



RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT
August 15, 2013

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Dear Ms. Wadhvani:

Re: SWRCB/OCC File A-2236(a) through
(kk) – Questions Concerning
Los Angeles County MS4 Permit

This letter is provided on behalf of the communities participating in the Riverside County Stormwater Program, (collectively, the "Riverside County Communities")¹ to respond to your letter dated July 8, 2013 regarding the above-referenced petitions. The Riverside County Communities appreciate this opportunity to provide comments on the important issue of how communities regulated by municipal separate storm sewer system ("MS4") permits in California can obtain a path of compliance with receiving water limitations ("RWL") requirements in those permits. This letter addresses your two questions, and also discusses additional reasons for reform of the current RWL language.

The District addressed these issues in our November 13, 2012 response to the State Water Resources Control Board's (State Board) call for comments in advance of its November 20, 2012 workshop on RWL language reform. The Riverside County Communities have attached this letter and its attachments as Exhibit 1 and request that it be added to the record in the Los Angeles County MS4 Permit ("LA MS4 Permit") appeal.

In assessing how RWL language might be reformed, it is important to highlight the progress that has been made in improving receiving water quality in California towards achieving the Clean Water Act's stated goal of fishable and swimmable waters. Improvements in sewage treatment, industrial wastewater discharges, and stormwater management have resulted in significant improvements to receiving water quality and protection of beneficial uses. In Riverside County, the regulated communities have worked with the State Board, the Regional Water Quality Control Board's (RWQCBs) and other stakeholders to successfully develop programs to address water quality impairments. However, due to numerous factors, including the very complexity of pollutant sources

¹ Riverside County Flood Control and Water Conservation District ("District"), County of Riverside, Coachella Valley Water District, and the Cities of Banning, Beaumont, Calimesa, Canyon Lake, Coachella, Corona, Cathedral City, Desert Hot Springs, Hemet, Indian Wells, Indio, Lake Elsinore, La Quinta, Menifee, Moreno Valley, Murrieta, Norco, Palm Desert, Palm Springs, Perris, Rancho Mirage, Riverside, San Jacinto, Temecula, and Wildomar.

(including from sources beyond the control of the regulated communities, such as motor vehicles, natural sources, and other non-MS4 sources), regulations that predate the science necessary to fully understand the impacts of stormwater on beneficial use attainment (particularly for nutrients and bacterial indicators), the lack of technology to effectively control pollutant sources, the continuing need to promote significant behavioral changes in various segments of society, and the wide variability of the magnitude of storm events, regulated communities are not in a position to ensure that MS4 discharges do not cause or contribute toward RWL exceedances.

For example, of the over 300 potential pollutants monitored in receiving waters in Riverside County, only a handful may exceed water quality objectives from time to time. Some of these pollutants, such as nutrients, bacterial indicators, iron, and manganese are challenging to address because they are both naturally and anthropogenically sourced. Metals such as copper, lead and zinc also exceed water quality objectives, yet are most typically linked to motor vehicles that are outside the authority of the regulated communities to control, as is toxicity that may be caused by lawfully applied pyrethroid pesticides. The proper management of these sources will require a combination of federal and state regulatory adjustments, public education, and local controls that will not be accomplished within the term of a single MS4 permit term, or even several permit terms. For these reasons, an adaptive management approach, such as that being reviewed by the State Board, is critical.

Overview of Riverside County MS4 Permits and Communities

Riverside County is under the jurisdiction of the Colorado River, Santa Ana, and San Diego RWQCBs and is subject to three different MS4 permits², each of which has specific watershed and water quality issues. However, these watersheds share certain common characteristics. They are located inland, and either semi-arid or arid. The Whitewater River Region, which includes the Coachella Valley and is regulated by the Colorado River RWQCB, is one of the most arid regions in the nation. A summary of some of the local conditions, opportunities and constraints of these three regions can help inform the need for additional RWL language flexibility.

