# Item No. 9

# Written Comments from Copermittees

## Supporting Document No. 6
## April 11, 2007

**Supporting Document No. 6**
**April 11, 2007**
**Item No. 9**

**Table of Contents**

*Bryan Speegle, Director*

# COUNTY OF ORANGE

*RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT*

Environmental Resources
1750 S. Douglass Road
Anaheim, CA 92806

Telephone: (714) 567-6363
Fax: (714) 567-6220

April 4, 2007

By E-mail and U.S. Mail

John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

**Subject: Tentative Order No. R9-2007-0002; NPDES No. CAS0108740**

Dear Mr. Robertus:

We are in receipt of the February 9, 2007, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District within the San Diego Region (Tentative Order No. R9-2007-0002) (NPDES No. CAS0108740). The County of Orange, as the Principal Permittee, welcomes the opportunity to provide comments on the Regional Water Quality Control Board's ("Regional Board") Tentative Order as prepared and distributed by the Regional Board staff. The Copermittees were involved in the development of these comments and the cities of Aliso Viejo, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo and Rancho San Juan Capistrano, Santa Margarita have directed that they be recognized as concurring entities.

The Copermittees reserve the right to submit additional comments up to the close of the public comment period. In order to accommodate the need for discussions with Regional Board staff to attempt to resolve our many concerns, the Copermittees hereby request that the Regional Board extend the comment period beyond the scheduled April 11 hearing.

The Orange County Stormwater Program (the "Orange County Program or Program") has been in existence under a National Pollutant Discharge Elimination System (NPDES) permit since 1990. The permit was reissued in 1996 and 2002. The Program is now a mature program, recognized as a statewide leader in municipal stormwater management. To provide a sound technical basis for the fourth term permit, the Copermittees conducted comprehensive program assessments using a multiple lines of evidence approach, including audit findings and the California Stormwater Quality Association (CASQA) Program Effectiveness Guidance. Based on these assessments, the Copermittees prepared and submitted the 2006 Report of Waste Discharge ("ROWD") to Regional Board staff. The ROWD identified many positive program outcomes, and where the assessments indicated improvements are needed, the Copermittees

proposed changes and added commitments to the Drainage Area Management Plan ("DAMP"), the foundational guidance and policy-setting document for the Program.

The Copermittees developed the ROWD, including the proposed DAMP, to provide strategic direction for the management of future water quality improvements. Given the progress of the Orange County Program to date, the demonstrated commitment of the Copermittees, and the comprehensive assessments of Program effectiveness, the Copermittees expected the ROWD and the revised DAMP would provide the basis for the fourth term permit. Instead, the Tentative Order imposes a management strategy and new technical requirements on the Orange County Program that may confound the ability of the Copermittees to deliver the water quality improvements that the Regional Board and the Copermittees seek to obtain. The Tentative Order imposes unnecessary burdens on the resources of the Copermittees and fails to provide any justification for disregarding many of the approaches set forth in the ROWD and revised DAMP.

We look forward to meeting with you to discuss these matters and achieve a satisfactory resolution. In the meantime, we have summarized our overarching concerns with the Tentative Order as General Comments in this letter and provide additional comments and concerns in the following Attachments:

- Attachment A presents comments on our main legal and policy issues.
- Attachment B presents technical comments and suggested language on specific requirements contained within the Tentative Order.
- Attachment C includes comments on the Monitoring and Reporting Program.

## GENERAL COMMENTS

### I. The Orange County Program is a Mature and Successful Program – A State Leader in Municipal Stormwater Management

At the inception of the Program the County of Orange and the 12 Copermittees developed a DAMP to serve as the principal policy and guidance document for the entire program. Over successive permit terms the Copermittees have modified the DAMP through an iterative development process designed to better reflect the needs of the Copermittees, ensure Copermittee accountability and deliver positive water quality and environmental outcomes. The DAMP now comprehensively guides each Copermittee in the development of its Local Implementation Plans (LIP), which describes how the program will be implemented on a city/jurisdiction basis. The DAMP also includes for each watershed in the San Diego Region an action plan that details the Copermittees' pollution prevention and control efforts on a watershed level related to constituents of concern, particularly those on the 303(d) List.

The Orange County Program has matured and made significant advances in stormwater pollution prevention and control with the DAMP as its foundational document. The DAMP serves as the basis for organizing our efforts and obtaining the necessary commitments of local governments to a common plan of attack. The result is that the Orange County Program has gained the strong participation and commitment of each of its local government jurisdictions to water quality improvements served by the Program. This level of participation and commitment has enabled the Program achieve many of its goals:

- The Orange County Program is proactive.

- The Copermittees are engaged in the Program and provide valuable input into the process.
- The program uses several separate, but highly inter-related water quality planning processes to address urban sources of pollutants
- The Program recognizes the benefits of watershed-based planning and regional controls and has an increased emphasis to support these approaches as foundational to the success of the program.
- The Copermittees adaptively manage the Program - the iterative process is actively employed and the necessary program modifications proposed and incorporated into the program.
- The existing framework and implementation of the program meets or exceeds the permit requirements.
- Throughout its history, the Program has received and continues to receive the significant funding and resources it requires to ensure its success.

As a result of the long history of Program development and achievement, the Orange County Program has become a statewide leader in municipal stormwater quality management efforts. For example, the Copermittees have been actively involved in the efforts of CASQA in developing and applying the practice of stormwater program effectiveness assessment. In addition, the Program has received statewide recognition for the excellence of its public education program, Project Pollution Prevention, and the South Orange County Integrated Regional Water Management Plan recently prevailed in statewide competition for $25 million in grant funding. This progress points an Orange County Stormwater Program that would now benefit from general regulatory direction rather than prescriptive requirements.

## II. Toward Attaining Water Quality Standards – Where Do We Go From Here?

Where we want to get to and how we want to get there during the course of the fourth term permit, is set forth in the 2006 ROWD, which includes the proposed DAMP for the period 2007-2012 ("Proposed DAMP"). The ROWD describes the Copermittees' compliance activities, enumerates Program accomplishments, and based upon comprehensive assessments of program effectiveness and the iterative process for achieving water quality standards, identifies the programmatic changes necessary to address areas of the Program that can be improved.

### *A. The ROWD and the Proposed DAMP Provide a Sound Basis for the Fourth Term Permit.*

The Copermittees spent a significant amount of time and energy developing the ROWD and Proposed DAMP. As a part of this process, the Copermittees conducted comprehensive effectiveness assessments using the CASQA Program Effectiveness Assessment Guidance. The Orange County Program is one of the few programs to date to have actively defined a series of performance metrics and used an assessment framework to define the relationships between compliance actions and positive changes in water quality. This assessment process is important because it measures the success of the Program in terms of its achievement of water quality improvements. It further provides a basis for identifying the changes that are needed to improve the Program's effectiveness in achieving water quality goals. The ROWD and the Proposed DAMP are, therefore, based on rigorous systematic assessments that should provide a sound technical basis for the fourth term permit.

Given the strong technical basis for the recommendations presented in the ROWD and the Proposed DAMP, and the commitments of the Copermittees to the success of the Program, our ROWD and Proposed DAMP deserve the respect and consideration of the Regional Board and its staff. It appears, however, that the Tentative Order, to a large extent, disregards the demonstrated successes of the Program, overrides the thoughtful recommendations in the ROWD without any justification and dismisses the Proposed DAMP as simply "procedural correspondence."

*B. The Tentative Order Unreasonably Limits the Use of Regional BMP Treatment Controls and Innovative Approaches.*

While the Copermittees and Regional Board are in agreement that, at the end of the day the common goal is to improve stormwater quality, the way in which this is achieved and the necessary timeframes for achieving Program improvements clearly differ. The Attachments to this letter identify and discuss many of these differences in detail. The most troubling of these are the limitations imposed on the location of treatment control BMPs. By its two Findings that (1) natural drainages, whether channelized or not, that are used to convey urban stormwater are both a "receiving waters" and an MS4, and (2) that treatment of urban stormwater must take place prior to discharge from an MS4 to a receiving water, the Tentative Order effectively mandates a "site-by-site" approach to stormwater treatment. This mandate is not supported on a technical basis or required by law, and it severely limits the ability to effectively manage stormwater in a manner that will help ensure attainment of water quality standards and maintain key watershed hydrologic and geomorphological processes.

For example, the Copermittees' efforts to address pathogen indictor bacteria unequivocally demonstrate the need for a regional treatment approach. Because it has been discovered that bacteria are incubated throughout the MS4 and receiving water system, effective treatment designed to improve water quality at Orange County beaches must occur at the end of the system prior to discharge to estuary and ocean receiving waters. Indeed, as a result of the coordinated efforts of the Orange County Program and implementation of regional controls, such as diversions and treatment systems, the Copermittees were able to make data submittals that now support 303(d) delisting of certain Orange County's beaches for pathogen indicator bacteria. While this delisting effort clearly represents a significant outcome, protecting beaches is not the only goal, of course, because the streams also have beneficial uses, including recreation. However, the watershed approach and the iterative process of implementation support the prioritization of efforts and an initial emphasis on protecting recreational uses in the places where the vast majority of those uses occur, which in South Orange County is at the beaches. Moreover, if regional treatment can protect public health by preventing pollution from reaching heavily used beaches, this approach should not be explicitly prohibited because it does not also solve all of the other water quality problems that we have identified.

From the perspective of future urban development, applying the proposed BMP site requirements at a project level may lead to poor project design from a broader sub-watershed and watershed level of analysis. The geomorphologic planning principles being given practical expression in the Rancho Mission Viejo project, place considerable emphasis on preserving sources of coarse sediments (e.g., sandy soils and crystalline terrains) important to streamcourse processes and beach sand replenishment by concentrating development in terrains that would otherwise generate fine sediments. Similarly, from a broader sub-watershed and watershed scale, it may be far better to avoid soils with high infiltration capabilities (e.g., sandy soils) by concentrating development in areas with higher levels of natural runoff rates (e.g. clayey soils) than to minimize impervious surface on a project-by-project basis.

These accomplishments and emerging and innovative approaches to surface water management and protection are threatened by overly restrictive and unnecessary limitations on the use of regional treatment BMPs.

C. *The Fourth Term Permit Should be Based on the ROWD and the Proposed DAMP; Any Other Requirements Must Have a Strong Technical and Legal Basis and Be Supported With Appropriate Findings in the Tentative Order.*

The Orange County Program has demonstrated continuous improvement over the past three permit terms. Looking forward, the Copermittees have provided a strong technical basis for the further improvements they have recommended in the ROWD. The Copermittee jurisdictions have the political will and adequate funding to achieve the Program policies and objectives as further detailed in the Proposed DAMP. For these reasons, the Regional Board and its staff should carefully consider the recommendations of the Copermittees as the basis for the fourth term permit. The Regional Board and its staff should incorporate other permit changes, especially more prescriptive programmatic requirements, only where they are necessary to achieve water quality improvements and are supported by strong technical justification and the requirements of the federal CWA. To the extent that such additional changes are incorporated into the fourth term permit, the Regional Board must set forth in the Fact Sheet/Technical Report the legal basis and technical justification for such changes and with appropriate Findings in the Tentative Order.

* * *

We appreciate the effort that you and the Regional Board staff have devoted to development of the fourth term permit for the Orange County Program. We look forward to working with you and the staff to revise the Tentative Order to ensure that it meets our mutual goals. We trust that the comment period will be extended beyond April 11, 2007 in order to accommodate such discussions.

Thank you for your attention to our concerns. Please contact me directly if you have any questions. For technical questions, please contact Chris Crompton at (714)834-6662 or Richard Boon at (714)973-3168.

Sincerely,

Bob Wilson

for Bryan Speegle, Director
Resources & Development Management Department

Attachment A: Legal & Policy Comments
Attachment B: Technical Comments
Attachment C: Technical Comments on Monitoring Program

cc: Technical Advisory Committee
Permittees

# ATTACHMENT A

## ORANGE COUNTY COMMENTS ON CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION TENTATIVE ORDER No. R9-2007-0002 NPDES NO. CAS0108740

## INTRODUCTION

This Attachment A contains the principal legal and policy comments of the County of Orange (the "County") on Tentative Order No. R9-2007-0002 dated February 9, 2007 ("Tentative Order"). Although the supporting Fact Sheet/Technical Report ("Fact Sheet") is referenced in this attachment, the County has not attempted, at this time, to provide detailed legal comments on the Fact Sheet. The County reserves the right to provide additional legal comments, on both the Tentative Order and Fact Sheet, before the close of public comment.

## PRINCIPAL LEGAL AND POLICY COMMENTS

### I. The Blanket Finding That All Natural Streams That Convey Urban Runoff Are Both An MS4 And A Waters Of The U.S. Is Inconsistent With Federal Law And Unsupported In the Fact Sheet

Tentative Order Finding D.3.c. (page 10) states that:

> Historic and current development makes use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. *In these cases, the urban stream is both an MS4 and a receiving water.* (Emphasis added.)

The Finding has two parts. First, it states that urban streams that are used to convey urban runoff are part of an MS4. Second, it states that such urban streams are both an MS4 and a receiving water. Neither part of this Finding withstands scrutiny.

#### *A. Under The CWA Definition Of MS4, A Natural Stream Is Not An MS4 Unless It Is Channelized And Owned Or Operated By The Copermittee*

An MS4 or "municipal separate storm sewer system" is a system of municipal separate storm sewers. "Municipal separate storm sewer" is defined as:

> [A] conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) . . . that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; [and]

(iv) Which is not part of [a POTW].

40 C.F.R. § 122.26(b)(8). The Tentative Order includes the same definition. Tentative Order at Appendix C-6.

According to the definition of MS4, to the extent that a municipality "channelizes" a natural stream and the man-made channel is owned or operated by a Copermittee and designed or used for collecting or conveying storm water, it might fit within the definition of MS4. Man-made storm drain conduits installed in natural drainages would also be part of an MS4. Otherwise, urban streams are not roads, streets, catch basins, curbs, gutters, ditches, or storm drains and thus are not MS4s. If the USEPA had intended the definition to include "natural streams" that convey storm water, then it would not have limited the relevant specific items included to "ditches and man-made channels." All of the specified conveyances are part of a constructed storm drainage system. Natural streams that also convey storm water are not.[1]

The Fact Sheet discussion of Finding D.3.c. does not support the assertion that "all natural streams" that are used to convey urban runoff are part of the MS4. The Fact Sheet limits its discussion to the circumstance where "an unaltered natural drainage[ ] receives runoff from a point source (channeled by a Copermittee to drain an area within [its] jurisdiction), which then conveys the runoff to an altered natural drainage or a man-made MS4." Fact Sheet at 54. Even with this narrowed focus, the "natural drainage" described still does not fall within the definition of an MS4, and the Fact Sheet provides no legal analysis in support of this finding.

Accordingly, the County recommends that the Regional Board delete Finding D.3.c. from the Tentative Order.

### *B. Under Rapanos, A Channel Through Which Water Flows Intermittently Or Ephemerally Or That Periodically Provides Drainage For Rainfall Is Not A Waters Of The U.S.*

Finding D.3.c of the Tentative Order states that natural streams used to convey urban runoff are both a part of the MS4 and a receiving water. The term "receiving waters" is defined in the Tentative Order as "[w]aters of the United States." Tentative Order at Appendix C-7. In 2006, the United States Supreme Court issued its most recent pronouncement as to what is (and is not) a "waters of the United States" under the Clean Water Act ("CWA"). The plurality decision in *Rapanos v. United States* 126 S. Ct. 2208, 2225 (2006) concluded:

[1] USEPA's proposed definition of an MS4 was limited to conveyances (including roads with drainage systems) "designed solely for collecting or conveying storm water." *See* 53 Fed. Reg. 49416, at 49467 (Dec. 7, 1988). Under the proposed definition, a natural stream clearly could not be an MS4 since it is not "designed." In light of comments that the proposed definition needed to be clarified to state that road culverts, road ditches, curbs and gutters are part of the MS4, USEPA "clarified that municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains" are MS4s. *See* 55 Fed. Reg. 47990, at 48036 (Nov. 16, 1990). Since not all of these man-made features are designed solely for collecting storm water, the final definition of MS4 provides "designed *or used* for collecting or conveying storm water" rather than "designed solely for collecting or conveying storm water." *Id.* at 48065 (emphasis added).

> In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." *See* Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Under this definition, the most that the Regional Board can say with respect to natural drainages used to convey urban runoff is that, to the extent they are relatively permanent, standing or continuously flowing bodies of water forming geographic features that would be described as streams or rivers, they might be considered to be waters of the U.S.. To the extent a drainage has only intermittent or ephemeral flows or only periodically provides drainage for rainfall, the finding that the drainage is a waters of the U.S. would be inconsistent with the current U.S. Supreme Court interpretation of the term. Moreover, to make a Finding that any particular drainage used to convey urban runoff is a waters of the U.S. would require a factual analysis on a case by case basis.[2] The Regional Board's blanket Finding D.3.c. is merely a broad declaration unsupported in fact or current law and should be deleted from the Tentative Order.

