

September 14, 2012

Ms. Laurie Walsh
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

Dear Ms. Walsh:

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

The Riverside County Flood Control and Water Conservation District (District) is submitting this comment letter on the above listed Administrative Draft Order, on behalf of the Riverside County MS4 Permittees within the San Diego Region (Riverside County Permittees) which includes the District, the County of Riverside and the Cities of Murrieta, Temecula and Wildomar. Administrative Draft Order R9-2012-0011 (Administrative Draft) was drafted by Board staff to cover Phase I municipal separate storm sewer system (MS4) permittees in San Diego County, Southern Orange County, and the portion of southwestern Riverside County referred to as the Santa Margarita Region. Although the Administrative Draft will initially only apply to the San Diego County MS4 permittees, Provision F.5.a mandates that it will apply to the Riverside County Permittees on expiration of their existing Santa Margarita Region MS4 permit in 2015, unless early enrollment is granted prior to Provision F.6. Since the Administrative Draft purports to cover the activities of the Riverside County Permittees, this letter, developed in consultation with the Riverside County Permittees, reflects those Permittees' most critical concerns. The Board's careful consideration of these critical concerns will be appreciated.

In the workshop on the Administrative Draft Order on April 22nd Regional Board staff identified the following desired outcomes of the Administrative Draft:

- Improving the quality of water discharged from the MS4
- Restoring or enhancing beneficial uses and receiving water quality

It was further identified by Board staff that to be able to meet those goals, the proposed regional MS4 permit needed to be 1) Strategic, 2) Adaptive, and 3) Synergistic.

While the Riverside Copermittees still have questions regarding the legal authority to issue this regional MS4 permit to Copermittees within the three counties, the Copermittees agree that being able to adapt and direct resources toward specific water quality priorities in a given watershed, rather than all-potential problems simultaneously, is more likely to result in actual / meaningful improvements in water quality. However, to be able to achieve those improvements the MS4 Permit must be written to allow the Copermittees to truly and fully adaptively manage their programs to focus their resources on those BMP strategies and monitoring efforts that are identified as being most effective, consistent with the MEP standard, at addressing the watershed's priorities.

Unfortunately, the prescriptive provisions and the receiving water limitations presented in the Administrative Draft are not supportive of achieving those outcomes, as it currently does not allow the Copermitees to be strategic with the use of their resources, nor to adapt their programs to focus on the highest priority water quality needs of the watershed. This comment letter identifies the fundamental issues which, if resolved, will address these limitations and facilitate the desired improvements. Among other issues, there needs to be a greater emphasis on the *integration* of the Monitoring, Water Quality Improvement Plans, and Jurisdictional Runoff Management Plans, which may require key elements of the Administrative Draft and, in particular, the proposed monitoring and jurisdictional requirements, to be simplified to provide the needed flexibility for effective implementation of an integrated adaptive management approach.

1 BACKGROUND

The Riverside County Permittees were issued an extensive and prescriptive MS4 Permit in November 2010 (2010 MS4 Permit) which greatly expanded monitoring obligations, required special studies, jurisdictional runoff management program, and watershed workplan requirements. Development and implementation of the 2010 MS4 Permit compliance requirements has been unduly expensive relative to the size, resources, and known beneficial use impairments in the Santa Margarita Region, and the demonstrated benefits of the mandated compliance requirements. These requirements have left other important societal needs unfulfilled by the Riverside County Permittees during a period of unprecedented and continuing economic distress. The Riverside County Permittees are still in the process of developing and implementing these requirements which is a concern given the different approach proposed in the Administrative Draft.

While the Riverside County Permittees have long sought a more flexible, adaptive, and outcome-oriented MS4 permit, the extraordinarily prescriptive compliance and monitoring mandates in the 2010 MS4 Permit have significantly limited the Riverside County Permittees' ability to participate in the focused meetings and to provide detailed comments on the Administrative Draft.

The Riverside County Permittees appreciate that Board staff were have been seeking MS4 permittee input during the focused meetings on the Administrative Draft. Unfortunately, the Riverside County Permittees were effectively precluded from participation in the first two focused meetings, due to the need to meet compliance deadlines set forth in the 2010 MS4 Permit issued by the San Diego Water Board just 18 months earlier. The Riverside County Permittees notified the Regional Board staff of these requirements both verbally and in written correspondence on multiple instances prior to the first focused meeting and stated that, without relief from the 2010 MS4 Permit requirements, the Riverside County Permittees could not attend the first two focused meetings. Nonetheless, Regional Board staff decided to proceed with those first two meetings without participation of the Riverside County Permittees, due to self-imposed goals for the adoption of this regional MS4 permit. Our ability to fully prepare for and participate in the second two focused meetings, and additionally to provide these written comments, continues to be constrained by the demands of developing and rolling out of additional compliance documents mandated in the 2010 MS4 Permit.

However, as the public noticing documents indicated, these comments on the Administrative Draft are considered to be informal and will not be responded to by staff. However, in an apparent contradiction, Regional Board staff has made other comments at focused meetings suggesting that a significant proportion of changes to the proposed regional MS4 permit will be made in response to comments on the Administrative Draft, and that proportionally fewer changes are expected based on (not yet submitted) comments on the (not yet drafted) Tentative Order. Under the Clean Water Act and California law, all interested persons, including the Riverside County Permittees, must be provided the full opportunity to review and comment upon the

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

Tentative Order, which will represent the actual proposed regional MS4 permit. To not give full consideration to address and respond to all comments on the Tentative Order, including the projected MS4 Permittees in the Santa Margarita Region, would be an abuse of discretion by the Regional Board. Not only should Regional Board staff provide full consideration of all comments on the Tentative Order, but Regional Board staff should have no pre-established expectation or limitation on the amount or scale of changes that will be considered as appropriate on the Tentative Order.

