



Inland Empire Waterkeeper

Advocacy • Education • Restoration • Enforcement

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October 8, 2009

Via Electronic Mail: kelliott@waterboards.ca.gov

Chair Carole H. Beswick and Members of the Board
California Regional Water Quality Control Board, Santa Ana Region
3737 Main Street, Suite 500
Riverside, CA 92501-3348
Attn: Keith Elliott

RE: Tentative Riverside County MS4 Permit Order No.R8-2009-0033 (NPDES No. CAS 618033)

Dear Chair Beswick and Members of the Board,

Inland Empire Waterkeeper (“Waterkeeper”) is a non-profit environmental organization with the mission to protect and enhance the water quality of the Upper Santa Ana River Watershed through programs of advocacy, education, research, restoration and enforcement. Waterkeeper’s members regularly use and enjoy the waterways of the Inland Empire, which are impaired by the discharge of pollutants through stormwater runoff.

On behalf of our members, we submit the following comments on Tentative Order No. R8-2009-0033, Riverside County Flood Control and Water Conservation District, County of Riverside, and Incorporated Cities of Riverside County, Area-Wide Urban Runoff Management Program (“Permit”), NPDES Permit No. CAS618036. Our comments focus on technical and substantive areas of concern the modification of which would help to resolve Riverside County’s chronic water quality issues.

Waterkeeper commends the Santa Ana Regional Water Quality Control Board’s (“Regional Board”) commitment to increasing the water quality of the Santa Ana River Watershed and sincerely hope to continue our partnership in making the Inland Empire a cleaner and more secure environment. We appreciate the amount of hard work and dedication the creation of a draft MS4 permit demands and hope our comments and recommendations are considered in the light they are delivered. We seek to make a good draft MS4 permit better by seeking clarification, encouraging the development of ideas, and ensuring uniform application of the Permit’s mandates and requirements. In cooperation with the Regional Board, Waterkeeper believes this Permit could become a model for future MS4 permits and encourages all participants to embrace this opportunity.

In the interest of the reader, this comment letter’s format mirrors that of the Permit and focuses on those sections which demand the greatest amount of revision.

Section XII. – New Development (Including Significant Redevelopment)

Section B.1. – Waterkeeper recognizes the need for an integrated Watershed Action Plan to be thoughtfully developed and implemented effectively manage the impacts of urbanization on water quality

and stream stability but is concerned that this section provides the impetus for one year of uncoordinated activity. The water quality problems facing Riverside County are tangible and cannot be further delayed by an unreasonably distant drafting and implementation of a Watershed Action Plan.

Section C.1.c.iv – Waterkeeper supports the revision of this section to clarify the nature and extent of “watershed-scale retrofits” in those areas where “such measures are likely to be effective and technically and economically feasible and not likely to create vector problems.”

Waterkeeper requests that the following language be included into the Permit to clarify the extent of this retrofit project:

1. LONG-TERM RETROFIT STRATEGY

a. By June 30, 2011, permittees shall develop a Retrofit Prioritization Plan (RPP) to prioritize areas where storm water retrofit strategies are likely to have the greatest benefits to water quality and beneficial uses relative to cost. The RPP shall incorporate procedures to prioritize and implement: 1) stand-alone retrofit projects directed at reducing or eliminating storm water discharge into at-risk waters; 2) project-triggered retrofits to existing and replaced pavement as part of transportation improvement projects; and, 3) opportunity-based retrofits of existing and replaced pavement that occurs as part of transportation improvement projects when permittees determine that it is cost effective to provide retrofits beyond those required to comply with the project-triggered retrofits.

Section IX. – Water Quality Benefits, Cost Analysis, and Fiscal Analysis

Section IX.D – Waterkeeper encourages the Regional Board to entirely omit this section of the Permit. Section D is an analysis of the “Current Economic Conditions” facing the Permittees during this temporary financial downturn. Waterkeeper acknowledges that this analysis is not a finding by the Regional Board, rather this is information provided by the Permittees in an attempt to explain their precarious fiscal situation posed by the current financial crisis.