### *C. To The Extent A Natural Drainage Is A Waters Of The U.S. It Cannot Also Be An MS4; By Definition An MS4 Discharges To Waters Of The U.S.*

As noted above, the Tentative Order and federal CWA regulations define an MS4 as a conveyance that discharges ***to*** waters of the United States. The notion that a drainage can be both part of an MS4 and a receiving water is inconsistent with this definition. Thus, to the extent a natural drainage is a waters of the U.S., it cannot also be an MS4 and vise versa. The Regional Board should revise the Tentative Order to make clear that if a conveyance is deemed part of an MS4 in accordance with the CWA definition, then it cannot also be deemed a waters of the United States.

## II. The Proposed Prohibition Of Treatment Control BMPs In Receiving Waters Is Unsupported By Federal Law And Inconsistent With State Law

The Tentative Order Finding E.7 (page 14) states that "[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water." Given Finding D.3.c., which states that all natural drainages that carry urban runoff are "both an MS4 and a receiving water," Finding E.7 presents significant practical issues for the placement of treatment control BMPs and creates a legal conundrum. Moreover, the Finding is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on storm water treatment BMPs.

Finding E.7 apparently is intended to support Tentative Order revisions to the Standard Urban Storm Water Mitigation Plan (SUSMP) requirements for Priority Developments. Tentative Order Section D.1.d.(6)(c) (page 28) is a new provision that provides, "All treatment control BMPs must be located so as to infiltrate, filter, or treat runoff prior to its discharge to any waters of the U.S.," except where multiple projects use shared treatment. Section D.1.d.(6)(f) (page 28) provides that treatment control BMPs for all Priority Development Projects must be

[2] Even under Justice Kennedy's concurring opinion, the determination of a "significant nexus" must be made on a case-by-case basis. *See* 126 S. Ct. at 2250-51.

"implemented close to pollutant sources (where shared BMPs are not proposed), *and* prior to discharging into waters of the U.S." (emphasis added). The corresponding provision in the third term permit, provides that such BMPs be "implemented close to pollutant sources, when feasible, and prior to discharging into *receiving waters supporting beneficial uses*" (emphasis added). Finally, and most directly, Section D.1.d.(6)(g) (page 29) provides that treatment control BMPs must "[n]ot be constructed within a waters of the U.S. or *waters of the State*" (emphasis added). The addition of "waters of the state" to this provision further exacerbates the problem. "Waters of the state" includes "any surface water, groundwater, including saline waters, within the boundaries of the state." Including this expansive term in Section D.1.d(6)(g) would impose extreme limitations on the location of treatment BMPs and greatly interfere with Copermittees' ability to achieve needed water quality improvements.

The revised language of the Tentative Order severely limits the potential locations for installation of treatment control BMPs. See Attachment B (pages 6-7). Given the lack of any proper legal or factual basis for these limitations, the Regional Board should strike Finding E.7 and the corresponding SUSMP revisions from the Tentative Order.

### *A. Neither The USEPA Regulation Nor The USEPA Guidance Cited In The Finding Provide Legal Support For The Finding or the Revised SUSMP Provisions*

#### *1. 40 CFR 131.10(A) Addresses Only Designated Beneficial Uses; It Does Not Prohibit The Use Of A Water Body For Incidental Waste Assimilation Or Conveyance*

Tentative Order Finding E.7 and the corresponding discussion in the Fact Sheet cite to regulations in 40 CFR Part 131, which govern the development of water quality standards. Section 131.10(a) provides:

> Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. *In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.* (Emphasis added.)

On its face, this provision clearly does not prohibit or support the prohibition of construction of treatment control BMPs in waters of the U.S.. It merely prohibits a state from adopting "waste transport" or "waste assimilation" as a *designated use for purposes of developing water quality standards*. It says nothing about, and has nothing to do with, the incidental use of a water body for those purposes.

The "legislative history" of 40 CFR 131.10(a) does not indicate that the "In no case" language was meant to prohibit the construction of treatment control BMPs in receiving waters. USEPA adopted Part 131 in 1983. It revised and consolidated in the new Part 131 existing regulations previously found in 40 CFR Parts 120 and 35, which governed the development, review, revision and approval of water quality standards. In 1982, Section 35.1550(b)(2) provided that the water quality standards of each state should:

> Specify appropriate water uses to be achieved and protected, taking into consideration the use and value of water for public water supplies, propagation of fish, shellfish, and wildlife, recreation purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

In USEPA's proposed rule to establish Part 131, the language from 40 CFR 35.1550(b)(2) was maintained:

> Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.

47 Fed. Reg. 49234, at 49247 (October 29, 1982). In the final rule, USEPA added the "In no case" language without discussion. In a "Summary of the Changes Made in the Proposed Regulation" table, USEPA simply stated: "Statement added to [131.10(a)] prohibiting *designating a stream* for waste transport or assimilation." 48 Fed. Reg. 51400, at 51404 (November 8, 1983) (emphasis added). The most that can be said, therefore, is that USEPA added the "In no case" language to avoid the prospect of states developing water quality standards to protect a stream for the beneficial use of waste assimilation or transport. There is nothing in the preambles to either the proposed or final rules to suggest USEPA intended the provision to prohibit construction of treatment control BMPs in receiving waters. Finding E.7 suggests that allowing construction of treatment control BMPs in a receiving water would be "tantamount to accepting waste assimilation as an appropriate use for that water body." The extent to which any assimilation and transport of waste is "appropriate" as an existing or incidental use is determined in accordance with state policy and water quality standards, including TMDLs. The CWA regulations cited in the Finding speak only to those uses that should and should not be identified as "designated uses" for the purpose of developing such water quality standards.

*2. USEPA's Part 2 Guidance Clearly Contemplates That Construction Of Treatment Control BMPs In Receiving Waters May Be The Best If Not Only Option*

The USEPA guidance cited in Finding E.7 and the Fact Sheet does not support prohibition of treatment control BMP construction in receiving waters. The Finding cites USEPA's *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems* (November 1992) ("Part 2 Guidance"). Section 6 generally discusses the proposed management program and Section 6.4 specifically addresses structural controls. Because a CWA Section 404 permit might be required for some structural controls, including control projects that involve the discharge of dredged or fill material into waters of the U.S., including wetlands, the guidance suggests that municipalities should try to avoid locating such controls in natural wetlands:

> Applicants should note that CWA Section 404 permits may be required for some structural controls, including any control

> projects that involve the discharge of dredged or fill material into waters of the United States, including wetlands. States may also require permits that address water quality and quantity. ***To the extent possible***, municipalities should avoid locating structural controls in natural wetlands. ***Before considering siting of controls in a natural wetland,*** the municipality ***should*** demonstrate that it is not possible or practicable to construct them in sites that do not contain natural wetlands, and that the use of other nonstructural or source controls are not practicable or as effective. In addition, impacts to wetlands should be minimized by identifying those wetlands that are severely degraded or that depend on runoff as the primary water source. Moreover, ***natural wetlands should only be used in conjunction with other practices***, so that the wetland serves a "final polishing" function (usually targeting reduction of primary nutrients and sediments). Finally, practices should be used that settle solids, regulate flow, and remove contaminants prior to discharging storm water into a wetland.

Part 2 Guidance at p. 6-21 (emphasis added). Rather than supporting a prohibition of constructing structural BMPs in receiving waters, this guidance clearly contemplates that construction of such controls sometimes will be the best, if not only, option for treating storm water. Moreover, rather than an overriding concern for water quality, the guidance appears primarily concerned with the burden of having to obtain a CWA Section 404 permit if construction results in dredged or fill material being discharged into wetlands.

Thus Finding E.7 and the additional and revised SUSMP provisions at Section D.1(d)(6) of the Tentative Order are made without legal or factual support. This Finding and the proposed prohibitions on construction of structural treatment BMPs in receiving waters should be stricken from the Tentative Order.

### *B. The Proposed Prohibition Is Inconsistent With Water Code 13360(a)'s Prohibition On Specifying How Discharge Requirements Are To Be Met*

The Tentative Order establishes waste discharge requirements for discharges of urban runoff. In establishing these requirements, the Porter Cologne Water Quality Control Act makes it abundantly clear that the Regional Board may order Copermittees to comply with the requirements, but it may not specify *how* they comply with the order. Water Code Section 13360(a) provides:

> No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, *or the particular manner in which compliance may be had with that requirement, order, or decree*, and the person so ordered *shall be permitted to comply with the order in any lawful manner.* (Emphasis added.)

As discussed above, it is *not* unlawful for Copermittees to construct treatment control BMPs in receiving waters. Accordingly, Section 13360(a) prohibits the Regional Board from specifying

that such BMPs must be located prior to discharge into receiving waters in an effort to achieve desired reductions in storm water pollution as required by the Tentative Order. Thus Finding E.7 and the proposed prohibitions on construction of structural treatment BMPs in receiving waters at Tentative Order Section D.1.(d)(6) should be stricken from the Tentative Order.

## III. The Finding That All Requirements In The Order Are Necessary To Meet The MEP Standard Is Unsubstantiated And Appears Designed To Avoid The Requirements Of California Law Applicable To Permit Requirements Imposed By The State In The Exercise Of Its Reserved Jurisdiction

Finding E.6 of the Tentative Order provides:

> Requirements in this Order that are *more explicit* that the federal storm water regulations in 40 CFR 122.26 are prescribed in accordance with the CWA Section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard. (Emphasis added.)

Finding E.6 is made without any identification of the "more explicit" provisions to which it refers and without the necessary analysis to support its conclusion that each such requirement is "necessary to meet the MEP standard." Moreover, Finding E.6 appears to be a "defensive finding" designed to avoid the requirements of Water Code Section 13241, which, together with Water Code Section 13263, requires the Regional Board to take economic considerations into account before adopting permit requirements that are more stringent than federal law requires. Moreover, to the extent that the Tentative Order imposes requirements more stringent than federal law requires, such requirements may be unfunded mandates prohibited by the California Constitution.

Because Finding E.6 refers to unspecified provisions of the Tentative Order and is not supported by any factual analysis of such provisions, it must be removed from the Order.

### *A. The Regional Board Cannot Simply Declare That All "More Explicit" Requirements In The Order Are Necessary To Meet MEP; It Must Identify Such Provisions and Demonstrate Why Each Requirement Is Mandated By Federal Law And Support Each Requirement With An Appropriate Finding*

Relying on California Supreme Court precedent, the State Board has held that, not only must waste discharge requirements or an NPDES permit be supported by findings, but also, in order to withstand challenge, the findings must be supported by substantial evidence. In Order No. WQ 95-4, reviewing an NPDES permit issued by the San Francisco Bay Regional Board, the State Board agreed with petitioners' contention that the findings (particularly Findings 17 and 18) were inadequate. Citing *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974), the State Board found that Findings 17 and 18 did not "bridge the analytic gap between the raw evidence and ultimate decision or order." Order No. WQ 95-4 at p. 23.

In *Topanga*, the California Supreme Court analyzed Section 1094.5 of the Code of Civil Procedure, which addresses the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. "11 Cal. 3d at 514-15. Section 1095.4 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." *Id.*

Without identifying each of the "more explicit" requirements of the Tentative Order and demonstrating such requirements are necessary to meet the MEP standard, the Tentative Order lacks the requisite substantial evidence to support the conclusion that all such requirements are necessary to meet the MEP standard.

### *B. In Particular, The MEP Finding is Not Supported By Any Analysis in the Fact Sheet*

In order to provide the substantial evidence necessary to support the MEP finding, the Regional Board would have to identify each "more explicit" requirement and establish that each such requirement in fact meets the definition of MEP. The Fact Sheet discussion of Finding E.6 makes no attempt to provide any factual analysis in support of the Finding. Fact Sheet at 68. The Fact Sheet is merely a summary of the Regional Board's reserved authority to implement its own standards and requirements, provided they are at least as stringent as those mandated by the CWA and federal regulations. The Fact Sheet further discusses the Regional Board's authority under CWA Section 402(p)(3)(B)(iii), which provides the statutory basis for the MS4 permitting program. Finally, the Fact Sheet refers to USEPA guidance, which "supports increased specificity in storm water permits . . . and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards." *Id.* at 69.

This Fact Sheet discussion may support increased specificity and more tailored BMPs, where needed, provided that the need for more specificity is supported by an evaluation of need for more specificity. The Fact Sheet does nothing to support the broad conclusion that all such "more specific" or "more explicit" requirements are "necessary to meet the MEP standard."[3] Accordingly, Finding E.6 is not supported by substantial evidence and should be deleted from the Tentative Order.

### *C. To The Extent The Tentative Order Imposes Requirements That, Rather Than Meeting MEP, Go Beyond MEP, Or Otherwise Represent The Exercise Of The State's Reserved Jurisdiction To Impose Requirements That Are Not Less Stringent Than The Federal CWA Mandate, The City of Burbank Decision Requires The Regional Board To Comply With State Law, Including The Requirement To Consider Economic Factors*

In *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005), the California Supreme Court held that when a regional board issues an NPDES permit with requirements more stringent than what federal law requires, state law requires that the regional board take into account economic factors, including the discharger's cost of compliance. *Id.* at 618. Specifically, the court ruled that, where permit restrictions exceed the requirements of the Clean Water Act, the regional board must comply with Sections 13263 and 13241 of the Porter Cologne Water Quality Control Act. *Id.* at 626. Read together, Sections 13263 and 13241 require regional boards to take into account economic considerations when adopting waste discharge requirements.

[3] Given that the Fact Sheet and Tentative Order provide no analysis of the Tentative Order requirements in relation to the MEP standard, the County reserves its right to comment on the definition of MEP contained in the Tentative Order at C-5, and the Fact Sheet at 35-36, should the need for analysis of requirements in light of the MEP standard arise in the future.

As noted above, by stating that the "more specific" or "more explicit" requirements in the Tentative Order are necessary to meet the MEP standard (*i.e.,* the federal requirement), without any support in the Fact Sheet, Regional Board staff appear to be making a defensive finding designed to ward off challenges that, in adopting the Tentative Order, the Regional Board failed to take into account economic considerations for those requirements that exceed the federal CWA mandate.

However, the California Supreme Court made clear in *City of Burbank* that whether, on the one hand, a permit requirement is mandated by federal law, or, on the other hand, is the exercise of the state's reserved jurisdiction to impose its own requirements so long as they are at least as stringent, is an issue of fact. *Id*. at 627. Thus the Regional Board cannot seek to cloak its more stringent requirements in the broad assertion that all such requirements are required to meet the MEP standard. That finding cannot be supported without a factual determination whether each such requirement is indeed "necessary to meet the MEP standard." The finding that all more "explicit" requirements in the Tentative Order are "necessary to meet the MEP standard" is an example of this. The Court in *City of Burbank* remanded the case to the trial court to decide whether certain requirements were "more stringent" and thus should have been subject to economic considerations in accordance with California law. *Id.*

To the extent the Tentative Order does include requirements that, in fact, do go beyond the federal mandate (which Copermittees believe it does), the Regional Board must subject such requirements to the required economic analysis as required by state law. Many such requirements are identified in Attachment B. For example, see the discussion of the Tentative Order's prescriptive JURMP provisions in Attachment B (pages 8-21) and the Fiscal Analysis provisions in Attachment B (pages 23-26).

### *D. To The Extent The Requirements Of The Tentative Order Exceed Federal Law, They Are Unfunded Mandates Under The California Constitution*

In addition to considering economic factors, to the extent the Regional Board has true choice or discretion in the manner it implements federal law, and chooses to impose costs on Copermittee that are not mandated by federal law, the state will have to fund the costs of complying with the requirements.

Under article XIII B, Section 9(b) of the California Constitution, federally mandated appropriations include "mandates of . . . the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the providing of existing services more costly*." *Sacramento v. California (Sacramento II)*, 50 Cal. 3d 51, 71 (1990) (quoting Cal. Const. art. XIII B, § 9(b)) (emphasis in original). In contrast, federal mandates that impose costs on local agencies do not require reimbursement by the state. *Hayes v. Commission on State Mandates*, 11 Cal. App. 4th 1564, 1593 (1992). This includes when a state implements a statute or regulation in response to a "federal mandate so long as the state had no 'true choice' in the manner of implementation of the federal mandate." *Id.* (citing *Sacramento II*).

In contrast, article XIII B, Section 6 of the California Constitution requires the state to reimburse local governments for the costs associated with a new program or higher level of service mandated by the Legislature or any state agency. Cal. Const. art. XIII B, § 6. Costs imposed on local agencies by the federal government "are not mandated by the state and thus would not require a state subvention." *Hayes*, 11 Cal. App. 4th at 1593.

Thus, under both *Hayes* and *Sacramento II*, if the state has a "true choice" or discretion in the implementation of the federal law, then the state cannot avoid its reimbursement function under Section 6. "If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." *Hayes*, 11 Cal. App. 4th at 1594. Therefore, federal law giving discretion to the states does not constitute a federal mandate.

