Ventura Countywide Stormwater Quality Management Program

Participating Agencies

Camarillo

County of Ventura

Fillmore

Moorpark

Ojai

Oxnard

Port Hueneme

San Buenaventura

Santa Paula

Simi Valley

Thousand Oaks

Ventura County Watershed Protection District

October 12, 2007

Ms. Tracy Egoscue
Executive Officer
Los Angeles Regional Water Quality Control Board
320 4th Street, Suite 200
Los Angeles, CA 90013

SUBJECT: SECOND DRAFT ORDER OF THE VENTURA COUNTY MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT (NPDES No. CAS004002) FOR THE VENTURA COUNTY WATERSHED PROTECTION DISTRICT, COUNTY OF VENTURA AND THE INCORPORATED CITIES

Dear Ms. Egoscue:

On behalf of the entire Ventura Countywide Stormwater Program ("Ventura Program"), including the Cities of Oxnard, Thousand Oaks, Simi Valley, Ventura, Camarillo, Moorpark, Santa Paula, Port Hueneme, Fillmore, Ojai, Ventura County Incorporated Areas and the Ventura County Watershed Protection District ("Permittees"), we thank you for the opportunity to provide comments on the Regional Water Quality Control Board's ("Regional Water Board") second administrative draft of Waste Discharge Requirements for Storm Water Discharges from the Municipal Separate Storm Sewer System ("MS4") within the Ventura County Watershed Protection District, County of Ventura, and the Incorporated Cities therein ("Second Draft Order") (NPDES Permit No. CAS004002).

Overall, the Permittees must express concern and frustration with both substantive provisions as contained in the Second Draft Order as well as the process in which the revisions were developed. At the close of the April 5, 2007 workshop, which was held on the First Draft Order, the Permitees were left with the impression that the Regional Water Board had directed Regional Water Board staff to work with the stakeholders to develop a balanced stormwater program.

In light of the Regional Water Board member's comments to staff and other stakeholders, the Permittees requested that a series of meetings be held with Regional Water Board staff to discuss the many complex issues associated with the First Draft Order. To ensure that the meetings were productive and focused

on the issues identified, the Permittees prepared written "Issue Papers" (Attachment D) that summarized the issues and proposed alternative approaches and/or language, where applicable. Although Regional Board staff referred to technical papers we have not been given an opportunity to review them. As a result, the Permittees, Regional Water Board staff and others spent a considerable amount of time in meetings discussing the issues. However, at the close of each meeting, Regional Water Board staff would basically comment that they would take the comments and alternatives prepared by the Permittees "under consideration." We did not feel that there was an adequate exchange of ideas and approaches for permitting stormwater discharges in Ventura County, contrary to the Regional Water Board's direction as given to staff at the April 5, 2007 workshop.

While the Permittees acknowledge that Regional Water Board staff have made some revisions that are reasonable and protective of water quality, there are many other revisions that accomplish the opposite. Thus, we find ourselves in the unfortunate position of repeating many of the same concerns previously expressed in our March 6, 2007 comments as well as in the issue papers submitted after the April 5, 2007 workshop. We also must express new concerns raised by the provisions in the Second Draft Order as they apply to the Permittees.

We have organized our comprehensive comments in a manner that will provide ease for the Regional Water Board members and staff. First, the comments contained here are intended to be an overview of our general policy concerns as well as an overview of some of the more specific issues that we have with many provisions in the Second Draft Order. To supplement our positions as contained in this cover letter, we have prepared a separate attachment (see Attachment A to October 12, 2007 comments) for in-depth policy and legal comments and analysis of various permit provisions. In addition, we are providing specific language for the municipal action level ("MAL") and total maximum daily load ("TMDL") sections of the Second Draft Order. (See "Attachment B to October 12, 2007 comments.) The Permittees also submit a revised matrix of technical comments that is intended to replace the original Attachment C. (The revised matrix is attached and is titled "Attachment C to October 12, 2007 comments.") We are including as Attachments D and F, respectively, the issue papers submitted after the April 5, 2007 workshop, and the Permittee's comments as submitted on March 6, 2007. Finally, we have also attached all of the Permittees' presentations from the September 20, 2007 workshop as Attachment E to ensure that the power point presentations and the content contained therein is included as part of the record for the Second Draft Order.

Before proceeding directly into our comments, we must first convey the ultimate goal by the Permittees. The Permittees, collectively and individually wish to work cooperatively with the Regional Water Board and the Regional Water Board staff to obtain a reasonable MS4 permit that reflects the issues of concern for Ventura County and allows Ventura County and the incorporated cities therein to prioritize and direct resources appropriately within jurisdictional boundaries. Unfortunately, the Second Draft Order is replete with prescriptive requirements that remove local flexibility in the implementation and regulation of an effective stormwater program. Our specific comments on these provisions are provided below and in the subsequent attachments.

I. Overview Policy Statements

A. Adoption Of A Reasonable, Environmentally Sound Permit Is A Top Priority For Ventura County And The Incorporated Cities Therein

At the September 20, 2007 workshop of the Regional Water Board, elected representatives from Ventura County and the incorporated cities therein clearly expressed that clean water was a top priority for all of the municipalities within the County. To that end, the Permittees within the County's boundaries have expended considerable resources over the last ten years to develop and implement watershed programs that are aimed at protecting the County's valuable natural resources and improving water quality. Please be assured the Permittees are equally committed to expending the necessary resources to protect water quality over the next ten years as well. In exchange, the Permittees look to the Regional Water Board and its staff to develop a MS4 stormwater permit that is reasonable and allows the entities subject to its provisions flexibility in identifying water quality priorities and implementing BMPs. If the Regional Water Board adopts a MS4 permit that is unreasonable, misdirected, and overly prescriptive, it will be counterproductive to implementing effective water quality improvements within Ventura County.