Further, due to the public policy significance of the shift to a regional permitting approach, a series of workshops in front of the Regional Board Members should, and are requested to be scheduled following release of the Tentative Order. Conducting such workshops for the Regional Board Members is critical to allow them to be fully informed of, and hear first-hand the issues from a variety of perspectives, before being asked by Regional Board staff to adopt a regional MS4 permit.

While the Riverside County Permittees appreciate this opportunity to comment on the Administrative Draft, we anticipate providing additional, and perhaps more significant, comments on the Tentative Order. As noted above, our opportunity to review, evaluate, participate in focused meetings on, and develop comments on the Administrative Draft has been significantly constrained by mandates to comply with the 2010 MS4 Permit. Moreover, the Riverside County Permittees reserve the right to make additional or different comments on the Tentative Order from those made on the Administrative Draft, including potentially on similar sections of the permits, as well as to submit redline comments and other exhibits. The provision of comments on the Administrative Draft does not, in any way, preempt the ability of the Riverside County Permittees to collectively or individually make comments on the Tentative Order, and any such comments should be fully considered at that time as part of the formal proceedings.

2 GENERAL COMMENTS

2.1 Authority to Require Regional Permit

Letters were sent by the Orange County and Riverside County Counsels' Offices to the State Water Board's Office of Chief Counsel in May, requesting the views of that office on the legal authority of the Regional Board to issue a single regional MS4 permit covering these three counties, across a number of separate watersheds, with no interconnected MS4, and for which no Report of Waste Discharge (ROWD) had been issued. The Office of Chief Counsel only provided a response to these letters a few days ago, several months after the original letters were sent. While we have reviewed their response, we believe that the response may not have fully considered the entirety of the Clean Water Act regulations regarding jurisdictions that can be regulated on a single permit. The Riverside County Permittees plan to address the Office of Chief Counsel letter separately.

While the Riverside County Permittees continue to reserve the right to contest inclusion in any regional MS4 permit, and wish to state that the submission of comments or participation in focused meetings regarding the Administrative Draft represents no waiver of such reservation, the Riverside County Permittees concur that they may voluntarily agree to enter into such a regional MS4 permit. While the participation of the Riverside County Permittees in focused meetings and workshops should not be construed as any agreement to voluntarily enter into a regional MS4 permit, they remain open to the concept of such a regional MS4 permit, depending on its terms.

2.2 Increase Flexibility to Account for Local Conditions

The Santa Margarita Region has distinctly different hydrology, soils, topography, climate, and water quality concerns than those found in Orange and San Diego Counties. These differences are significant and warrant MS4 permit provisions that are sufficiently flexible to account for them. In addition, the Riverside County Permittees are making significant resource and staff investments in developing and implementing compliance programs for the 2010 MS4 Permit, and are concerned that the inclusion of highly prescriptive requirements in the Administrative Draft, may unnecessarily conflict with the programs developed. If the Regional Board intends to adopt a tri-county regional MS4 permit, these factors must not be ignored or dismissed by Regional Board staff in the development of the Tentative Order, and need to be addressed by giving full consideration to, and not dismissing, each of the comments provided by the Riverside County Permittees.

2.3 Adaptive Management

The Riverside County Permittees are supportive of the adaptive management approach verbally advocated by the Regional Board staff; however the adaptive management approach proposed in the Administrative Draft will require modification to be feasible.

The Administrative Draft does not currently allow true/full adaptive management, and as such will not enable the MS4 Permittees to focus and prioritize their efforts and resources toward obtaining those improvements. The Administrative Draft also proposes an extraordinarily expansive monitoring data collection exercise that is not justified by water quality needs and potential benefits, and certainly not by the conditions found in the Santa Margarita Region. This absence of flexibility and mandated commitment of resources to implement the monitoring program would severely restrict the ability of the Riverside County Permittee's flexibility to redirect resources to address priority water quality concerns.

Recommendation

Effective implementation of an adaptive management approach requires broad compliance and budgetary flexibility to allow the Riverside County Permittees to focus their resources on those BMP strategies and monitoring efforts that are identified in the approved WQIP as being most effective, consistent with the MEP standard, to address the watersheds priorities. A figure entitled "Example Process for Integrated Adaptive Management Process" which illustrates the adaptive management process supported by the Riverside County Permittees is attached to this letter.

The Riverside County Permittees have attached a figure entitled "Example Process for Integrated Adaptive Management Process" which illustrates the type of adaptive management process supported by the Permittees. Following is a narrative summary of the attached figure. Although Orange and San Diego Counties may be including similar figures in their comments, differences underscore the need to collaborate in the development of an effective adaptive management approach, including development of functional definitions of "adaptive management" and "iterative approach" as related to the implementation of compliance programs:

- **WQIP:**

The WQIP should be the primary driver for decisions regarding what programs should be implemented, and the relative scale and resources dedicated to those programs. To provide structure, predictability, and enforceability to that decision process, the WQIP should empower the MS4 Permittees to:

