



## RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

May 14, 2009

Mr. Ben Neill  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, California 92123-4353

Dear Mr. Neill:

Re: Comment Letter – Revised Tentative  
Order R9-2009-0002, NPDES No.  
CAS0108740, Orange County Municipal  
Separate Storm Sewer System Permit  
Reissuance - *NWU:658018:bneill*

The Riverside County Flood Control & Water Conservation District (District), the County of Riverside and the incorporated cities of Menifee, Murrieta, Temecula and Wildomar (Riverside County Permittees) appreciate the opportunity to comment on the above listed Revised Tentative Order issued to the MS4 Permittees in south Orange County (Draft South OC MS4 Permit). Although the Draft South OC MS4 Permit will only apply to Orange County, it raises several policy issues contained that are of concern should the fourth-term Municipal Separate Storm Sewer System (MS4) Permit that will be issued to the Riverside County Permittees contain similar provisions. Our comments herein are principally focused on those policy issues.

### **MAJOR POLICY SHIFTS SHOULD BE ADDRESSED BY STATEWIDE POLICY**

As described in the Little Hoover Commission Report (January 2009), policies developed on a Regional Water Quality Control Board (Regional Board) by Regional Board basis result in ineffective and inefficient stormwater programs. The Little Hoover Commission Report specifically states:

*The Commission found a critical need for a more unified regulatory agency that has clear priorities and procedures that can be implemented throughout the state. While current statutes give the State Water Resources Control Board ample authority to direct the nine Regional Water Quality Control Boards, in practice the regional boards are too independent, with differing policies and processes on even some of the most important statewide issues. (Page 93)*

Many of the Findings and Provisions set forth in the Draft South OC MS4 Permit represent significant shifts in policy on issues that are of statewide importance. Several of these are identified herein and as described are inconsistent with the Federal Regulations, State policy as established by the State Water Resources Control Board (State Board), and/or current statewide practices and understanding. Such significant changes in policy related to the administration and implementation

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of the NPDES Phase I MS4 stormwater permit program should be addressed by the State Board, through the development of a statewide policy and should not be independently implemented by the San Diego Regional Board.

**RE-DEFINITION OF NON-STORMWATER AS NOT SUBJECT TO MEP**

The NPDES Phase I MS4 permits issued in California since 1990 have reflected a clear understanding that Clean Water Act (CWA) section 402(p)(3)(B)(iii), which defines that the “discharge of pollutants” must be reduced to the Maximum Extent Practicable (MEP), also applies to the discharge of pollutants that may exist in non-stormwater. This understanding reflects the reality that, although the discharge from a MS4 may constitute a point source to the receiving water, the sources of the pollutants are often “non-point” in nature. Additionally, unlike industrial wastewater discharges, pollutants that may be in both wet and dry weather runoff are not under the direct control of the MS4 Permittees and cannot practicably be regulated or eliminated as though this were the case.

Dry weather non-point source discharges can be described as akin to other property related land use violations – on a long-term basis they can be managed, but never eliminated. The Draft South OC MS4 Permit proposes to re-define the performance standards, and exclude non-stormwater from being subject to the MEP performance standard and require strict prohibition similar to an industrial wastewater discharge. Implementing MS4 permit provisions that deviate from the MEP performance standard should not be made at the discretion of Regional Board staff. If the Regional Board believes that such a shift in policy or standard is necessary, the Regional Board should pursue a statewide policy through the State Board. Not doing so continues to impose inconsistent and ineffective regulations upon the regulated community, an outcome which was criticized in the Little Hoover Commission report.

Additionally the strict prohibition of non-stormwater discharges as required in the Draft South OC MS4 Permit is contrary to the Final Phase I Regulations, 55FR222, on Page 48037 which state:

*EPA is clarifying that section 402(p)(3)(b) of the CWA (which requires permits for municipal separate storm sewers to ‘effectively’ prohibit non-stormwater discharges) does not require permits for municipalities to prohibit certain discharges or flows of non-stormwater to waters of the United States through municipal separate storm sewer systems in all cases. Accordingly 122.26(d)(2)(iv)(B)(1) states that the proposed management program shall include: “A description of a program including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system.”*

As clearly stated in the regulations, the ‘effective’ prohibition of non-stormwater discharges does not require ‘strict’ prohibition, but rather a management program focused on prohibiting illicit discharges to the MS4 system. Further, the clear intent of the Federal regulations is that only those exempted

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non-stormwater discharges that are found to be illicit discharges be managed. It was not expected that whole classes of exempted discharges would be prohibited.