B. Second Administrative Draft Order Is Overreaching and Overly Prescriptive

As currently configured, the Second Draft Order is overreaching and overly prescriptive in many ways. Instead of requiring the Permittees to maintain and implement certain program elements that allow the Permittees to determine the specifics of the various program elements, the Second Draft Order specifically requires us to take actions that are beyond our authority and identifies the actions and activities that the Permittees must implement.

For example, the Public Information and Participation Program ("PIPP") requires the Permittees to "provide schools within each School District in the County with materials, including, but not limited to, videos, live presentations, and other information necessary to educate a minimum of 50 percent of all school children (K-12) every 2 years on storm water pollution." (Second Draft Order at p. 37.) In addition to providing information, the Second Draft Order requires the Permittees to develop and implement a strategy to measure effectiveness for the in-school education programs. (Second Draft Order at p. 38.) The Permittees seriously question their ability to complete these requirements successfully in light of the fact that the Permittees lack any authority over school curriculum and ability to gain access to classrooms to measure the effectiveness of the program. At most, the Permittees can work cooperatively with the various in-county school districts to develop feasible education goals that include some measure of effectiveness, but only if the districts are willing.

In addition, there are currently over 145,000 students in Ventura County public schools. (Ventura County Office of Education website.) Thus, the PIPP requirements require the Permittees to reach and evaluate the effectiveness of the message delivered to over 72,000 students every other year. The cost of just delivering such a message and how its effectiveness would be measured is unknown. The Permittees are perplexed on how such a requirement can be successfully implemented. Any protocols developed that can measure the

effectiveness of the program, other than to account for the number of students reached, would require the schools to voluntarily share information gathered on their students, leaving the Permittees with no control to get this done.

Another example of an overly prescriptive requirement pertains to commercial facilities. In addition to requiring mandatory source control BMPs, the Second Draft Order requires the Permittees to require additional treatment control BMPs for discharges to environmental sensitive areas ("ESAs") and 303(d) listed waters. (*Id.* at 41.) Thus, instead of giving the Permittees the discretion and flexibility to determine if treatment controls are necessary for any given commercial facility, the Permittees would be required to impose such control on commercial facilities. Under this requirement, a commercial facility would be required to implement treatment controls if it discharges to a 303(d) listed water body regardless of whether the constituent of concern is present in its discharge. Likewise, even if a facility discharged the listed constituent, the facility would have to implement treatment controls regardless of whether source control BMPs or product substitutions would eliminate the discharge.

These are just a few examples of over reaching and overly prescriptive requirements as contained in the Second Draft Order. Many of these other provisions are discussed more fully throughout the body of this letter and in the attachments.

C. The Overly Prescriptive Nature of the Second Draft Order is not consistent with the MS4 Program as put forth and required by the federal Clean Water Act

When a state issued permit exceeds federal CWA requirements, the state (or in this case the Regional Water Board) is required to apply state statutory requirements. (See *City of Burbank v. State Water Resources Control Board* 35 Cal.4th X, 618.) This includes consideration of the various public interest factors articulated in Water Code section 13241. The public interest factors for consideration contained in section 13241 include economic considerations as well as water quality conditions that could reasonable be achieved through coordinated control. (Water Code §13241.) (See Attachment A for further discussion regarding the application of Water Code section 13241 to provisions contained in the Second Draft Order.) The Second Draft Order attempts to disregard this important legal requirement by making a generic finding that all provisions contained in the Second Draft Order are part of a federal mandate. (Second Draft Order at p. 12.) Through this statement, the Second Draft Order tries to conclude that because the requirements are federally mandated, the Second Draft Order does not require consideration of Section 13241 factors or constitute an unfunded local government mandate. As explained further in Attachment A, the Permittees disagree with this finding for several reasons.

In summary, the Second Draft Order contains many provisions that individually and collectively exceed federal CWA requirements for MS4s. Municipal storm water programs are typically a combination of source controls and management practices that address targeted sources within a municipality's jurisdictional area. (See NPDES Permit Writers' Manual at p. 164.) Also, permit writers are instructed to rely on application requirements and management programs as proposed by the applicants when developing appropriate permit conditions. (See Id. at 165.) However, in this case, the Second Draft Order dictates the management practices as well as compliance with numeric limits. A prime example of the Second Draft Order's inclusion of a provision that

exceeds federal authority is inclusion of Municipal Action Levels ("MALs") as a numeric compliance standard. However, the federal CWA does not require or mandate the imposition of technology-based standards, beyond "maximum extent practicable," in MS4 permits. In another example, the requirement for treatment control BMPs for commercial facilities that discharge into ESAs or 303(d) listed waters also exceeds federal authority. As explained above, the treatment control requirement as contained in the Second Draft Order applies to commercial facilities regardless of a facilities actual potential to discharge or discharge the constituent of concern. Thus, the Second Draft Order contains provisions, individually and collectively that exceed federal Clean Water Act requirements as they pertain to MS4s. (See Attachment A for further explanation as to the provisions that exceed federal CWA authority.)

Finally, the overly prescriptive nature of the Second Draft Order and the inclusion of numeric effluent limits through the application of MALs creates a permit that would violate the 10th Amendment to the U.S. Constitution, if adopted in its present form. (See Attachment A for further explanation regarding violation of the 10th Amendment.) Because the Permittees would be forced to implement specific BMPs on its citizens and would also be forced to comply with numeric limitations, the Permittees are being given no choice for compliance and are therefore being compelled to implement a federally mandated regulatory scheme in contravention of the 10th Amendment to the U.S. Constitution.

