define the standard of compliance. This manual will be reviewed by a wide array of stakeholders, including Regional Board staff, Permittees, and developers, and will undergo public review. Using a manual as the standard will allow periodic revisions of LID technical criteria without revising permits.

Finding 62. We disagree with the inference that the 5% EIA metric is as well proven and protective as suggested. For example, the SCCWRP study does not state that 5% EIA will prevent downstream impacts. The draft Orange County Permit has not documented a scientific basis to support the use of a 5% EIA limit, especially on a project-by-project approach. Scientific literature provides watershed- or subwatershed-scale evaluations that show a correlation between watershed imperviousness (whether expressed as EIA or total impervious area) and adverse impacts to stream ecology (most notably: Booth & Jackson 1997. Urbanization of aquatic systems: degradation thresholds, stormwater detention, and the limits of mitigation. *Journal of the American Water Resources Association*. 33(5):1077-1090). However, it does not necessarily follow that site-by-site implementation of an EIA limit will have the expected benefits, particularly in fully or partially urbanized watershed areas. It is probable that a substantial implementation burden will be placed on individual projects with little resultant ecological benefit.

Finding 72. We disagree with the decision to impose "Numeric Effluent Limits." While it is true that completed TMDLs often contain numeric targets, load allocations, and waste load allocations, Regional Board staff have repeatedly stated in response to public comments that these numeric values were not effluent limits, and would not be used as such in MS4 permits. If the Regional Board now wishes to adopt

a different interpretation of these requirements, it must first revisit the TMDLs and provide a new opportunity for public review and comment.

Finding 73. We disagree with the conclusion of this finding regarding the iterative process described in WQO 99-05. WQO 99-05 explicitly modifies WQO 98-01 regarding the "receiving water limitations" language to be included in future municipal stormwater permits in California based on objections to the language that was specified in WQO 98-01. Briefly, the resulting language specified by WQO 99-05 describes the procedure that is required following a determination that discharges are causing or contributing to an exceedance of water quality standards. This procedure, described in WQO 99-05 and included in the draft OC Permit in Section IV.3.a – d, describes what is referred to as the "iterative approach" in Finding 73. However, the steps describing the iterative approach are followed by the statement:

"So long as the permittees have complied with the procedures set forth above and are implementing the revised DAMP, the permittees do not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless the Executive Officer determines it is necessary to develop additional BMPs.(bold emphasis added)"

Therefore, WQO-99-05 actually limits the number of required iterations, rather than requiring "increasingly more effective" control measures. The Executive Officer has ultimate control over the implementation of control measures—it is not an automatic continuing "do-loop" as suggested in Finding 73.

Comments on Permit Provisions

Section I.B.12: Responsibilities of the Principal Permittee. This requires developing an entire training program. These competencies are in large part already well-established by the California Stormwater Quality Association (CASQA), the California Department of Transportation, the Center for Watershed Protection, and the International Erosion Control Association, among others. We suggest this requirement be revised to allow materials and training programs developed and provided by CASQA or other reputable sources to suffice. It would be appropriate for the Principal Permittee to coordinate the training effort.

Section III.6: We strongly support this statement that MEP (as described above regarding Finding 3) is the compliance standard.

Section IV: This section is consistent with MEP and WQO 99-05 and does not modify the iterative process as suggested in Finding 73.

Sections VIII, IX, and X: These inspection requirements have new specific actions, such as an electronic database, to check if sites have filed an NOI, photos that need to be in the inspection database, or linked to it, and requirements for on-site enforcement actions. We suggest that the permittees be allowed to prioritize and take enforcement actions based on their own criteria.

Section XI: The requirement for a residential program (beyond education and outreach) will be problematic for the Permittees. It will add substantial cost; it seems likely to have little water quality benefit. Residential pollutant sources, such as pesticides, should be regulated by other state agencies (such as the Department of Pesticide Regulation) that have greater authority to require labels and restrict public use.

The requirement for a Water Quality Ordinance for residential activities is likely to be difficult to enforce, and it is not clear how it will effectively address pollutants.

The use of irrigation controllers should be consistent with the proposed landscape ordinance requirements from Assembly Bill 1881. It may be appropriate to refer to the AB 1881 requirements here.