**PROHIBITION OF IRRIGATION RUNOFF**

The Draft South OC MS4 Permit removes landscape irrigation, irrigation water and lawn watering (collectively, “irrigation runoff”) from the list of conditionally-exempted discharges. Regional Board staff has asserted that data submitted by the Orange County MS4 Permittees supports this action. However, the Orange County MS4 Permittees do not draw the same conclusions from their data. In any case, the data leading to the Regional Board’s conclusion is specific to Orange County, and as such, incorporation of a similar requirement in Riverside County would be inappropriate and unwarranted. Nevertheless, the Riverside County Permittees have identified the following issues with the approach the Regional Board is taking in the prohibition of irrigation runoff.

At the May 6<sup>th</sup> public workshop Regional Board staff stated that their “hands were tied” and that the Regional Board is “required” to prohibit discharges of irrigation runoff. On the contrary, when conditionally exempt discharges are determined to be a source of pollutants to receiving waters, there is no requirement that they be outright prohibited. Both the Final Phase 1 Rule V.55 No. 222, page 48037 and 40CFR 122.26 (d) (2) (iv) (B) (1) clearly state that these “non-stormwater discharges or flows shall be *addressed* (emphasis added) where such discharges are identified *by the municipality* (emphasis added) as sources of pollutants to waters of the United States.” Finding C.14 in the Draft South Orange County MS4 Permit inappropriately adds onto this language by stating that “Exempted discharges identified as a source of pollutants are required to be addressed through prohibition. The term ‘addressed’ does not implicate nor require prohibition, but instead, and as described in the above referenced final rule, should consist of a “program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent (the discharge) to the municipal storm sewer.” The Federal regulations clearly do not require the prohibition of irrigation runoff and as such (and not withstanding the other comments herein on this matter) the language in Finding C.14 should be removed.

An MS4 Permittee’s ability to eliminate irrigation runoff as required in the Draft South OC MS4 Permit is akin to any government’s ability to eliminate crime or homelessness. It is something that can be managed, but never eliminated. In the April 3<sup>rd</sup> Public Workshop, Regional Board staff stated that they intend to use discretion when enforcing this permit provision, and not necessarily enforce it in every instance, pending a determination by Regional Board staff as to whether reasonable controls had been implemented. This statement reveals that even San Diego Regional Board staff does not believe that an outright prohibition of irrigation runoff is reasonable or enforceable. Yet, the Draft South OC MS4 Permit includes findings and provisions that would nevertheless put the MS4 Permittees in unavoidable non-compliance and subject to citizen suits for noncompliance under the Clean Water Act. It is the responsibility of the Regional Board to develop permits that have clear and attainable requirements.

A programmatic approach to addressing non-point sources of pollution (instead of prohibition) is especially appropriate in the case of irrigation runoff, where outright prohibition would effectively

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require the MS4 Permittees to commit significant financial and staffing resources in tracking down and enforcing against every potential source of irrigation runoff including broken sprinklers, over-spraying nozzles, inappropriately set residential sprinkler timers, etc. The language in the Draft South OC MS4 Permit should instead be revised to promote control of irrigation runoff through various programs such as public education and cooperative programs with water purveyors, rather than inappropriately prohibiting this discharge. Despite implementation of an extensive and expensive program to attempt to enforce a prohibition on irrigation runoff, it is unlikely that such a program could ever be successful in completely eliminating this discharge, again resulting in unavoidable non-compliance. Additionally, when evaluating the economic considerations of a strict prohibition of irrigation runoff, implementation of such a program would provide little benefit to designated beneficial uses relative to the significant costs that would be required.

The Permit writers and the Orange County Permittees should be working together to define appropriate county-specific programs that can be written into the Draft South OC MS4 Permit to address this issue.

#### REMOVAL OF “URBAN”

Through Finding C.2 and removal of references to ‘urban’ runoff, the Draft South OC MS4 Permit makes the Permittees responsible for exceedances of water quality standards irrespective of the source and manner of discharge. While MS4 Permittees have successfully developed and implemented effective programs to control sources of pollution under their jurisdiction, typically there are entities within a watershed over which the Permittees have no authority/ability to regulate, including:

- Tribal entities
- Federal installations
- State facilities
- Agricultural operations

Additionally, some pollutants discharged from natural sources and conserved lands can cause MS4 discharges to exceed water quality standards. Identification and characterization of the sources of these natural loads is often beyond the technical and fiscal resources of the MS4 Permittees.