The Riverside County Communities in the Whitewater River Region are located in the Coachella Valley, a desert area with less than 4 inches of annual rainfall on average. The communities governed by this MS4 permit have a total population of under 500,000 residents. Soils within the urbanized area of this region are extremely porous, with 85% of area soils exhibiting permeability properties of at least 1 inch per hour, and the majority of these soils exhibiting permeability properties between 6 and 20 inches per hour. Only one TMDL is effective in this Region (relating to bacterial indicators in the Coachella Valley Stormwater Channel), and only one community is named as a responsible party in that TMDL. There are no other waterbodies listed as impaired for any pollutant under Clean Water Act Section 303(d). Due to the unique climatic, hydrologic, geologic

² The District is the Principal Permittee for these three MS4 Permits: Order No. R8-2010-0033 of the Santa Ana RWQCB (covering the Santa Ana Region in northwestern Riverside County); Order No. R9-2010-016 of the San Diego RWQCB (covering the Santa Margarita River Region in southwestern Riverside County); and Order No. R7-2013-0011 of the Colorado River Basin RWQCB (covering the Whitewater River Region in the desert portions of central Riverside County).

and water quality conditions in this region, development of new and extensive programs to identify and address pollutants of concern (as are set forth in the LA MS4 Permit) are not required and would be an inappropriate use of limited public fiscal resources.

The Santa Margarita Region also has a small population (less than 400,000 residents) and rural character. Approximately half of the region is ultimately planned for designated conservation zones intended to protect rare and endangered species. During proceedings to adopt the current MS4 Permit for this region, Marine Corps Base Camp Pendleton, which is located downstream and which relies on runoff from the Santa Margarita Region for its water supply, raised several concerns with permit requirements for onsite retention of stormwater runoff. Camp Pendleton was concerned that the installation of significant infiltration BMPs could have a detrimental impact on their adjudicated water rights (this issue is presently before the State Board in a petition filed by Camp Pendleton with regard to the 2010 MS4 Permit).

Studies are ongoing to assess the impacts of onsite retention on the Camp Pendleton water supply and to determine the need for modifications to the Permit that may relax or remove requirements for new developments and redevelopments to retain stormwater runoff onsite. As stormwater retention is typically one of the most effective management measures to address stormwater quality issues, the lack of an ability to use it as a tool to address both existing and new developments could significantly impact the cost and timing of ongoing community efforts to manage stormwater sources. Further, reliance on an Enhanced Watershed Management Plan strategy in this region would be problematic, as BMPs could not rely on retention for RWL compliance. The communities would need an alternative pathway to compliance that recognizes the unique hydrologic and water resource limitations of this region. The communities are, in the mean time, continuing to look for other innovative means to meet RWLs through integrated regional programs that may be able to address and balance water rights, water quality, flood management, and habitat conservation goals and objectives.

Most of Riverside County's population is located in the Santa Ana Region (1.2 million residents). Two TMDLs are effective in this region, the Middle Santa Ana River Bacterial Indicator TMDL, and the Canyon Lake and Lake Elsinore Nutrient TMDL. The MS4 Permit adopted in 2010 for the Riverside County Communities in this region requires the development and implementation of an iterative and cooperative compliance plan option for these TMDLs, which provides the Riverside County Communities in the Santa Ana Region and other parties the opportunity (and responsibility) to develop plans to attain the final waste load allocations. In many ways, these plans serve as pollutant and waterbody specific Enhanced Watershed Management Plans, such as those set forth in the LA MS4 Permit except that they do not require retention.

The studies required for the Canyon Lake and Lake Elsinore Nutrient TMDL and Middle Santa Ana River Bacterial Indicator TMDLs were complicated, expensive, and time consuming to implement. Each study cost several hundred thousand dollars and took approximately two years to complete. Implementation of the Comprehensive Nutrient Reduction Plan (CNRP) for the lakes and Comprehensive Bacteria Reduction Plan (CBRP) for the river will also be phased over multiple

years. However, the process of developing and implementing these compliance plans provides a valuable example of adaptive management over an entire MS4 permit area, with solutions focused on attaining the beneficial uses, which should be the goal of any regulatory program governing MS4s. Water supply issues also impact this area, as Lake Elsinore, the largest natural waterbody in southern California, is a declining lake where evaporation rates of over 6 feet per year exceed the natural rate of replenishment. For this reason, programs aimed at extensive onsite retention of stormwater were not considered in development of the CNRP as the best option to minimize potential impacts on lake recreational uses. Similarly, the CBRP did not rely on retention of runoff in an effort to minimize potential impacts to other beneficial uses of the Santa Ana River that may have been impacted by reductions in dry weather base flows.

