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January 7, 2010

Via Electronic Mail: kelliott@waterboards.ca.gov

California Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348
Attn: Keith Elliott

RE: **Tentative Riverside County MS4 Permit Order No.R8-2010-0033 (NPDES No. CAS 618033)**

Dear Chair Beswick and Members of the Board,

On behalf of our members, we submit the following comments on Tentative Order No. R8-2010-0033, Riverside County Flood Control and Water Conservation District, County of Riverside, and Incorporated Cities of Riverside County, Area-Wide Urban Runoff Management Program (Permit), NPDES Permit No. CAS618033. Our comments focus on technical and substantive areas of concern the modification of which would help to resolve Riverside County's chronic water quality issues.

Waterkeeper commends the Santa Ana Regional Water Quality Control Board's (Regional Board) commitment to increasing the water quality of the Santa Ana River Watershed and sincerely hope to continue our partnership in making the Inland Empire a cleaner and more secure environment. We seek to make a good draft Municipal Separate Storm Sewer System (MS4) permit better by seeking clarification, encouraging the development of ideas, and ensuring uniform application of the Permit's mandates and requirements. In cooperation with the Regional Board, Waterkeeper believes this Permit could become a model for future MS4 permits and encourages all participants to embrace this opportunity.

However, Waterkeeper is concerned with the development of the third draft of the MS4 permit issued to the County of Riverside. As written, the draft permit represents a significant lost opportunity to restore the degraded condition of the Santa Ana River, Lake Elsinore and the waters of the County of Riverside and those municipalities downstream.

The regulatory complexities of 2010-2015 will become immediately apparent to the co-permittees following the implementation of comprehensive plans intended to restore decades of environmental decay and degradation. The Santa Ana River TMDL deadline for bacteria and the designation of critical habitat for the Santa Ana River Sucker will both occur during the lifecycle of this permit.[1] Storm water is

[1] *See* 74 Fed. Reg. 65,056 (Dec. 9, 2009).

recognized as the "leading cause of water quality impairment in California, as well as nationally."[2] The adoption of a responsible and progressive MS4 permit which appropriately considers and plans for scheduled events and contingencies provides co-permittees with a solid framework on which to build the future of the County of Riverside.

The Regional Board must remember that while permittees, like any stakeholder in the regulatory process, have the right to make their opinions known, decisions on pollution control measures must be based upon defensible empirical evidence and not the desire to placate anxious stakeholders. The passage of the Clean Water Act, Porter-Cologne Water Quality Control Act, the Clean Air Act, and the creation of the Environmental Protection Agency were each in response to anemic government oversight which led to dramatic environmental degradation and a public outcry for well-reasoned scientifically supported regulatory oversight. The adoption of a muted MS4 permit effectively permitting self-regulation at the expense of the determined progress during a period of alarming drought is poor public policy.

Waterkeeper agrees that the assertion that the "number of waterbodies failing to achieve compliance with our nation's water quality goals is not declining." [3] As such, the issuance of MS4 permits is critically important if that trend is destined to retreat and clear, measurable, and enforceable requirements are essential in moving towards that national goal.

In the interest of the reader, this comment letter's format mirrors that of the Permit and focuses on those sections which demand the greatest amount of revision.

Section II.K – Water Quality Based Effluent Limits (WQBELs) and TMDL WLA

Section II.K. - Waterkeeper encourages the Regional Board to adopt MS4 permits with clear, numeric effluent limits similar to those seen with the Lake Elsinore/Canyon Lake nutrient TMDL and the MSAR bacteria TMDL. There, consistent with 40 C.F.R. 122.44(d)(1)(vii)(B), the WLA in the approved TMDL act as de facto WQBELs. This provides permittees with clear, measurable and enforceable limitations which provide each permittee with notice and an opportunity to avoid violations.

The adoption of WQBELs is consistent with the Los Angeles Water Quality Control Board's recently issued MS4 permit to the County of Los Angeles which includes, "numeric limits on bacteria levels for storm water discharges into the Santa Monica Bay during wet weather conditions" and the "TMDL-derived, water-quality-based numeric effluent limitations" specifically applied to MS4 discharges for wet-weather bacteria to be "implemented over a long period of time."[4]

However, consistent with our first comment letter concerning the County of Riverside and the County of San Bernardino's MS4 permits, we cannot support a monitoring mechanism which guarantees failure while trumpeting success. A circuitous compliance tool without concrete benchmarks, little hope for progress, and no potential for permittees to be held responsible for their failures is not a solution to chronic storm water pollution. *(Also see Section F. below)*

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[2] Storm Water Enforcement Act § 1, 1998 Cal. Stat. 998, ("The Legislature hereby finds and declares all of the following: (a) unregulated storm water runoff is a leading cause of contamination of the states surface water and groundwater.") ; Municipal Storm Water Permitting, at 252.