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

- Identify the highest water quality priorities that are affected by discharges from the MS4;
 - Develop jurisdictional and regional BMP strategies, and identify monitoring and assessment efforts, which will be most effective at addressing the watershed's highest water quality priorities affected by discharges from the MS4;
 - Develop an assessment system, including monitoring, to measure progress, and identify and control pollutant sources, etc;
 - The Water Quality Improvement Plan (and the BMP strategies and Monitoring and Assessment Plans (MAP) therein), should be adaptively managed every five years (addressed in the ROWD), and as/if needed in between; and
 - Each MS4 Copermittee should then be held accountable to implement its respective responsibilities as laid-out and scheduled within the WQIP, thereby constituting compliance with the proposed regional MS4 permit.
- *JRMP and Monitoring:*
 - There should not be an expectation (or requirement) that the JRMP and/or the Monitoring programs are separately adaptively managed outside the WQIP process. These plans/programs should be iteratively managed on an ongoing, as-needed basis, provided that WQIP commitments are met. For example, if the WQIP specifies a target for inspections of a particular existing development management area of every three months, a Copermittee should be able to change its internal inspection processes, inspection forms, etc. at any time, provided that the inspections still occur every three months. As illustrated in the attached figure, maintenance of baseline programs (e.g., IC/ID, public education, and others) will continue to be included. However, those baseline programs will be evaluated and revised to tailor to the specific needs of each watershed area and will likely result in changes from the programs described in the existing MS4 permits.
 - The JRMP and monitoring program requirements should be described in the regional MS4 permit as a "menu" of options, recognizing that the WQIP – which will be publically vetted and approved by the Regional Board - will specify those jurisdictional and regional activities that will be implemented to address that watershed's priorities, the appropriate frequencies, performance standards and other compliance elements. This Permit language must recognize that not all compliance requirements specified in the Administrative Draft may be required to appropriately manage high water quality priorities; otherwise if everything is still required all the time, the Copermittees' will NOT be able to focus their resources, and the desired outcomes will likely not be achieved.

2.4 Legal Authority

First, the Legal Authority Establishment and Enforcement provisions, E.1, must be modified to reflect the requirements of law. First, the requirement to address illicit discharges as written is much broader than the requirements of the federal regulations, which require MS4 permittees only to "effectively prohibit through ordinance, order or similar means, illicit discharges to the municipal separate sewer." 40 CFR § 122.26(d)(2)(i)(B). The permit should reflect this language, and should not include any goals or requirements to 'eliminate' or 'prevent' illegal discharges.

Second, the requirement to control discharges from industrial and construction activity should not include the responsibility to control sites covered by general stormwater permits, as that responsibility is that of the Regional Board and fees for the inspection of those facilities are already collected by the State.

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

Third, the regulations do not require interagency agreements between non-MS4 dischargers and third parties such as Native American tribes, Caltrans or the federal government, but only among MS4 permittees. The Regional Board has authority and responsibility under the Porter Cologne Water Quality Act to regulate discharges from other non-MS4 sources, and that responsibility cannot be transferred to the MS4 permittees. The MS4 copermitees can certainly work cooperatively with such third parties on a voluntary basis.

2.5 “Ensuring” Compliance

Provision E.4.d of the Administrative Draft requires MS4 permittees to conduct inspections of construction sites to “ensure” compliance with various requirements. Such terminology can be read as a requirement to ‘guarantee’ compliance. The MS4 permittees are not required under federal law to “ensure” (or guarantee) the compliance of third parties, and cannot in fact do so. These provisions should be modified to require that the MS4 permittees “confirm” that requirements are being met, and to conduct enforcement within their jurisdictional authority, where necessary, to prompt the party to come into compliance.

Additionally, the use of the term “ensure” can be found in other provisions in the Administrative Draft, and the Riverside County Permittees object to those usages as well. In particular, we note that the term is used in Provision E.3.e. (Priority Development Project BMP Impact and Oversight), E.4.a. (Construction Management Project Approval Process), E.5.d. (Existing Development inspections) and in the definition of Jurisdictional Runoff Management Program in the Glossary, which requires that JRMPs “ensure” that pollutants in MS4 discharges are reduced to the MEP. In all these cases, and elsewhere in the Administrative Draft where there is a requirement to “ensure” or otherwise guarantee compliance, the Riverside County Permittees request alternative language, such as “confirm,” which reflects the iterative process of compliance, one which reflects the real world impossibility of ‘ensuring’ compliance.

2.6 Fiscal Analysis

Provision E.8.A. requires that “Each Copermitee must secure the resources necessary to meet all the requirements of this Order.” This requirement is objectionable on several grounds. First, it exceeds the requirements of federal law or regulation. The MS4 regulations require *only* that MS4 permittees submit a “fiscal analysis” of the resources required to accomplish MS4 permit program activities, including a description of the sources of funds. 40 CFR § 122.26(d)(2)(vi). Second, this requirement ignores the real world limitations facing MS4 permittees in attempting to find funding to conduct the programs required under MS4 permits and ignores the economic conditions faced by the Riverside County Permittees. Third, neither the Clean Water Act nor the Porter-Cologne Water Quality Act give the Regional Board budget authority over municipalities or flood control districts. Thus, there is no legal authority for this provision. It should be deleted and replaced with language reflecting the requirements of the MS4 regulations, which are cited above.

2.7 Purpose of Clean Water Act

Throughout the Administrative Draft, it is stated that that the goal of various provisions of the Administrative Draft is to protect, preserve, enhance or restore water quality or designated beneficial uses of waters of the state. It is true that the Clean Water Act has as its basic goal to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) Congress, however, translated that goal for MS4 operators (which does not call for “enhancement” of those waters) in the provisions of Section 402(p)(3)(B), which require that MS4 operators “effectively prohibit” non-stormwater discharges into the MS4s and to “require controls to reduce the discharge of pollutants to the

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” 33 U.S.C. § 1342(3)(B) Thus, the two Congressional requirements for MS4 operators in the Clean Water Act for MS4 Permits are (1) effective prohibition of non-stormwater discharges into the MS4 and (2) the control of pollutants discharged from the MS4, of whatever source, to the maximum extent practicable (“MEP”).

