



RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT

November 17, 2009

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

Re: Comments on the October 22, 2009 Second Draft Order R8-2009-0033 for the Renewal of Waste Discharge Requirements for the Riverside County Flood Control and Water Conservation District, the County of Riverside and the incorporated cities of Riverside County, Tentative Order R8-2009-0033, NPDES CAS618033, Area-wide Urban Runoff Management Program (Tentative Order)

Chair Beswick and Members of the Board:

On behalf of the Riverside County Flood Control and Water Conservation District, the Principal Permittee for this Tentative Order, I would like to thank you for the opportunity to provide comment regarding the adoption of this important NPDES municipal stormwater (MS4) permit for the portion of the Santa Ana watershed within Riverside County. The District and its municipal Co-Permittees¹ (Permittees) strongly support clean water and healthy receiving waters. Protecting and conserving our water resources promotes both a healthy environment and a vibrant economy by ensuring that our local water resources are fully available to address the competing and diverse demands upon them.

However, given the current economic climate, where taxable retail sales are down 6%, assessed valuations are down over 10% and unemployment exceeds 14%, every effort must be made to ensure that remaining local tax dollars be carefully allocated to best protect our environment, residents and businesses. In our estimation, this Tentative Order will significantly increase the regulatory burden on the Permittees and their residents and businesses by imposing more stringent requirements on new developments, increasing monitoring and inspection requirements, and incorporating new regulations regarding Total Maximum Daily Load (TMDL) implementation. Preliminary indications are that these new provisions will roughly double the

¹ Co-Permittees include County of Riverside, Cities of Beaumont, Calimesa, Canyon Lake, Corona, Hemet, Lake Elsinore, Menifee, Moreno Valley, Murrieta, Norco, Perris, Riverside, San Jacinto and Wildomar.

Permittees' annual compliance costs. In light of the above, the Permittees request that the Regional Board exercise its discretion to ensure that the terms of the Tentative Order are commensurate with both the water quality needs and the economic reality of Riverside County.

The purpose of this letter is to specifically request that the Regional Board carefully exercise its discretion with regard to the incorporation of TMDL Waste Load Allocation (WLA) requirements in the Tentative Order. TMDL WLAs for Urban Runoff have been adopted for Permittee discharges to Canyon Lake, Lake Elsinore and the Middle Santa Ana River. Although the Permittees support the steps necessary to restore the beneficial uses of these important waterbodies, the Tentative Order is vague and ambiguous with regard to whether the Permit's Water Quality Based Effluent Limits (WQBELs) implementing the TMDL WLA requirements are to be construed as numeric effluent limits, narrative effluent limits or both. The Permittees are gravely concerned that this ambiguity exposes the Permittees to significant, unintentional and potentially irreversible, fiscal liability for non-compliance with the WQBELs. Without clarification of these requirements, the Permittees cannot support the Tentative Order.

The Permittees have proposed alternative language to address the WQBEL issue. The language is consistent with existing federal regulations and policy specifically addressing the incorporation of TMDL WLAs into permits, the recent findings of the State Water Resource Control Board's Storm Water Blue Ribbon Panel Report regarding the feasibility of numeric effluent limits and with actions taken just five weeks ago by the San Francisco Bay Regional Water Quality Control Board in the adoption of the San Francisco Bay Regional MS4 Permit (Order No. R2-2009-0074). This request is further supported below by a separate comment letter from Warren D. Williams, General Manager-Chief Engineer of the District to Gerard Thibeault, Regional Board Executive Officer.

The reluctance of Regional Board staff to incorporate the Permittees' proposed language appears to be in response to the United States Environmental Protection Agency (USEPA) Region 9's position that the existing guidance² cited by the Permittees is no longer accepted by the Agency. USEPA Region 9 contends that the Board has no alternative other than to accept the Permit as written.

The Permittees strongly contend that the current published guidance on this subject fully supports our position. Such guidance has been incorporated into the draft US EPA Handbook for Developing Watershed TMDLs³. Additionally, the recently adopted San Francisco Bay

² Memorandum from Robert H. Wayland to USEPA Regional Water Division Directors, *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (Nov. 22, 2002)

³ See Section 5.2, page 86, December 15, 2008, USEPA, Office of Wetlands, Oceans & Waterways

Regional MS4 Permit relied on this very same guidance to incorporate TMDLs in a manner that is explicit and consistent with our request. USEPA did not challenge that Permit or refute the use of the guidance. As recently as 2008, USEPA has drafted permits that are consistent with this guidance⁴.

The Regional Board has the discretion to support the position advocated by the Permittees.