In relation to Finding E.6 regarding "more explicit requirements," the Fact Sheet states that "CWA section 402(p)(3)(B)(iii) *clearly provides states with wide-ranging discretion*, stating that municipal storm water permits "[s]hall require controls to reduce the discharge of pollutants to the 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." Fact Sheet at 68 (emphasis added).

In the Report of Waste Discharge (ROWD) for the Tentative Permit, Copermittees described the extensive evaluations they have performed to identify weaknesses in their MS4 program. Where weaknesses were identified, the Copermittees recommended additional and more stringent BMPs to address them. While Regional Board staff accepted some of these recommendations in the Tentative Order, the Tentative Order includes other new requirements that lack any similar foundation in program analysis and evaluation. We would argue that these are not only "discretionary," but impose unnecessary financial burdens on the Copermittees.

The Regional Board should require its staff to identify those requirements that are not based upon Copermittee recommendations in the ROWD and determine whether such requirements indeed are necessary to meet the federal standard. If not, they should be deleted from the Order.

## IV. The Tentative Order Impermissibly Imposes Third-Party Obligations On Copermittees

Finding D.3.d of the Tentative Order states that MS4 operators "cannot passively receive and discharge pollutants from third parties" and that where these operators do so, they "essentially accept[ ] responsibility" for such illicit discharges. Section D.3.h. of the Tentative Order would hold Copermittees responsible for sewage overflows and infiltration that may discharge into their MS4s, regardless of whether Copermittees owned or controlled the sewage system

To the extent the Tentative Order imposes obligations on Copermittees that are properly the responsibility of others (*e.g.,* the Regional Board, sanitary sewer districts, etc.) or over whom Copermittees otherwise have no control, the County objects.

### *A. Although The Copermittees May Have A Role In Regulating Industrial And Construction Sites, The Order Impermissibly Requires Copermittees To Assume Responsibilities Duplicating The Regional Board's Responsibilities Under The Statewide General Storm Water Permitting Programs*

Under the Tentative Order, discharges from industrial and construction sites are subject to dual (state and local) regulation. *See* Tentative Order, Finding D.3.a. The Finding and Fact Sheet acknowledge that many industrial and construction sites are subject to the General Industrial Permit[4] and the General Construction Permit,[5] adopted by the State Board and enforced by the Regional Board, but claim that USEPA supports an approach holding the Copermittees responsible for the control of discharges from industrial and construction sites in their jurisdictions.

While the Copermittees may have a role in regulating industrial and construction sites, to the extent that the Tentative Order requires the Copermittees to assume responsibilities which either duplicate the Regional Board's responsibilities for the statewide general permitting program or are more extensive than those mandated under the CWA regulations applicable to MS4s, the County objects.

*1. Duplication Of The Regional Board's Responsibilities Under Statewide General Permits*

Contrary to the assertion made in the Fact Sheet at 51-51 and Finding D.3.a, USEPA in fact rejected placing responsibility for regulating discharges from industrial sites (including certain construction sites[6]) with municipalities. In USEPA's proposed Phase I storm water regulations, USEPA actually *considered* placing responsibility for industrial discharges through MS4s with the local municipalities (*see* 55 Fed. Reg. 47990, at 47997 (Nov. 16, 1990)), but ultimately rejected this approach, placing the responsibility for regulating industrial discharges through MS4s with the state and/or regional boards and requiring industrial dischargers to obtain their own permits. *Id.* at 48000. According to USEPA, "this approach . . . address[ed] the concerns of municipalities that they lack sufficient authority and resources to control all industrial contributions to their storm sewers and will be liable for discharges outside of their control." *Id.* at 48001. Instead of having *responsibility* for industrial site discharges, municipalities would only have "an important role in source identification and the development of pollutant controls" for industries that discharged through MS4s. *Id.* at 48000.

Furthermore, the Fact Sheet's reliance on the Phase II storm water regulations is misplaced. First, the Phase II regulations do apply to Phase I permits. Even if they are relevant to medium and large MS4s, the Phase II regulations only provide that small MS4s are to develop and implement ordinances or other regulatory mechanisms to require *erosion and sediment controls* for construction sites, as well as sanctions to ensure compliance, to the extent allowable under state, local or tribal law. 40 C.F.R. § 122.34(b)(4)(ii)(A) (emphasis added). This provision clearly does not make the Copermittees *responsible* for erosion and sediment from construction

[4] The "General Industrial Permit" refers to State Water Resources Control Board Water Quality Order No. 97-03-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000001, Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities.

[5] The "General Construction Permit" refers to State Water Resources Control Board Order No. 99-08-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000002, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity.

[6] "Industrial activity" is defined to include construction activity that results in the disturbance of more than five acres of total land area. 40 C.F.R. § 122.26(b)(14)(x).

sites. Nor does it provide the Regional Board with authority to shift its responsibility for regulating construction site storm water to the Copermittees by requiring them to establish a duplicative program.

In fact, in the USEPA Storm Water Phase II Compliance Assistance Guide cited to in the Fact Sheet, USEPA explicitly says that in order to aid construction site operators to comply with both local requirements and their own NPDES permit, the Phase II Final Rule includes a provision that "allows the NPDES permitting authority to reference a 'qualifying . . local program' in the NPDES general permit for construction." USEPA Storm Water Phase II Compliance Assistance Guide, p. 4-32. This means that *if* a small municipality has a construction permit program that satisfies the NPDES requirements of the general construction permit program, then the site operator's compliance with the local program would constitute compliance with the General Construction Permit. In other words, USEPA does not *require* small MS4s to assume the construction permit obligations of the Regional Board; it simply allows small MS4s to take on those obligations. *Id.*

Thus, rather than supporting an approach that would have municipalities duplicating the responsibilities of the State under the statewide general industrial and construction permits, USEPA's regulations seek to avoid such duplication, clearly placing responsibility for discharges from industrial and construction sites with the State and the site discharger.

*2. Proper Limits Of The Copermittees' Obligations*

The scope of obligations that can be legitimately imposed on the Copermittees with respect to discharges from industrial and construction sites is narrow. The Copermittees are required to demonstrate adequate *legal authority* to control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity (which includes certain construction sites). 40 C.F.R. § 122.26(d)(2)(i)(A). They are also required, to the extent practicable and applicable, to describe in their MS4 permit application a proposed program to monitor and control pollutants in storm water discharges to MS4s from certain industrial sites and a proposed program to implement and maintain structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to MS4s. 40 C.F.R. §§ 122.26(d)(2)(iv)(C) and (D); 40 C.F.R. § 122.26(d)(2)(viii). Tentative Order requirements that have the Copermittees duplicating the State's program for industrial and construction sites and diverting resources to sites that are not significant sources of pollutants are poor public policy.

***B. Simply Because A Municipality Has An Obligation To Establish And Enforce Prohibitions Against Illicit Discharges Does Not Mean It Ise "Responsible For" Such Discharges; Copermittees Only Have The Power To Establish And Enforce Prohibitions Against Illicit Discharges And To Pursue Violations Of Such Prohibitions When They Are Identified***

Finding D.3.d. states that operators of MS4s "cannot passively receive and discharge pollutants from third parties" and that where these operators do so, they "essentially accept[ ] responsibility" for such illicit discharges. As support for this contention, the Fact Sheet cites to Section 402(p) of the CWA, which requires municipal NPDES permits to "include a requirement to effectively prohibit non-storm water discharges into the storm sewers." *See* 33 U.S.C. § 1342(p)(3)(B)(ii).

Simply because a municipality has an obligation to establish and enforce prohibitions against illicit discharges does not mean they are "responsible for" such discharges. Nor does anything in the Porter Cologne Act or the CWA support such a contention. The Copermittees do not and cannot physically control discharges into their MS4s, and short of blocking all storm drains, cannot prevent all illicit discharges from occurring. Rather, the Copermittees only have the power to establish and enforce prohibitions against illicit discharges, to educate the public concerning the prohibitions and to pursue violations of such prohibitions when they are identified.

USEPA made this clear in the preamble to the Phase I Storm Water Regulations when it stated that under the regulations, municipal applicants would be required "to develop a recommended site-specific management plan to detect and remove illicit discharges (or ensure they are covered by an NPDES permit) and to control improper disposal to municipal separate storm sewer systems." 55 Fed. Reg. 47990, at 48037 (Nov. 16, 1990) ("Phase I Storm Water Rulemaking").

Moreover, Copermittees may lack legal jurisdiction over storm water discharges into their systems from some state and federal facilities, utilities and special districts, Native American tribal lands, waste water management agencies and other point and non-point source discharges otherwise permitted or controlled by the Regional Board. Similarly, certain activities that generate pollutants present in storm water runoff may be beyond the ability of the Copermittees to control. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear and leaching of naturally occurring minerals from local geography.

Accordingly, the County recommends the modification of Finding D.3.d. to acknowledge the limitations of the Copermittees' authority to control certain discharges and activities beyond their regulatory jurisdiction.

### *C. The Tentative Order Would Impose Requirements With Respect To Sewage Overflows And Infiltration That The State Board Specifically Stayed In The Current Permit And Which Are Duplicative To Requirements Imposed By the State Board And Regional Board*

Section D.4.h. of the Tentative Order would hold Copermittees responsible for sewage overflows and infiltration that may discharge into their MS4s, regardless of whether Copermittees owned or controlled the sewage system. The current permit contains a similar provision. *See* Section F.5.f. of R9-2002-0001. However, because the owners of sewage systems at issue already were regulated by sanitary sewer NPDES permits, the State Board issued a stay of this provision. *See* State Board Order No. WQ 2002-0014. Having a dual system of regulation of the sanitary sewers, the Board found, could lead to "significant confusion and unnecessary control activities." WQ 2002-0014 at p. 8. With the State Board's adoption of statewide general waste discharge requirements for sanitary sewer systems (Order No. 2006-0003-DWQ) and the Regional Board's own waste discharge requirements for sewage collection agencies (R9-2007-0005), the newly proposed requirements of the Tentative Order would likely result in even greater "confusion and unnecessary control activities."

Given the previous findings of the State Board on this same issue, and given that none of the factual reasons supporting the State Board's decision have changed, the Regional Board should remove this provision so as to reduce duplicity of effort and the implementation of unnecessary control activities.[7]

## V. The Tentative Order's Requirements For Fiscal Analysis Exceed Federal Law And Have No Foundation In State Law

Section F (at p. 74) of the Tentative Order requires the Copermittees to secure the resources necessary to implement the permit and conduct a fiscal analysis of the capital and operating costs of its program, as required by the federal regulations. However, in addition, Section F requires the fiscal analysis to include "a qualitative or quantitative description of fiscal benefits realized from implementation of the storm water protection program." Section F further requires each Copermittee to submit to the Regional Board a "Business Plan that identifies a long-term funding strategy for program evolution and funding decisions." While the County agrees with Regional Board staff that there is an identified need to prepare a fiscal reporting strategy to better define the expenditure and budget line items and to reduce the variability in the reported program costs (and have committed to do so in the ROWD), the County takes exception to the requirements to identify the fiscal benefits realized from the program and develop a long-term funding strategy and business plan. These requirements are not required by federal law and

---

[7] The Regional Board also should delete Finding D.3.e., which provides that "pollutant discharges ***into*** MS4s must be reduced to the MEP" (emphasis supplied). This statement is inconsistent with federal law and State Board precedent. MS4 permit requirements are dictated by CWA section 402(p)(3)(B), which provides that permits for discharges "from" MS4s shall require controls to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B)(iii). Such permits also must include a requirement to effectively prohibit non-storm water discharges "into" the storm sewers. 33 U.S.C. § 1342(p)(3)(B)(ii). The CWA is thus very clear that except for non-storm water discharges, municipal storm water permits may only apply the MEP standard to discharges *from* MS4s, not *into* MS4s.

This was the conclusion of the State Board in *In re Building Industry Association of San Diego County*, Order WQ 2001-15. Agreeing with petitioner's argument that the CWA authorizes permits only for discharges "from" MS4s, the State Board stated:

> We find the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. . . . [T]he specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.

Order WQ 2001-15 at p. 9-10. Finding D.3.e., accordingly, should be deleted.

are not based upon any analysis of whether they are necessary for the Copermittee programs, which the Copermittees have funded successfully for 16 years. *See* discussion in Attachment B (pages 23-26).

Federal law requires neither a business plan nor identification of fiscal benefits of the MS4 program. The federal regulations require only that Copermittees provide, for each fiscal year to be covered by the permit,

> [A] fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the program under paragraphs (d)(2)(iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

40 CFR 122.26(d)(2)(vi).

Nor does state law require a business plan or identification of fiscal benefits. Section 13377 of the Water Code, which the Fact Sheet cites in support for the fiscal analysis requirement, simply requires the Regional Board to issue waste discharge requirements that apply and ensure compliance with all applicable provisions of the CWA. Because the CWA does not require a business plan or identification of fiscal benefits, neither does Section 13377 of the Water Code.

According to the Fact Sheet, the requirement for a business plan, including a long-term funding strategy, and the requirement to identify fiscal benefits are based on recommendations in guidance from the National Association of Flood and Storm water Management Agencies (NAFSMA). Fact Sheet at 111. These recommendations were prepared for small MS4s as a basis for developing fee-based programs and have no relevance to the Copermittees MS4 programs. This is discussed in more detail in the Attachment B (page 26).

Given that these Section F requirements are not required by state or federal law and are based on recommendations by NAFSMA that were not intended for Phase I MS4s, the County requests that Provision F of the Tentative Order be revised consistent with the requirements of applicable law.

## VI. The Proposed Order Is Increasingly Prescriptive Without The Appropriate Findings Of Fact And Legal Or Technical Justification

### *A. The Prescriptive Nature of the Tentative Order is Inconsistent with Both State and Federal Law*

The Tentative Order, both generally and particularly with respect to the JURMP/SUSMP requirements, is unlawfully prescriptive under Section 13360 of the Water Code and does not comport with the MS4 programs envisioned by USEPA in the CWA implementing regulations and subsequent USEPA guidance.

#### 1. *The Tentative Order Mandates The Particular Manner Of Achieving Compliance, Rather Than Allowing Compliance "In Any Lawful Manner" as Required by State Law*

In its current form, the Tentative Order, not including its five separate attachments, is over 80 pages in length. By comparison, the current permit is approximately 80 pages in length *including* its five attachments. The principal reason for this added length is that the Regional Board staff continues to add detailed requirements that usurp the Copermittees' right to determine how best to achieve the performance goals set out in the CWA regulations and the Tentative Order. This approach is unduly prescriptive and in direct conflict with Water Code Section 13360 which, as previously discussed, states:

> No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, *or particular manner in which compliance may be had with that requirement, order, or decree*, and the person so ordered *shall be permitted to comply with the order in any lawful manner.*

Cal. Water Code § 13360(a) (emphasis added).

Section 13360 grants a Copermittee unlimited authority to determine how best to meet the substantive obligations imposed under its storm water permit. This authority enables a Copermittee to constantly improve its programs while ensuring that its resources are used in the most efficient manner possible. During the term of the third-term permit, the Copermittees extensively evaluated the effectiveness of their programs. Based on these assessments, the Copermittees determined that most aspects of their programs were working well and identified areas that could be improved. Based on these assessments, the Report of Waste Discharge recommended the Regional Board reissue the permit substantially in its current form with the recommended changes designed to address needed improvements. While the Tentative Order reflects some of the Copermittees' recommendations, it also includes many additional requirements that increase the burdens on Copermittees' resources without any demonstration that they will achieve commensurate water quality improvements.[8]

The Regional Board cannot and should not ignore the limitations on its statutory authority. While the Regional Board may set performance goals for the Copermittees, it cannot tell the Copermittees how to achieve these goals.

2. *The Clean Water Act Regulations Were Designed To Preserve Flexibility And Allow Municipal Copermittees To Fashion Storm Water Management Programs Meeting Their Local Needs And Circumstances*

When enacting the 1987 amendments to the CWA, which added the municipal storm water permit requirements, Congress was aware of the difficulties in regulating discharges from MS4s solely through traditional end-of-pipe treatment. *See* 55 Fed. Reg. at 48037-38. In earlier

[8] Ironically, the issue of prescriptive MS4 permits has been addressed by the Regional Board's own legal counsel. As noted in the County of San Diego's comments on Tentative Order No. 2001-01 ("San Diego Comments"), in December 1997 the Regional Board staff sought advice concerning the permissible level of detail for municipal storm water permits. *See* San Diego Comments, p. A-3. In response, the Regional Board's legal counsel stated that while storm water permits could set forth certain performance goals, they could not specify the manner of complying with such goals. *Id.* Similarly, legal counsel advised that storm water permits could not prescribe the particular pollution control strategies to be used by the permittees. *Id.*

rulemakings, much of the criticism of the concept of subjecting discharges from MS4s to NPDES permits focused on the perception that "the rigid regulatory program applied to industrial process waters and effluents from [POTWs] was not appropriate for the site-specific nature and sources which are responsible for the discharge of pollutants from [MS4s]." *Id.* at 48038.