D. The Cost Of Implementing The Second Administrative Draft Order Is Not Commensurate With The Environmental Benefits To Be Gained

In our initial comment letter, we estimated the cost for complying with the December 27, 2006 draft permit would result in an approximated household cost of $213 per year, which would be a six fold increase over existing program costs. This original cost estimate was based on planning level cost estimates and did not reflect the costs for TMDL implementation. At a very preliminary level the above listed household cost would likely double to $400 a household to address TMDL requirements. In developing comments for the Second Draft Order, a more through review of the cost was conducted and resulted in an estimated annual household cost (excluding TMDL implementation requirements) of over $800 per household per year, which is a twenty three fold increase over current program costs. (See City of Fillmore Comment Letter dated October 15, 2007).) As clearly stated in the September workshop, the Permittees are committed to protecting the environment but the current permit is not only cost prohibitive but does not address the priority water quality issues relevant to the County of Ventura.

II. Municipal Action Levels/Maximum Extent Practicable

The Second Draft Order contains revised provisions related to municipal action levels ("MALs") as compared to the First Draft Order. However, overall the use of MALs remains the same. The Regional Water Board staff continues to advocate for the use of MALs to interpret the technology based maximum extent practicable standard ("MEP") with a numeric standard and require compliance with MALs at the "end-of-the-pipe." In turn, the Permittees continue to strongly oppose the Regional Water Board staff's use of MALs in this fashion for many reasons, both legal and technical, which we summarize here (Attachment A contains extensive comments on why the Regional Water Board's use of MALs to interpret, or define, MEP is improper and

illegal.). Our concerns are not just theoretical but are also based on practical concerns related to our ability to comply with the Second Draft Order and all of its provisions.

In the alternative, the Permittees recommend that MALs be re-fashioned from a naturally based numeric value that determines permit compliance to a locally relevant one used as an upset value that triggers the need for further evaluation, and if appropriate, modification of management practices. Our alternative proposal for the use of MALs is described in more detail below. We have also provided specific recommended language for this approach in Attachment B.

A. ***Summary of Concerns with use of MALs to determine compliance with MEP.***

i. **Use of MALs to define MEP is contrary to Congressional intent with regards to MEP and the State's implementation thereof**

As indicated in our previous March 6, 2007 comments and expanded further in Attachment A, the use of MALs to interpret or define compliance with MEP constitutes the development of a technology based effluent limitation that is contrary Congress' intent with regards to MEP for municipal stormwater. To date, Congress, federal EPA, states and municipalities have interpreted MEP as a narrative standard rather then a numeric standard. Federal and State law and guidance makes clear that MEP is a highly flexible standard that requires the balancing of numerous, location-specific factors that emphasizes a strong preference for implementing the MEP standard with narrative limitations through an iterative process.

In the Second Draft Order, the Regional Water Board staff ignores two decades of implementing and interpreting MEP as a narrative, flexible standard and instead proposes to determine compliance with MEP by using numeric MALs that are derived from national data. This approach is flawed for two over-arching reasons. First, MEP is a site-specific, flexible, narrative standard that typically goes to the types of best management practices being installed. It is not defined by a numeric end-point. Second, at the very least, a numeric end-point that is used to define a technology-based standard should be subject to the same factors for consideration as other technology-based standards. This includes consideration of the age of equipment, the process employed, engineering aspects of the application of types of control techniques, process changes, non-water quality environmental impacts (including energy requirements), other discretionary factors as deemed appropriate, and the costs for implementing the standard. (33 U.S.C. §1314(b); See Attachment A for further discussion.) Nowhere in the Second Draft Order does the Regional Water Board staff provide information that indicates it considered all of these factors in developing the MALs as articulated in Attachment C to the Second Draft Order.

ii. **Defining MEP is a quasi-legislative action – not a quasi-adjudicatory action**

The First and Second Draft Order represents the first instance in which a Regional Water Board has numerically interpreted the MEP standard within a MS4 permit. The Regional Water Board staff's proposal to interpret the MEP standard to include numeric MALs represents the promulgation of a new rule and policy shift affecting the rights and obligations of all current and

future stormwater applicants. Thus, such an action is quasi-legislative in nature and inappropriate for adoption in a quasi-adjudicatory order.

Furthermore, the Second Draft Order proposes to use a presumption to determine compliance with MEP. Presumptions are evidentiary standards that are either derived legislatively or judicially. As used in this case, the presumption sets forth an assumption of fact (i.e. 20% or greater exceedances means that the Permittees are not in compliance with MEP) to be made from another group of facts (i.e. data as compared to MALs). For such a presumption to be valid, it must be established in law. Presumption is "an assumption of fact that the law requires to make from another group of facts." (Evidence Code §600(a).) Thus, at most, the Regional Water Board would need to adopt the presumption pursuant to its quasi-legislative authority, and not in a quasi-adjudicatory order. (See Attachment A for further discussion.)

iii. MALs Are Numeric Effluent Limits that May Subject the Permittees to Mandatory Minimum Penalties, Administrative Civil Liability and Third Party Lawsuits

Of primary importance to the Permittees is that the Regional Water Board adopt a permit that is reasonable, feasible and protects water quality. At this time, the Permittees do not believe that compliance with most of the MALs is feasible. As a result, the Permittees will face jeopardy for not complying with all the MAL discharge limitations. Where there is non-compliance, the Permittees will be faced with liability under several different enforcement regimes. First, the MALs, as proposed in the Second Draft Order, would clearly constitute effluent limitations. Violation of effluent limitations in an NPDES permit subjects the Permittees to mandatory minimum penalties. (See Water Code §§ 13385 and 13385.1; and, see Attachment A for further discussion on why the MALs meet the definition of effluent limitation as it applies to mandatory minimum penalties.) In addition, non-compliance with the MALs may subject the Permittees to additional enforcement actions imposed by the Regional Water Board and through the third party actions under the citizen suit provisions of the CWA.

