



Inland Empire Waterkeeper

Advocacy • Education • Restoration • Enforcement

3741 Merced Drive, Unit F2
Riverside, CA 92503
Phone 951-689-6842
Fax 951-689-6273
Website www.icwaterkeeper.org

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Via Electronic Mail: mmacario@waterboards.ca.gov

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

RE: Comments on the proposed San Bernardino County MS4 Permit

Dear Chair Beswick and Members of the Board,

Inland Empire Waterkeeper (“Waterkeeper”) is an 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. On behalf of our members, we submit the following comments on Draft Tentative Order No. R8-2009-0036, San Bernardino County Flood Control District, County of San Bernardino and Incorporated Cities of San Bernardino County, Area-Wide Urban Storm Water 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 San Bernardino 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 XI.A. – General Requirements

Section A.1. - Section A.1. of the Permit seeks to ensure the continuation of the previous permit’s requirement that all construction sites greater than one acre and sites less than one acre if part of a common plan or development file with the State Board a Notice of Intent for coverage under the State’s General Construction Permit and obtain a valid Waste Discharge Identification (WDID) number. Compliance with the state-wide construction permit is not complete until the WDID number is obtained and an adequate SWPPP is developed. Therefore, Waterkeeper suggests that the section be modified to

add "...and have developed a SWPPP" following the requirement for the applicant to obtain a WDID number. This modification will provide clarity to the section.

Section A.4 - Section A.4 describes a frequent event effecting a significant portion of San Bernardino County which results in our office being contacted by distraught property owners that now have a flooding problem on their hands, including bills from weed management and vector control that forces them to litigate against the source of the runoff.

For example, at the city/county boundary between Woodcrest and Orange Crest, runoff from a housing tract flows onto privately owned property within the county creating year-round standing water, 15 foot high cattails, vector breeding grounds and other problems that the property owner must now bear.

Section XI.B – Watershed Action Plan

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 San Bernardino County are tangible and cannot be further delayed by an unreasonably distant drafting and implementation of a Watershed Action Plan.

Section B.2 - In recognition of impaired water quality in San Bernardino County and serious drought conditions resulting in the Governor's issuance of an order directed to the Department of Water Resources to "join with other appropriate agencies to launch a statewide water conservation campaign," the Regional Board should revise Section B.2 to require the Principal Permittee to facilitate the formation of a Technical Advisory Committee to develop a Watershed Action Plan within 6 months of the adoption of the Permit.¹ This accelerated schedule would reflect the nature of California's water quality and quantity predicament responsibly.

Section B.3.b - The Permit should be revised to omit "...that are vulnerable to geomorphological changes due to hydromodification," because, by their nature, all unarmored channels are vulnerable. To suggest that unarmored channels are only partially vulnerable to physical changes due to alterations in flow rates depending on the time the events occur would be patently false.

Section B.3.c - Section B.3.c is subject to a number of interpretations and Waterkeeper suggests the subsection is revised for clarity to ensure proper compliance with the meaning the Regional Board intends to apply to the subsection. Vagueness is a constant hurdle for administrative agencies, regulated industries, and third parties seeking regulatory accountability. Therefore, this section should be revised for clarity to prevent the potential for an argument of vagueness.

Section XI.C - Consideration of Watershed Protection Principles in California Environmental Quality Act (CEQA) and Planning Process

Section C.1 - Waterkeeper identified a potential timing conflict between the mandate that within twelve months after the adoption of the Permit, each Permittee shall complete a review of CEQA, the general plan, development standards, zoning codes, conditions of approval, development project guidance, and WQMP despite the fact that the Watershed Action Plan is not scheduled to be completed

¹ Office of the Governor of the State of California, Gov. Schwarzenegger Takes Action to Address California's Water Shortage, February 27, 2009, available at <http://gov.ca.gov/index.php?/print-version/press-release/11556/>.

for eighteen months. It logically follows that after the development and approval of the Watershed Action Plan an additional review of the same programs and regulations could be required to ensure compliance. This inconsistency is potentially significant and would likely prolong the implementation of the Permit's enforcement mechanisms.

Waterkeeper suggests, in connection with suggestions previously mentioned, that the Regional Board retain the deadline in this section and modify the deadlines in earlier sections in order to reach compliance. An efficient and responsive Watershed Action Plan should be reviewed contemporaneous with the programs and regulations detailed in this section.

Section C.3.a – In recognition of the nature of natural water bodies and drainage systems the Regional Board should change “limit” to “avoid” and include “...and flood plains...” after “drainage systems.”

Section XI.D – Water Quality Management Plan (WQMP) for Priority Projects

Section D.4.h – Footnote 80 should be modified to include further information concerning the rationale for a waiver for the specific high pollution areas described. Even after reading “Managing Wet Weather with Green Infrastructure: Green Streets” the provision of waivers in this section requires additional clarity to provide regulators with the ability to fully understand the applicability of the waiver requirements.

Section D.5 – 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.

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

Section XI.E.2.h – Revise this subsection to define “narrow streets.” EPA document “Managing Wet Weather with Green Infrastructure: Green Streets” defines “narrow streets” and is used in footnote 80 of the 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.

Section XI.E.5 – Waterkeeper encourages the Regional Board to modify the language of the section and change the last sentence to “Any portion of the design capture volume that cannot be

infiltrated, harvested....” This modification reiterates the Regional Board’s commitment to LID BMPs and belief that it is the preferred option.

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. Such

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.

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

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.

Technical and Formatting Issues

Section XI.D. – This section of the Permit is improperly numbered and should be renumbered to reflect the reordering of subsection 5 which is repeated twice. Therefore, as corrected, the Water Quality Management Plan for Priority Project would have eight subsections and not the current seven.

Section XI.E.6.d.iv.e – This section should be redrafted to reference subsections “b, c, and d” instead of subsections “1, 2, and 3.”

Conclusion

Waterkeeper appreciates the effort the Regional Board and its staff have put towards developing an effective MS4 permit for San Bernardino 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”² 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.”³ The fact that the Act’s original Congressional mandate has not been met should not be minimized or forgotten.

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 San Bernardino 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 the San Bernardino 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,



Garry Brown
Executive Director

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

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