The water quality impacts of discharges from MS4s depend on a wide range of factors, including: the magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharge to receiving water flow. *Id.* In enacting the 1987 amendments, Congress recognized that:

> [P]ermit requirements for [MS4s] should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges. . . . "All types of controls listed in subsection [402(p)(3)(C)] are not required to be incorporated into each permit."

*Id.* (*quoting* from 132 Cong. Rec. HI0576 (Daily Ed. Oct. 15, 1986) Conference Report).

Consistent with Congressional intent, the Phase I Storm Water regulations "set[] out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions." *Id.* While USEPA believed that all municipalities should face essentially the same responsibilities and commitments for achieving the goals of the CWA, it "agree[d] that as much flexibility as possible should be incorporated into the [MS4] program." *Id*.[9]

USEPA's *Interim Permitting Approach* is not inconsistent with the requirement of flexibility in MS4 permits.[10] The guidance simply (and logically) provides that where existing BMPs are not adequately controlling the discharge of pollutants from MS4s, "expanded or better-tailored BMPs in subsequent permits" should be implemented. 61 Fed. Reg. at 43761. More specific conditions or limitations may be appropriate in MS4 permits only where "adequate information exists" and only where "necessary and appropriate." *Id.* In other words, USEPA does not suggest each iteration of the MS4 should necessarily become increasingly prescriptive; more detailed MS4 conditions only may be prescribed where necessary and appropriate. The *Interim Permitting Approach* does not provide support for the Regional Board to make Copermittees' MS4 permit ever more prescriptive simply for the sake of, for example, making it easier to enforce.

The prescriptive approach mandated by the Tentative Order clearly is at odds with both Congress' intent in enacting the municipal storm water program and with USEPA's intent in implementing it. Rather than allowing the Copermittees the flexibility to develop and implement

---

[9] Notwithstanding that the Fact Sheet cites to the guidance in support of the prescriptive Tentative Order, USEPA's mandate of *flexibility* is confirmed in USEPA's Part 2 Guidance: "The Part 2 application requirements provide each MS4 with the flexibility to design a program that best suits its site-specific factors and priorities. . . . [F]lexibility in developing permit conditions is encouraged by allowing municipalities to emphasize the controls that best apply to their MS4." Part 2 Guidance, *supra*, at p. 6-1.

[10] *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 43761 (August 26, 1996).

their own storm water management programs within the parameters set forth by USEPA, the Tentative Order would dictate more and more prescriptive programmatic requirements that are not warranted in the context of the Orange County Storm Water Program. Attachment B identifies numerous such overly prescriptive requirements.

### *B. To The Extent The Tentative Order's Prescriptive Requirements Are Permissible And Appropriate, They Must Be Supported By Findings And A Fact Sheet Providing Legal And Technical Justification*

As discussed above, the requirements of the Tentative Order must be supported by a fact sheet and findings, which in turn must be supported by substantial evidence. *See, e.g.,* State Board Order No. WQ 95-4; State Board Order No. WQ 2001-15; *Topanga Association for a Scenic Community v. County of Los Angeles, et al.*, *supra* at p. 8. Even assuming the prescriptive nature of the Tentative Order did not run afoul of state and federal law as discussed above, it still would be fatally flawed in that the prescriptive requirements are not supported by a fact sheet providing legal or technical justification for the specific requirements nor are the requirements supported by adequate findings.

# ATTACHMENT B

## ORANGE COUNTY TECHNICAL COMMENTS ON CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION TENTATIVE ORDER No. R9-2007-0002 NPDES NO. CAS0108740

## INTRODUCTION

Attachment B contains the principal technical comments of the County of Orange (the "County") on Tentative Order No. R9-2007-0002 dated February 9, 2007 ("Tentative Order"). Although the supporting Fact Sheet/Technical Report dated February 9, 2007 ("Fact Sheet") is referenced occasionally in this attachment, the County has not attempted to provide detailed comments on the Fact Sheet.

These comments are divided into three sections: (1) General Comments, (2) Findings, and (3) Permit Provisions. The first section discusses the County's global concerns with the Tentative Order, whereas the latter two sections address issues relating to specific parts of the Tentative Order. At times, the issues and concerns raised will pertain to more than one section of the Tentative Order.

The County has endeavored to provide a complete set of comments on the Tentative Order. However, the County reserves the right to submit additional comments relating to Tentative Order No. R9-2007-0002 and the supporting Fact Sheet/Technical Report to the Regional Board up to the close of the public comment period.

## GENERAL COMMENTS

### TENTATIVE ORDER INAPPROPRIATELY USES THE TERM "VIOLATION" INSTEAD OF "EXCEEDANCE"

In several instances the language in the Tentative Order has been changed from the prior Order (R9-2002-0001) to replace the term "exceedance" with the term "violation". For example, "exceedances of water quality objectives" has been replaced with "violations of water quality objectives" (emphasis added). In some cases, the change is inappropriate.

The Tentative Order should use the term "exceedance" where it refers to a comparison of data with criteria such as water quality objectives that are relevant to evaluation of the data. The Tentative Order should use the term "violation" when it is referring to a failure to comply with a prohibition or other requirement of the Tentative Order. Careful use of these terms is important, because an "exceedance" does not equate with a "violation." For example, while it may be useful to compare water quality monitoring data to receiving water quality objectives and use identified "exceedances" to target potential

problems areas and pollutants, it is inappropriate to make this same comparison and determine that there is a "violation".

The use of the term "violation" to refer to any exceedance detected would, in effect, be using the water quality objectives or other relevant reference criteria as de-facto numeric effluent limitations.

The County requests modification of the Tentative Order language to use the word "exceedance" instead of "violation" when referring to the comparison of water quality monitoring data to reference criteria. The locations in the permit where these changes should be made are:

- Page 5, Finding C.7.
- Page 7, Finding D.1.b.
- Page 11, Finding D.3.d.
- Page 12, Finding E.1.
- Page 15, A.3.
  The term "violation" in this section is inconsistent with SWRCB Order WQ 99-05 and needs to be modified to "exceedance ". The iterative language in the receiving water limitations speaks to exceedances of water quality standards, not violations.
- For Monitoring and Reporting Program Page 12.B.1., we recommend the following alternative language:

  "The wet weather program must, at a minimum, include collection of samples for those pollutants <u>on the 303(d) list and/or are Permittee pollutants of concern</u> ~~causing or contributing to violations of water quality standards within the watershed~~."

**TENTATIVE ORDER IS OVERLY PRESCRIPTIVE AND DISMISSES THE IMPORTANCE OF THE DRAINAGE AREA MANAGEMENT PLAN**

The Fact Sheet states that the Tentative Order includes sufficient detailed requirements to ensure compliance and seemingly dismisses the DAMP as "procedural correspondence" which guides implementation and is not a substantive component of the Order.

This permitting approach fundamentally shifts the level of program detail to the permit instead of the Drainage Area Management Plan (DAMP). The increasingly prescriptive and detailed permits provisions continue to erode the flexibility and local responsibility of Copermittees for continued development and improvement of the MS4 program based upon their extensive and collective experience in managing the program. This shift runs counter to the purpose and intent of the federal stormwater management program and as set forth in the federal CWA regulations and USEPA guidance.

The CWA regulations speak to the necessity and importance of the stormwater management plan in the permitting process. The management program "shall include a comprehensive planning process…..to reduce the discharge of pollutants to the

maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate……Proposed management program shall describe priorities for implementing controls". 40 CFR 122.16(d)(2)(iv).

A more flexible permitting approach sets the foundation for the Orange County Program and places upon the Copermittees the continuing responsibility of weighing economic, societal, and equity issues as they define the policies, standards and priorities to be employed in implementing the program.

In fact the DAMP and local JURMPs are fundamental and necessary elements of the MS4 program since they serve as the primary policy and guidance documents for the program and describe the methods and procedures that will be implemented to reduce the discharge of pollutants to the maximum extent practicable and achieve compliance with the MS4 permit performance standards. While the management plans must effectively address and be in compliance with the permit requirements, the necessary detail and prioritization of efforts in doing so must remain at the local level and be described within the Drainage Area Management Plan, not the permit.

The increasingly top down approach reflected in the Tentative Order also inadvertently reduces the ability of the Copermittees to adaptively manage their programs to meet the MEP standard. This seems contrary to the discussion of MEP in the Fact Sheet, which stresses the dynamic aspects the MEP standard and the need for continuous response to assessments of the program. "This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP). However, since MEP is a dynamic performance standard which evolves over time as urban runoff management knowledge increases, the Copermittees' urban runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard."[1] and "Reducing the discharge of stormwater pollutants to the MEP requires Copermittees to assess each program component and revise activities, control measures, best management practices (BMPs), and measurable goals, as necessary to meet MEP"[2]. Finally, "….the Copermittees' urban runoff management programs to be developed under the Order are the Copermittees' proposals of MEP……The Order provides a minimum framework to guide the Copermittees in meeting the MEP standard."[3]

These statements acknowledge that it is incumbent upon the Copermittees to ensure that the program is effective and adaptively managed to meet the ever-evolving MEP standard. The ability of the Copermittees to adaptively manage and develop their programs is undermined by the statement within the Fact Sheet that the DAMP is "procedural correspondence" and not a substantative component of the Order. In the

[1] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 34
[2] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 34
[3] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 35

comments below the Copermittees request a number of language changes so that the necessary programmatic detail is developed within the DAMP instead of the permit.

## FINDINGS

### DISCHARGE CHARACTERISTICS

- **Categories of Pollutants (Finding C.2. Page 3)**
  Finding C.2. identifies common categories of pollutants in urban runoff. For some, but not all pollutants, the finding identifies sources [total suspended solids, sediment (due to anthropogenic activities)]. Since the Copermittees are not responsible for pollutants from all types of sources (atmospheric deposition, etc.), this Finding should be modified to identify the pollutants commonly found in urban runoff without specifying sources unless a more thorough discussion of sources is provided.

- **Clean Water Act 303(d) Impaired Waters (Finding C.6. Page 4)**
  Finding C.6. includes Table 2a. which is titled "Common Watersheds and CWA Section 303(d) Impaired Waters". By paraphrasing the 303(d) list Table 2a unfortunately connotes systemic water quality issues that are, in fact, limited to specific water quality segments. In addition, a number of contaminants are incorrectly identified as causes of impairment. For example, Aliso Creek is not listed for benzo[b]flouranthene, dieldrin, and sediment toxicity. The table needs to present the 303(d) list exactly in accordance with the 303(d) list approved by the State Board on 10/25/06 or be deleted.

- **Water Quality Monitoring Data (Finding C.7. Page 5)**
  Finding C.7. states in part that ". . . water quality data submitted to date documents persistent violations . . .". For the reasons discussed above and to be consistent with the Fact Sheet (page 8), the term "violation" should be changed to "exceedances."

  In addition, the Finding states that the water quality monitoring data collected to date indicates that there are exceedances of Basin Plan water quality objectives for a number of pollutants and that the data indicates that urban runoff discharges are the leading cause of impairment. While the receiving water quality may exceed Basin Plan objectives for constituents identified by the municipalities as pollutants of concern, there is inadequate data to make such a definitive statement that the urban discharges are the leading cause of impairment in Orange County. This statement does not take into account the other sources within the watershed or the uncertainty within many of the studies that have been conducted. Accordingly, the last sentence of that paragraph should be modified to read,

> "In sum, the above findings indicate that urban runoff discharges ~~are~~ may be causing or contributing to water quality impairments, and ~~are a~~ warrant ~~leading cause of such impairments in Orange County~~ special attention.

## URBAN RUNOFF MANAGEMENT PROGRAMS

- **New or Modified Requirements (Finding D.1.c. Page 7)**
  Finding D.1.c. states that the Tentative Order "contains new or modified requirements that are necessary to improve the Copermittees' efforts to reduce the discharge of pollutants to the MEP and achieve water quality standards". The Finding further states some of these new or modified requirements "address program deficiencies that have been noted in audits, report reviews, and other Regional Board compliance assessment activities." In fact, in many cases the new or modified requirements do not have adequate findings of fact and technical justification.

  In many instances the Fact Sheet not only provides little or no justification of the need for the new requirement, it also does not identify the "program deficiency" that warrants the modification. In many cases the Fact Sheet also ignores the thorough program analysis that the Copermittees conducted as a part of their preparation of the ROWD and the deficiencies and program modifications that Copermittees themselves identified as necessary for the program. The Permit Provisions comments in the next section of these comments identify many of the areas where new or modified provisions of the Tentative Order lack factual or technical support in the Fact Sheet.

- **Development Planning - Treatment Control BMPs (Finding D.2.b. Page 9)**
  Finding D.2.b. states that end-of-pipe BMPs are more effective when used as polishing BMPs. Treatment BMPs are not particularly effective as polishing BMPs and work best when the pollutant load is high. The finding should be modified to remove the statement that end-of-pipe BMPs are more effective when used as polishing BMPs.

- **Heavy Industrial Sites (Finding D.2.e. Page 9)**
  Finding D.2.e. states that the one-acre threshold for heavy industrial sites is appropriate "since it is consistent with the requirements in the Phase II NPDES stormwater regulations that apply to small municipalities". The Phase II stormwater regulations do not apply to the Phase I communities. 40 CFR 122.32. The reference to Phase II NPDES regulations and, as discussed below, the corresponding change in the permit provisions should be deleted.

- **Discharges "Into" the MS4 (Finding D.3.e Page 11)**
  Finding D.3.e. states that pollutants discharged "into" an MS4 must be reduced to the MEP. This appears to be an error. The corresponding Tentative Order Section A.2 prohibits only discharges "from" an MS4 that contain pollutants which have not been reduced to the MEP. Finding D.3.e should be revised accordingly.

## STATUTE AND REGULATORY CONSIDERATIONS

- **Treatment and Waters of the U.S. (Finding E.7. Page 14)**
  Finding E.7. states that,"[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water." We believe that Finding E.7. is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on storm water treatment BMPs. This is discussed in detail in Attachment A (Pages 1-7). We wish to comment here on the implications it has for watershed restoration activities.

  Prohibiting treatment and mitigation in receiving waters severely limits the potential locations for installation of treatment control BMPs and will adversely affect many watershed restoration projects. For example, this Finding may have unintended adverse effects for the Aliso Creek Water Quality SUPER Project.

  The Aliso Creek Water Quality SUPER Project proposes a multi-objective approach to Aliso Creek watershed development and enhancement, accommodating channel stabilization, flood hazard reduction, economic uses, aesthetic and recreational opportunities, water quality improvements, and habitat concerns. The project is aimed at water supply efficiency and system reliability through reclamation, along with benefits for flood control and overall watershed management and protection. The ecosystem restoration and stabilization component of the project will include:
    - Construction of a series of low grade control structures and reestablishment of aquatic habitat connectivity;
    - Shaving of slide slopes to reduce vertical banks; and
    - Invasive species removal and riparian revegetation and restoration of floodplain moisture.

  The Copermittees are concerned that some of these activities may be deemed "urban runoff treatment and/or mitigation" in a receiving water and, thus, may not be allowed, compromising the project objectives.

  In addition, this Finding seems to conflict with Section 3.a.(4) of the Tentative Order, which requires the Copermittees to evaluate their flood control devices and identify the feasibility of retrofitting the devices to provide for more water quality benefits.

  Given the lack of any proper legal or factual basis for these limitations as well as the adverse impacts on watershed restoration efforts, the Finding should be deleted from the Tentative Order.

# PERMIT PROVISIONS

## LEGAL AUTHORITY

- **Effectiveness of BMPs (Section C.1.j. Page 19)**
  The Tentative Order includes a new provision that requires the Copermittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. This provision is inappropriate. It ignores the fact that the New Development/Significant Redevelopment section of the DAMP (Section 7.0) establishes a process for the selection, design, and long-term maintenance of permanent BMPs for new development and significant redevelopment projects and requires development to select BMPs that have been demonstrated as effective for their project category. In addition, it ignores the fact that the Copermittees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs. This Section C.1.j. should be deleted from the Order.

## JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

### Development Planning Component

- **Infiltration and Groundwater Protection (Section D.1.c.(6) Page 22)**
  Section D.1.c.(6)(a) requires urban runoff to undergo pretreatment prior to infiltration. This is problematic for several reasons. First, this requirement unnecessarily constrains the use of infiltration devices, which should be at the discretion of the designer, and diminishes the beneficial aspects of infiltration devices. At the same time, the volume of stormwater that can be treated will be reduced since the volume will be limited to the sizing of the pretreatment device and not the sizing of the infiltration device. Besides, pollution prevention and source control BMPs are required prior to infiltration.

  Second, the Fact Sheet provides no technical basis for the requirement to provide pretreatment before infiltration. This restriction on the use of infiltration technology should not be included in the Tentative Order without a strong technical basis for the requirement that details the necessity of pretreatment before infiltration and the concerns related to infiltrating stormwater.

