



California Regional Water Quality Control Board, San Diego Region

September 7, 2012

Via U.S. Mail and E-Mail

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Subject: May 10, 2012, Letter from County of Orange, County Counsel and May 21, 2012, Letter from County of Riverside, County Counsel Re Regional Municipal Separate Storm Sewer System Permit

Messrs. Baron and Huff:

This letter responds to legal concerns raised in a May 10, 2012, letter from the County of Orange and the Orange County Flood Control District (collectively Orange County) and in a May 21, 2012, letter from the County of Riverside and Riverside County Flood Control & Water Conservation District (collectively Riverside County). Both letters question whether legal authority exists to support a Regional Municipal Separate Storm Sewer System (MS4) Permit (Regional MS4 Permit), as is under development by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board). Orange County questions whether and how a regional MS4 permit application process is consistent with and can satisfy the individual permit application requirements in federal law as neither County is yet required to submit, nor has submitted a Report of Waste Discharge (ROWD) for the discharges covered under their respective MS4 Permits.

As a foundation for their concerns, the Counties maintain that the three groups of Copermittees (San Diego County, portions of Orange County and portions of Riverside County) presently regulated under three separate MS4 permits do not share an interconnected MS4, are not under common jurisdiction, contain separate and distinct watersheds, are

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characterized by different hydrologic and climatic conditions and possess distinctly different water quality concerns.

The San Diego Water Board has the legal authority to issue a regional MS4 permit through its authority in the Clean Water Act. Section 402, subpart (p)(3)(B) of the Clean Water Act states that "Permits for discharges from municipal storm sewers—(i) may be issued on a system- or jurisdiction-wide basis" The federal storm water regulations in 40 Code of Federal Regulations (CFR) at Part 122.26, subdivision (a)(1)(v) also state that the Director may designate dischargers from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination, the Director may consider the following factors: (A) the location of the discharge with respect to waters of the United States; (B) the size of the discharge; (c) the quantity and nature of the pollutants discharged to waters of the United States; and (D) other relevant factors. (40 CFR Part 122.26(a)(1)(v).)

More specifically, the federal regulations provide that for large and medium MS4 systems, the San Diego Water Board may issue a regional permit. Specifically, the regulations provide:

"(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either: (A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operator of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system; (B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or (C) A regional authority may be responsible for submitting a permit application under the following guidelines

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-

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wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.”

(40 CFR Part 122.26 (a)(3)(ii)-(v).)¹

These regulations make it clear that the San Diego Water Board may issue a regional MS4 permit. The regulations also clarify that the permit may include different conditions for separate discharges covered by the permit. This allows the San Diego Water Board to ensure that suitable water quality conditions and provisions are identified for each watershed.

The United States Environmental Protection Agency’s (USEPA) responses to comments for the above-mentioned regulations also make it clear that the permitting authority, in this case the San Diego Water Board, has the flexibility to establish system- or region-wide permits. In the Final Rule published in the Federal Register and containing the responses to comments, USEPA notes that that paragraph (iv) (40 CFR § 122.26(a)(3)(iv)) would allow an entire system in a geographical region under the purview of a State agency to be designated under a permit. (National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 FR 47990-01, 48042.) USEPA also states that many commenters wanted to allow the permitting authority broad discretion to establish system-wide permits, and that EPA believes that paragraphs (a)(1)(v) and (a)(3)(ii) allow for such broad discretion. (*Id.*, 47990-01, 48039-48042.)

Not only is it legally allowable for the San Diego Water Board to issue a regional MS4 permit, it is also appropriate for the San Diego Water Board to do so. Orange County argues that the three large metropolitan counties “do not share an interconnected municipal storm sewer system, are not under common jurisdiction, and contain separate and distinct watersheds.”² However, the counties are connected through shared watersheds and/or are adjacent to each other. For example, the Santa Margarita watershed begins in Riverside County but drains into San Diego County. The Regional MS4 Permit creates watershed requirements that apply to multiple counties, which will ensure consistency of regulations in a watershed and result in overall cost savings for the Copermittees due to reduced redundancy in water quality monitoring. Even if the MS4s were not interconnected, the regulations make it clear the San Diego Water Board can require one permit for all MS4s that are adjacent. (40 CFR Part 122.26(a)(3)(iv).) Managing storm water on a watershed basis is expected to result in improved water quality, as the Regional MS4 Permit focuses the monitoring and management practices necessary to improve each watershed rather than arbitrary political boundaries. A single permit also allows San Diego Water Board staff to expend fewer resources developing multiple permits and more resources working cooperatively with all three current groups of Copermittees to ensure implementation of the permit results in improved water quality.

¹ These regulations are applicable to California’s NPDES program. (40 CFR §123.25.)

² Letter from the County of Orange, dated May 10, 2012, on page 1.

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A regional MS4 permit also does not expand the requirements for each municipality beyond its borders as each municipality is only responsible for discharge within its jurisdictional boundaries. The federal regulations make it clear that Copermitees need only comply with permit conditions relating to discharges from the MS4s for which they are operators. (40 CFR Part 122.26(a)(3)(vi).) The Administrative Draft Regional MS4 Permit does not require the Counties to manage storm water outside of their jurisdictional boundaries, but rather to work collectively to improve storm water management within watersheds.

The San Francisco region-wide permit from the Regional Water Quality Control Board, San Francisco Region, provides an example of a regional MS4 permit. Neither the USEPA nor the State Water Resources Control Board (State Water Board) objected to the San Francisco regional MS4 permit. While that permit was developed with consensus among the Copermitees, the Federal Regulations make it clear that the San Diego Water Board may impose a regional MS4 permit without a consensus. Another example of a regional MS4 permit is in Alaska, where the City of Fairbanks, the City of North Pole, the University of Alaska, and Department of Transportation and Public Facilities received a single permit, NPDES Permit No. AKS-053406.

The Regional MS4 Permit will continue to use the ROWD process prior to initially enrolling any Orange or Riverside County Copermitee into the Regional MS4 Permit or renewing the permit. The San Diego Water Board understands that each municipality is unique although the Counties share watersheds and geographical boundaries. As provided in their current MS4 permits, the Orange and Riverside County Copermitees will submit a ROWD no later than 180 days prior to expiration of their current permits. Staff at the San Diego Water Board will review the ROWDs to determine whether the Copermitees should be enrolled in the Regional MS4 Permit, what changes to the Regional MS4 Permit proposed in the ROWD are appropriate, and what is the proper level of public process for consideration of the issues raised in the ROWDs. The regional MS4 permit will continue to rely on the ROWD process to frame prospective revisions to the permit. Prior to release of the Public Comment Draft Permit, San Diego Water Board staff will consider whether changes to the text of the Administrative Draft are necessary for consistency with the intent to fully evaluate the ROWDs submitted by the Orange and Riverside County Copermitees as outlined above.

Please contact either me at 916-341-5168 or by e-mail at Jessica.jahr@waterboards.ca.gov or Catherine George Hagan at 858-467-2958 or by e-mail at catherine.hagan@waterboards.ca.gov if you have questions.

Respectfully,



Jessica Jahr

cc: See next page

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cc: David W. Gibson, Executive Officer (via e-mail only)
San Diego Water Board Interested Persons List (via e-mail only)