B. Permittees' Alternative Approach for Use of MALs

While the Permittees disagree with the use of MALs to define MEP as a numeric value to determine compliance, we understand the Regional Water Board is looking for a new mechanism to ensure Ventura County's stormwater program is effective and protective of water quality. Thus, instead of using MALs as proposed in the First and Second Draft Orders, we propose an alternative method consistent with the approach proposed by the State Water Resources Control Board's "Blue Ribbon Panel of Experts," as express in the June 2006 Blue Ribbon Panel Report ("BRP Report"). This approach would meet the Regional Water Board's desire to include performance measures in a municipal stormwater program for Ventura County.

To achieve these goals, we support an approach that "would set "an 'upset' value, which is clearly above the normal observed variability, which would allow bad actor catchments to receive additional attention" through creation of an upset value. (Underline added, BRP Report at p. 8.) The BRP Report termed upset value as "...an Action Level because the water quality discharge from such locations are enough of a concern that most all could agree that some action

should be taken..." (Id.) The strikeout/underline language in Attachment B presents the Permittee's proposal for how MALs should be developed and used to achieve the purpose set forth in the BRP Report. The Permittees' proposal is to use locally relevant MALs as a tool which, together with additional investigation and attention, will ensure the MEP standard is achieved in each sub-watershed.

To develop MALs for this purpose, the Permittees propose to use the 80th percentile of local, countywide data to develop MALs. Any sub-watershed that exceeds the 80th percentile would be above the normal observed variability and in need of additional attention. In addition, we propose to develop MALs only for those pollutants where there is water quality impairment (based on the section 303(d) list), or have been identified as pollutants of concern and that are present in significant quantities in MS4 discharges. The Permittees approach would avoid using public resources unwisely and inefficiently and focus on pollutants that are causing water quality concerns.

Where a sub-watershed exceeds an MAL due to the MS4 discharge, the Permittees propose that the responsible Permittee be required to submit an "MAL Action Plan" to the Regional Water Board's Executive Officer. The plan would need to include an assessment of the sources responsible for the abnormal pollutant levels, the existing BMPs that address those sources, an assessment of additional BMPs and actions that could be implemented, and, based on such analyses, the additional BMPs and/or actions the responsible Permittee proposes to implement to achieve the MAL to the MEP. The Executive Officer, in approving the plan, would have the opportunity to identify additional BMPs or actions the Regional Water Board believes necessary to address the constituent of concern.

In summary, Permittees propose that MALs be used to identify poor performing catchments or sub-watersheds for pollutants of concern to implement further practical controls. Where MALs are exceeded, the Permittees, in conjunction and with approval by the Regional Water Board's Executive Officer would be required to implement additional actions deemed necessary to address the high concentration. Thus, MALs are used to elevate municipal responsibility in a manner that is reasonable and practical while improving water quality.

III. MS4 Permit must be consistent with adopted TMDLs but is not required to contain numeric water quality based effluent limitations

Where the Regional Water Board has adopted, and the State Water Board and EPA have approved, total maximum daily loads ("TMDLs") for 303(d) listed impaired water bodies, NPDES permits must contain effluent limits and conditions consistent with the requirements and assumptions of the wasteload allocations in the adopted TMDLs. (See Memorandum from Robert H. Wayland, III, and James A. Hanlon to Water Division Directors (Nov. 22, 2002) regarding *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (Memo Re: WLAs for Stormwater).) Currently, nine TMDLs have been adopted and are effective for water bodies within Ventura County. The effective TMDLs are as follows:

i. TMDL for Nitrogen Compounds for the Santa Clara River - (Effective date: March 23, 2004).

ii. TMDL for Toxicity, Chlorpyrifos and Diazinon in the Calleguas Creek, its Tributaries and Mugu Lagoon - (Effective date: March 24, 2006).

iii. TMDL for Organochlorine Pesticides, Polychlorinated Biphenyls, and Siltation in Calleguas Creek, its Tributaries and Mugu Lagoon - (Effective date: March 24, 2006).

iv. TMDL for Nitrogen Compounds and Related Effects for the Calleguas Creek Watershed - (Effective date: July 16, 2003).

v. TMDL for Bacteria in Malibu Creek and Lagoon – (Effective date: January 26, 2006).

vi. TMDL for Metals and Selenium in the Calleguas Creek, its Tributaries and Mugu Lagoon (Effective date: March 26, 2007).

vii. TMDL for Chloride in the Santa Clara River Reach 3 (EPA established June 18, 2003).

viii. TMDL for Chloride in Calleguas Creek Watershed (EPA established March 22, 2002).

ix. TMDL for Nutrients in Malibu Creek Watershed (EPA established March 22, 2002).

The TMDLs for Nitrogen Compounds and Related Effects for the Calleguas Creek Watershed, Chloride in Calleguas Creek and Santa Clara Watersheds, and Nutrients in Malibu Creek Watershed do not contain WLAs for Ventura County urban runoff and therefore should not be incorporated into the NPDES permit. The remaining TMDLs should be incorporated into the NPDES permit in a manner consistent with the assumptions and requirements of the WLAs as adopted in the TMDLs.

However, the TMDL provisions in the Second Draft Order are not consistent with the assumptions and requirements of the adopted TMDLs. Contrary to statements in the Second Draft Order, waste load allocations are not required to be translated into "end-of-pipe" effluent limitations." (Second Draft Order at p. 11). In fact, the memorandum referenced to support the Second Draft Order's declaration actually advises the opposite.

> Effluent limitations to control the discharge of pollutants generally are expressed in numerical form. However, in light of 33 U.S.C. § 1342(p)(3)(B)(iii), **EPA recommends that for NPDES-regulated municipal and small construction storm water discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits.** [Cite omitted.] The Interim Permitting Approach Policy recognizes the need for an iterative approach to control pollutants in storm water discharges. ... EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to

establish numeric limits for municipal and small construction storm water discharges.