[3] Alexandra Dapolit Dunn and David W. Burchmore, Regulating Municipal Separate Storm Sewer Systems, 21 Nat. Resources & Env't L. 3 (2007).

[4] Robin Kundis Craig, Protecting Oceans from Urban Storm Water Runoff, 21 Nat. Resources & Env't L. 36, 38 (2007).

Section II.F -- CWA Section 303(d) Listed Waterbodies and TMDLs

Section II.F.23 - Waterkeeper is concerned that interim compliance determination with the WLAs in the TMDLs will be based on the permittees progress in implementing the TMDL implementation plan. The mere compliance with an implementation plan may not result in actual compliance with limitations which are appropriate under the circumstances. Rather than approach chronic storm water pollution problems on 303(d) listed waters with TMDLs from a perspective permitting continual contamination so long as a tasks are being performed the Regional Board should strengthen its position and ensure actual compliance with state and federal regulations.

Waterkeeper echoes EPA's concerns regarding the MS4 permit's section on Lake Elsinore/Canyon Lake's nutrient TMDL. Chiefly, that it be revised to clarify that numeric WLA and the implementation of specific tasks in the implementation plan are independent obligations of permittees and the satisfaction of one does not equate to the satisfaction of the other. As EPA stated, "Currently, the language suggests that compliance with the tasks in the implementation plan may satisfy the requirement to comply with the numeric WLAs, even if the various tasks do not result in actual compliance with the numeric WLAs." The letter concluded, "the revision would provide greater assurance of consistency with the WLAs and would enhance the enforceability of the permit with regards to the WLAs."

We agree with EPA that WLAs as numeric limits is appropriate in a final permit and strongly encourage uniform consistency between the TMDL provisions for Riverside and Orange County's MS4 permit on this issue.

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

Waterkeeper echoes the opinion of EPA Region IX that the implementation of LID principles in MS4 permits, especially third or fourth generation permits, must include *clear, measurable, and enforceable* provisions for the implementation of LID. (*emphasis added*) Similarly, permits should also include *clearly defined and enforceable* process for requiring off-site mitigation for projects where use of LID design is infeasible. (*emphasis added*). Waterkeeper would not support replacing concrete quantifiable approaches with qualitative provisions without measurable goals.

Additional requirements clarifying MEP and improving enforceability of the permit would only strengthen the practical impact of the permit on localized water quality. Section 402(p) of the Clean Water Act establishes the MEP standard as the requirement for MS4 permits without affirmatively dictating what that term in intended to mean.[5] While ambiguous, the MEP standard does not permit

[5]Clean Water Act § 402(p)(3)(B)(iii), 33 U.S.C. §1342(p)(3)(B)(iii) (2000). The EPA has identified the following factors as relevant to the MEP standard: (1) storm water discharge size; (2) climate; (3) implementation schedules; (4) current ability to finance the program; (5) hydrology; (6) capacity to perform operation and maintenance; (7) conditions of receiving waters; and (other specific local concerns and aspects included in a comprehensive watershed plan. National Pollution Discharge Elimination System-Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, Part II. 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999([Phase 2 Storm Water Rules]; John H. Minan, Municipal Separate Storm Sewer System (MS4) Regulation Under the Federal Clean Water Act: The Role of Water Quality Standards?, 42 San Diego L. Rev. 1215, 1218 (2005).

"unbridled discretion" by the Regional Board in determining the appropriate measure of compliance.[6] Rather, the standard "imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible."[7] Previous municipal audits in California have identified a lack of detailed requirements as a frequent shortcoming in previously-issued MS4 permits in southern California. Refined clarity in the quantitative requirements of LID sought by the Regional Board would help clarify to all parties the requirements of the permit as well as providing a consistent foundation upon which to measure regional progress.

Section XII.G. – Alternatives and In-Lieu Programs

Section XII.G.3 - Waterkeeper is concerned over the likelihood that the "obligation to install Treatment Control BMPs at New Development" if the "BMPs are constructed with the requisite capacity to serve the entire common project" will actually be achieved. During periods such as this current economic downturn there is a real threat that common plan developments begin construction with the intent to have structural BMPs satisfy the entire project's obligations that are never actually constructed because the common development stalls and is either not completed or placed on indefinite hiatus. These situations allow the possibility of new developments which would fall within the requirements of this MS4 permit to avoid actual construction of required BMPs because the common development project ceases construction and those residences already built will be without the otherwise required BMPs.

Waterkeeper recommends the Regional Board consider requiring the pro rata development of BMPs to overall common development construction. For example, a common development construction in Riverside County which is twenty-five percent complete (phase 1 of 4) must have sufficient BMP capacity to address twenty-five percent of the storm water for that portion complete or enough to counter all of the immediately completed development.

