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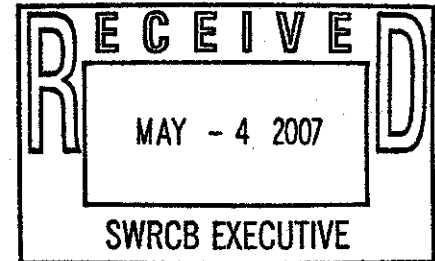
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**RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT**

May 4, 2007

Construction General
Permit - Stormwater
Deadline: 5/4/07 5pm

Ms. Song Her
Clerk of the Board
State Water Resource Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Dear Ms. Her:

Re: Preliminary Draft General National
Pollution Discharge Elimination System
Permit for Construction Activities

The Riverside County Flood Control and Water Conservation District (District) serves as the Principal Permittee for NPDES Municipal Separate Storm Sewer System (MS4) Permits covering the cities of Banning, Beaumont, Calimesa, Canyon Lake, Cathedral City, Coachella, Corona, Desert Hot Springs, Hemet, Indian Wells, Indio, Lake Elsinore, La Quinta, Moreno Valley, Murrieta, Norco, Palm Desert, Palm Springs, Perris, Rancho Mirage, Riverside, San Jacinto and Temecula as well as the County of Riverside and the Coachella Valley Water District. In collaboration with the aforementioned Cities and County of Riverside, the District is submitting comments on the Preliminary Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities Order No. 2007-XX-DWQ (PDP).

SUPPORT FOR CALIFORNIA STORM WATER QUALITY ASSOCIATION COMMENTS

As a participating member of the California Stormwater Quality Association (CASQA), we support their comment letter. The comments presented below are supplemental to the comments presented by CASQA. They are intended to identify additional issues or further define issues raised in the CASQA comment letter.

GENERAL COMMENTS

As a policy, the Permittees oppose incorporation of Post-Construction Best Management Practice (BMP) requirements in the Preliminary Draft Permit (PDP). The Permittees strongly believe that a State-wide stormwater policy is necessary to define the roles and requirements for each NPDES Permit. Such a policy would prevent the State Water Resources Control Board's (SWRCB) perceived need for cross-over requirements such as incorporation of post-construction hydromodification requirements into NPDES permits for construction related activities.

The Permittees strongly believe that if the SWRCB is proposing to significantly enhance the requirements of the PDP, the SWRCB should ensure that the Regional Water Quality Control Boards (RWQCB) have adequate resources to implement, inspect and enforce the PDP requirements. It is

not appropriate for the SWRCB to presume that municipal governments will ultimately be liable for enforcing the requirements of the PDP through their MS4 Permits. These Permits are issued by the SWRCB, under the authority of the Federal Clean Water Act, and with the express expectation from the Environmental Protection Agency (EPA) that the SWRCB will administer the permit programs, including any required inspections and enforcement.

UNINTENDED CONSEQUENCES FOR PUBLIC WORKS PROJECTS

The Permittees are concerned that the proposed permit may have unintended consequences for public works projects. For this reason, the Permittees believe that municipal transportation projects and other public works projects be appropriately considered in the PDP. The existing transportation system of a local municipality is also part of its MS4, accepting run-on from adjacent properties, both developed and undeveloped. As a result, transportation improvement projects such as street widening for safety and capacity (both level of service and hydraulic), bikeways, and pedestrian facilities must consider and accept run-on from sources outside the project area.

Diversion of the run-on flows is usually not a good option due to legal, financial, and safety impacts to the public and environment. Therefore, in order to meet the requirements of the PDP, both construction and post-construction hydromodification BMPs must be designed and sized to accommodate not only runoff from the project but also run-on from sources outside the project site. The proposed new Permit requirements on a transportation project will significantly increase its cost. These additional design, construction and maintenance costs may not be eligible for transportation funding sources such as State Gas Tax and Federal Transportation Funds (TEA 21 and SAFETEA-LU) due to the sources of runoff not being transportation related. The mandated costs without associated funding will impose an unfunded burden on the Permittees. In addition, the increased size of Post-Construction BMPs may require the acquisition of real property for implementation, thus possibly disrupting neighborhoods.

RISK-BASED APPROACH

The Permittees strongly agree with CASQA's recommendations regarding the need to modify the risk-based approach proposed in the PDP. The soil criteria and other factors would categorize public works construction projects as medium or high risk, particularly during the dry season. Necessary modifications need to be made to the risk-based characterization, including adding wet season and dry season criteria to ensure that the risk categories have meaning and are effective tools at mitigating real water quality impacts while protecting scarce public funds.