(Emphasis Added. Memo Re: WLAs for Stormwater at p. 4.) Thus, instead of imposing numeric "end-of-pipe" effluent limitations, the Regional Water Board staff must revisit the assumptions and requirements of the applicable TMDLs to determine appropriate permit requirements. To assist in this effort, we have provided new language to replace the existing TMDL sections of the Second Draft Order that are reflective of adopted TMDLs (See Attachment B).

IV. Low Impact Development (LID)/Hydromodification/Grading Restrictions

A. The Permittees Support LID Policies

The Permittees all support the concepts and policies related to LID. However, the Permittees are concerned that the LID provisions as contained in the Second Draft Order attempt to impose a one-size-fits-all requirement on the Permittees. For example, the City of Simi Valley has very high ground water in the middle and on the west side of the City. The implementation of some LID provisions could exacerbate high ground water levels and cause further groundwater seepage problems for which the City is already trying to mitigate. In lieu of establishing specific LID requirements within the Second Draft Order, the Permittees recommend that the Second Draft Order be amended to require the Permittees to increase integration of LID into the existing *"Technical Guidance Manual for Stormwater Quality Control Measures, Ventura Countywide Stormwater Management Program"*.

As it pertains to Smart Growth, this permit should clearly provide for Smart Growth/LID projects, rather than treat them as the exception to the rule. This Second Draft Order appears to encourage urban sprawl. The addition of the RPAMP in the Second Draft Order only adds another layer of unnecessary bureaucracy to Smart Growth projects. This extra layer will take an extraordinary amount of administrative time and resources that will push developers toward suburban projects where requirements are fully defined and can be much easier implemented.

Smart Growth/LID projects are acknowledged in the permit as an environmentally preferable way for a city to provide housing. These projects often use infill or redevelopment with a reduced number of parking spaces in a subterranean garage, commercial uses or office space at street level, and residential or office space in the upstairs floors. These projects reduce the amount of impervious area utilized to much less than are created by suburban development, create walkable communities and facilitate public transportation. Smart Growth projects are typically full site build-outs, and offer very limited space to implement BMPs that will maintain the pre-development hydrograph. The existence of these Smart Growth projects is, in itself, a tool for improving water quality. These projects should be credited for their sustainability benefits. The Permittees should be encouraged to continue participation with the Local Government Commission on development of a system that can be included in any future Order to encourage sustainable development and the environmental benefit of Smart Growth.

B. The Permittees Support Principles Related To Hydromodification Controls

Like LID, the Permittees support many of the policies and principles associated with hydromodification. In general, hydromodification criteria are intended to reduce stormwater pollution and control sediment in post-development runoff. LID measures and the Water Quality Treatment BMPs, also reduce peak flow from development and provide levels of treatment. When LID measures are used, most likely there will be a reduced need for other Water Quality Treatment BMPs, including changes to hydromodification controls.

The Second Draft Order should recognize the interdependence of hydrologic controls such as hydromodification and LID, and propose a sequencing of analysis. The sequence of analysis would begin with LID measures, followed by water quality mitigation for any remaining runoff. A proposed flow chart was included in the City of Ojai's September 20, 2007 RWQCB Workshop presentation. The Permittees recommend that Section 5.E.III of the Second Draft Order be modified to include this flow chart for hydrologic control analysis.

In addition, the Permittees, are concerned that the hydromodification criteria contained in the Second Draft Order have not been tested or studied for application in Ventura County considering its local conditions. Establishing unproven criteria for all waterbodies may create "sediment hungry" water. Furthermore, within Ventura County there are rivers and creeks that require sediment to nourish habitat and beaches, while in other areas of the County creeks have accumulated excessive sediment. Thus the need to develop a criterion that reflects local conditions and needs. The current work being undertaken by SCCWRP (and funded by the Stormwater Monitoring Coalition, including Ventura County) regarding the assessment and management of hydromodification effects will provide the needed data to develop Ventura specific criteria.

To address concerns regarding the application of generic hydromodification criteria to Ventura County, the Permittees recommend that the Second Draft Order contain interim hydromodification criteria in the Second Draft Order as follows:

> Replace Section 5.E.III.3.a (pg 54) with:
> Use the 2002 Ventura County Technical Guidance Manual for Stormwater Quality Control Measures and the updates that are required under the LID and Water Quality Mitigation sections of this permit for determining runoff and treatment BMPs from all projects that qualify under Section 5.E.II. Until the SCCWRP study is completed, the effects of LID measures and Water Quality Mitigation BMPs are deemed to satisfy the Interim Hydromodification Criteria.

In summary, the Second Draft Order needs to be revised to add practical, measurable interim criteria that apply to Ventura County conditions until such time SCCWRP has completed its study in the next 3 – 5 years. The Permittees recommend that future hydromodification requirements be coordinated with other Integrated Watershed Management Planning efforts that are occurring throughout Ventura County.

C. Development Construction Program

The Second Draft Order reflects a prescriptive approach to addressing runoff from construction sites regardless of the nature of the construction site or activities on a site. Specifically, the Second Draft Order requires all construction sites (regardless of size) to implement BMPs identified in Tables 6 and 7 regardless of whether the BMP is appropriate for the site. At a minimum, the Second Draft Order should be modified to provide the Permittees with flexibility in selecting and/or requiring BMPs applicable to the site and construction activities. Currently such flexibility does not exist. Likewise the Second Draft Order would require all construction sites less than 1 acre in size to calculate the erosivity factor to determine whether specific BMPs are required. Such a requirement would be overly prescriptive given the lack of sophistication of the smaller construction site operator. In this case, the Second Draft Order should provide the Permittees with sufficient flexibility to require minimum BMPs as necessary and leave the construction sites subject to the State Construction General Permit to address the erosivity issue.