  Since the Fact Sheet does not currently provide a any technical basis for the requirement, Section D.1.c.(6)(a) should be deleted from the Tentative Order.

  Section D.1.c.(6)(g) restricts the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic. High vehicular traffic is defined as 25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway. There is no technical basis for this restriction or the definition of “high vehicular traffic” included within the Fact Sheet. As such, prescriptive

requirements should not be included in the Tentative Order unless there is a strong technical basis. Although SWRCB Order WQ 2000-11 provides guidance on some of the restrictions on the use of infiltration treatment control BMPs contained in the Tentative Order, there is no mention of restrictions related to areas subject to high vehicular traffic. Moreover, we are not aware of any demonstrated relationship between traffic counts and frequency of materials deposited on the street.

Since the Fact Sheet does not currently provide a technical basis for restricting the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic, Sections D.1.c.(6)(a) and D.1.c.(6)(g) should be deleted from the Tentative Order.

- **Standard Urban Storm Water Mitigation Plans (SUSMPs) (Section D.1.d. Page 23)**
  Section D.1.d. requires each Copermittee to implement an updated local SUSMP within twelve months of adoption of the Order. The schedule for the update of the SUSMP is overly aggressive and does not allow the time necessary for the Copermittees to incorporate changes and implement an updated SUSMP. Since the modifications for the SUSMP will take longer than the 12-month period identified in the Tentative Order, the provision should be modified to require each Copermittee to implement an updated local SUSMP within 24 months of adoption of the Order.

- **Definition of Priority Development Project (Section D.1.d.(1)(b) Page 23)**
  Section D.1.d.(1)(b) defines Priority Development Projects as "redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)". This Section is not clear on whether the "already developed site" or the redevelopment project must fall under one of the categories in section D.1.d.(2) in order for the project to be considered a Priority Development Project. The Copermittees request clarification regarding this Section.

  The project categories listed in section D.1.d.(2) includes "single-family homes". Requiring SUSMP requirements for re-development projects of single-family homeowners presents an unnecessary burden in terms of cost and complexity and likely minimal water quality benefit. This provision should be modified to exclude single-family homes from SUSMP requirements.

- **Priority Development Project Categories (Section D.1.d.(2) Page 24)**
  Section D.1.d.(2) defines Priority Development Project Categories. In an introduction to the listed categories, this section states that, where a new development project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements. As currently written this provision would require a new

development that has a 5,000 square foot parking lot feature and 100,000 square feet of other land uses that are not Priority Development Project Categories, to provide treatment for the entire project (105,000 square feet). This requirement would unduly burden the landowner in this case with the cost of treating runoff from 105,000 square feet when only 5,000 square feet should be subject to SUSMP requirements and treatment controls.

The need to treat runoff from a greatly increased land area will require an increase in the size of treatment controls, which will increase the volume of water treated without a likely commensurate increase in pollutant removal. This requirement will unnecessarily increase the cost of treatment control BMPs without commensurate pollutant removal benefits and likely discourage re-development.

The Fact Sheet fails to provide any information showing that development land uses that are not in the Priority Development Project Category contribute pollutants to the MS4 and are a threat to water quality. The Fact Sheet (page 78) states that this provision "is included in the Order because existing development inspections by Orange County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partially treated runoff from redevelopment sites. This explanation does not demonstrate any connection between development land uses that are not in the Priority Development Project Category and the observed "threats to water quality." In addition, although the explanation focuses on the water quality benefits for redevelopment projects, the Section is for "new development" projects".

Since the Fact Sheet does not provide any technical information showing that land uses that are not Priority Development Project Categories are a significant source of pollutants and a threat to water quality, the introductory paragraph of Section D.1.d.(2) subjecting the entire project footprint to SUSMP requirements should be removed from the permit.

- **Commercial Developments (Section D.1.d.(2)(b) Page 24)**
  Section D.1.d.(2)(b) lowers the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 square feet (2.3 acres) to one acre. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. However EPA Phase II guidance is not relevant to a Phase I permit.

  The Fact Sheet also states that this Provision is based on Copermittee findings that smaller commercial facilities pose high threats to water quality. This is not the case. The Copermittees indicated that commercial facilities of 100,000 square feet or less receive a score of 3 out 5 (a medium threat) in Table 9-8 in the 2007 DAMP. Since the Fact Sheet does not provide any technical basis for

lowering the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 (2.3 acres) square feet to one acre, the category should be described as, “Commercial developments greater than 100,000 square feet.”

- **Industrial Developments (Section D.1.d.(2)(c) Page 24)**
  Section D.1.d.(2)(c) requires industrial developments of greater than one acre to comply with SUSMP requirements. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. Again EPA Phase II guidance is not relevant to a Phase I permit. In addition, the Fact Sheet does not provide a technical basis for adding industrial sites to the Priority Development Project Categories and consequently Section D.1.d.(2)(c) should be deleted from the permit.

- **Streets, Roads, Highways, and Freeways (Section D.1.d.(2)(i) Page 25)**
  Section D.1.d.(2)(i) includes as a Priority Development Project Category streets, roads, highways, and freeways including any paved surface of 5,000 square feet or greater that is used for transportation. It is unclear whether a project such as the addition of a right turn pocket to a roadway would subject the entire roadway to SUSMP requirements and treatment controls. This provision should be revised to include language clarifying that only the subdrainage area where the roadway improvements are occurring is subject to SUSMP requirements and required to include BMPs, not the entire roadway.

- **Retail Gasoline Outlets (Section D.1.d.(2)(j) Page 25)**
  Section D.1.d.(2)(j) includes as a Priority Development Project Category Retail Gasoline Outlets (RGOs) that meet the criteria of 5,000 square feet or more or have a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. SWRCB Order WQ 2000-11 provides guidance on whether RGOs are subject to SUSMP requirements. The State Board states in this Order that “In considering this issue, we conclude that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. Moreover, in light of the small size of many RGOs and the proximity to underground tanks, treatment may not always be feasible, or safe.” Although the State Board does not prohibit subjecting RGOs to SUSMP requirements, the State Board provides a number of reasons for not doing so, including that fact that RGOs are already heavily regulated. It should also be noted that the DAMP already prescribe a suite of BMPs specific to RGOs. Subjecting RGOs to SUSMP requirements imposes duplicity where it is not needed. Section D.1.d.(2)(j) should be removed from the permit.

- **Treatment Control BMP Requirements (Section D.1.d.(6)(ii)(f) and (g) Page 28)**
  Section D.1.d.(6)(ii)(f) require treatment control BMPs be implemented prior to discharging into waters of the U.S. and provision D.1.d.(6)(ii)(g) requires that treatment controls not be constructed within waters of the U.S. or waters of the

State. These provisions of the Tentative Order greatly limit the use of regional BMP and watershed-based approaches. The provisions demand a lot-by-lot approach in implementing BMPs that is analogous to the site-by-site septic tank approach that has been discredited as an effective strategy for sewage treatment in urban areas. Similarly, the Copermittees submit that such an approach is also ineffective for stormwater and will lead to a diversion of limited resources to managing thousands of site-by-site treatment controls, which are managed by parties that have limited or no experience, instead of hundreds of regional controls, that are managed by parties and governmental agencies that have expertise in BMP management.

The Tentative Order encourages a renewed focus on the 'watershed approach' but the proposed restriction on regional BMPs is antithetical to a watershed approach. The USEPA in its *National Management Measures Guidance to Control Nonpoint Source Pollution from Urban Areas, Management Measure 5: New Development Runoff Treatment* dated November 2005 (page 5-38) states that "regional ponds are an important component of a runoff management program." and that the costs and benefits of regional, or off-site, practices compared to on-site practices should be considered as part of a comprehensive management program. The EPA guidance acknowledges that a regional approach can effectively be used for BMPs.

In addition, the Fact Sheet does not provide any technical justification for these provisions. Since neither the Findings nor the Fact Sheet provide any technical basis for precluding regional BMPs and EPA guidance recommends the use of regional BMPS, these provisions should be deleted from the permit.

- **Low Impact Development (LID) Site Design BMP Substitution Program (Section D.1.d (8) Page 30)**
  Section D.1.d.(8)(e) states that the LID Site Design BMP Substitution Program must not apply to automotive repair shops or streets, roads, highways, or freeways that have high levels of average daily traffic. The Copermittees do not design, construct or operate freeways. It is suggested that the word "freeways" be removed from this provision.

- **Treatment Control BMP Maintenance Tracking (Section D.1.f Page 32)**
  Section D.1.f.(2)(c) requires a very prescriptive and resource intensive inspection program for the treatment controls. For example, (iii) requires Copermittees to annually inspect of 100% of projects with treatment control BMPs that are high priority. Annual inspection of structural BMPs will create a burgeoning and resource intensive inspection program that is not warranted. The Provision should be amended to reduce the prescriptive nature of the inspection program and allow the Copermittees to develop an inspection program that will meet the intent of the provision while balancing the need for a variety of approaches to complete this element of the program in a cost effective manner. This is important because such approaches include not only inspections but also

targeting identified or problem BMPs based on past reporting and investigations of water quality problems downstream.

- **Requirements for Hydromodification and Downstream Erosion (Section D.1.h. Page 33)**
  Section D.1.h. discusses the hydromodification requirements for Priority Development Projects. The hyrdomodification provisions are of concern to the Copermittees for several reasons.

  As a general matter, the hydromodification provisions may actually discourage smart growth and sustainable development and encourage urban sprawl. High density urban development generally does not have the space to allocate to onsite hydromodification controls. However, urban development has other water quality benefits such as incorporating subterranean parking garages, retail and office workspace, and residential space into a single impervious footprint. As a result, these types of developments have a much smaller impervious footprint than suburban developments that accommodate the same features. This Provision should be amended to include an exception for urban development based on impervious footprint.

  Section D.1.h.(3) (Page 34) requires each Copermittee to implement, or require implementation of, a suite of management measures within each Priority Development Project to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels. This section should not apply to development where the project discharges in locations where the potential for erosion is minimal or not present. This would include those channels that are significantly hardened and engineered to accept flows from large impervious areas and discharges directly to water bodies not susceptible to erosion.

  In addition, this section should not apply to watersheds or watershed plans that already include sufficient hydromodification measures. For example, the County of Orange and major landowners, such as Rancho Mission Viejo have put in place a comprehensive watershed land use/open space strategy for the San Juan Creek Watershed/Western San Mateo Watershed which includes water quality/quantity management as an integral component. The Tentative Order should be amended to provide an exception to this section for those watersheds where a watershed plan that contains sufficient hydromodification measures has been developed.

  This section should also recognize that the common hydromodification management measures for complying with the hydromodification requirements don't necessarily apply directly to flood control projects.

  Section D.1.h.3.(b) (Page 34) requires that management measures must be based on a sequenced consideration of site design measures, on-site management controls, and then in-stream controls. The provision does not

include an option to address hydromodification on a regional or watershed basis. This provision should be amended to include an option to address hydromodification on a regional or watershed basis.

Section D.1.h.(3)(b)(i) (Page 34) requires that site design measures for hydromodification must be implemented on all Priority Development Projects. It is neither necessary nor prudent to require hydromodification controls on all priority projects. Some priority projects may be too small to have hydromodification effects and some may discharge into engineered channels, which makes these measures unnecessary. The receiving channel must always be part of the assessment of whether hydromodification controls will be required. This Provision should be amended to include language that the controls are required unless a waiver per paragraph (c) of this section is granted.

Section D.1.h.(3)(c) (Page 35) defines the on-site hydromodification control waivers. This provision does not address channels that have been engineered to accept the discharge from the urbanized landscape. Much of the lower part of the San Juan Creek watershed falls into this category. For example, San Juan Creek from its confluence with Trabuco Creek Channel is an example. The channel has been improved with soil cement side slopes, and drop structures, all specifically designed to accept the master plan development flows. It is also possible that future channels will be engineered with natural design concepts to accept master planned discharges. There are very few 'natural' channels in areas where development has yet to occur, and the hydromodification provisions of the Tentative Order must accommodate this fact. It is suggested that the provisions be amended to include an exception as part of the on-site hydromodification control waivers criteria, for channels that have been engineered to accept the discharge and flows of the Priority Development Project

Section D.1.h.(3)(c)(ii)(b) requires hardened channels to include in-stream measures to improve the beneficial uses adversely affected by hydromodification. However, this section seems contradictory to the waiver concept since, in order to qualify for the waiver, the development must provide improvements to the channel to improve the beneficial uses. It is unclear how one would improve the beneficial uses of a severely altered or significantly hardened channel without removing the channel armoring. Therefore, it seems that this section does not provide an effective waiver option, and, thus this section should be deleted from the Tentative Order.

Section D.1.h.(4) (Page 35) requires the development and implementation of hydromodification criteria within two years of adoption of this order. This section is problematic for several reasons. First, the development of this criteria will likely take longer than two years since criteria must be established for specific projects and receiving waters. In addition, the criteria must be based on findings from the Hydromodification publications produced by the Stormwater Monitoring Coalition (SMC) and Southern California Coastal Water Research Project

(SCCWRP), however, if there are any delays with these publications, the permit section does not provide an alternative to the two year timeframe. Due to these concerns, the language should be modified to state that, until the completion of the SMC Hydromodification Control Study, the Copermittees should implement interim hydromodification criteria.

Section D.1.h.(5) requires that within 180 days of adoption of the Order, each municipality must ensure that projects disturbing 20 acres or more include and implement the interim hydromodification management measures identified. Section D.1.d. of the Tentative Order allows the Copermittees 12 months (suggested amendment to 24 months) from permit adoption to update their Local WQMPs. In order to prevent confusion with regard to changes in the Local WQMPs, it is suggested that the requirement to place interim hydromodification requirements on large projects be extended so that it is in line with the Local WQMP update (as suggested by the Copermittees). It is also suggested that this section be amended to provide an exception to those watersheds where a watershed plan that contains sufficient hydromodification measures to meet the requirements of the section, has been incorporated into the JURMP and to those projects that have already designed BMPs to address hydromodification issues, received approval for the but have not started construction.

Section D.1.h.(5)(a)(iii) (Page 36) requires control of runoff through hydrograph matching for a range of return periods from 1 year to 10 years. An exception to this requirement should be Priority Development Projects that discharge to hardened channels or engineered channels. It is suggested that the provision be amended to include an exception for Priority Development Projects that discharge to hardened channels or engineered channels.

- **Reporting (Section D.1.j Page 37)**
  Section D.1.j. details the reporting requirements of the development Planning Component. This provision substantially increases the Copermittees' reporting obligations. This level of effort will divert program resources from pollution reduction projects. This provision should be amended to reflect the level of reporting requirements included in the current permit Order No. R9-2002-01.

**Construction Component**

- **Permit Fees**
  Although not directly addressed within the Tentative Order, the Copermittees take issue with the requirement that they must pay a significant fee for the municipal stormwater permit, which covers their construction responsibilities and are also required to pay an additional fee when they submit an NOI to obtain coverage under the Statewide Construction General Permit. Since there is some discretion in how the Regional Water Board addresses these fees, the Copermittees request that their municipal stormwater fees cover all municipal

activities including construction and that they not be held liable for additional fees when submitting NOIs.

- **Site Planning and Project Approval Process (Section D.2.c.(2) Page 39)**
  The Tentative Order requires that, prior to permit issuance, the Copermittees require and review a project proponent's stormwater management plan to verify compliance with local grading ordinances and other applicable ordinances. We interpret this to refer to the stormwater pollution prevention plan (SWPPP) required by the Statewide General Construction Stormwater Permit.

  The Fact Sheet (Page 92) discussion provided as technical justification for this new requirement is inaccurate and/or misapplied. The Fact Sheet cites USEPA guidance as stating that Copermittees should review site plans submitted by the construction site operator to ensure that the appropriate erosion and sediment controls are implemented before ground is broken. While the Copermittees agree with this, the requirement is to review site plans submitted in conformance with <u>local</u> requirements, not state requirements.

  The Fact Sheet goes on to state that audits of Orange County Copermittee stormwater programs found that the "site plan and SWPPP reviews were inadequate". While there may be issues related to the site plans, the Copermittees are not responsible for enforcement of the Statewide Construction General Permit and, therefore, do not review SWPPPs for conformance with local codes and ordinances prior to issuing local permits, they only review locally required plans such as erosion and grading control plans.

  The Copermittees take exception to this language and recommend that the language be modified as follows:

  > (2) Prior to permit issuance, the project proponent's ~~stormwater management plan~~ <u>locally required plans such as grading plans and erosion and sediment control plans</u> must be reviewed to verify compliance with the local grading ordinance, other applicable local ordinances, and this Order.

- **BMP Implementation (Section D.2.d Page 40-41)**
  Section D.2.d.(1)(a)(ii) requires the development and implementation of a site-specific stormwater management plan. For the same reasons discussed above, the Copermittees recommend that this section be modified as follows:

  > (ii) Development and implementation of a site-specific ~~stormwater management plan~~ <u>erosion and sediment control plan</u>;

  Section D.2.d.(1)(c)(i) (Page 41) states that the Copermittees must require implementation of advanced treatment for sediment at construction sites that are determined to be an exceptional threat to water quality.