The CNRP and CBRP provide examples of how RWL compliance could be effectively achieved without the need for reliance upon retention requirements. Conversely, though the CNRP and CBRP also provide a cautionary example of the potential cost and time commitments necessary to develop such plans. RWL compliance options need to consider the costs of attempting to replicate these efforts at watershed scales for all pollutant-waterbody combinations and the fiscal impact on the regulated communities that will ultimately be required to develop them.

These differences in the MS4 permit regions just within Riverside County illustrate the need for flexibility in the State Board's ultimate statewide RWL policy. Onsite retention of stormwater, a BMP that may be appropriate in some areas, may be inappropriate in other areas due to water supply and/or other environmental factors. In the Santa Ana and Santa Margarita Regions, runoff is needed to provide for maintenance of lake levels and stream base flows and to meet downstream water rights, so compliance cannot be solely based on stormwater retention requirements. In the Coachella Valley, the receiving waters are primarily dry desert washes, the existing drainage infrastructure relies on significant infiltration of stormwater, and there is only one 303(d)-listed waterbody. Therefore, development of new and extensive programs to identify and address pollutants of concern is not warranted.

Finally, the resources required to adopt an extensive stormwater quality management program, such as that set forth in the LA MS4 Permit, are not as available in less affluent and less densely populated counties nor is there an existing compliance knowledge base, such as is generated in the development of multiple TMDLs (which is the case in Los Angeles County). Any new State Board policy must provide for prioritization and scheduling flexibility to recognize the differing water quality needs and the complexity of stormwater quality management. As will be discussed below, the Riverside County Communities believe that the model language proposed by the California Stormwater Quality Association ("CASQA") can form the basis for a precedential ruling by the State Board, applicable throughout California.

Before discussing the CASQA model language, we wish to emphasize the importance of two Ninth Circuit decisions that compel the State Board to act.

Ninth Circuit Decisions Drive the Need for Reform

Under the most authoritative interpretation, the State Board has stated that the current RWL language "does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards over time, through an iterative approach requiring improved BMPs" Order WQ 2001-15 at 7. This interpretation reflected language requiring regulated communities to comply with this requirement (and a companion requirement prohibiting discharges from causing or contributing to a condition of nuisance) "through timely implementation of control measures and other actions to reduce pollutants in storm water discharges in accordance with this Order" *E.g.*, Order R9-2010-016, Part A.3.a.

That language, however, was completely disregarded by the United States Circuit Court of Appeals for the Ninth Circuit in *Natural Resources Defense Council v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011), *reversed on other grounds*, 133 S. Ct. 710 (2013), *reinstated and amended on other grounds*, No. 10-56017 (slip op. August 8, 2013). In its first decision, the Ninth Circuit ruled that the language prohibiting discharges which "cause or contribute" to a violation of a water quality standard must be interpreted on its own, without reference to the iterative process language contained in the standard RWL language endorsed by the State Board in Order Nos. 99-05 and 2001-15. 673 F.3d at 892. This meant that regulated communities are strictly and immediately liable for any such violations.

The Ninth Circuit's opinion was reversed on other grounds by the United States Supreme Court, which remanded the case back to the Ninth Circuit. The Supreme Court did not rule on the Ninth Circuit's strict compliance interpretation. However, in a decision issued only last week, the Ninth Circuit pushed liability for MS4 permit violations in a new and radical direction, holding that there was no need for a plaintiff to even prove that a discharge from the MS4 was causing or contributing to the water quality standard violation. The court held that if receiving water monitoring reflected an exceedance of a water quality standard, even at a mass emission monitoring station located miles from the discharge and which monitored literally hundreds of separately permitted discharges (including non-MS4 discharges), that was sufficient to establish a community's liability for violation of the permit and the Clean Water Act. Slip op. at 32-33.