Accordingly, Congress’ intent was not to place the entire burden of achieving the goals of the Clean Water Act in a watershed upon owners/operators of the MS4, nor that the attainment of water quality standards or beneficial uses should be expressed as the ‘goal’ of an NPDES MS4 permit. The USEPA, the State Board and the Regional Boards regulate many other potentially significant sources of pollutants, including from industrial dischargers, publicly owned treatment works, federal and tribal sources and agricultural runoff, sources that are beyond the control of the MS4 owners/operators. It is through the combined and proper regulation – by the USEPA, State and Regional Boards, of each of those sources that the goals of the overall Clean Water Act can be met.

[Additionally, while the Water Board has the authority, under the Porter-Cologne Water Quality Act, to adopt requirements in a waste discharge requirement, that adoption requires the Regional Board to follow the requirements of state law, including those set forth in Water Code § 13263(a), and, without limitation, the requirements of Water Code § 13241. The Administrative Draft does not set forth that such requirements have been complied with, as was required by both state law and the California Supreme Court in *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613, 625.]

2.8 Attempted Transfer of Regional Board Responsibilities

Under the Porter-Cologne Water Quality Act, the Legislature delegated primary responsibility for managing waters of the state to the Regional Boards. This includes developing and implementing multi-discharger watershed management approaches if/where necessary, including directly regulating all sources of pollutants in a watershed. Although MS4 dischargers are only one of those potential sources of pollutants, in several sections the Administrative Draft inappropriately attempts to transfer the entire responsibility and burden of watershed planning and attainment or restoration of beneficial uses to the MS4 Permittees, in the form of MS4 permit requirements and, to that extent, is thus inconsistent with this legislative mandate. These responsibilities include proposed requirements for the MS4 Permittees to singlehandedly take the lead in developing watershed plans, conducting receiving water monitoring; conducting special studies, controlling and regulating non-MS4 pollutant sources, and implementing retrofit and stream rehabilitation projects, each with the goal of restoring or rehabilitating beneficial uses in receiving waters. However, in adopting the Porter-Cologne Water Quality Act, the Legislature determined that the Regional Boards, not the MS4 Permittees (i.e., general purpose governments and flood control districts), are the most appropriate entities to implement such efforts. The Riverside County Permittees have demonstrated their commitment to *participate in* watershed management planning and to implement compliance programs that are focused on addressing the watershed’s highest water quality priorities specifically related to MS4 discharges to the extent of their authorities. However, the Riverside Copermittees are not willing to usurp what is otherwise the responsibility of the Regional Board, and to unilaterally pay for activities, such as previously mentioned, that which should be accomplished via the combined resources and proper regulation of all sources, including non-MS4 sources.

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

The Administrative Draft also attempts to assign all responsibility and liability for funding programs for improving receiving water quality and attaining water quality objectives in receiving waters on the MS4 dischargers. Development and implementation of water quality improvement plans, receiving water monitoring, and monitoring of non-MS4 sources of pollutants must be supported by all of the entities responsible for these pollutant sources. These other sources include Phase II facilities, sites permitted under the General Construction and Industrial Stormwater Permits, federal and state facilities (including Caltrans), agricultural sources, POTWs, purveyors of reclaimed water, and NPDES and waste discharge requirement dischargers otherwise authorized by the Regional Board. The requirement in the Administrative Draft for the MS4 permittees to fully fund the development and implementation of watershed improvement plans would constitute an attempted transfer of local public resources to support the activities of these other public and private entities. If the Regional Board's desired objective is to implement a watershed approach rather than a discharger-based approach, the Regional Board must require all dischargers and sources in the watershed to participate in jointly funding the watershed planning efforts.

Recommendation

If the Regional Board endeavors to accomplish the broader goals of the Clean Water Act, the proper means would be to focus existing Regional Board staff and resources on proper proactive regulation and permitting of all source categories, and bringing those sources together to implement the desired watershed and Basin Planning. All requirements or implications that any element of the MS4 permittees' programs should to singlehandedly take on or lead those responsibilities, or meet those broader Clean Water Act goals, must be removed in the Tentative Order.

In assigning responsibility for basin planning to the Regional Boards, the Legislature authorized the Regional Boards to issue permits and other mandates and to require funding of compliance requirements. The Riverside County Permittees request that the Regional Board retain its legislatively-mandated leadership role in basin planning and require that all sources of pollutants participate in funding monitoring, planning, compliance and other water quality management activities and that requirements which focus that effort only on MS4 permittees be removed from the Tentative Order. The approach described in the federal regulations for development and implementation of Total Maximum Daily loads is a possible model of such an inclusive process.

2.9 Update of Basin Plan

For outcome-based permitting to be successful, the desired outcomes must be achievable by the discharging entity and take into account the background conditions in the watershed (see previous comments about setting desired goals or outcomes at the broader Clean Water Act goals). The Basin Plan should be updated prior to adoption of a regional permit to identify realistic water quality standards which take into account data reflecting local conditions, not just a literature search.

Recommendation

The Riverside County Permittees support a comprehensive evaluation of the Basin Plan for the Santa Margarita River watershed to determine if water quality standards need adjustment to properly reflect local conditions. With the move to outcome based permitting, such an update is necessary to ensure that limited local resources are focused on solving real environmental problems. Such an update should be led by and adequately funded by the Regional Board with participation by the MS4 permittees and other dischargers and sources in the watershed.

2.10 Use of “including but not limited to” Language

Throughout the Administrative Draft, the wording “including but not limited to” is used to define various requirements. This language is impermissibly vague and ambiguous, and potentially leaves the MS4 permittees open to liability for permit violations due to their alleged failure to guess at additional requirements. The MS4 permittees must have certainty in the requirements of the MS4 Permit so that they can plan their compliance activities. The MS4 Permittees cannot be forced to guess at what additional, unstated requirements may be in the minds of Regional Board staff or citizen plaintiffs. The terms of the MS4 Permit are read like a contract. *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995). A provision requiring a MS4 permittee to perform “including but not limited to” certain identified tasks leaves the MS4 permittee with no certainty that performance of the identified tasks is enough for compliance. This basic uncertainty renders the MS4 permit vague and unenforceable and subject to abuse.