The Fact Sheet provides no justification for this requirement. The newly released preliminary draft Statewide Construction General Stormwater Permit identifies the Active Treatment System (ATS ) as an advanced sediment treatment technology. The ATS prevents or reduces the release of fine particles from construction sites by employing chemical coagulation, chemical flocculation, or electrocoagulation to aid in the reduction of turbidity caused by fine suspended sediment. The preliminary draft permit, requires the use of ATS *or source controls* where the project soils exceed 10% medium silt.

Since advanced sediment treatment is a newly emerging statewide issue that needs to be fully vetted to address a host of issues including potential byproducts and application of limitations and other options, this provision should be deleted until the costs and benefits of this particular BMP are better understood.

**Municipal**

- **Flood Control Structures (Section D.3.a.(4)(c) Page 47)**
  Section D.3.a.(4)(c) requires the Copermittees to evaluate existing flood control devices to identify those that are causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structure. This provision is problematic for several reasons as described below.

  The current Order (Order No. R9-2002-0001) requires that the Copermittees "evaluate the feasibility of retrofitting existing structural flood control devices and retrofit where needed" [(F.3.a.(4)(b)i]. The Copermittees completed this in November 2003 with the submittal of a technical memorandum *Identification of Retrofitting Opportunities – Existing Channel Assessment.* The purpose of the flood control channel assessment was to identify locations within the flood control channel system that, based on a qualitative assessment, appear to have potential for modification to enhance beneficial uses or provide a water quality (pollution control) function.

  Based on an identification and field review of channel segment locations throughout the County, approximately 20 locations were identified as having the potential for reconfiguration, four (4) of which were in the San Diego Region. However, before final selection and implementation of these identified potential retrofit locations can occur, quantitative analyses must be conducted to ensure that the flood control/drainage function of the channels is not compromised, and project specific design, cost estimate, and environmental permitting/coordination work must be conducted. Thus, the provision is duplicative of work that has already been completed under the existing permit and, therefore, unnecessary.

  The federal regulations [40 CFR, Part 122.26(d)(2)(vi)(A)(4)] focus on evaluating flood control devices and determining if retrofitting the device is feasible. The regulations state:

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from stormwater is feasible.

The language should be modified so that it is aligned with the current stormwater permit, recognizes the work that has been completed, is consistent with the intent of the federal regulations, and is consistent with the justification within the Fact Sheet. The proposed language modification is as follows:

(4). BMP Implementation for Flood Control Structures
(c) Each Permittee who owns or operates flood control devices/facilities must continue to evaluate its existing flood control devices/facilities, ~~identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution,~~ as needed and identify opportunities and the feasibility of configuring and/or reconfiguring channel segments/structural devices to function as pollution control devices to protect beneficial uses. The ~~inventory and~~ updated evaluation must be completed by July 1, 200~~8~~10 and submitted to the Regional Board with the Fall 200~~8~~10 annual report.

- **Street Sweeping (Section D.3.a.(5) Page 48)**

Section D.3.a.(5) requires the Copermittees to design and implement the street-sweeping program based on two new criteria including traffic counts and trash and debris. This provision is problematic for several reasons as described below.

First, the Copermittees are supportive of designing and implementing a street sweeping program that maximizes water quality benefits, and, in fact, have developed their existing program with this objective in mind. The Tentative Order should propose language that provides objectives for the program instead of strictly defining the criteria, especially since the criteria should be determined based on local needs and experience.

For example, if the street sweeping program has to "optimize the pickup of toxic automotive byproducts based on traffic counts", there needs to be a strong technical basis for this requirement and for the relationship between traffic counts and frequency of materials deposited on the street. Although "toxic automotive byproducts" broadly includes oil, gasoline, transmission fluid, brake fluid, brake dust (specifically copper), radiator fluids and tire wear (specifically zinc), the street sweeping program is only effective at removing those byproducts which adhere to sediment particles or other large debris. Once the liquid byproducts absorb into the asphalt, the street sweeper will be ineffective at removing the material.

Second, if the Tentative Order is going to include new prescriptive street sweeping requirements, the findings must indicate why the existing street sweeping program is ineffective and the Fact Sheet must identify the technical basis for the finding and as well as demonstrate the correlation between the traffic counts and need for street sweeping.

All Copermittees maintain street sweeping programs in residential, commercial and/or industrial areas and, in 1993, the Copermittees compiled information regarding their existing street sweeping schedules and practices and subsequently changed elements of their programs such as the types of sweepers purchased, the frequency of sweeping, and the use of parking restrictions in order for the street sweeping program to more effectively aid in water quality improvements. In fact, the Copermittees have observed an 87% increase in the weight of material collected from 2001-2002 to 2004-2005 indicating a marked increase in effort and diversion of materials that would have otherwise ended up in the receiving waters[4].

Since the findings and Fact Sheet do not currently support the new prescriptive requirements for street sweeping and the Copermittees have a program that has already been optimized for water quality benefits, Section D.3.a.(5) should be deleted. The Tentative Order should, instead, focus on the objectives for the program, the review/revision of model maintenance procedures as needed, and training to ensure that the program is consistently implemented.

- **Infiltration from Sanitary Sewer to MS4 (Section D.3.a.(7) Page 49)**
  Although the first portion of the Tentative Order provision (7)(a) is consistent with the current permit (Order No. R9-2002-0001), the Copermittees submit that this provision is more applicable to sanitary sewer agencies, not stormwater agencies, and is an unnecessary duplication of other regulatory programs. The State Board stayed a similar provision in the existing permit as leading "significant confusion and unnecessary control activities." WQ 2002-0014 at p.8. Since that time, the State Water Resources Control Board has adopted the Statewide General Waste Discharge Requirements (WDRs) for Sanitary Sewer Systems, Water Quality Order No. 2006-0003 (Sanitary Sewer Order) on May 2, 2006 and the Regional Water Board adopted Order No. R9-2007-0005 on February 14, 2007 (which is more stringent and prescriptive than the Statewide General WDRs).

  The Statewide General WDRs require public agencies that own or operate sanitary sewer systems to develop and implement sewer system management plans which, among other things, requires that the agencies describe and implement routine preventative operation and maintenance activities as well as a rehabilitation and replacement plan. The Regional Board requires that all

[4] Report of Waste Discharge, July 21, 2006, Section 5.0 Municipal Activities.

sewage collection agencies within the San Diego Region comply with Order No. R9-2007-0005 as well as the Statewide General WDRs.

Since there are now two regulatory mechanisms in place to address sanitary sewer exfiltration-related issues, part (a) of the provision (7) should be deleted from the Tentative Order.

While the Copermittees agree that stormwater agencies must also address various aspects of sanitary sewer overflows and connections, the provisions in (7)(b) are aspects of other portions of the stormwater program and should be moved to those sections of the Tentative Order. The proposed changes include:

i. *Adequate plan checking for construction and new development* – incorporate in the Construction and New Development programs
ii. *Incident response training for municipal employees that identify sanitary sewer spills* – incorporate in the Illegal Discharges/Illicit Connections (ID/IC) program.
iii. *Code enforcement inspections* – delete, this is covered by other programs
iv. *MS4 maintenance and inspections* – incorporate in the Municipal program, provision D.3.a(6).
v. *Interagency coordination with sewer agencies* – incorporate in the ID/IC program
vi. *Proper education of municipal staff and contractors conducting field operations on the MS4 ~~or municipal sanitary sewer (if applicable)~~* – incorporate in the Municipal program

**Commercial/Industrial**

- **Commercial Sites/Sources (Section D.3.b.(1)(a) Page 53)**
The Tentative Order added four new categories of commercial sites/sources: food markets, building material retailers and storage, animal facilities, and power washing services. The Fact Sheet notes that these facilities were added because these activities were identified as potentially significant sources of pollutants in annual reports.

  Although we agree that those sites/sources that are identified by the Copermittees as contributing a significant pollutant load to the MS4 should be added to the list of sites/sources and incorporated into the inventory, unless universally identified as a significant source, those determinations made at a local level should only be incorporated into the local JURMP and not universally within the Tentative Order. If these determinations are made at a local level and then the requirement applied countywide, the Board staff may inadvertently be diverting resources from high priority issues to lower priority issues.

  The new categories should be deleted from the Tentative Order and, instead, recognize that those sites/sources have been locally determined to contribute a

significant pollutant load to the MS4 be should be incorporated into the local JURMP(s).

- **Mobile Businesses (Section D.3.b(3)(a) Page 55)**
  The Tentative Order has added a new requirement to develop and implement a program to address discharges from mobile businesses. The program must include the identification of BMPs for the mobile business, development of an enforcement strategy, a notification effort, the development of an outreach and education program, and inspection as needed. This provision is problematic for several reasons as described below.

  If the Tentative Order is going require the development and implementation of a significant new element of the commercial program, the Findings must adequately support the new requirement. The Findings do not currently address this provision.

  The Fact Sheet must also provide a technical basis for the addition of the mobile business program to the commercial program, identify the basis for applying the requirement to all MS4s in their region, and ensure the water quality benefit will be commensurate to the resources necessary to develop and implement such a program.

  The Fact Sheet indicates that this provision is not significantly different than the existing requirements, but then acknowledges that "mobile businesses present a unique difficulty in stormwater regulation" for several reasons including:
    - The regular, effective practice of unannounced inspections is difficult to implement;
    - Tracking these mobile businesses is difficult because they are often not permitted or licensed; and
    - Mobile businesses are transient in nature and may have a geographic scope of several cities or the entire region

  The Copermittees agree that the development and management of a mobile business program will be very difficult and resource intensive. For all the inherent difficulties listed above, the development and implementation of a mobile business program is, in fact, significantly different from the existing commercial/ industrial program, which largely focuses on fixed facilities.

  While the Copermittees understand the intent of the provision, the Tentative Order should include language that limits the scope of the provision until the costs and benefits of the program are better understood. As such, the Tentative Order should include language that allows the Copermittees to identify a mobile business category that may be a significant source of pollutants and to develop a pilot program for that category. The pilot program would allow the Copermittees to work together on a regional basis to develop an appropriate framework for addressing mobile business and determine whether the program is effective prior

to expending a significant amount of resources on multiple categories of mobile businesses.

- **Food Facility Inspections (Section D.3.b.(4)(c) Page 56)**
  The Tentative Order includes new, prescriptive requirements for food facility inspections and requires that the scope of the inspections be expanded to address maintenance of greasy roof vents (c)(iv) and identification of outdoor sewer and MS4 connections (c)(v). While the issue of grease on roof vents has been discussed at the Aliso Creek meetings, the Findings and Fact Sheet do not provide any justification for the additional requirements, any clarification as to how the Copermittees would inspect for these issues, or any rationale as to how this would make the inspection program more effective or improve water quality.

  In fact, the annual food facility inspection program that has been conducted over the past few years has been focused on the critical stormwater-related issues typically found at a food facility and has been effective. The existing food facility inspection program focuses on the major water-quality related issues associated with restaurants including disposal methods for food wastes, fats, oils and greases, wash water, dumpster management and floor mat cleaning. In 2004-2005 over 25,000 food facility inspections were conducted and over 1,400 were identified as having stormwater-related issues. In 2003-2004, over 12,000 inspections were conducted and about 1,300 were identified as having stormwater-related issues.

  This comparison suggests that the inspections and related outreach efforts are having a positive impact since the incidence of issues is decreasing from 1 in 10 inspections to 1 in 17 inspections.

  Since the food facility inspection program is focused on the major concerns that need to be addressed at a food facility and has been successful, provisions (c)(iv) and (c)(v) should either be deleted from the Tentative Order or the subject of further technical justification.

- **Third Party Inspections (Section D.3.b(4)(d) Page 57)**
  The Tentative Order includes new, prescriptive requirements for third party inspections that provide a significant amount of detail as to how the inspection program must be managed. However, the Findings and the Fact Sheet do not address the need for these expanded requirements or provide any rationale as to how these new requirements would make the third-party inspection program more effective.

  In fact, this level of detail should be determined locally and should be included as a part of the program within the model DAMP and local JURMPs. After the inclusion of the industrial and commercial inspection programs in the third term permit, the Copermittees determined that they could leverage their resources by utilizing and expanding upon existing inspection programs to assist them in

complying with the permit instead of creating duplicative inspection programs. The ability to utilize third-party inspections as an effective part of the program, has allowed the Copermittees to maximize their resources. An example of a third party inspection program that has been developed and implemented is the use of the Orange County Health Care Agency (OCHCA) inspectors to assist the Copermittees in inspecting 10,000 restaurants countywide on an annual basis. The Copermittees have developed this program in conjunction with OCHCA so that it is only an incremental burden on their limited resources, effective, and allows for clear communication between the inspectors and the Copermittees.

Since the Copermittees have already developed an effective framework for a third-party inspection program, provisions (i)(a) through (i)(d) are unnecessary and should be deleted from the Tentative Order.

**ID/IC Program**

- **Investigation/Inspection and Follow Up (Section D.4.e(2)(b) and (c) Page 63)** The Tentative Order requires that the Copermittees <u>conduct</u> an investigation or document why the discharge does not require an investigation within two days of receiving dry weather field screening or analytical laboratory results. Although the Copermittees understand and agree with the intent of the permit language, the existing language is onerous and does not recognize the resources that are necessary to conduct an investigation or the variability of the types of investigations that may be warranted.

  It is suggested that the language be modified to preserve the intent of the requirement as follows:

  (b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees must either ~~conduct~~ <u>initiate</u> an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.

  (c) Analytical data: Within two business days of receiving analytical laboratory results the exceed action levels, the Copermittees must either ~~conduct~~ <u>initiate</u> an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.

- **Elimination of Illicit Discharges and Connections (Section D.4.f Page 64)** The Tentative Order requires that the Copermittees “take immediate action to eliminate all detected illicit discharges….” And that illicit discharges that pose a serious threat….”must be eliminated immediately”. Although the Copermittees understand and agree with the intent of the permit language, the existing language is onerous and does not recognize the time and/or resources that are

necessary to respond. It is suggested that the language be modified to preserve the intent of the requirement as follows:

> f. Elimination of Illicit Discharges and Connections
> Each Permittee must take ~~immediate~~ action to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections as soon as practicable after detection. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated ~~immediately~~ in a timely manner.

**Watershed Urban Runoff Management Program (Section E. page 66)**
The Tentative Order includes increasingly prescriptive requirements for the Watershed Urban Runoff Management Program (WURMP) including the designation of default Copermittee leads for each of the watershed management areas, the specific role of the Lead Permittee, the number of water quality and watershed activities that need to be implemented on an annual basis within each WMA, and a requirement for the description and assessment of each structural and non-structural management practice implemented.

The Fact Sheet states that the increased prescriptiveness for the WURMP provision was necessary because enforceability of the permit has been a critical aspect. The Fact Sheet further states that:

> "For example, the watershed requirements of Order No. R9-2002-01 were some of the Order's most flexible requirements. This lack of specificity in the watershed requirements resulted in inefficient watershed compliance efforts. This situation reflects a common outcome of flexible permit language. Such language can be unclear and unenforceable, and it can lead to implementation of inadequate programs[5]."

Not only do the Copermittees take strong exception to this statement, but the Fact Sheet is inconsistent with the Findings, which simply state that the WURMPs need to focus on the high priority water quality issues. In addition, the Fact Sheet does not acknowledge any of the notable Copermittee successes including 1) the development of a South Orange County Integrated Regional Watershed Management Plan (IRWMP), which resulted in a $25 million IRWMP competitive grant award, (2) the 303(d) de-listing efforts that are ongoing and have been submitted for consideration; and 3) the efforts of the County of Orange and major landowners, such as Rancho Mission Viejo to put in place a comprehensive watershed land use/open space strategy for the San Juan Creek Watershed/Western San Mateo Watershed through the approved Southern Subregion Habitat Conservation Plan (HCP) and Special Area Management Plan (SAMP) both of which include water quality/quantity management as an integral component.

[5] Fact Sheet/Technical report for Tentative Order No. R9-2007-0002, page 10

The Copermittees submit that the increased prescriptiveness of the Tentative Order is unwarranted and antithetical to a watershed management approach, which should be founded on a stakeholder driven process. Successful watershed-based programs follow a stakeholder driven process and are developed from the "bottom-up" not from the "top-down". The Copermittees must be given latitude in how the watershed-based programs are developed and implemented, especially since many of the pollutants of concern (Cu, Zn, pesticides, pathogen indicators, etc.) and issues are the same within and among watersheds.

The language must be modified to provide the flexibility that is necessary within a watershed management program (similar to the language in Order No. R9-2002-0001) and, instead, focus on the major objectives for the program. Some language changes that would assist the Board in making these changes are provided below.

