COALITION FOR PRACTICAL REGULATION

"Cities Working on Practical Solutions"

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DOWNEY
GARDENA
HAWAIIAN GARDENS
INDUSTRY
IRWINDALE
LA CAÑADA FLINTRIDGE
LA MIRADA
LAKEWOOD
LAWNDALE
MONROVIA
MONTEREY PARK
NORWALK
PALOS VERDES ESTATES
PARAMOUNT
PICO RIVERA
POMONA
RANCHO PALOS VERDES
ROSEMEAD
SANTA FE SPRINGS
SAN GABRIEL
SIERRA MADRE
SIGNAL HILL
SOUTH EL MONTE
SOUTH GATE
SOUTH PASADENA
VERNON
WALNUT
WEST COVINA
WHITTIER

October 15, 2007

Dr. Xavier Swamikannu
California Regional Water Quality Control Board
Los Angeles Region
320 W. 4th Street, Suite 200
Los Angeles, CA 90013

Re: Second Draft Ventura County MS4 Permit Comments

Dear Dr. Swamikannu and Members of the Board:

I am writing on behalf of the Coalition for Practical Regulation (CPR) to provide comments on the Second Draft Ventura County MS4 Permit. CPR is an ad-hoc group of 43 cities within Los Angeles County that have come together to address water quality issues. Thank you for the opportunity to provide these comments.

CPR would like to thank the Board for holding the two Ventura Permit workshops to allow the Ventura County Watershed Protection District and the cities of Ventura County, along with other permittees and interested parties, to provide comments on the Second Draft Ventura County MS4 Permit. However, despite all of the time the Regional Board has spent meeting with permittees and others, and holding two Regional Board workshops to promote stakeholder involvement and solicit comments, the Second Draft Permit is disappointingly similar to the first draft. We hope that the Regional Board will consider and act upon comments they receive to this draft to make the Permit more reasonable. It would be extremely unfortunate to expose permittees to likely minimum mandatory penalties and third party litigation due to permit requirements that are almost impossible to achieve.

We are writing to reiterate and expand upon comments made by CPR at the April 5, 2007 workshop and comments by Dr. Gerald E. Greene on behalf of the City of Downey, and Richard Watson on behalf of the City of Signal Hill at the September 20, 2007 workshop in Ventura. We support the extensive and detailed comments by the Ventura County permittees and the Building Industry Association (BIA) at the workshops and in their

previous comment letters. We will limit our comments to a few of the basic concerns we have with the Second Draft Permit.

Definition of Maximum Extent Practicable

First, the Draft Permit still lacks a good working definition of "maximum extent practicable (MEP)." This draft of the Ventura Permit operationally defines MEP on the basis of exceedances of Municipal Action Levels (MALs) derived from nationwide monitoring data. This ignores both the need to comply with the provisions of the Porter-Cologne Act and local factors and characteristics. MEP is a general guideline and should be applied in a manner that is consistent with the factors set forth in the Porter-Cologne Act, including only imposing requirements "that could be reasonably achieved."
The San Diego Permit contains a long definition of MEP partly based on the 1993 Elizabeth Jennings memo defining MEP. The San Diego Permit states, in part:

> "MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense)...MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their urban runoff management programs. Their total collective and individual activities conducted pursuant to the urban runoff management programs becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities...In the absence of a proposal acceptable to the Regional Board, the Regional Board defines MEP."

(Source: San Diego Regional Board Order No. R9-2007-0001 – Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems [MS4s] Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego Regional Airport Authority. Attachment C Definitions, p. C-4.)

The San Diego Permit also notes that useful factors to consider in selecting BMPs to achieve the MEP standard include effectiveness, regulatory compliance, public acceptance, cost, and technical feasibility. While the Regional Board or the State Board has the final determination as to whether a municipality has reduced pollutants to the MEP, San Diego permittees have the opportunity to propose their own definition as applied to their overall efforts and to specific activities.

California SB 1342 (2002) proposed the following definition for MEP:

> "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."

The proposed SB 1342 definition of technologically feasible and economically achievable follows. Five of the six points listed in the proposed definition 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.
>
> 6) Demonstrate economical achievability through the identification of available funding sources or through a proposed funding plan, or both, considering the need for the continuation of existing municipal services and the application of legal restrictions for approval of new sources of funding consistent with the state law and federal regulatory requirements prescribed under subsection (d) of Part 122.26 of Title 40 of the Code of Federal Regulations."

These suggested definitions address the need for a definition of MEP that is effective at removing pollutants of concern while demonstrating a sound cost-benefit ratio and economic achievability. CPR is concerned that the way the Regional Board seeks to define MEP in the Second Draft Ventura Permit does not address economic achievability at all. We recommend that the Regional Board use either the definition of MEP used by the San Diego Regional Board in its Order No. R9-2007-0001 or the proposed definition in SB 1342 (2002).

Municipal Action Levels Are Inappropriately Used

The second concern CPR wishes to address is the use of Municipal Action Levels (MALs). The MALs in the Second Draft Ventura MS4 Permit are based on nationwide monitoring criteria.

Action levels should be based on watershed-specific or even waterbody-specific data that reflect natural background and local conditions.

Further, the proposal in the Draft Permit to establish MALs as statistically derived numeric effluent limits (NELs) is inconsistent with the iterative process in State Water Board Order 99-05. This proposed use of MALs also is contrary to the findings of the State Water Board's Blue Ribbon Panel, which found, "It is not feasible at this time to set enforceable numeric criteria for municipal BMPs and in particular urban discharges." The proposed application of MALs as numeric effluent limits could trigger permit violations and enforcement actions. Action levels should only be used as triggers for the application of enhanced management measures as part of the iterative process. In addition, the Municipal Action Levels called for in the Second Draft Ventura MS4 Permit will cost millions, if not billions, of public dollars, indicating again Board staff's failure to address economic considerations. We believe that such use of MALs would constitute an unfunded mandate. For further discussion on unfunded mandates, please see page five of this letter.