The Permittees appreciate the Regional Water Board staff's revisions from the First to the Second Draft Order in that the variance to the prohibition is now properly within the authority of the Permittees and not the Regional Water Board's Executive Officer. However, the Permittees are concerned with the administrative effort that would be required to implement such a variance program. The Permittees also remain concerned with the overly restrictive nature of the grading prohibition as it currently stands. In particular, to grant a variance from the prohibition, the Second Draft Order requires the Permittees to ensure total suspended solids discharged are 100 mg/L or less; ensure that turbidity of the discharge is 50 NTU or less; not impair beneficial uses; and, includes a monitoring program to ensure effectiveness. These BMP provisions would apply even to projects that are anticipated to have little or no discharge to the waterbody because the sites include properly designed and erosion and sediment control BMPs. It is our understanding turbidity and total suspended solids requirements would require the installation of advanced treatment units as it would be impossible to meet such requirements otherwise. This is on top of the grading prohibition which applies from October 1 through April 15 in an arid climate such as found in Ventura County.

In lieu of the approach proposed in the Second Draft Order, we support the alternative approach put forwarded by the Building Industry Association ("BIA"). Under the BIA approach, the Second Draft Order should specify the additional BMPs that would be required for high risk projects such as those conducted on slopes that exceed 20%. We also have some fundamental concern with the Regional Board staff establishing technology based effluent limits for the high risk construction sites and using a MS-4 Stormwater permit to create such limits. Section F.1.1.(c) is a clear effort by the Regional Water Board staff to establish such limits. We would submit that technology based effluent limits should be developed through the State Construction General Permit process and not backdoor through the Ventura permit. Our comments relative to the development of technology based effluent limits noted previously in this letter are relevant to this discussion.

And finally the requirement that all Permittees must provide an electronic tracking system for grading permits seems overly prescriptive. It would seem the important point here is that a tracking system is in place, up to date and not the type of platform for tracking. Similar to a

wastewater treatment plant, a NPDES permit should dictates the performance standard, not the type of treatment to meet the performance.

V. Monitoring

The Second Draft Order stipulates a monitoring and reporting program (MRP) that is disconnected to the needs of our Countywide Stormwater Management Program. While we agree the current monitoring program (Order Number 00-108) can be improved to provide better information to characterize and improve the stormwater quality program, the Draft MRP is resource intensive and misdirected. A revised monitoring program could both identify water quality problems and provide the Permittees information useful to improve program effectiveness.

Some of the technical issues we have with the Second Draft Order are summarized below:

1. We fundamentally disagree with the Board's conclusion regarding the manner of TMDL incorporation into the Draft Order (see our discussion regarding the TMDLs). We do not support the proposed MRP which stipulates a comprehensive TMDL compliance monitoring programs. The Draft MRP is in conflict and in many cases redundant with the monitoring programs required under the various TMDLs. The MRP should reflect the TMDL monitoring program already developed and required pursuant to the TMDL.
2. The MRP is somewhat deceptive in addressing MALs. As presented in the previous pages we disagree with the concept of MALs as envisioned by this Second Draft Order (i.e. enforceable numeric effluent limits for stormwater outfalls). The Second Draft Order identifies the point of compliance as major outfalls and if these points are not available then the Permittees' mass emission stations are used for assessing compliance. The MRP on the other hand does not require direct monitoring of the major outfalls for assessing MAL compliance but only identifies the mass emission stations that are to be monitored. Given that the Permittees' mass emission stations include runoff from all types of land uses (urban as well as non-urban) and therefore are commingled, the mass emission stations are a very poor choice to identify the "bad actors" (or under the Regional Board strategy to assess permit compliance with MEP). It is unclear how the mass emission stations can be used for anything but assessing the overall health of the water body or compliance with receiving water quality standards. Our suggested approach to use MALs and outfall monitoring are included in our attachments (see Attachment B)
3. The Draft MRP establishes a new approach to characterizing urban runoff. The standard to date has been to collect a flow weighted sample for the entire event (thus the name Event Mean Concentration)[1]. In California these events typically last longer than 3 hours but are usually limited to 24 hours. However, the Draft MRP stipulates that the runoff must now be characterized by the first three hours of a storm (we will call it the 3 hour mean concentration). This change in procedure is paramount to our monitoring program as we have been following standard procedures in collecting EMCs for over 92 storm

[1] Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Storm Sewer Systems, USEPA, EPA 833-B-92-002, November 1992.

events over the last 15 years. By switching to the 3 hour mean concentration the Regional Board staff is discarding all our historical data (at an approximate cost up to $ 1 million dollars). This data is critical if we are to continue to maintain base line and be able to measure trends regionally and statewide. Thus the Regional Board is requiring the Program to start all over again. To compound the issue, the database used by the Regional Board to establish MALs is based on the standard procedure for monitoring (i.e. EMCs not 3 hour mean concentrations). Given the fact that runoff quality is typically poorer in the first part of the storm[2] then the Countywide Program is being penalized by the Regional Board by changing the method of assessing MALs. In other words the MALs are based on EMCs, but the compliance will be based on 3 hour mean concentration.

In lieu of the Draft MRP we recommended that the monitoring program be based on guidelines created in the *2004 Report Model Monitoring Program for Municipal Separate Storm Sewer Systems (MS4) in Southern California* from the Southern California Stormwater Monitoring Coalition. These guidelines allows for an adaptive approach to monitoring so resources are spent obtaining information useful for improving stormwater programs and stormwater quality. The Model Program presents a series of management questions that guide the adaptive development of a monitoring plan.

Two of the management questions are, "What is the relative urban runoff contribution to the receiving water problems?" and "What are the sources to urban runoff that contribute to receiving water problems?" Resources spent answering these questions would allow managers to focus programs on identified problems in urban runoff.