This or similar language can be found in the Administrative Draft at the following places:

A.2.a; B.2.a.6; B.2.c.4; B.5.a.1; B.5.b.1; E.3.c.4.(b); E.3.d.1; E.3.f.4.(a)(4); E.5.c.4.(a); F.3.b.1.(d); Attachment B, General Provision 2.g.2; Attachment B, General Provision j.1; Glossary, definition of “construction site.”

The Riverside County Permittees object wherever this or similar language is found in the Administrative Draft, whether or not identified above.

Recommendation

The proposed MS4 permit can require that minimum steps be followed; if such steps are followed; however, the permittee is in compliance, though the permittee could voluntarily elect to follow additional steps

3 SPECIFIC CONCERNS

The following comments represent specific high level concerns that the Riverside Copermitees have identified at this time. It does not represent a comprehensive set of comments on all issues with the Administrative Draft.

3.1 Findings

The Riverside County Permittees have two separate sets of comments on the Findings set forth in the Administrative Draft. The first addresses the failure of the draft to include findings on important aspects of California law as well as the physical setting of the Santa Margarita Region. The second addresses issues raised by specific Findings that were included in the Administrative Draft.

3.1.1 Needed Additional Findings

The Administrative Draft fails to fully address the context and conditions under which the proposed regional MS4 permit requirements are to be applied. A more complete explanation of this background is necessary to ensure that the provisions ultimately included in the Tentative Order are credible and appropriate, and legally required, and that the provisions (which should stem from the Findings) are written in context of the broader issues that affect MS4. The Riverside County Permittees request that the Regional Board work with the MS4 permittees to expand the Findings, including the addition of findings to address the following:

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

- California Water Law – This body of law requires that downstream entities must accept runoff from upgradient properties. Owners and operators of MS4s are not exempt from this legal mandate, even if that runoff contains pollutants. A Finding which describes this mandate is fundamental to properly frame the role of the MS4 permittees, the difficulties in managing runoff from the MS4, and in turn provide the context for the requirements proposed within the MS4 permit.
- Porter-Cologne Water Quality Act – This legislation establishes the State Water Resources Control Board and the Regional Water Quality Control Boards, not the MS4 permittees, are the primary governmental entities responsible for adequately regulating sources of pollutants to meet beneficial uses in receiving waters in California. Please see discussion above.
- Flooding – Many areas that would be under the jurisdiction of a proposed regional MS4 Permit are subject to periodic catastrophic flooding resulting from natural conditions. This flooding exists even in the absence of development. Such flooding has and will result in loss of life, widespread property damage, and exposes runoff to significant amounts of pollutants from industrial, commercial, residential and agricultural land uses, thus damaging watercourses, habitat and the beneficial uses therein. Further, flooding can mobilize significant volumes of pollutants that can have significant and permanent detrimental effects. MS4 systems are designed and constructed to mitigate these impacts. A Finding describing these conditions is necessary to provide a context for the role of drainage system improvements in the management of flood waters and receiving water quality.
- Flood Control District Acts – The Legislature adopted separate acts to establish Flood Control Districts in Orange, Riverside, and San Diego Counties. In these Acts, the Legislature has determined that protection of life and property from the effects of flooding through the implementation of flood control improvements is a priority, and has assigned those Districts with the sole responsibility for the identification of necessary flood hazard mitigation efforts, and the construction and maintenance of those improvements that are necessary to manage and contain flood waters to prevent such negative impacts. These improvements are not only critical to the protection of life and property, but they represent fundamental water quality BMPs inasmuch as they reduce the widespread exposure of runoff to pollutants. Additionally, the Flood Control Districts, while being owners and operators of MS4s, have no authorities or powers beyond those granted by the Legislature in their Acts. The Legislature did not provide the districts authority to control the quality of runoff received by their MS4 facilities. Additionally, the Districts lack authority to govern land use activities since they are not municipal entities. Findings describing the legislative priority for flood control and the limitations on the governing power of the Flood Control Districts are necessary to provide context for the role of flood control improvements relative to water quality priorities and to provide context for the appropriate role of the Flood Control Districts as MS4 permittees.
- Limits of Permittee Legal Authority - The MS4 permittees lack the authority to regulate many of the categories of sources of pollutants that may impact surface receiving waters. For example, the Permittees lack authority to regulate pollutants discharged from federal and state lands and facilities, tribal lands, special districts, utilities, agriculture, and railroads. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) precludes local regulation of pesticides. In some instances, the Regional Board has authority to regulate these sources. A Finding(s) describing these limitations is necessary to provide context for properly assigning responsibilities to the MS4 permittees.

3.1.2 Findings 3, 4 and 16

Findings 3 and 4 of the Administrative Draft erroneously state that the Clean Water Act requires controls to reduce the discharge of pollutants “in storm water” to the MEP. Finding 16 states that non-storm water discharges from the MS4 are “not considered storm water discharges and therefore are not subject to the MEP standard, arguing that the MEP standard “is explicitly for ‘Municipal . . . Stormwater Discharges’” from the MS4s.

In fact, the plain language of the Clean Water Act is silent as to the nature of the waters discharged from MS4s which must be controlled to the MEP standard. See 33 U.S.C. § 1342(p)(3)(B)(iii). While the heading of 33 U.S.C. § 1342(p) refers to “Municipal and industrial stormwater discharges,” this is not dispositive, as 33 U.S.C. § 1342(p)(3)(B)(ii) in fact refers specifically to “non-stormwater” discharges. Also, USEPA, in the preamble to the final stormwater regulations, made it clear that “MEP control measures” would be implemented to address not only pollutants in “storm water” but also from “non-storm water discharges.”