It is imperative that the Regional Board carefully consider the Permittees' request prior to taking action on the Tentative Order. The record of the adoption of the TMDLs themselves supports the approach advocated by the Permittees, and argues strongly against the position advocated by Region 9. The basis for our request follows:

- 1) Although requiring direct compliance with the numeric WLAs may seem logical and appropriate, the TMDLs for these waterbodies were adopted based on limited science and preliminary information. The WLAs for the Lake Elsinore, Canyon Lake, and Middle Santa Ana River TMDLs were intended to be "preliminary" targets subject to revision as additional science and data were collected. Regional Board Executive Officer Gerard Thibeault even noted in a June 2004 workshop on the Lake Elsinore/Canyon Lake TMDL that the Regional Board was being forced to take legal actions for problems for which it had no practical solution. The Regional Board's own academic peer reviewer for the TMDL, Robert Gearheart, stated in his October 10, 2004 comments on the Lake Elsinore/Canyon Lake Nutrient TMDLs that:

"This is an example where the TMDL has no real application in terms of a likely outcome that removed the impaired water body status... I would tend to be very pessimistic in terms of being able to reverse the impaired nature of these water bodies in both the interim (2015) and final (2020) time frame"

Similarly, Regional Board staff noted in their response to comments regarding the Middle Santa Ana River TMDL that economic analyses of the costs and feasibility of BMP implementation were deferred based on the expectation that the TMDL would be revised based on the work of the Storm Water Quality Standards Task Force⁵.

Compliance with both TMDLs was expected to result from the collection of additional data and science necessary to refine the TMDLs, the identification and development of new and innovative BMP technologies, and pending regulatory actions yet to be adopted. All of these facts demonstrate that adopting narrative WQBELs based on the adoption

⁴ See City of Worcester Authorization to Discharge Under the National Pollutant Discharge Elimination System Draft NPDES Permit No. MAS010002, Section I.C

⁵ See response to Comment 11, Attachment B, June 24, 2005 Middle Santa Ana River TMDL Staff Report

and enforcement of iterative BMPs programs is the appropriate measure of compliance, not the application of numeric WQBELs based on TMDL WLAs that were never intended to represent the regulatory “end point” for the TMDLs.

- 2) Incorporating numeric WQBELs into NPDES MS4 Permits carries with it significant ramifications, including mandatory minimum penalties of \$3,000 per violation for non-compliance. Should the existing WLAs not be revised in a timely manner, the Permittees could be subject to unavoidable non-compliance, excessive and unavoidable fines, and third-party litigation. We would add that in the event of third-party litigation, it is inevitable that Regional Board staff themselves would be affected, due to the pressures of discovery.
- 3) Incorporating numeric WQBELs into the Permit may be irreversible. Federal Clean Water Act “anti-backsliding” requirements are very stringent. They effectively preclude relaxing effluent limits incorporated into NPDES permits unless very specific and limited conditions are met. The anti-backsliding provisions can preclude amending numeric effluent limits even if underlying water quality objectives and/or TMDL WLA requirements change. While it is not entirely clear that the anti-backsliding requirements would apply in this case - and Regional Board staff has argued that they would not - the Permittees are deeply concerned about the long-term risks they may incur under this scenario.
- 4) The Regional Board has consistently supported the TMDL Task Force approach. However, numeric WQBELs may cause years of joint TMDL Task Force efforts to develop science and technology to address TMDL requirements to unravel. As an example, the Lake Elsinore/Canyon Lake TMDL Task Force has focused its efforts on implementation of innovative in-lake strategies based on biomanipulation that would directly address the impairments and restore beneficial uses. If numeric WQBELs are incorporated into the Tentative Order, the Permittees would likely be driven to divert resources intended to develop these strategies and fine-tune a workable, yet currently unproven, in-lake management strategies to a watershed-based engineering solution that can be used to directly demonstrate nutrient reductions required by the TMDL WLAs. This would be necessary as the TMDL WLAs are based on a 10 year-rolling average that takes effect in 2010. In effect, pressures to use limited resources to individually comply with the Permit's proposed numeric effluent limitations would override motivations to use those resources to jointly develop effective in-lake solutions.

- 5) The WLAs are not sufficiently developed to be specified as numeric effluent limits. Numeric effluent limits are required to be specific to individual dischargers. The current WLAs are, instead, jointly assigned to NPDES MS4 Permittees, CalTrans, state and federal agencies and a myriad of construction and industrial stormwater permit holders. Even if the WLAs were subdivided and assigned to individual dischargers, it would not be possible to accurately measure compliance with numeric WLAs due to the sheer number of outfalls contained in these large watersheds, the number of dischargers that contribute flow to individual outfalls, and the variability of rainfall that results in discharges. Further, both this Tentative Order and the March Air Reserve Base Order No. R8-2009-0040, also scheduled for adoption on December 10, 2009, have each been assigned the entire Urban WLA. If the WLAs are expressed as enforceable numeric WQBELs, they are not consistent with the adopted TMDL, as implementation of the WQBEL would lead to a de facto exceedance of the allowable urban loads for Lake Elsinore and Canyon Lake. By contrast, if the WQBELs are expressed narratively, there are no issues as to the numeric accuracy of the WLAs assigned to each discharger.