However, the inclusion of Section D’s description of the recession is wholly inappropriate in the issuance of this or any permit. Imbedded into the Permit as a “poison-pill,” this analysis provides the rationale for permittees to avoid their regulatory responsibilities and seeks to have violations of state and federal environmental regulations pardoned by the decline in the permittees revenue base. Waterkeeper reminds the Regional Board and permittees that this is a five-year permit and a national fiscal crisis during year-one is not sufficient rationale to sacrifice the environmental protections of the region for a full permit term. Riverside County is a critical nexus of water resources for communities downstream and while the temporary decline in property values is a universal concern the continuation of the status quo regarding regional water quality disturbs an economic web far beyond Riverside County. Therefore, Waterkeeper strongly encourages the omission of the entire section proposed by the Permittees.

Section XI.E – Low Impact Development (LID) and Hydromodification Management to Minimize Impacts from New Development/Significant Redevelopment Projects

Section XI.E.4 – Waterkeeper strongly encourages the Regional Board to revise this worrisome section to reflect the importance of LID and its effective implementation. Currently, Permittees responsibilities are limited to “identify[ing] barriers for [the] implementation of LID.” Once those barriers have been identified, Permittees are merely encouraged to revising those barriers to promote “green infrastructure/LID techniques.”

If adopted as written, the principal barriers to LID implementation are likely to remain upon the issuance of the Riverside County's fourth MS4 permit. The coupling of a mandatory requirement for Permittees to review barriers to LID implementation with a permissive clause merely requesting that Permittees "*should consider revising*" those "ordinances, codes, building and landscape design standards" which act as those barriers fails to responsibly respond to the reality of cost-effective and environmentally proven LID technologies as a tool in water conservation and groundwater recharge in the third year of a multi-year statewide drought.

Waterkeeper encourages the Regional Board to revise Section XI.E.4 for clarity and continuity to *require* the revision of "barriers for [the] implementation of LID" after they have been identified by the Permittees.

Section XI.E.4.i – Waterkeeper encourages the Regional Board to revise this subsection by defining "narrow streets." EPA document "Managing Wet Weather with Green Infrastructure: Green Streets" defines "narrow streets" and is used in footnote 80 of the Tentative San Bernardino County MS4 Permit. Waterkeeper is unaware of alternative definitions to this term, however, if the Regional Board intends to utilize the definition as it is understood in the EPA document then it should directly reference that document to provide Permittees with proper notice. Similarly, all government or industry manuals produced and relied upon for the development and enforcement of the adopted Riverside County MS4 permit should be clearly identified within the permit to provide guidance to regulated entities and the public alike.

Section XI.F – Alternative and In-Lieu Programs

Section XI.F.1 – This section places an understandable but improper emphasis on cost as the central measure of infeasibility that critics of improved water quality would likely exploit. This section would be improved by listing factors of infeasibility such as construction that is lot-line to lot-line, subterranean parking, high groundwater, unfavorable or unstable soil conditions where infiltration is attempted, and any other factor submitted to the Regional Board for consideration.

Section XI.F.3 – Waterkeeper strongly encourages the revision of this section to ensure that if a waiver is granted then an urban runoff fund "shall" be established even if the Permittees failed to collectively or individually propose to establish such a fund. The failure to establish the fund should preclude the issuance of waivers, otherwise the parties seeking a waiver could avoid BMP installation without taking into account the costs avoided. In other words, the issuance of a waiver should automatically trigger the establishment of urban runoff fund.

Section XI.F.4 – Waterkeeper is concerned over the likelihood that the "obligation to install structural BMPs at new development" if the "BMPs are constructed with the requisite capacity to serve the entire common project" will actually be achieved. During periods such as this current economic downturn there is a real threat that common plan developments begin construction with the intent to have structural BMPs satisfy the entire project's obligations that are never actually constructed because the common development stalls and is either not completed or placed on indefinite hiatus. These situations allow the possibility of new developments which would fall within the requirements of this MS4 permit to avoid actual construction of required BMPs because the development ceases construction and those houses already built will be without the otherwise required BMPs.