As the preamble states:

"Permittees are required to develop management programs for four types of pollutant sources which discharge to large and medium municipal storm sewer systems. Discharges from [such systems] are usually expected to be composed primarily of: (1) Runoff from commercial and residential areas; (2) storm water runoff from industrial areas; (3) runoff from construction sites; and (4) non-storm water discharges. Part 2 of the permit application has been designed to allow [permittees] the opportunity to propose MEP control measures for each of these components of the discharge."
55 Fed. Reg. at 48052. (emphasis supplied)

This language sets forth USEPA’s understanding of the plain language of the Clean Water Act: “pollutants” must be controlled to the MEP from the MS4 “discharge,” not merely pollutants in stormwater.

3.1.3 Finding 27

This finding purports to find that the regional MS4 permit proposed in the Administrative Draft does not constitute an unfunded state mandate. The Riverside County Permittees take issue with the subsections set forth in this finding. More importantly, the finding is without legal effect because exclusive jurisdiction as to whether a state mandate exists lies with the Commission on State Mandates. Government Code §§ 17751 and 17552; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 837; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1546, 1596-97. The finding of an agency that has no jurisdiction to make that finding is entitled to no weight. This finding should be deleted.

3.1.4 Finding 29

The Riverside County Permittees believe that the receiving water limitation language set forth in the Administrative Draft renders compliance with the regional MS4 permit proposed in the Administrative Draft impossible, since exceedances of water quality standards may occur routinely through no fault of the MS4 Permittees. Please see discussion regarding Provision A, below. Moreover, this same language, as recently interpreted by the United States Court of Appeals for the Ninth Circuit in *Natural Resources Defense Council v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011), *cert. granted*, ___ U.S. ___ (2012), renders any “iterative process” to comply with water quality standards or other requirements superfluous, since the Ninth Circuit ruled that the prohibitions against discharges that exceed water quality standards or create condition of nuisance must be read, and enforced, separately

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

from the iterative process otherwise set forth in the MS4 permit. 673 F.3d at 892. The Riverside County Permittees view the exposure to third party litigation from the Receiving Waters Limitations language, highlighted by the *NRDC* case, to be one of the most significant detriments to the otherwise collaborative effort to design a regional MS4 permit that utilizes an iterative approach to achieve long term water quality improvement.

3.2 Provision A, Prohibitions and Limitations

As noted above, the requirements set forth in Provision A are of great concern to the Riverside County Permittees, especially in light of the recent *NRDC* decision by the Ninth Circuit. The Riverside County Permittees note that the State Water Board has proposed a workshop scheduled for November 20, 2012, in which the concerns of stakeholders regarding the current Receiving Water Limitations language (which is reflected in the Administrative Draft) and how it has been interpreted by the Ninth Circuit, will be addressed. Additionally, the Riverside County Permittees have reviewed comments submitted by South Orange County permittees on Provision A and believe that this approach may have merit.

The Riverside County Permittees generally support an approach to compliance that utilizes Water Quality Improvement Plans (WQIP). Additionally, the Riverside County Permittees have reviewed comments submitted by South Orange County permittees on Provision A and believe that this approach has merit in addressing the problems raised by the *NRDC* decision. However, the Permittees wish to note a concern that the basic benefit of the WQIP approach, its prioritization of resources and effort to address the greatest threats to water quality, not be lost if the MS4 Permittees must develop ‘additional BMP strategies’ and ‘schedules for implementation’ for every exceedance of a water quality standard or other receiving water limitation that is not identified as a high priority for the watershed.

Recommendation

The Riverside County Permittees request that the Regional Board revise Provision A in a manner that ensures that a true iterative process be employed with respect to the Receiving Water Limitations language and further request that no Tentative Order version of Provision A be released until after the State Water Board has considered this issue.

In the absence of a revised precedential order from the State Water Board, the Riverside County Permittees further request that the Regional Board consider the alternative language being submitted by stakeholders on the Administrative Draft intended to address the loss of the iterative process originally set forth in State Board Order Nos. 99-05 and 2001-0015. *In particular*, to facilitate successful implementation of an Adaptive Management process, Provision A should not require that every exceedance to become a ‘de-facto’ high priority water quality concern outside of the WQIP prioritization process.

3.2.1 Provision A, Introduction (page 9)

The Riverside County Permittees have the following comments on this paragraph. First, the provision sets forth a goal that includes the enhancement and restoration of water quality and designated beneficial uses. Please see comments above regarding how Congress determined to implement the goals of the Clean Water Act through permits for MS4 dischargers. Second, the provision states that the MS4 permit will implement control measures that effectively prohibit non-storm water discharges “into and from the Copermittees’ MS4.” The Clean Water Act requires only the effective prohibition of non-stormwater discharges *into* the MS4. 33 U.S.C. § 1342(p)(3)(B)(ii). Third, the provision notes the pollutants “in

storm water discharges” from the MS4 must be controlled to the MEP. As discussed above, the Clean Water Act does not differentiate between storm water and non-stormwater discharges from the MS4. Moreover, as noted above, these provisions do not acknowledge the fact that California water law requires that upstream runoff must be accepted, without exception as to the quality of the runoff. To manage the quality of MS4 discharges, the MS4 Permittees will necessarily rely on the proactive efforts to control discharges and sources not under their control.