HYDROMODIFICATION

The Permittees oppose incorporation of Post-Construction BMP requirements in the PDP. In addition to the previously mentioned negative impacts to municipal public works projects and the issues raised in the CASQA letter, it is our belief that hydromodification provisions are already adequately addressed in the development review process based on existing case law and standard

operating practices of land use authorities. These requirements are independent of MS4 Permit coverage or current General Construction Permit coverage. Duplicative requirements in the PDP may result in wasted public resources associated with having to reprocess CEQA, tentative maps, plans and specifications for projects whose PDP hydromodification proposals are denied or modified through the PDP public review process.

The Natural Watercourse Rule as established in *San Gabriel Valley Country Club vs. County of Los Angeles* (1907) 182 Cal. 392 requires that drainage areas not be unreasonably altered. Specifically, the Natural Watercourse Rule granted immunity to upstream landowners who make drainage improvements as long as those improvements conform to three basic premises:

1. They have not diverted runoff out of its pre-development, or *natural* watershed;
2. Runoff is conveyed to the natural stream course (with bed and bank) that the runoff would have naturally flowed to; and
3. The upstream improver has not created *unnatural* diversions, obstructions or trespassed into the high-flow channel cross section which could be construed as unreasonable, negligent or worthy of trespass.

In 1994, the California Supreme Court placed a limit on the Natural Watercourse Rule with respect to alterations of flow volume and velocity by development. *Locklin vs City of Lafayette* (7Cal 4th 327, 1994) specifically established that private and public landowners can be held liable, despite the Natural Watercourse Rule, if they act unreasonably in the collection, conveyance, and discharge of surface waters, including the improper management of increased stormwater volume or velocity from development. Public agencies are also held liable for watercourses that are converted into public works, such as MS4. Locklin specifically dealt with degradation of downstream receiving water due to public improvements in an upstream watershed. This liability is independent of MS4 Permit or current General Construction Activity Permit requirements. In summary, both public and private property owners, and land use authorities, are required to manage stormwater run-on, stormwater conveyance through the project, and discharge of stormwater from the project so as to ensure that all impacted property owners, both present and future, and upstream and downstream, are not negatively impacted by development.

Land use authorities already review developments for conformance with the previously cited case law for both watershed diversions and increases in runoff volume and velocity. Proposed management of these drainage issues typically effects lotting for tentative development projects. Management practices proposed by developers require careful consideration of design, maintenance, and funding by land use authorities, and are subject to CEQA review. Incorporating Post-Construction Hydromodification BMP requirements into the PDP effectively provides the Regional Board with a veto for any proposed stormwater management BMP proposal, long after the completion of the CEQA process and local land use decision making. Because the PDP coverage would only be applied for after tentative maps have been approved, plans have been developed, and maintenance and financing mechanisms agreed to for stormwater management BMPs addressing hydromodification, Regional Board mandated revisions to structural hydromodification BMPs:

- May require a proposed development to reconsider lotting to incorporate additional BMPs such as detention/retention basins, effectively wasting all of the public resources dedicated to the review and approval of the initial development proposal;
- May not be consistent with municipality efforts to implement BMP design, prioritization, maintenance and funding requirements to ensure proper design and maintenance of BMPs;
- Can negatively impact the Permittees' obligations under MS4 NPDES Permits to ensure the ongoing function and maintenance of Post-Construction BMPs; and
- May interfere with the land use authorities.

In addition, most MS4 Permit programs in southern California, if not throughout the State, are already in the process of, or have recently completed, developing hydromodification criteria that either confirms or exceeds existing stormwater management criteria. Development of such criteria includes an assessment of stream types susceptible to hydromodification, land use changes that may exacerbate hydromodification, and potential management measures for hydromodification. Such a scientific study is currently underway by the Southern California Coastal Watershed Research Project, with the support of several southern California Counties and municipalities for watersheds in southern California. It is likely that the recommendations of this study will be incorporated into several southern California MS4 Permits. In Riverside County, the Permittees have committed to enhancing existing hydromodification criteria based on the findings of this study. The SWRCB should rely on these very sophisticated and detailed scientific efforts to assess hydromodification and identify in the planning stage appropriate Post-Construction BMPs for mitigating hydromodification impacts of new developments, not more generalized requirements in the general construction permits.

Further, if the hydromodification requirement remains for non-MS4 areas, a phased-in schedule for these requirements should be considered. Clarification as to the recharge requirement or expectation should also be identified with the PDP.