- **Lead Watershed Permittee (Section E.1.a. page 67)**
  The Tentative Order has designated which entity within the watershed should be the default lead Permittee and what those responsibilities entail. The Copermittees contend that this level of detail is inappropriate for a permit provision and should, instead, be a collaborative decision that is made among the various watershed stakeholders based on locally determined criteria and needs.

  The Copermittees propose that the language be modified as follows:

  a. Lead Watershed Permittee Identification
  Watershed Copermittees ~~may~~ must identify the Lead Watershed Permittee for their WMA. ~~In the event that a Lead Watershed Permittee is not selected and identified by the Watershed Copermittees, by default the Permittee identified in Table 3 as the Lead Watershed Permittee for that WMA must be responsible for implementing the requirements of the Lead Watershed Permittee in that WMA.~~ The Lead Watershed Copermittees~~must~~ will serve as liaisons between the Copermittees and Regional Board, where appropriate.

- **BMP Implementation and Assessment (Section E.1.e. page 70)**
  The Tentative Order requires an arbitrary minimum number of "watershed program activities" to occur in each year (during each reporting period the Copermittees must implement no less than 2 "watershed water quality activities" and 1 "watershed education activity"). The Fact Sheet states that the Copermittees have completed the assessments, prioritization, and collaboration and now need to implement the activities identified.

  While the Copermittees agree that there are activities that will be undertaken in conformance with the WURMP, the Tentative Order should not presuppose that the Copermittees will not follow through with implementation of the WUMRPs now they have been developed. Since this requirement is unfounded, onerous,

arbitrary, and dictates a top-down approach for managing the watersheds, the language should be modified to incorporate the flexibility necessary for the stakeholders to identify the BMPs to be implemented and the details of that implementation. The Tentative Order language should be modified to remove the prescriptive detail and incorporate more flexible language that will ensure that the WURMPs contain performance standards, timeframes for implementation, responsible parties and methods for measuring the effectiveness of their programs.

**Fiscal Analysis (Section F. Page 74)**

Section F of the Tentative Order requires the Copermittees to secure the resources necessary to implement the permit, conduct a fiscal analysis of the stormwater program including the expenditures and fiscal benefits realized from the program, and develop a long-term funding strategy and business plan. While the Copermittees agree with Board staff that there is an identified need to prepare a fiscal reporting strategy to better define the expenditure and budget line items and to reduce the variability in the reported program costs and have committed to do such in the ROWD, the Copermittees take exception to the requirement to develop a long-term funding strategy and business plan and identify the fiscal benefits realized from the program. The concerns for both of these new requirements are discussed in further detail below.

*Long Term Funding Strategy and Business Plan*

The Tentative Order requires that each Copermittee submit a funding business plan that identifies the long-term strategy for program funding decisions. The Fact Sheet states that this requirement is based on the need to improve the long-term viability of the program and is based on the 2006 *Guidance for Municipal Stormwater Funding* from the National Association of Flood and Stormwater Management Agencies (NAFSMA). The Fact Sheet further indicates that, without a clear plan, that the Board has uncertainty regarding the implementation of the program.

The Copermittees submit that this requirement, which is, perhaps, more reasonable for a newly developing stormwater program, is an unnecessary and burdensome requirement for the Copermittees that will yield no commensurate benefit to water quality and divert precious resources away from the implementation of the program. In addition, the rationale for this provision is taken out of context and unnecessary for the Orange County Program for two reasons.

First, while Board staff rely heavily on the 2006 NAFSMA *Guidance for Municipal Stormwater Funding* to justify this new requirement, this national guidance document was developed to provide a resource to local governments as they address stormwater program financing challenges and primarily focuses on the considerations and requirements for developing a service/user/utility fee. While the guidance document states that the most “successful” programs have developed a business plan to guide the program evolution and funding decisions, it is not a one

size fits all approach that should be applied to every program, nor is it warranted for the Orange County Program.

Second, the Copermittees have a demonstrated history of compliance and leadership in developing, implementing and adequately funding the stormwater program. Regardless of the source of funds, a historical review of the expenditures to date provide undisputable evidence that the Copermittees are dedicated to the program, plan their budgets accordingly, and have adequately funded the program for the past 16 years (**Figures 1** and **2**).

The Copermittees have two types of costs: shared costs and individual costs.

- Shared Costs – Over the last three permit terms the shared costs have increased from just under $300,000 to almost $6 million. The shared costs are those costs that fund the activities performed by the County of Orange as Principal Permittee

- Individual Costs - Over the last three permit terms the individual costs have increased from just over $30 million to a projected amount of almost $102 million for 2006-2007. Individual costs are those costs incurred by the Copermittees for the implementation of their local program (including capital and operation and maintenance costs).

**Figure 1. Historical Review of Shared Costs (1990-2006)**

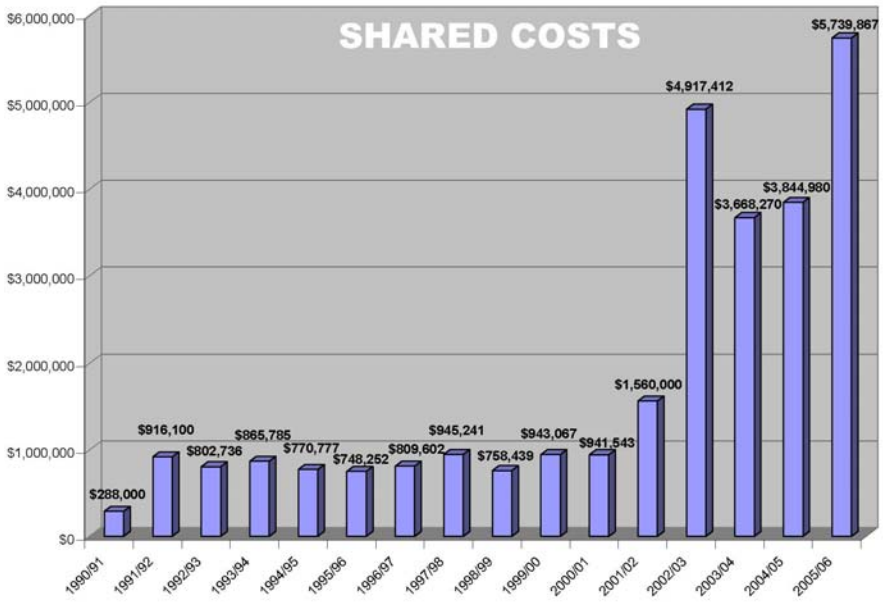
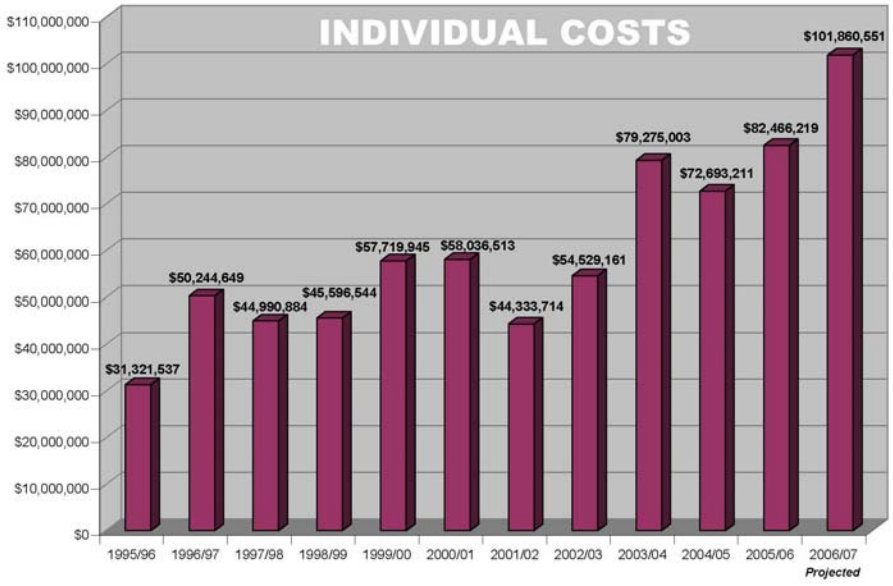


**Figure 2. Historical Review of Individual Costs (1995-2007)**




While the Copermittees are committed to providing increased standardization for their reporting, they have a demonstrated history of adequately funding the program and committing additional resources as needed. As a result, this provision (F.3.) is unnecessary and should be deleted from the Tentative Order.

*Fiscal Benefits*

The Tentative Order requires the Copermittees to include a qualitative or quantitative description of fiscal benefits realized from the implementation of the stormwater program. This requirement is problematic for three reasons. First, the requirement goes beyond the federal mandate to provide a fiscal analysis of the necessary capital and operation and maintenance expenditures to implement the program, second, the Board staff rely heavily on the 2006 NAFSMA *Guidance for Municipal Stormwater Funding* for justifying this new requirement.

The federal regulations [40 CFR, Part 122.26(d)(2)(vi)] require the following:

> *(vi) Fiscal Analysis*. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the program under

> paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

Not only do the federal regulations not require a qualitative or quantitative description of the fiscal benefits realized from the implementation of the program, it is unclear as to how one would do this and the level of analysis that would be required.

While the Fact Sheet indicates that this new requirement is based on the 2006 NAFSMA *Guidance for Municipal Stormwater Funding*, the concept is taken out of context and misapplied within the Tentative Order. The national guidance document does not suggest that stormwater programs should unilaterally identify the benefits realized from the implementation of the program as a part of the annual fiscal reporting, rather it discusses the need to identify benefits of a program if one is establishing a utility/user fee so that there is a nexus between the fee and the services or benefits provided to ensure that the fee is commensurate with such services.

Since the Copermittees have already committed to preparing a fiscal reporting strategy to better define the expenditure and budget line items included in the fiscal report, which will enhance the reporting that is required pursuant to the federal regulations, Section (F.2.c.) should be deleted from the Tentative Order.

**Program Effectiveness Assessment (Section G. Page 75)**

Section G. of the Tentative Order requires the Copermittees to assess the effectiveness of their JURMP, identify necessary program modifications, and report that information to the Regional Water Board on annual basis. Section G.1.A. identifies specific water quality-based objectives for 303(d) listed water bodies, environmentally sensitive areas (ESAs), and the major program components.

Although the concept and intent of the provision is understood and supported by the Copermittees, the specificity and inclusion of the required water quality-based objectives and focus on the 303(d) listed water bodies and ESAs is misplaced and has not been developed within the context of the California Stormwater Quality Association (CASQA) Guidance, the existing Orange County program effectiveness assessment framework and metrics, or the recommendations within the ROWD (Section 1.2.2). In addition, the Tentative Order also requires that each Copermittee conduct their own assessments including integrated assessments, which are more effective on a regional scale and over a longer timeframe. As written, this section of the Tentative Order does not provide flexibility for the Copermittees to develop objectives and an overall strategy for the effectiveness assessment and will result in resources being expended without achieving the intended goal.

Since the Copermittees have already developed and implemented a program effectiveness assessment framework and programmatic and environmental

performance metrics and have committed to developing metric definitions and guidance to improve the efficacy of the assessments in the ROWD, the provision should be modified to allow the Copermittees to functionally update their long-term effectiveness assessment (LTEA). The updated LTEA would build on the existing framework that has been utilized within the County for the past four years as well as the CASQA Municipal Stormwater Program Effectiveness Assessment Guidance Document, which is due for release in early April, and would assess the jurisdictional, countywide, and watershed-based elements of the stormwater program. The long-term strategy would include the purpose, objectives, and methods for the assessments and achieve the Regional Water Board staff objectives.

The proposed language, which is provided below, would replace G.1. and G.2. of the Tentative Order and is based on the current permit requirements.

The proposed language is:

a. As part of its individual Jurisdictional URMP, each Permittee shall ~~develop~~ update ~~a~~ their long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP based on lessons learned from the existing program framework and available guidance. The long-term assessment strategy shall identify the purpose, objectives, methods and specific direct and indirect measurements that each Permittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
b. As part of its individual Jurisdictional URMP Annual Report, each Permittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy. The updated long-term strategy shall be submitted within 365 days after adoption of the permit.

i. Long-term strategy for assessing the effectiveness of the Watershed URMP. As part of the WURMPs, the watershed Copermittees shall update their long-term strategy for assessing the effectiveness of the WURMPs based on lessons learned from the existing program framework and available guidance. The long-term assessment strategy shall identify the purpose, objectives, methods and specific direct and indirect performance measurements that will track the long-term progress of Watershed URMP towards achieving improvements in receiving water quality impacted by urban runoff discharges. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment. The updated long-term strategy shall be submitted within 365 days after adoption of the permit.

**Reporting (Section H. Pages 77-80 and Section E. Page72)**

Section H of the Tentative Order requires the Copermittees to submit the following reports:

- Individual and Unified JURMP annual reports - September 30 of each year (July 1 – June 30)
- Individual and Unified WURMP annual reports - January 31 of each year (July 1 – June 30)

Although the Copermittees understand that the Tentative Order included these changes to allow for a longer time period between the two sets of submittals, the Copermittees would receive more benefit from keeping the two timelines for the submittals aligned. As such, the language should be revised so that the JURMPs and WURMPs are submitted January 31[6] of each year. This will allow the Copermittees to assess their stormwater program and water quality monitoring program and conduct an integrated assessment to identify water quality improvements.

Section E.3. requires that the Copermittees submit the Aliso Creek WURMP annual report by March 1 of each year for the period January – December of the previous year. Since the Watershed Action Plan Annual Report for the Aliso Creek Watershed has historically been submitted in November of each year and has been based on the fiscal year like the other WURMP reports, it is unclear why Board staff are requiring this change. As such, the Aliso Creek WURMP submittal is now inconsistent with the other WURMP submittals both in the date for submittal and the time period for which the report covers.

The submittal date for the Aliso Creek WURMP annual report should be modified to be aligned with the other WURMP submittals. The proposed language modification is as follows:

3. Aliso Creek Watershed URMP Provisions
   b. Each Permittee must provide annual reports by ~~March 1~~ <u>January 31</u> of each year beginning in 200~~8~~<u>9</u> for the preceeding annual period of ~~January~~ July 1 through ~~December~~ June 30……..

[6] Reporting schedules will need to be aligned with the Santa Ana Permit reporting schedules.

# ATTACHMENT C

## ORANGE COUNTY ENVIRONMENTAL MONITORING COMMENTS ON CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION TENTATIVE ORDER No. R9-2007-0002 NPDES NO. CAS0108740

## INTRODUCTION

Attachment C contains the principal technical comments of the County of Orange (the "County") regarding the monitoring and reporting requirements of Tentative Order No. R9-2007-0002 dated February 9, 2007 ("Tentative Order").

These comments are divided into two sections: (1) General Comments, and (2) Specific Comments. The first section discusses the County's strategic concern with the Tentative Order's requirement, whereas the latter section addresses issues relating to specific requirements.

The County has endeavored to provide a complete set of comments on the Tentative Order. However, the County reserves the right to submit additional comments relating to Tentative Order No. R9-2007-0002 and the supporting Fact Sheet/Technical Report to the Regional Board in the future.

## GENERAL COMMENTS

The principal goal of the Copermittees' environmental monitoring program is to support the Drainage Area Management Plan. This goal is entirely consistent with other observations on the role of monitoring. For example, "monitoring is most useful when it results in more effective management decisions, specifically management decisions that protect or rehabilitate the environment." (NAS, 1991[1]). A number of the proposed modifications to the monitoring program do not appear to be supportive of this goal. Further, as changes in protocols and procedures are mandated there is a significant risk that they start to compromise the integrity and value of what is increasingly being recognized as one of the most comprehensive urban stormwater quality data sets in the United States. Finally, while the Board's interest in moving toward greater regional consistency is recognized, the Permittees are concerned that requirements are being prescribed without due consideration of the needs of south Orange County.

## SPECIFIC COMMENTS

### E.II.A.1.c. Timing of Mass Loading Station (MLS) Monitoring

The requirement to sample the first wet weather event of the year at each MLS needs to be considered in the context of the entire Orange County effort. Including the six MLSs

[1] Managing Troubled Waters, National Academy of Sciences, 1991

in the tentative order, there would in future be eighteen MLSs in Orange County requiring “first flush” sampling.