Likewise, Waterkeeper has concerns with WQMP's that defer installation of permanent treatment BMPs until such time that the Home Owner's Association (HOA) can provide them. We feel strongly that this caveat should not be allowed and that it is the responsibility of the project proponent to complete

the project in its entirety. It could be years until the HOA is developed and fully capitalized so we urge the Regional Board to close this loophole with this permit revision.

General Clarifications

Waterkeeper requests a determination from Regional Board counsel what the implications would be as a result of the following expected actions: In the event that a REC-1 waterbody listed for fecal coliform impairment undergoes a Use Attainability Analysis to change the beneficial use to REC-2 or REC-X, while simultaneously the fecal coliform objectives are removed from the Basin Plan and replaced with an *E. Coli* objective - what would the new bacteria objective be? Would the waterbody still be impaired? Does this constitute back-sliding?

We expect the fecal coliform objectives for REC-1 and REC-2 to be replaced with *E. Coli* objectives. We also expect many REC-1 waters to be changed to REC-2, and many REC-2 waters changed to REC-X as a result of UAA's. The resulting scenarios should be analyzed and solutions considered to avoid degradation of water quality or back-sliding of regulations.

Risk Sciences – Task Force Suggestion Regarding the San Bernardino County MS4 Permit

Tim Moore of Risk Sciences suggested, which was supported by the San Bernardino County Permittees, that the task force model used in TMDL implementation be incorporated into the MS4 permit. Although Waterkeeper usually supports the collaborative “task force” approach for TMDL implementation, we cannot support this approach to be used in permitting as part of the MS4 permit. Showing “good faith efforts” should not be the bar by which permittees are measured. We foresee this approach causing an unending chain of meetings for both the Regional Board staff and permittees resulting in little action, deferred compliance, a false sense of accomplishment on behalf of co-permittees and even less enforcement.

Waterkeeper reiterates its objection to the inclusion of a “task force” approach for the San Bernardino County MS4 permit and objects to its potential inclusion into the Riverside County MS4 permit.

Conclusion

Waterkeeper appreciates the effort the Regional Board and its staff have put towards developing an effective MS4 permit for Riverside County which effectively and efficiently addresses the environmental concerns of the watershed in a transparent and comprehensive approach.

When reviewing any administrative document concerning water quality it is critically important to reflect upon the purpose of the Clean Water Act (“Act”), that being to “restore and maintain the chemical, physical and biological integrity of the nation’s waters”¹ and to accomplish the lofty goal of “eliminating the discharges of pollutants by 1985, and to enhance water quality nationally to a ‘fishable/swimmable’ level by 1983.”² The fact that the Act’s original Congressional mandate has not been met should not be minimized or forgotten.

¹ 33 U.S.C. § 1251(a); *see also* Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001).

² 33 U.S.C. §§ 1251(a)(1), (2); Philip Weinberg and Kevin A. Reilly, Understanding Environmental Law, 118,119, Second Edition, LexisNexis 2008.

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Finally, the Regional Board should be resolute in ensuring the adoption of this Permit in recognition of the increasing need for clean water. Brief economic disruptions, while regrettable and unenviable, provide an insufficient rationale for regulatory delay. Although the global recession has impacted Riverside County to a significant degree the Regional Board must remember that recessions are transitory and cannot be allowed to dictate foundational regulatory mandates such as those under the Act.

In conclusion, the Regional Board should avoid granting extensions because all parties possessed advanced notice of the expiration of the existing MS4 permit and San Bernardino County and Riverside County staff were in attendance at regional MS4 permit meetings over the past year. This actual knowledge by county staff of the criteria considered by the Regional Board and stakeholders concerning the issuance of new MS4 permits provided staff with adequate time to prepare for the deliberations concerning Riverside County's MS4 permit. The granting of an extension would unreasonably delay attaining increased water quality objectives and recharging depleted groundwater through the wider implementation of LID principles.

Sincerely,

A handwritten signature in black ink that reads "Garry Brown". The signature is written in a cursive, flowing style.

Garry Brown
Executive Director
Inland Empire Waterkeeper