These decisions put every regulated community in California into even greater potential jeopardy for immediate violations of the Clean Water Act, even though every responsible agency, including U.S. EPA, the State Board and the RWQCBs, has recognized that MS4 discharge compliance with water quality standards cannot be immediate.

The need for reform of the RWL language is now even more critical.

Responses to Questions Raised in July 8, 2013 Letter

In answer to the questions raised in your July 8, 2013 letter, the Riverside County Communities believe that the LA MS4 Permit's watershed management program/enhanced watershed management program alternative is a significant step forward from the current RWL language, as interpreted by the Ninth Circuit. The Los Angeles RWQCB has attempted to address key concerns of the regulated communities in that region while encouraging projects that will benefit both water quality and achieve other societal objectives. The Riverside County Communities believe that the provisions in the LA MS4 Permit set forth what may be an appropriate approach to implementing RWL requirements in heavily urbanized watersheds with significant TMDL coverage, such as those found in Los Angeles County.

In particular, the Riverside County Communities support key aspects of the LA MS4 Permit, including voluntary participation in the watershed programs; strategic compliance planning conducted on either a watershed or jurisdictional basis; BMP-based compliance with numeric water quality standards; prioritization of pollutant waterbody combinations; adaptive management of BMPs; processes for stakeholder input; the establishment of the enhanced watershed management program with its allowance for the 85th percentile design storm; and, perhaps most importantly, the ability for regulated communities to be deemed compliant with RWL and discharge prohibition provisions from the date of their notification of intent to participate in the strategic compliance process. This last provision avoids a potential "liability trap" during the period while RWQCBs are working to approve the strategic compliance programs submitted by the communities.

Considering the fiscal realities faced by the regulated communities in California, the iterative process promotes collaborative projects which are scientifically based and which create tangible results in addressing water quality impairments. In Riverside County, such collaborative work has repeatedly brought state and federal dollars for water quality projects that have and will make a difference. Absent an iterative process, efforts would likely be piecemeal and ineffective. In that, all stakeholders are committed to improving water quality, the State Board, the RWQCBs, the regulated communities, and the public alike should support a policy for attaining RWLs which fosters collaboration and as a result, brings critically needed resources to bear to address water quality impairments.

While the LA MS4 Permit may present a superior alternative to the current RWL language and appears suited for that highly urbanized, coastal and TMDL-rich county, the specific requirements of that Permit are less useful as a model for less populated and affluent regulated communities that do not discharge to coastal beaches with intense recreational use. Further, RWL attainment strategies focused on the capture of stormwater runoff may not be appropriate for areas where retention is not viable (and potentially detrimental) due to water rights issues, hydrologic, geologic or other factors (as noted above). Finally, the RWL attainment requirements ultimately adopted must recognize that some potential pollutant issues will require state and/or federal regulatory intervention, either in the form of product reformulation requirements or potentially adjustments to water quality standards, to

ensure that the water quality standards properly assess the impacts of stormwater on beneficial use attainment.

For these reasons, the Riverside County Communities favor the model language proposed by CASQA. This language, like that in the LA MS4 Permit, provides flexibility in managing MS4 discharges. This flexibility is provided through provisions for voluntary participation, structuring of the strategic compliance program on a watershed/subwatershed or jurisdictional basis, prioritization of pollutants/waterbodies, BMP-based compliance approaches, explicit provision for an adaptive management process, opportunities for stakeholder and public input, identification of the 85th percentile "design storm" and provision for regulated communities to obtain a determination that they comply with RWL and discharge prohibitions provisions in the MS4 permit so long as the communities comply with the requirements of the strategic compliance program.

The CASQA model language, moreover, provides both additional flexibility and structure, which makes it more useful as precedential requirements for the differing watershed conditions and varying water quality issues experienced throughout the state. The CASQA language allows existing programs in a MS4 permit to be recognized as a strategic compliance program and provides flexibility in determining the requirements for such a program, within the general framework of the model language.