Despite the inability of MS4 Permittees to regulate the quality of discharges from these sources, the California Rule establishes that if any of these lands are upstream of lands under the jurisdiction of the Permittees, the Permittees must accept tributary flows from these areas, and these flows and any pollutants contained therein will inevitably enter the Permittees’ MS4. The Draft South OC MS4 Permit stipulates that in the event these flows contribute pollutants that cause or contribute to an exceedance of water quality standards in receiving waters, the Permittees will be held in violation despite the fact that they have no regulatory authority to control these sources.

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In contrast, State law specifically grants the Regional Board responsibility and authority to directly regulate the discharges from the entities not under the jurisdiction of the MS4 Permittees and has the responsibility to correct water quality standards to accommodate background pollutant concentrations from natural sources. The USEPA has authority to regulate Federal facilities and tribal entities not under the jurisdiction of the Regional Board. It is inappropriate for the Regional Board to attempt to transfer the responsibilities of the Regional Board and the USEPA to MS4 Permittees, and hold them responsible for the actions of dischargers over which they have no jurisdiction.

The Riverside County Permittees generally support the proposed addition of Section D.4 to the Draft South OC MS4 Permit in the tentative updates dated May 5, 2009, which clarifies that the intent of the permit is not to regulate natural sources and conveyances. However, the subsequent requirement to demonstrate that the likely and expected cause of the exceedance is non-anthropogenic in nature can be difficult and expensive for some constituents (i.e., pH, total dissolved solids, total suspended solids, metals, bacteria, etc.). In order to adequately demonstrate this, MS4 Permittees would be obligated to spend a significant amount of resources for each exceedance, even when the source of the exceedance may be found to be from natural sources or sources that have otherwise not been adequately regulated by the Regional Board or USEPA under existing or needed permits. This difficulty is also reflected in our comments below pertaining to the applicability of Water Quality Based Effluent Limits in stormwater permits.

#### USE OF WATER QUALITY-BASED EFFLUENT LIMITS AS COMPLIANCE METRICS

The Panel of Experts commissioned by the State Board to determine the appropriateness and applicability of numeric effluent limits to stormwater discharges (hereinafter referred to as the Blue Ribbon Panel), stated in their 2006 Report: “It is not feasible at this time to set enforceable numeric effluent criteria for... urban discharges”. Despite and contrary to the recommendations of this State Board-commissioned report, the Regional Board staff has proposed Water Quality Based Effluent Limits (WQBELs) as both Wet Weather and Dry Weather Compliance metrics in the Draft South OC MS4 Permit. The Riverside County Permittees object to the use of WQBELs as compliance objectives in MS4 permits for the same reasons as presented in that report, and due to the distributed (non-point) and quite often random nature of the source(s) of the pollutants of concern. As stated previously, the Riverside County Permittees have significant concern where the Draft South OC MS4 Permit departs from current State policy.

Inasmuch as Regional Board staff has indicated their intent to use the South OC MS4 Permit as a model for the MS4 permit to be issued to Riverside County, the Riverside County Permittees proactively outlined more appropriate approach for Municipal Action Levels in their January 2009 ROWD that warrants consideration in the development of their MS4 permit.

#### CLOSING

In closing, we would like to thank you for the opportunity to comment on the Draft South OC MS4 Permit and appreciate your consideration of the concerns listed herein. As Regional Board staff have indicated their intent to use the Draft South OC MS4 Permit as a model for the Riverside County

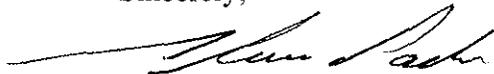
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MS4 Permit, the Riverside County Permittees reiterate their request made in the ROWD submitted in January 2009 that the next Riverside County MS4 Permit be based on our existing permit and only amend language as necessary to address water quality issues identified in the upper Santa Margarita Watershed. The Permittees believe it is inappropriate to use a coastal region permit as a model for addressing the very different issues associated with a semi-arid region such as the Upper Santa Margarita River Region. Further, we request that the draft Riverside County MS4 Permit limit expansion of compliance requirements and support our efforts to improve the effectiveness of existing compliance programs in addressing water quality impairments. We appreciate your consideration of our comments and look forward to meeting with Regional Board staff in the development of a MS4 permit specific to Riverside County. If you have any questions regarding these comments, please contact me at 951.955.1273.

Sincerely,



*For*

JASON UHLEY  
Engineering Project Manager

c: Riverside County Management Steering Committee  
David Huff, Deputy County Counsel

CP:cw  
P8/125151