CPR does support the use of quantifiable measures designed to help permittees understand the effectiveness of the programs, to make necessary adjustments in their programs, and to improve water quality. We encourage the Regional Board to use action levels as measures of achievement and triggers for more aggressive actions as suggested by the California Storm Water Quality Association (CASQA) in their draft White Paper entitled *Quantifiable Approach to Municipal Stormwater Program Implementation and Permit Compliance Determination.* This approach is consistent with the findings of the State Water Board's Blue Ribbon Panel and could initiate the implementation of a consistent approach across the State.

Atmospheric Deposition Is Not Adequate Addressed in the Second Draft Ventura MS4 Permit

We would like to thank Regional Board staff for recognizing the adverse impacts of aerial deposition on water quality in Finding B(19) of the Second Draft Permit. 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, more needs to be done.

USEPA, in its publication, *Frequently Asked Questions About Atmospheric Deposition, A Workbook for Watershed Managers*, 2001, has identified an extensive list of water pollutants that are linked to atmospheric deposition. Further, the State Board has acknowledged the importance of atmospheric deposition in meeting water quality objectives. An April 14, 2006 letter from Celeste Cantu, then Executive Director of the State Water Resources Control Board, to USEPA states,

> "We will not be able to fully address these impaired water bodies until the component of atmospheric deposition is understood and quantified...As was made apparent by our atmospheric deposition workshop, USEPA's air regulation structure needs to include atmospheric deposition's known impact on water quality."

The Natural Resources Defense Council (NRDC) is another entity that has been encouraging action regarding the air-water interface. NRDC cited scientific studies illustrating the problems of atmospheric deposition in the Region's waterbodies and petitioned the Los Angeles Regional Board to request technical information from industrial aerial emission sources. NRDC also requested that Section 13267 letters be sent to the top 10 dischargers of each of the selected constituents.

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.

The Water Board and the regulated community need assistance from the Air Board to tackle this problem. The Air Board needs to acknowledge that water pollution is one of the public welfare effects that needs 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 Board to engage with the Water Boards to tackle the problem of the impacts of atmospheric deposition, we 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 Second Draft Ventura County MS4 Permit Contains Unfunded Mandates

Finding E(10) of the Draft Permit 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(10) should not be adopted as a matter of good public policy and is otherwise objectionable on several grounds.

First, 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(10) 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(10) 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(10) should not be included in the permit. In any event, such a Finding would be gratuitous. The Regional Board is not the agency that is authorized to address this issue.

Additional Concerns

CPR also has concerns with the infiltration, low impact development (LID) and hydromodification components of this Draft Permit and will provide detailed comments on those components after we see how staff modifies the relevant sections of the Second Draft Permit in response to the extensive comments made by the permittees and the building industry at the workshops. At this time, we will only urge the Board to be careful in applying watershed imperviousness data to permits. Most of the studies on the effects of increased imperviousness have been done on a watershed basis. The results of these studies should not be used for MS4 permit regulations when substantial portions of the watersheds are outside the area covered by permits. For instance, the major watersheds of both the Ventura County MS4 Permit and the Los Angeles County MS4 Permit contain large areas of National Forest that are not covered by the MS4 permits but impact the functioning of the watersheds. Specifically, as pointed out during the September 20 workshop, Ventura County urban areas constitute only 3% of the Ventura River Watershed, 5% of the Santa Clara River Watershed, and 25% of the Calleguas Creek Watershed. Applying watershed-based imperviousness factors to the urban areas of these watersheds would be excessive and inappropriate regulation.

Recommendations

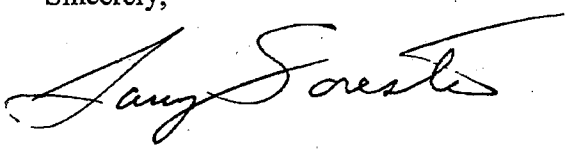
In conclusion, I would like to summarize the actions that CPR recommends the Regional Board take to improve the next draft of the Ventura County MS4 Permit.

- We recommend that the Regional Board use either the definition of MEP used by the San Diego Regional Board in its Order No. R9-2007-0001 or the proposed definition of MEP in SB 1342 (2002).

- We recommend that the Regional Board directs staff to remove MALs that are based on national, rather than regional, data, and that staff clarify Draft Permit language to state that action levels should only be used as triggers for the application of enhanced management measures as part of the iterative process as recommended by CASQA, and not as numeric effluent limits.
- We recommend that the Regional Water Board work with the State Water Board and municipalities to get a commitment from the Air Board to work jointly with the Water Boards to address the sources of atmospheric deposition that adversely affect water quality.
- We request that Board staff include in the Ventura County MS4 Permit language similar to that used by the Santa Ana Regional Water Board in its Order No. R8-2002-0010, which recognizes that permittees should not be held responsible for stormwater discharges for which they lack legal jurisdiction.
- We request that Board staff strike Finding E(10) from the Draft Permit on the grounds that it should not be adopted as a matter of good public policy and is otherwise objectionable on the several grounds stated in this letter.

Thank you again for the opportunity to comment on the Second Draft Ventura County MS4 Permit.

Sincerely,



Larry Forester
CPR Steering Committee
City Council Member, City of Signal Hill