- 6) The TMDL WLAs are inherently variable and thus subject to revision. The Lake Elsinore and Canyon Lake TMDL WLAs are dependent on land use. As the San Jacinto River watershed develops, urban WLAs are expected to increase as agricultural, open space and dairy WLAs decrease. Specifying numeric WQBELs based on the current WLAs would lock in late 1990 land use assumptions used to develop the WLA and ultimately place the Permittees in a situation of unavoidable non-compliance. The Regional Board would be forced to re-evaluate the TMDL, and re-open the Permit unnecessarily to ensure that the WLA were consistently appropriate to current land use distribution. If anti-backsliding applies, this is a fatal compliance problem that could ultimately preclude further development of the watershed.

As previously noted, the incorporation of WLAs as numeric WQBELs is not required. The Regional Board has the authority to incorporate narrative WQBELs expressed through iterative implementation of BMPs consistent with the Regional Board adopted TMDL Implementation Plans. The Permittees proposed revisions (attached hereto) implement the narrative WQBEL approach. The Permittees approach is consistent with US EPA Headquarters Guidance and the NPDES MS4 Permit adopted by the San Francisco Bay Regional Board in October 2009. Further, narrative WQBELs, based on requirements to develop plans and implementation schedules are actually significantly more enforceable than numeric WQBELs since it is economically and technologically infeasible to actually and effectively measure direct compliance with the WLAs.

Conclusion

Flexibility is particularly important to the municipalities in Riverside County in these times of financial hardship. The County and the municipalities within it have been particularly and seriously affected by the downturn in housing prices, construction activity, and employment, all of which have contributed to the loss of tax revenues. Notwithstanding such hardship, the Permittees remain committed to improving water quality and protecting beneficial uses in the receiving waters. By incorporating the TMDLs into the Tentative Order using narrative WQBELs based on enforceable iterative BMP implementation requirements (requirements which are consistent with the TMDL Implementation Plans), the Order would provide flexibility to the Permittees. On the other hand, the Permittees, faced with numeric WQBELs, will be driven to focus their monitoring and implementation efforts away from the innovative Task Force approach and toward individual compliance with the WLAs. Similarly, through application of anti-backsliding provisions, Permittees could be locked into WLAs that were intended to be revised in light of developing science, changing regulations, changing land use and emerging technologies. Such a diversion would result in a waste of resources already invested in the work of the Task Forces by not only the Permittees, but also by the Regional Board and potentially have significant and irreversible economic impacts.

Unfortunately, it appears that the Tentative Order only partially supports the Task Force approach, by setting forth numeric WLAs and compliance dates and then indicating that compliance may be achieved through the implementation of BMPs. This approach may leave the Permittees in the position of having to adopt available, but potentially less effective BMPs and then still being in violation of the Permit if the WLAs are not achieved or maintained. The implicit adoption of numeric effluent limitations by the incorporation of the numeric WLAs in the MSAR and LE/CL TMDLs is in fact infeasible because:

- Current WLAs were intended to be placeholder values subject to revision by future Regional Board action;
- The required economic analysis of WLA feasibility was deferred until such time that sufficient data and/or other expected, yet pending, regulatory actions occurred that would amend the TMDL⁶. Permittee data provided to Regional Board staff at the Lake Elsinore/Canyon Lake TMDL adoption indicated the potential costs of watershed based BMP compliance at several billion dollars; and

⁶ See Response to Comments 11 and 61, Attachment B to the June 24, 2005 staff report (Agenda Item 17) regarding Proposed Basin Plan Amendment – Incorporate of TMDLs for Bacterial Indicators in the Middle Santa Ana River Watershed Waterbodies.

- The WLA are not properly specified at a discharger-specific level.

It has been our experience that Regional Board staff have historically been outspoken advocates of adaptive management and regulatory flexibility to resolve complicated water quality problems. However, the manner in which the TMDL WLA requirements are incorporated in the Tentative Order is inconsistent with the federal regulations, published US EPA and SWRCB policy and guidance, and the recent actions of the San Francisco Bay RWQCB. The Permittees request that the Regional Board exercise its discretion in this matter and require the Tentative Order to adopt the Permittees' recommended approach, i.e., to explicitly express the WQBELs narratively, as the iterative implementation of BMPs, and not as numeric effluent limits. This approach is consistent with federal and state law and policy, and is consistent with the requirement of the State Board that incorporation of TMDL WLAs into NPDES Permits be more than an "academic" exercise. Given the ramifications of the decision before you, the Permittees recommend that you support this approach over possible objections by Regional Board staff and staff of USEPA Region 9. USEPA always retains the right to revise the Permit if this approach is truly inconsistent with federal requirements.