In rebuttal to the potential BIA and permittees claims regarding the state of the regional or localized economy's impact on the area as an excuse for the status quo Waterkeeper directs the Regional Board's attention to an EPA study on the impact water quality has on residential property value.[8] The study analyzed residential property values in the area around Lake Champlain in the Northeast United States and revealed that residences with higher water quality were valued twenty percent higher than those properties with poor water quality.[9]

Locally, a 2001 study conducted by the California Water Awareness Campaign revealed that the quality and quantity of water available rank as the two most important environmental issues facing California.[10] It stated, "of the ten statewide issues, water quality and supply ranked at the top with eighty-three percent and eighty-two percent of the respondents ranking them, respectively, as 'very important.'"[11]

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[6] Defenders of Wildlife v. Babbit, 130 F.Supp.2d 121,131 (D.D.C. 2001); Friends of Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible").
[7] Id.
[8] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LIQUID ASSETS: A SUMMERTIME PERSPECTIVE ON THE IMPORTANCE OF CLEAN WATER TO THE NATION'S ECONOMY 8 (1996); Municipal Storm Water Permitting, 253-54.
[9] Id.
[10] Id. at 254; *Also see* http://www.wateraware.org/surveyresults.html
[11] Id.

As such, when deliberating the reasonableness of recommendations for the improvement of MS4 permits the Regional Board should remember the underreported aspects of water quality improvement on residential home values as well as the level of importance the general public regards the issue of water quality and quantity in California prior to the adoption of any tentative order.

Finally, we caution the Regional Board insomuch as it defers compliance with WQMPs goals with the development of "watershed-based Treatment Control BMPs." The implementation of appropriate BMPs has been proven to result in improvements in storm water quality on a "site-specific basis, but information about watershed-scale improvement is lacking."[12]

Likewise, Waterkeeper has concerns with WQMP's that defer installation of permanent treatment BMPs until such time that the Home Owner's Association (HOA) can provide them. We feel strongly that this caveat should not be allowed and that it is the responsibility of the project proponent to complete the project in its entirety. It could be years until the HOA is developed and fully capitalized so we urge the Regional Board to close this loophole with this permit revision.

General Comments

A common theme throughout this latest iteration of the MS4 permit is an unwillingness to hold those permittees accountable for their failure to abide by the terms of the permit, if that were to happen, and/or an uneasiness to demand specific goals be met by date certain. Previously, Waterkeeper submitted a comment letter to the Regional Board stating our opposition to a form of collaborative governance similar to the task force model used in the TMDL process. If permitted, the process will fail to achieve the concrete goals established in this or any MS4 permit because the intent of the process is not to reach defined objectives but rather to defer expenditures and responsibility.

We reiterate our firm opposition to the use of a collaborative task force approach in the execution and enforcement of the terms provided in this or any MS4 permit. Showing a "good faith effort" should not be the bar by which permittees are measured. We foresee this approach causing an unending chain of meetings for both the Regional Board staff and permittees resulting in little action, deferred compliance, a false sense of accomplishment on behalf of co-permittees and even less enforcement.

The goal of the Clean Water Act is clear, to "restore and maintain the chemical, physical and biological integrity of the nation's waters"[13] and to accomplish the lofty goal of "eliminating the discharges of pollutants by 1985, and to enhance water quality nationally to a 'fishable/swimmable' level by 1983.'"[14] The end of this permit will fall on the thirtieth and thirty-second anniversaries of those two dates, respectively. That begs the question, how much closer does this iteration of the MS4 permit take us to accomplishing those goals?

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[12] EPA, PRELIMINARY DATA SUMMARY OF URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-2 (1999) at 5-85, *available at* http://www.epa.gov/OST/stormwater/#report (last modified May 24, 2000); 31 Entv'l L 767, 773 (2001).

[13] 33 U.S.C. § 1251(a); *see also* Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Circ. 2001).

[14] 33 U.S.C. §§ 1251(a)(1), (2); Philip Weinberg and Kevin A. Reilly, Understanding Environmental Law, 118,119, Second Edition, LexisNexis 2008.

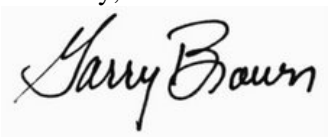
Conclusion

Waterkeeper appreciates the effort the Regional Board and its staff have put towards developing an effective MS4 permit for Riverside County which effectively and efficiently addresses the environmental concerns of the watershed in a transparent and comprehensive approach.

Finally, the Regional Board should be resolute in ensuring the adoption of this Permit in recognition of the increasing need for clean water. Brief economic disruptions, while regrettable and unenviable, provide an insufficient rationale for regulatory delay. Although the global recession has impacted Riverside County to a significant degree the Regional Board must remember that recessions are transitory and cannot be allowed to dictate foundational regulatory mandates such as those under the Act.

If you would like to discuss these comments, please contact our Costa Mesa offices at (714) 850-1965, or Autumn DeWoody at our headquarters (951) 689-6852.

Sincerely,



Garry Brown
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