The CASQA model language also provides needed structure to ensure that the strategic compliance program is technically based, adaptive and allows resources to be focused on watershed water quality priorities. While the regulated communities seek a "path to compliance," having an actual "pathway" to compliance set forth in the MS4 permit is equally important. The structure inherent in a strategic compliance program (as opposed to the current simple prohibitory RWL language), provides the regulated communities, the RWQCBs and stakeholders with that pathway to compliance, a pathway that is rigorous, based on the highest threats to water quality, is adaptable and is designed to attain water quality standards. This structure gives both the regulated communities and the RWQCBs (as well as the public) clear guideposts as to their mutual responsibilities and provides all stakeholders with specific scheduling requirements that ensure continued accountability.

A clearly defined pathway to compliance, such as that outlined in CASQA's model Strategic Compliance Program also ensures that the expectations of the RWQCB and the public can be met in a structured and orderly manner. As interpreted by the Ninth Circuit, the current RWL language does not link achievement of water quality standards with a specific iterative process and provides no pathway to compliance. This is a far less transparent and structured process than the one set forth in the model CASQA language. Further, the current RWL provisions do not allow prioritization of resources to address problem pollutant-waterbody combinations. As noted above, in Riverside County of the approximately 300 pollutants being monitored as part of the MS4 monitoring programs, only a handful are proving to be persistent in certain waterbodies. It is not good public policy to require regulated communities to "chase" the source of every pollutant that may show up in a monitoring program. Instead, as called for in CASQA's strategic compliance program, regulated

communities should first prioritize those pollutants which are the subjects of TMDLs or where data indicate are creating exceedances of RWLs or discharge prohibitions.

For all of these reasons, the Riverside County Communities support the CASQA model language as providing the basis for the State Board's reform of the current RWL language.

The Riverside County Communities Are Not Seeking a "Safe Harbor"

The remainder of our letter focuses on some additional reasons why a strategic compliance program, such as that set forth in the model CASQA language, is appropriate and required to move the stormwater regulatory landscape from one leading to litigation and confrontation to one that provides systematic procedures to cooperatively address priority water quality impairments. To explore those issues, the letter addresses the most common objection made by opponents of RWL language reform: that the regulated communities simply want a "safe harbor" from regulation.

The "safe harbor" objection assumes that the issuance of an MS4 permit is a "license to pollute" with no consequences to the regulated communities. This is not supported by the facts or the law. First, regulated communities are tasked to promote and ensure public health and safety both in terms of pollutant reduction and also flood control (which is the primary function of MS4s. They must accomplish these mandates (as well as other societal needs) with finite fiscal resources.

Moreover, every aspect of an MS4 permit, every condition and requirement, is enforceable. For example, Order R8-2010-0033, Part XX.G, provides: "The Permittees must comply with all terms, requirements, and conditions of this Order. Any violation of this Order constitutes a violation of the CWA, its regulations and the California Water Code, and is grounds for enforcement action"

Each MS4 permit requires, at minimum, the six categories of control measures set forth in 22 CFR § 122.26(d)(2)(iv). MS4 permits require a stormwater management plan, the requirements of which are enforceable. MS4 permits typically require numerous reports, proposed programs and other submittals to be made to the RWQCBs; any failure to timely submit is enforceable. If a regulated community fails to comply with such requirements, it can be subject to enforcement.

The achievement of water quality standards in receiving waters is, however, a very different problem, one that is fundamentally beyond the immediate control of the regulated communities. This fact was recognized by the State Water Board's own Blue Ribbon Panel in 2006, long after the RWL language at issue was incorporated into most MS4 permits. The Blue Ribbon Panel specifically found that it was not possible to set a numeric effluent limit for a catchment not treated by a structural or treatment BMP. Given that most of the waters flowing into the MS4 are not so treated, the enormity of this task is readily apparent.

Only recently, David Gibson, Executive Officer of the San Diego RWQCB, in testimony on the adoption of the regional MS4 Permit (which contained a version of the current RWL language), noted that the RWLs could not be complied with as of its adoption:

"The receiving water quality objectives are already being exceeded. That condition of vulnerability exists today, even without this tentative order, and that condition will most likely continue for some time".