Despite this substantial concern regarding the incorporation of the TMDL WLAs into the Riverside County MS4 Permit, the Permittees maintain a productive and positive relationship with Regional Board staff and look forward to continuing the otherwise cooperative process of implementing the program elements specified in the Tentative Order. We also look forward to continuing to work with your Board in managing the water resources within the Santa Ana region of Riverside County.

Sincerely,



MARION ASHLEY, Chairman
Board of Supervisors
Riverside County Flood Control
and Water Conservation District

D. WATER QUALITY BASED EFFLUENT LIMITATIONS - TOTAL MAXIMUM DAILY LOADS (TMDLS)

1. MIDDLE SANTA ANA RIVER (MSAR) WATERSHED BACTERIA INDICATOR {tc "1. Middle Santa River (MSAR) Watershed Bacteria Indicator" \f A \l 3} TMDL{tc "Middle Santa River (MSAR) Watershed Bacteria Indicator TMDL" \f C \l 3}

- a. **Waste Load allocations:** Urban Runoff discharges from tThe County of Riverside and the cities of Corona, Riverside and Norco (see Table 13-1 of the DAMP, herein MSAR Permittees) shall comply with the WLA for the following Middle Santa Ana River Watershed Bacterial Indicator TMDLs by implementing BMPs designed to attain the following WLA the Effective Date consistent with Section II.K:
- b. **Dry Summer Conditions** (April 1 through October 31): Compliance shall be achieved by no later than December 31, 2015.
 - i. **Fecal Coliform WLA**¹
5-sample/30-day logarithmic mean less than 180 organisms/100mL, and not more than 10% of the samples exceed 360 organisms/100mL for any 30-day period.
 - ii. *e coli* WLA
5-sample/30-day logarithmic mean less than 113 organisms/100mL, and not more than 10% of the samples exceed 212 organisms/100mL for any 30-day period.
- c. **Wet Winter Conditions** (November 1 through March 31): Compliance shall be achieved by no later than December 31, 2025.
 - i. **Fecal Coliform WLA**³⁴
5-sample/30-day Logarithmic Mean less than 180 organisms/100mL, and not more than 10% of the samples exceed 360 organisms/100mL for any 30-day period.
 - ii. *e. coli* WLA
5-sample/30-day Logarithmic Mean less than 113 organisms/100 mL and not more than 10% of the samples exceed 212 organisms/100mL for any 30-day period.

¹ The fecal coliform WLA becomes ineffective upon the replacement of the REC1 fecal coliform objectives in the Basin Plan by approved REC1 objectives based on E. Coli.

2. LAKE ELSINORE/CANYON LAKE (SAN JACINTO WATERSHED) NUTRIENT TMDLS

- a. ~~The Urban Runoff discharges from the~~ Permittees in the San Jacinto watershed identified in Table 13-1 of the DAMP (LE/CL Permittees) shall comply implement BMPs designed to meet with the WLAs specified in the San Jacinto Watershed Nutrient TMDLs listed in Tables 8 and 9, below (or as subsequently amended by the Regional Board) consistent with Section II.K. Compliance may be achieved by implementing the various tasks identified in the TMDL implementation plan.

**Table 8 - Canyon Lake
Nitrogen and Phosphorus Waste Load and Load Allocations^a**

Canyon Lake Nutrient TMDL	Final Total Phosphorus Waste Load Allocation (kg/yr) ^{b, c}	Final TN Waste Load Allocation (kg/yr) ^{b, c}
Urban	306 (675 lbs/yr)	3,974 (8763 lbs/yr)
Septic systems	139 (306 lbs/yr)	4,850 (10692 lbs/yr)

^a The WLAs for Canyon Lake apply to those land uses located upstream of Canyon Lake.

^b Final allocation compliance to be achieved as soon as possible, but no later than by December 31, 2020.

^c TMDL and allocations specified as 10-year running average.

**Table 9 - Lake Elsinore
Nitrogen and Phosphorus Waste Load and Load Allocations^a**

Lake Elsinore Nutrient TMDL	Final Total Phosphorus Waste Load Allocation (kg/yr) ^{b, c}	Final TN Waste Load Allocation (kg/yr) ^{c, d}
Urban	124 (273.3 lbs/yr)	349 (769.4 lbs/yr)
Septic systems	69 (152 lbs/yr)	608 (1340 lbs/yr)

^a The Lake Elsinore TMDL allocations for septic systems only apply to those land uses located downstream of Canyon Lake.

^b Final compliance to be achieved as soon as possible, but no later than by December 31, 2020.

^c TMDL and allocations specified as 10-year running average.

^d WLA for supplemental water should be met as soon as possible as a 5 year running average.

^e Allocation for Canyon Lake overflows