RECEIVING WATERS MONITORING

Though monitoring may be an effective tool at evaluating the impacts to receiving waters, the receiving waters monitoring program proposed in the PDP is not infeasible. From our understanding of the April 17, 2007 PDP workshop, the monitoring requirement will be used more for the purpose of receiving waters data collection to answer bigger picture questions about impacts of construction activities. However, the Permittees question the purpose and value of implementing this program on a site-by-site basis, especially considering safety issues associated with monitoring receiving waters, the potential to foster unintentional trespassing, and the difficulty of accessing/locating receiving waters in some areas.

If the SWRCB wishes to implement such a monitoring program, they should incorporate the cost of monitoring into the Construction Permit Fee and implement the monitoring program as part of SWAMP.

RAIN EVENT ACTION PLAN

In addition to comments identified in the CASQA letter, the PDP should clearly identify Rain Event Action Plan (REAP) amendment procedures and requirements. The PDP should specifically:

- Ensure that it is feasible for onsite Project Engineers or Site Foremen to obtain the training necessary and authority to update the REAP as necessary to ensure appropriate BMPs are implemented in a timely manner;
- Identify what level of detail is expected for the REAP. A template document for the REAP incorporated into the PDP would assist dischargers with determining appropriate levels of effort;
- Identify how the REAP integrates with the Storm Water Pollution Prevention Plan (SWPPP);
- Identify the frequency to which the REAP must be updated. This may vary with every site, but it is not clear as to whether the REAP needs to be storm specific, construction phase specific or programmatic. The Permittees believe that a REAP that is specific to each major phase of construction would be the most appropriate level of effort (mass grading, fine grading, streets and utilities, vertical construction, etc); and
- Incorporate flexibility to implement rain event BMPs be provided. For example, if a sufficient rain event is predicted 48 hours in advanced, appropriate BMPs must be in place 24 hours prior to the rain event, presuming the rain event is still predicted at that time.

ACTIVE TREATMENT SYSTEMS

The Permittees are concerned with the implementation of ATS prior to scientific confirmation by the SWRCB that such technologies do not cause toxicity. Further, the Permittees believe that existing erosion control and sediment control technology requirements, when properly implemented, more than adequately control pollutant discharges from the vast majority of public works projects.

Further, the Permittees are concerned about the costs, feasibility, and ramifications of toxicity data collection for active treatment systems. The Permittees do not believe that toxicity monitoring required each 24 hour period of ATS operation is justified, particularly given that toxicity tests can take up to 72 hours to complete. As noted by SWRCB staff at the April 17th workshop, it is not the intention of the SWRCB to require retention of ATS effluent until toxicity impacts can be assessed. Therefore, any adverse environmental impacts from detected toxicity would likely have already occurred by the time toxicity results were received. We, therefore, request the SWRCB carefully reconsider toxicity testing requirements in the PDP. If toxicity testing requirements are incorporated, we recommend that the SWRCB develop toxicity monitoring guidelines based on site risks and feasible timing of attaining toxicity results. The PDP should also identify limitations of testing, a phase-in period and applicability.

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GRANDFATHERING CLAUSE

As identified in the PDP, existing dischargers shall include and implement necessary revisions to their SWPPP and Monitoring Program to reflect the changes in this General Permit no later than 90 days after permit adoption. As indicated in the CASQA comment letter, a grandfathering clause should be added for projects already in construction, those that have completed their land development approval processes with local agencies, and those projects funded by public entities that will not be able to redesign to meet the new requirements.

PUBLIC NOTIFICATION

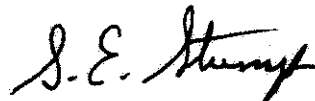
The Permittees do not support online publication of monitoring data. The web-based Action Level Exceedance Evaluation Report (ALEER) increases liability to a project. While targeted effluent levels might be exceeded on occasion, posting the information on the website will target Permittees for liability, without regard to their remedies, the cause of the occurrence or past levels of compliance. Therefore, "good actors" are just as at-risk as "bad actors" to third party lawsuits. This may facilitate a waste of public resources. Freedom of information requests should be responded to on an individual basis. Therefore, it is recommended that ALEER results not be posted online.

The Permittees also believe that the additional specific requirements in this permit are sufficient to prevent "self-regulation" and that the additional public notification requirements are redundant. Further, we believe that the public review periods will unduly delay the construction process and could result in certain interest groups unduly delaying public works projects for purposes other than protecting water quality.

CLOSING

The Permittees are committed to continuing their ongoing efforts to work cooperatively with the SWRCB staff in implementing an effective general construction program. If you have any questions concerning this matter, please feel free to call me at 951.955.8411 or Jason Uhley at 951.955.1273.

Very truly yours,



STEPHEN E. STUMP
Chief of Regulatory Division

JEU:cw
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