The remaining management questions regarding the water quality conditions of receiving waters also need to be addressed. Fortunately, there are many other programs in Ventura County that contribute valuable water quality data on the receiving waters. Additional available data comes from high quality monitoring programs such as other NPDES permits, the irrigated lands conditional waiver, and Total Maximum Daily Loads (TMDLs). Ventura County Permittees have worked cooperatively with the Regional Board and other stakeholders to develop TMDL compliance monitoring plans. These efforts should not be overlooked, and a comprehensive MS4 monitoring plan will need to take into consideration these other regional monitoring efforts to avoid unnecessary and costly duplication.

An example of a monitoring program for Ventura County based on the 2004 Model Monitoring plan was provided to Regional Board staff on May 11, 2007, and in the Permittees Presentation at the RWQCB September 20, 2007 Workshop. This monitoring program was first presented and described to Regional Board staff at our meeting on May 8, 2007. We hope through this type of a collaborative effort we can jointly develop an appropriate monitoring program that provides the Regional Board with useful information.

To provide a starting point of how the Model Program could be written into an Order we have prepared and are submitting the attached framework and materials as part of Attachment B.

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[2] First Flush Phenomenon Characterization, Caltrans, CTSW-RT-05-73-02.6, August 2005.

VI. Other Issues

Public Agency Activities (Routine Maintenance, Permitting and Pavement Repair)

The Second Draft Order requires coverage of routine and long-term maintenance activities under the Construction Activities Stormwater General Permit (CASGP) through the following requirements: (1) by specifically identifying certain routine maintenance activities, such as street repaving, sidewalk replacement, and channel maintenance, as Capital Improvement Projects that need to be covered under the CASGP (Provisions 5.G.1(c)); and (2) by specifically identifying certain long-term maintenance activities, such as maintaining flood control channels, sidewalk replacement, pavement replacement, etc. as activities that need to be covered under the CASGP (Provisions 5.G.1(c) and 5.G.7(a)). However, the Second Draft Order also defines construction[3] (page 94) to exclude routine maintenance that maintains the original line and grade or hydraulic capacity. Thus, the Second Draft Order is internally inconsistent. We would submit the exclusion of routine maintenance activities from coverage under the CASGP is more in line with the intent of the CASGP. In fact this definition is more in line with the CASGP definition for construction which also excludes routine maintenance that maintains the original line and grade or hydraulic capacity from coverage under the permit. Consequently, the Permittees request sections of the Second Draft Order requiring routine maintenance be subject to the CASGP be modified to be consistent with the Draft Order and CASGP's definition for construction to exclude routine maintenance.

The other relevant section of the Second Draft Order for CIP is Provision 5.G.I.1(a) which requires all Permittee owned and operated construction projects to be subject to the requirements of the New Development Program (Provision 5.F). These requirements are in many cases impossible to implement, especially for common linear projects. Reducing the percentage of Effective Impervious Area to less than 5% of total project area for a road project is very difficult and in most if not all cases cannot be done because of the nature of the project. The Permittees understand that larger projects meeting the criteria for the Land Development Planning requirements should be designed appropriately. However, applying this requirement to <u>all</u> Permittee owned or operated public construction projects does not take into consideration the realities of how small some public construction projects can be. Post construction BMPs and limiting effective imperviousness on a new traffic signal or a wheelchair access curb ramp is highly impracticable and of little benefit to water quality since these improvements do not generate additional pollutants.

These projects take place on existing streets in existing neighborhoods which provide little area for post construction BMPs. Drinking water or sewer line upgrade where soil and pavement are being disturbed to perform the activity, do not provide practicable opportunities to retrofit infiltration devices to serve as a post-construction BMP. This example also demonstrates a lack of parity because this requirement is only for Permittee owned facilities, and does not apply to private water companies or other wastewater districts. These utilities operate under the CAGSP when required to, as do municipally owned utilities.

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[3] It should be noted that the definition for construction was changed from the 12/28/06 draft order to the 8/28/07 draft order to address the issue of routine maintenance and CASGP coverage.

The Ventura County Stormwater Order should require the Permittees to meet the same requirements as those imposed on other (non-permitted) public agencies and private companies.

Trash Excluders

Contrary to statements made at September 20, 2007, Regional Board workshop. Permittees have very effective trash management programs. Provision 5.G.5(e) of the Second Draft Order requires the installation of trash excluders on catch basins in commercial areas, industrial areas, and near educational institutions i.e. areas subject to high trash generation. We appreciate the Board staff effort to address trash proactively; however, we have serious reservations about this sledge hammer approach. Ventura County is different from Los Angeles County which was the origin of the excluder approach. The 303(d) list for trash impaired water bodies for Ventura County only includes Beardsley Wash and Revolon Slough and the Ventura River estuary (representing only 4% of the county), versus the multitude of trash impaired water bodies in Los Angeles County. The Permittees would submit their current trash management program is one of the primary reasons. Given the uncertain nature of trash excluders and the potential for flooding[4] the Permittees would prefer more flexibility in defining their trash management program(s). This is especially true when considering the backdrop of the TMDL program. Once a water body is listed as impaired for trash and the TMDL is developed, an implementation plan must also be developed. The implementation plan provides an analysis of control alternatives, and ultimately selects controls that are cost effective and implementable. Thus, the TMDL is the safety net for addressing water bodies should the water body become impaired due to trash. As evident by the lack of trash listed water bodies in Ventura County their current trash management programs appear to be quite effective. We have expressed this preference before and the Board staff has indicated that such an approach is possible through Provision 5.A.2 which allows for the substitution of BMPs. While this provision does allow such a substitution, the provision sets up a resource intensive process (for both the Permittees and Regional Board staff) and is sufficiently vague giving Regional Board staff considerable latitude to allow or not allow the substitution. In general the Permittees should have the ability to assess various trash control options and select the most cost effective option. This only seems reasonable and provides the flexibility that is warranted given the combined safety net of the TMDL program.