3.2.2 Provision A.1.a (page 9)

The Riverside County Permittees have two comments. First, the provision prohibits “discharges into MS4s.” Such discharges are not the responsibility of the MS4 operators but rather third party dischargers, and thus are beyond the scope of the MS4 permit. Second, the provision prohibiting discharges which are “threatening to cause” a condition of pollution, etc. is unenforceable, because it prohibits an action that, with respect to MS4 operators, is beyond their control. Also, there is no authority for such provisions in waste discharge requirements.

3.2.3 Provision A.1.b (page 9)

This provision in the Administrative Draft attempts to prohibit non-stormwater discharges “from” MS4s.” As noted above, such discharges are subject to the MEP standard, not the “effective prohibition” standard. The “effective prohibition” standard in the Clean Water Act refers only to discharges of non-stormwater “into” MS4s. Also, the Clean Water Act requires that discharges of non-stormwater *into* the MS4 must be “effectively prohibited,” so the word “effectively” should be added to this subsection.

3.2.4 Provision A.1.c (page 9)

This provision in the Administrative Draft requires the MS4 permittees to comply with the Basin Plan prohibitions listed in Attachment A. This list is over-inclusive, as it contains many requirements that are inapplicable to either any MS4 discharger, or to the Riverside County Permittees in particular. The Riverside County Permittees request that this provision be amended to read as follows: “Discharges from MS4s are subject to all applicable waste discharge prohibitions in the Basin Plan.”

3.2.5 Provision A.2.a (pages 9-10)

The Riverside County Permittees have three comments on this provision of the Administrative Draft. First, as noted above, this provision and Provisions A.1. and A.3 should be subject to an iterative process described in A.4. The language employed in Provision A.2.a. as well as elsewhere in Provision A (in subsections A.1 and A.3.) has been interpreted to impose strict liability on MS4 Permittees for any exceedance of a water quality standard. *NRDC*, 673 F.3d at 892. Second, the provision uses the “including but not limited to” language discussed previously. Third, the Riverside County Permittees are concerned that the plans, policies, etc. set forth in Provision A.2.a.(1)-(4) may not all qualify as “water quality standards” or be applicable to the MS4 permittees. These subsections should be deleted, and replaced with a reference to “Water Quality Standards,” which is a defined term in the Administrative Draft. Otherwise, the MS4 permit would become over inclusive with respect to what is considered a water quality standard. Such standards must be established in accordance with federal and state law. If this process has not been followed for a particular requirement, it is not a “water quality standard.”

3.2.6 Provision A.2.c (page 10)

The Riverside County Permittees believe that this requirement should simply reflect that, for Receiving Water Limitations associated with a water body/pollutant combination addressed in a TMDL in

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

Attachment E, the MS4 Permittees must achieve compliance as outlined in Attachment E (Total Maximum Daily Load Provisions).

3.2.7 Provision A.3.a (page 11)

As discussed above, this provision erroneously states that pollutants “in storm water discharges” from MS4s must be reduced to the MEP. This MEP requirement applies to all discharges from MS4s as discussed above.

3.2.8 Provision A.3.b (page 11)

This provision should also provide that compliance with a TMDL constitutes compliance with those pollutants/water bodies subject to a TMDL.

3.2.9 Provision A.4.a (pages 11-12)

The Riverside County Permittees support an approach whereby compliance with Provisions A.1 through A.3 are achieved through a truly iterative approach, one which reflects the intent of the precedential State Water Board Order Nos. 99-05 and 2001-015. The Riverside County Permittees note again that the State Water Board is planning a workshop on November 20 to discuss Receiving Water Limitations language, and request that the Regional Board hold in abeyance any Tentative Order language on Provision A until that workshop has been held and any revisions to Receiving Water Limitations language are adopted by the State Water Board.

3.2.10 Provision A.4.b (page 12)

This provision proposed in the Administrative Draft, which requires the repeating of the procedure set forth in Provision A.4.a. unless directed not to do so by the Regional Board, does not reflect the language of State Water Board Order No. 99-05, which does not require such repetitions. This provision should reflect either the provisions reflected in precedential decisions of the State Water Board or potential new Receiving Water Limitations language to be adopted by the State Water Board in response to the *NRDC* decision.

3.2.11 Provision A.4.c (page 12)

This provision should be deleted. It affords the Regional Board untrammelled discretion to enforce the proposed MS4 permit, making any iterative process absolutely without meaning, and potentially further reinforcing the Ninth-Circuit Court of Appeals decision. While the Regional Board plainly retains its jurisdiction to enforce the MS4 permit, but the MS4 Permittees must be given the ability to address the requirements of Provision A through a true iterative process.

3.3 Provision B, Water Quality Improvement Plans

3.3.1 Provision B, introductory paragraph (page 13)

This paragraph states that the “goal” of the Water Quality Improvement Plan (“WQIP”) “is to attain the reasonable protection, preservation, enhancement, and restoration of water quality and designated beneficial uses of water of the state.” Such a goal is not a requirement for NPDES MS4 permittees, who are required under the Clean Water Act, again, to effectively prohibit non-stormwater discharges into the MS4 and to apply controls to the MEP to address discharges from the MS4. Please see the general comments above.

3.3.2 Provision B.2.d (page 17)

This provision requires that numeric targets and schedules must be used to measure progress towards “an ultimate outcome of protections, preservation, enhancement, and restoration of receiving water beneficial uses.” As discussed above, meeting the broader goals of the Clean Water Act cannot be singlehandedly assigned to a single discharger group, in this case the MS4 permittees. The goals of an MS4 Permit are clearly established in the Clean Water Act; see comments above.

3.3.3 Provision B.3 (page 18)

The introductory paragraph again refers to the requirement to prevent or eliminate non-stormwater discharges “from the MS4” and reducing pollutants in “storm water discharges” to the MEP. As noted above, the Clean Water Act requires effective prohibition of discharges “into” the MS4, and does not distinguish between stormwater and non-stormwater in discharges from the MS4 subject to the MEP standard.