Transcript of Proceedings, May 8, 2013, San Diego RWQCB Hearing, page 75:22-page 76:1.

Thus, the San Diego RWQCB's regional MS4 permit (and other MS4 permits across the state that contain the standard RWL provisions) require instant, continuous and strict liability from the moment of adoption. This conclusion is inescapable in light of the *NRDC* case.

Unless MS4 permits provide for an iterative compliance provision, such as that set forth in the CASQA model language, those permits will remain impossible to comply with, in violation of the Clean Water Act. *See, e.g., Hughey v. JMS Development Corp.* (11th Cir. 1996) 78 F.3d 1523, 1530 ("In interpreting the liability provisions of the CWA, we realize that Congress is presumed not to have intended absurd (impossible) results.").

What the Riverside County Communities, and other regulated communities across California, seek is not a "safe harbor" but a means in which to achieve water quality standards through an orderly process that is governed by science and engineering, not lawyers and judges, and which prioritizes and addresses significant problems, not chases random pollutants. CASQA's model language establishes such a program. This program requires assessment of the prioritized water quality issues, development (and RWQCB approval) of a program to address the issues, implementation of the program and measurement of the progress to meet program goals (through monitoring and other means), and continuous reassessment of compliance strategies. It provides a pathway to assure the regulated communities, RWQCBs and the public that progress is being made to address water quality impairments caused by MS4 discharges.

The current "one strike and you're out" liability scheme created by the Ninth Circuit also diminishes the ability of the regulated communities to innovate. During the development of the "regional permit," San Diego RWQCB's staff repeatedly stated that they wanted the regulated communities to "fail" in efforts to achieve better stormwater quality. By this, staff meant that the regulated communities should be encouraged to try new strategies to achieve better water quality and, if those strategies fail, to try alternatives. In essence, RWQCB staff was advocating the iterative process. The Riverside County Communities strongly agree with San Diego RWQCB staff on the importance of being able to "fail." Due to the extreme difficulty in attaining water quality objectives or waste load allocations, the regulated communities must be able to experiment with different BMP approaches through an iterative approach. This iterative approach is set forth in the CASQA model language. Being allowed to "fail" is, of course, impossible when failure is punishable by a potential citizen suit, in which a successful plaintiff can force the payment of civil penalties, obtain injunctive relief and win attorneys' fees.

The awarding of injunctive relief is of particular concern, because a federal district judge is not bound by the terms of the MS4 permit. The court can order a remedy that is entirely separate from the MS4

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permit, potentially rendering the permit's terms meaningless and the thousands of person-hours invested by the RWQCBs, the regulated communities and other stakeholders in developing those terms a complete waste of time.

Additional reasons for RWL language reform are set forth in the District's November 13, 2012 letter (attached), and we request that State Water Board staff consider that letter and its attachments as part of the preparation for the State Board workshop.

Conclusion

Much has been achieved in California to improve receiving water quality under the Clean Water Act. The remaining impairments have multiple sources, many of which are not related to urban runoff and/or are not under the control of the regulated communities. The sources are not fully understood, many are not under the control of the regulated communities, and the technology required for the management of water quality are, in many cases, not developed or technically/economically infeasible. As described, control of many sources will require state and federal regulation. Therefore, any requirements established by the State Water Board to attain RWLs must provide flexibility and a pathway to compliance that provides for orderly development of effective water quality management programs.

The Riverside County Communities request the State Water Board to reform the current RWL language, language which through Ninth Circuit interpretation has been turned unworkable and an impediment to achieving water quality improvements. We believe that the strategic compliance program approach proposed by CASQA provides a framework for collaborative success that can provide the needed flexibility and path to compliance with RWLs.

The Riverside County Communities appreciate the State Water Board's outreach to interested parties and look forward to the workshop to be held on this important issue. If you or any of State Water Board staff have any questions, please contact David Garcia at 951.955.1330 dhgarcia@rcfloo.org.

JASON UHLEY



Chief of Watershed Protection Division

Enclosures: Comment Letter to SWRCB –
Receiving Water Limitations Language
Workshop

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