Treatment Control BMPs for Critical Sources

Provision 5.D.2(a) (page 41) requires the implementation of treatment control BMPs for critical source businesses that discharge to an MS4 which then discharges to a 303(d) listed water body or ESA. Such a requirement essentially requires all critical source businesses in Ventura County to retrofit their site with treatment control BMPs regardless of whether the site is discharging the constituent for which the 303(d) list is based. In Ventura County this is approximately 3900 businesses[5]. The Permittees do not believe this is the best approach for dealing with our business

[4] Ventura Permittee research indicates that Glendale and Rancho Palos Verdes have initiated very small pilot programs (28 and 79 inlets, respectively) to test excluders meeting the five-millimeter criteria. These pilot programs, initiated due to a trash TMDL, are currently underway and final assessments have not been made. The impacts of flooding and bacterial regrowth will be considered in these studies.

[5] Ventura countywide critical source businesses: food facilities – 1,929, automotive facilities – 1,413, general industrial – 538, and nurseries – approx. 40

community. First, the provision basically undermines the use of source control and pollution prevention BMPs which has been the fundamental strategy in dealing with urban runoff. Second, the arbitrary requirement to retrofit businesses regardless of their discharge will likely mean significant expenditure of money resulting in little to no environmental benefit. Third, the TMDL process is the mechanism to address pollutants that are causing exceedances of water quality standards. As noted before, the TMDL implementation plan is the vehicle for identifying the sources, control measures, and schedules for addressing 303(d) listed water bodies. Provision 5.D.2 (a) is not the vehicle. In the September 20, 2007 workshop we provided the following recommendations to advance the implementation of the industrial/commercial program:

- Require Critical Source facilities to implement effective source control BMPs.
- Critical Source Facilities that fail to utilize effective source controls, shall apply pollutant specific treatment control BMPs.
- Use the TMDL program to address site specific or business specific sources of listed pollutants.

Jurisdictional Concerns

The proposed area of permit coverage, as identified in Figure 1 of the Second Draft Order improperly includes non-urbanized areas of Ventura County and improperly characterizes Ventura County as mostly urban development or undergoing urban development. As explained in our March 6, 2007 comments, most of Ventura County is actually unincorporated area that consists of National Forest land, agricultural land and open space.

Because MS4 permits are intended to control stormwater runoff from urban areas and areas containing MS4s, not un-urbanized areas, the Second Draft Order, and Figure 1 in particular must be revised to clearly indicate that the provisions as contained in the Second Draft Order apply only to urbanized areas within Ventura County.

Small Communities Issues

The communities of Fillmore, Port Hueneme, Ojai, Moorpark, Camarillo and Santa Paula collectively represent less than 20% of Ventura County's population. Because of the small populations within these communities, there are fewer staff resources and the Cities are unable to dedicate staff solely to the stormwater program. Furthermore, there are fewer financial resources to implement the stormwater program and ultimately implementation of the program results in a higher cost per capita on our residents.

In light of these circumstances, the small communities request special accommodations within the Second Draft Order that recognizes the resource challenges faced by these communities. In particular, the small communities seek extended compliance periods for implementing many of the provisions contained therein. By reducing the requirements as they apply to small communities, the small communities will be better positioned to actually meet the requirements as contained in the Second Draft Order.

VII. Conclusion

In light of the many pivotal concerns expressed by the Permittees previously and here, the Regional Water Board must consider a new approach for renewing the Ventura County stormwater permit. Instead of continuing on the present course, which consists of the Regional Water Board staff putting forward revisions and the Permittees reacting to the revisions, we recommend that the Regional Water Board and its staff enter into a facilitated collaborative process with the Permittees and other appropriate stakeholders. Through a facilitated process, the Permittees would hope that they and staff could work together to formulate a reasonable permit protective of water quality. Without such a process, and commitment from the Regional Water Board to enter into such a process, the Permittees fear that continued discussions on the Second Draft Order will result in the Regional Water Board adopting a permit that is fundamentally flawed and subject to subsequent challenge. Also, absent major revisions, the Second Draft Order in its current form would place excessive burdens on the Permittees and would subject the Permittees to multiple enforcement actions including, but not limited, to mandatory minimum penalties, ACLs and third party litigation. The Permittees can not in good conscious accept such an Order. The Permittees wish to avoid such an outcome and would prefer to work with Regional Water Board and its staff to put forward a permit that is reasonable and protective.

To that end, the Permittees request a series of facilitated meetings with Regional Water Board staff over the next several months. Through a facilitated process, the Permittees would hope to actively engage with Regional Water Board staff on the language contained in the Second Draft Order. Additionally, to help our understanding of the Board staff's position, the Permittees would appreciate the opportunity to review the technical memos referred to by Regional Board staff at numerous meetings, and at the Sept 20, 2007 RWQCB workshop prior to next workshop or hearing. The goal, of course, would be to reach mutual agreement Order, prior to release of a Tentative Order. We look forward to working with you and your staff to craft a revised Draft Order that meets all of our needs.

If you have any questions, please contact me at 805-654-5051, or via email at Gerhardt.Hubner@ventura.org.

Sincerely,

Gerhardt J. Hubner
On Behalf of the Entire
Ventura Countywide
Stormwater Management Program

Attachments

A. Ventura Countywide Program Policy and Legal Comments
B. Ventura Countywide Program Strikeout Version of 2nd Draft Order (Parts 1-3, 6-7, and MRP/Attachment F)
C. Permittee's Combined Technical Comments for Ventura County MS4 Permit Draft Order, dated October 12, 2007
D. Ventura Countywide Program "Issue Papers" (Alternative Approaches)
E. Permittee's Presentations at September 20, 2007 RWQCB Workshop
F. Ventura Countywide Program Comments on 1st Draft Permit, dated March 6, 2007

Cc: LARWQCB Board Members
Xavier Swamikannu, Storm Water Permitting, Los Angeles Regional Water Quality Control Board
Ventura Countywide Program Permittees