3.4 Retrofitting and Channel Rehabilitation

In Section II.E.5.b the Administrative Draft proposes to require the MS4 permittees to develop and implement a program to retrofit areas of existing development to reduce the discharge of pollutants in stormwater from the MS4 to the MEP and to restore impaired beneficial uses of streams within their jurisdictions. During the Focused Meeting on the Administrative Draft in Vista on August 22, Regional Board staff stated that all MS4 permittees would be expected to identify and implement retrofit and restoration projects.

The Riverside County Permittees have the following comments regarding these proposed requirements:

- These requirements not only go beyond the Clean Water Act requirements established in 33 U.S.C. § 1342(p)(3), they also could compromise public safety and flood control efforts, as described below.
- Flood control channels are generally not part of the MS4 but rather navigable waters of the United States. The Clean Water Act does not require “rehabilitation” of such navigable waters.
- As described in our comments on “Findings” above, the State Legislature has mandated that the Flood Control Districts, including the Riverside County Flood Control and Water Conservation District, implement measures necessary to protect lives and property from flooding. Achieving this protection may require the construction and maintenance of engineered channels. A requirement to “restore” or even rehabilitate such streams can conflict with these requirements, and must be removed. While there may be cases where rehabilitation can occur, it is up to the Flood Control Districts to determine when that is feasible consistent with their legislative mandate for protection of lives and property from flooding. It is inappropriate for the Regional Board to set policy within an MS4 permit that presumes and/or requires such restoration or rehabilitation to occur.
- The MS4 Permittees cannot be unilaterally held responsible for restoring receiving waters as has been discussed previously.
- Retrofitting and channel rehabilitation projects can only be considered warranted and responsible use of public funds where the WQIP has identified both that such projects are necessary and that funding is realistically available and, moreover, that the project will not interfere with an MS4 permittee’s ability to meet other societal needs including the protection of public safety. Retrofit and channel rehabilitation projects should only be considered a ‘tool in the toolbox’ – not a mandated compliance requirement.

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

- “Rehabilitation” of flood control improvements should only be considered where such projects are determined to be consistent with Army Corps of Engineers mandates for navigable waters and flood protection applicable to such improvements. Such flood control channels are most likely navigable waters of the United States, and not MS4.

3.5 Monitoring

Provision D of the Administrative Draft proposes a 22-page detailed, prescriptive and expensive monitoring-centered approach that is extremely broad and excessive relative to the data needed to manage water quality in the Santa Margarita Region. The proposed monitoring provisions should be revised to provide for identification of monitoring programs that are specific to the needs of each hydrologic unit. Specifically, monitoring should have three purposes:

- Inform receiving water priorities in the WQIP (and future updates thereto)
- Help identify pollutant sources to those receiving water priorities
- Help assess the effectiveness of the BMP strategies

These purposes are part of the Monitoring Action Plan (‘MAP’ - part of the WQIP) – so the WQIP (not the permit itself) should define specifics of the ‘where’, ‘when’, ‘how often’, and ‘for what’ that needs to be monitored. The monitoring provisions in the proposed regional MS4 permit should be limited to broadly establishing the monitoring elements that need to be considered in developing the MAP, but leave the specifics to the WQIP.

3.6 Non-Stormwater

As previously stated, the Clean Water Act only requires the ‘Copermittees’ to ‘effectively prohibit’ Non-Stormwater discharges ‘into’ the MS4. It is not practical to presume, nor to require, that Non-Stormwater discharges need to be ‘eliminated’ everywhere. Proactive source IDs and elimination of pure non-stormwater, should ONLY be done if/when/where the WQIP dictates that is an appropriate strategy to address the watershed’s highest priorities, or where there is an obvious pollutant (illegal) discharge. For example, if a non-stormwater discharge infiltrates and does not reach perennial surface waters, these discharges have little opportunity to affect the beneficial uses of the perennial surface waters. Redirecting resources to conduct source IDs and enforcement for such a discharge reduces the Copermittees’ ability to implement efforts that are important to the watershed’s priorities, and further diminishes the overall credibility of the MS4 permit programs. It would be better to allow the Copermittees to focus such efforts on discharges that are known or believed to be affecting those identified watershed priorities. In that case, during enforcement, the Copermittees can better explain to dischargers why a discharge needs to be eliminated.

4 CONCLUSION

The Riverside County Permittees are supportive of an MS4 Permitting approach that reduces compliance costs and provides for a more focused, flexible, and adaptive approach to addressing priority water quality concerns. Based on the markedly different climatic, hydrologic, and water quality conditions between the Santa Margarita Region and Southern Orange and San Diego Counties, a less prescriptive management approach that relies on a more robust and integrated adaptive management program is needed to cost-effectively address the priority water quality concerns in our watershed.

Ms. Laurie Walsh

- 17 -

September 13, 2012

Re: Administrative Draft Order R9-2012-0011,
NPDES No. CAS 0109266 and Waste
Discharge Requirements for MS4s Draining
the Watersheds within the San Diego Region

The Riverside County Permittees strongly support working with the Regional Board staff, the San Diego and South Orange County MS4 permittees and other interested parties in developing a more cost-effective integrated adaptive management approach to addressing high priority water quality concerns. The Riverside County Permittees request that the Regional Board staff continue to work with the MS4 Permittees in all three counties, prior to the release of a Tentative Order, to address the concerns of the three counties, including those discussed in this letter.

Very truly yours,

JASON E. UHLEY
Chief of Watershed Protection Division

CP:BC:cw
P8/

Example Process for Integrated Adaptive Management Process

* This presents an example scenario. Based on the strategy, various JRMP elements may become prioritized.