Section XII contains numerous new and enhanced requirements compared to the 2002 Orange County MS4 and San Bernardino County MS4 Permits. The most problematic of these are summarized below:

The requirement for the Principal Permittee to "facilitate the formation of" a Technical Advisory Committee of Community Development Planning Directors appears to actually require the development of such a TAC. We understand that the Orange County Stormwater Program already convenes committee meetings that include Planning Directors. Although the San Bernardino County Flood Control District would be willing to facilitate formation of such a TAC among their Co-Permittees, it may be beyond their authority to require participation by any particular Co-Permittee Planning Directors.

Section XII.2.i: WQMP and LID requirements for street/road projects 5,000 square feet or larger will be difficult to implement due to constraints on road right-of-way and cost. We suggest the option for alternatives proposed in Footnote 42 be expanded, clarified, and brought into the body text of the Permit. Typical WQMP requirements will not be appropriate or feasible for these projects. Road projects conducted within local government rights-of-way are typically constrained by very limited widths, and the need to mesh with existing drainage pathways and property boundaries. Therefore, the design and construction of these projects allow very little opportunity to incorporate site design or other WQMP features. We suggest that WQMP requirements for these projects be streamlined to address these constraints during the Permit approval process rather than requiring a feasibility study for each project as described in Footnote 42.

XII.B.6: Regional Treatment Control BMPs: we suggest this requirement be revised to require the creation of a regional task force to develop the regulatory approval recommendations to improve the implementation prospects for Regional Treatment. This issue is equally problematic throughout our region, if not the entire state, and warrants a broader effort.

XII.C.3: As stated, it is unclear whether the 5% EIA metric for LID is a goal or a strict metric. We suggest that the 5% EIA requirement is superfluous if LID techniques are already required, and should be removed as a compliance metric from the draft Permit. Also, the paragraphs under Section XII.C.3.a – d appear to offer alternate ways to implement LID. However, the entirety of Section XII.C is not clear on what is actually required for LID versus what is an alternative, and how compliance would be determined. We suggest that a more clear approach be presented in this section that shows a decision process for determining how to select the implementation options for a specific project.

XII.D.2.a: We suggest that the terminology be made as clear as possible. For example, it is not clear to state that the time of concentration should not "significantly exceed" those of pre-development conditions. The intent is that times of concentration be maintained.

XII.D.2.b: It would be practical to place reasonable limits to how far downstream this exclusion should apply. For example, controlled release points, such as dams or basins, should serve as an evaluation endpoint for HCOCs. For Reaches 4 and 5 of the Santa Ana River, the flow and sediment transport

regimes, as well as the sediment supply to the river, are now greatly impacted by the presence of the Seven Oaks Dam. We suggest that the dam and its operation exert more influence upon the geomorphic characteristics and habitat quality of those river reaches than could be prevented or mitigated by development projects in the contributing watershed area. In addition, we are very concerned that there is a growing trend to consider rainwater itself as a "pollutant." There is no evidence in the record to suggest that increased flow is intrinsically harmful, especially when it is contained in improved flood control channels. The permit should be written to impose more restrictive requirements only where harmful effects occur. If the Regional Board believes "excessive" flows may impair beneficial uses, then it should adopt a water quality objective limiting such flows before imposing more stringent numeric effluent limits, such as the proposed 5% EIA requirement. In addition, we believe any new flow restrictions would constitute a state unfunded mandate, as such limits are not required, and may not even be authorized, by the CWA.

XII.D.2.c: As stated in comments on Finding 62 above, the 5% EIA metric has not been demonstrated to be necessary, or effective, in protecting against actual downstream impacts. Please clarify whether variances are also to be approved by the Executive Officer.

XII.D.3 and D.4: It is unclear what is expected in the evaluation of potential downstream impacts from the project. Scientific findings suggest that control of the 2-year peak flow is not likely to be protective (see MacRae 1996. Experience from morphological research on Canadian streams: is control of the two-year frequency event the best basis for stream channel protection? In Roesner, L., ed., Effects of watershed development and management on aquatic ecosystems. Snowbird, Utah. ASCE; pp. 144-162.).

XII.E: We support the alternative approaches. Development of in-lieu or credit-trading programs might be more effectively accomplished through a regional stakeholder effort within the Santa Ana Watershed.

If you have questions regarding these comments please contact Matt Yeager at (909) 387-8112.

Sincerely,



VANA R. OLSON, P.E., Flood Control Engineer
San Bernardino County Flood Control District

VRO/NPV/MAY/nh:CRWQCB – Santa Ana_Orange County MS4 Draft Permit Comments

cc: San Bernardino County Stormwater NPDES Coordinators
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ARI Reading File