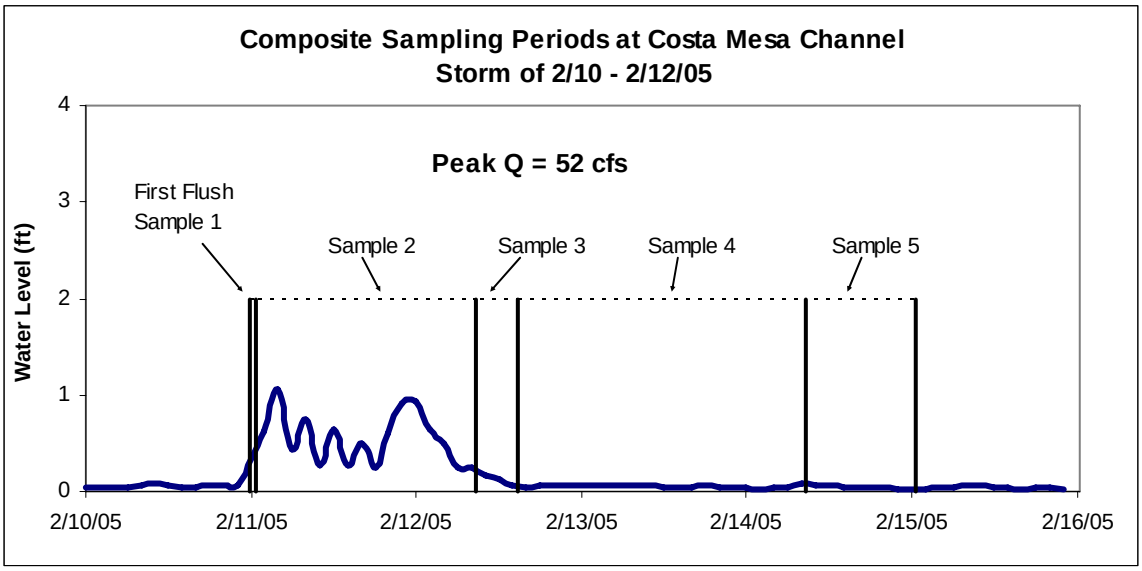
Proposed modification:

The requirement to increase the “first flush” sampling effort needs to be predicated on an assessment and finding of need.

**E.II.A1.d. Flow-weighting of Wet Weather Samples**

The requirement to collect flow-weighted composite stormwater samples will not allow accurate comparisons to CTR criteria for chronic toxicity due to dissolved metals. The County’s present method provides a more thorough and reliable characterization of a storm with respect to comparison to water quality standards. 3-5 time-weighted composite samples are collected during a 4-day period to characterize a storm and its subsequent effects (see example below). The first flush sample is collected over an hour period and is comprised of six discrete samplings 12 minutes apart. The subsequent composite samples are prepared from bi-hourly samples.

The analyte concentrations from each of the composite samples are combined with the respective discharge volumes during the composite samplings to calculate the individual and total stormwater loads. The dissolved metals concentrations from each of the samples are compared to the CTR acute criteria. The time-weighted average dissolved metals concentrations for the 4-day sampling period are compared to the CTR chronic criteria.




Flow-weighted compositing by field instrumentation (automatic sampler linked to portable flowmeter) has many disadvantages including:

- Since the components are linked, if one component fails the system fails.

- When programming the autosampler the operator must have a fairly accurate prediction of the size of the storm. If the magnitude is over predicted the sampler will not collect enough volume for all of the required analyses. If the magnitude is under predicted the autosampler will collect too frequently and the latter part of the storm will be missed unless the autosampler is serviced before or immediately after the time of the last sampling. Since the County will be required to monitor 18 MLSs during the first measurable rain event of the season this type of maintenance is not possible.
- The channel rating must be accurate at the time of sampling. Flow rates are calculated from the water level records using the channel rating (stage-discharge relationship). Presently, water level records are processed at the end of monitoring year (quarterly for Santa Ana Region TMDL programs). The water level records are adjusted (with shifts) to reflect changes in the stage-discharge relationship arising from sediment deposition/scouring or new instantaneous discharge measurements. These adjustments can result in significant differences in the calculated discharge rates.

If the County were required to modify its current automatic sampling procedure for stormwater, manpower limitations would dictate that the process be conducted by flow-weighted compositing in the laboratory as described in EPA 833-B-92-001 Exhibit 3-20 (constant time – volume proportional to flow rate). Aliquots from each bottle, proportional to flow rate at the time of collection would be composited into a single large container. Aliquots from the container would be submitted for the required analyses.

Advantages:

- The autosampler and the flowmeter are not linked, reducing the likelihood of sampling failure.
- Unscheduled autosampler servicing (to reprogram the collection frequency due to changes in storm magnitude) would not be required.

Disadvantages:

- The volume of a composite sample may not be great enough to accommodate all of the chemical and toxicity testing analyses. For short duration storms the volume of the composite sample would be much smaller. Presently Orange County analyzes chronic toxicity in mass emissions samples with multiple dilution tests. Some of these tests require substantial volume. Approximately 4 gallons of sample are required for toxicity tests currently conducted on stormwater samples under the third term permit.
- The space limitations of the County's laboratory would severely hinder expeditious processing of all of the samples from the first measurable event of each year.

Two automatic samplers, operating simultaneously, would be used to collect bi-hourly samples. Each sampler contains eight 1.8-liter glass bottles and the site would have to be serviced at least every 16 hours to change bottles and power supplies. The maximum volume collected in each bi-hourly sampling is 2 x 1.8 = 3.6 liters. The volume from each bi-hourly sampling used in the composite sample is calculated as:

$V_i = V_L[(V_{imax}Q_i/Q_{max}) / (V_{imax}Q_i/Q_{max})]$ where

$V_i$ = volume from each bi-hourly sampling
$V_L$= volume required for all analyses
$V_{imax}$ = volume of the bi-hourly sample corresponding to the greatest discharge rate
$Q_i$ = flow rate for sample i
$Q_{imax}$ = maximum flow rate recorded for any bi-hourly sampling

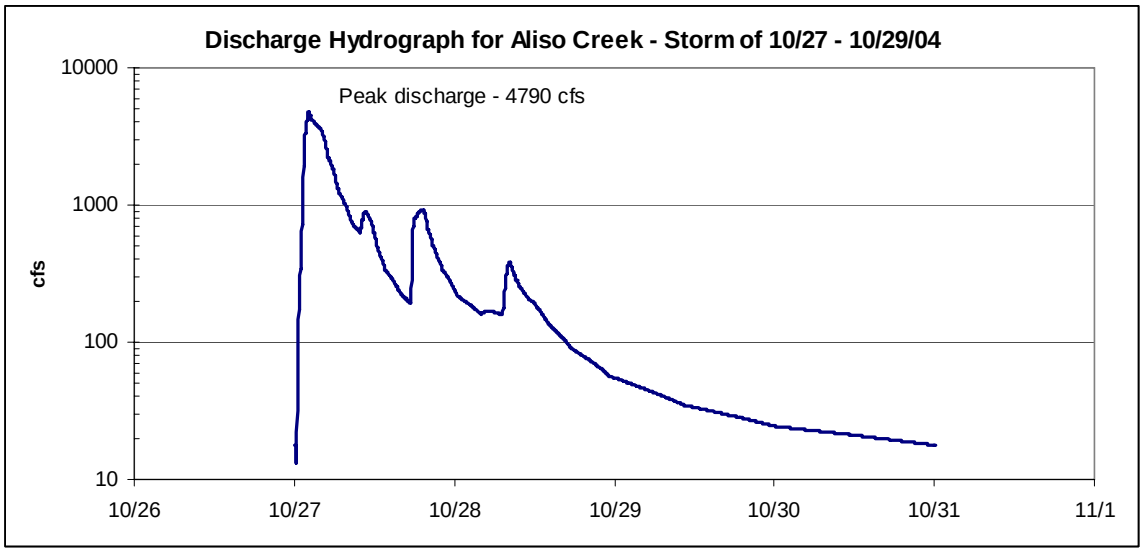
$(V_{imax}Q_i/Q_{imax})$ must first be calculated to ensure that it is greater than $V_L$. If it is not, the equation becomes:

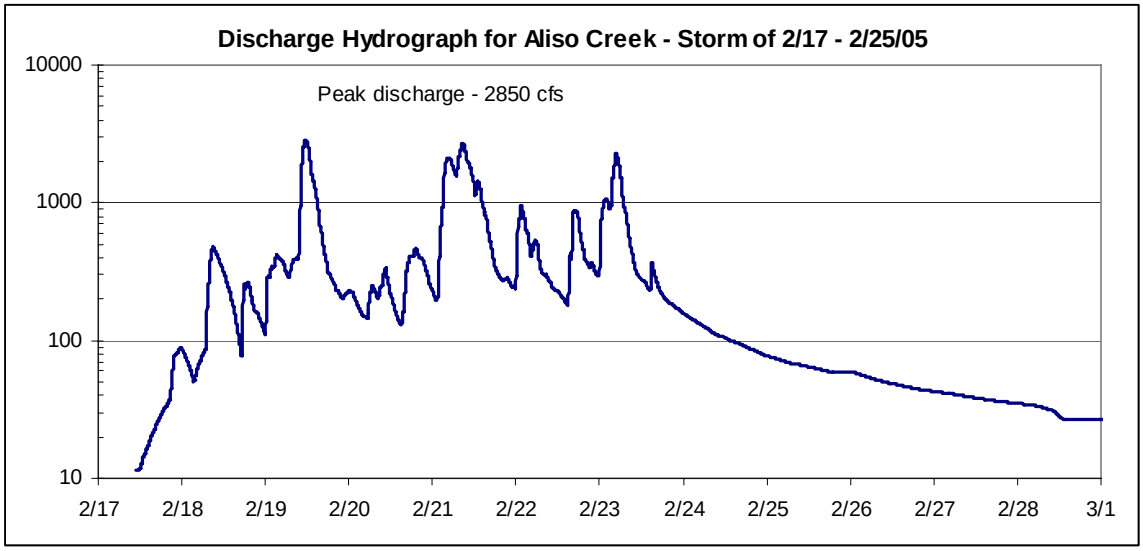
$V_i = V_{imax}Q_i/Q_{imax}$

The following two discharge hydrographs illustrate the disadvantages of flow-composite sampling using automatic sampling and laboratory compositing. The first storm spans approximately two days and has a significant peak discharge. Assuming a maximum sample bi-hourly sample volume of 3.6 liters, the total volume of the composite sample would be just 12.9 liters. The sample volumes required for chemical and toxicity tests used in the program are tabulated below.

| | **Analysis** | **Req. Vol. (L)** | |
|---|---|---|---|
| | Nutrients incl. TSS | 1.5 | |
| | Trace Metals (total) | 0.25 | |
| | Trace Metals (diss) | 0.25 | |
| | OP + Pyrethroid Pesticides | 2.0 | |
| | Carbamate Pesticides | 1.0 | |
| | DOC | 0.25 | |
| | TOC | 0.25 | |
| | TDS | 0.25 | |
| | **Toxicity Tests** | 0-1 dilutions | 5 dilutions |
| 1 | Ceriodaphnia survival/reproduction | 6 | 10 |
| 2 | Hyalella survival | 1.5 | 3 |
| 3 | Selenastrum growth | 1.5 | 3 |
| | **Total Chem + Tox 1-3** | **14.75** | **21.75** |
| 4 | Mysid survival/growth | 10 | 14 |
| 5 | Sea Urchin fertilization | 1 | 1 |
| 6 | Fathead Minnow survival | 10 | 14 |
| | **Total Chem + Tox 1,5,6** | **22.75** | **30.75** |
| | **Total Chem + Tox 1,4,5,6** | **32.75** | **44.75** |

Storm 2 spans more than seven days and would generate enough volume in the composite to accommodate all analyses. However, these seven days of sampling would yield approximately 90 bi-hourly samples (90 1.8-liter bottles) which would have be stored and refrigerated until the sampling was completed and the maximum discharge rate determined.




Proposed Modification:

Clearly the choice of automatic sampling options is not an easy one. The present method and the constant time – volume proportional to flow rate method each have advantages and disadvantages. The choice should not be solely based on costs or logistics. The County recommends that a pilot study be conducted to determine the differences between the two methods rather than making such a significant change to the direction of the monitoring program through the permit process.

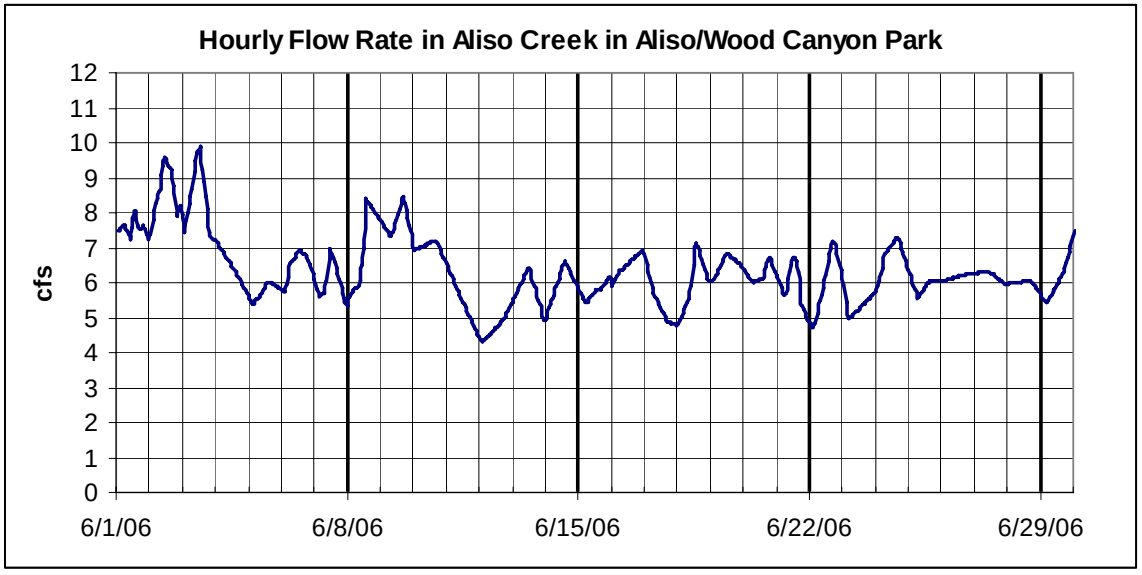
Until the study is completed, the monitoring protocols would remain the same as in the third permit.

**E.II.A.1.d. Dry Weather Composite Sampling**

The proposed frequency of sample collection (minimum 3 samples / hour) during dry weather monitoring at MLSs does not support the objective of identifying illegal discharges and illicit connections and presents significant technical challenges. During a "typical" 24-hour period, flow rate at an MLS does not vary significantly and the changes in water chemistry at an MLS would be muted because of the large size of the watershed and the number of stormdrain inputs.

In order to comply with this requirement these composite samples would have to be prepared using the constant time – volume proportional to flow increment method (EPA 833-B-92-001 Exhibit 3-19) or constant time – volume proportional to flow rate method (Exhibit 3-20). Either method would require that 72 discrete samples be collected during a 24-hour period and that the samples be flow-composited in the laboratory. Automatic samplers linked to flowmeters will not accommodate both constant time collection and flow-compositing during the same sampling period. To collect 3 samples/hour and produce a flow-composite sample, three automatic samplers would be required at each site for each event.

The flow rate at an MLS, as noted above, does not vary significantly during a typical 24-hour day. Below is a graphic showing the hourly flow rate in Aliso Creek at the streamgauge in Aliso/Wood Canyon Wilderness Park during June of 2006. As can be seen from the graph, the greatest difference between the maximum and minimum hourly flow rates during any 24-hour period is less than 35% of the maximum value (9.9 cfs at 13:00 on 6/3 and 6.5 cfs at 12:00 on 6/4). To produce a flow-composite sample, aliquots from each of the 72 samples collected during the 24-hour period would be combined in a single container. The volume of each of the aliquots would be proportional to the flow rate ($q_i/q_t$) at the time of sample collection and the volume of the sample collected at the maximum flowrate. Unless the pollutant discharge occurred over several hours or if the concentration of the pollutant was several orders of magnitude above the baseline concentration, it would be difficult to detect intermittent illegal discharges from the composite sample concentration.



Proposed Modification:

Conduct dry-weather monitoring at MLSs with time-weighted composite samples composed of 24 discrete hourly samples. Compute the mass loads of pollutants as the product of the composite sample concentration and the total volume of water discharged past the monitoring point during the time of sample collection.

**E.II.A.1.g. Analytical Testing for Mass Loading, Bioassessment, and Ambient Coastal Receiving Waters**

Nitrite is readily oxidized to nitrate in the natural aquatic environment. Analysis of this form of nitrogen would not provide any added benefit and would significantly increase program costs. Presently and in prior permit monitoring programs, the concentrations of nitrite + nitrate has been determined and reported as $NO_3$.

Proposed Modification:

Analyze nitrite + nitrate together as in prior monitoring programs.

**Pyrethroid Pesticides**

Pyrethroid pesticides are very insoluble and tend to bind to sediment. They would not be detected in an aqueous sample unless the sample had a very high concentration of suspended solids.

Proposed Modification:

Analyze Pyrethroid pesticides in sediments at Bioassessment sites and in Dana Point Harbor.

**E.II.A.1.h.(1) DDE Monitoring at the San Juan Creek MLS**

Assuming that the requirement to add DDE monitoring was a product of the 303(d) listing of San Juan Creek for DDE, the MLS is not within the water quality limited segment defined by the 303(d) list. The listing was based on samplings conducted at SWAMP station San Juan Creek 9. The 2006 303(d) list states that the estimated size affected is 1 mile. The San Juan Creek MLS is two miles upstream of San Juan Creek 9.

Proposed Modification:

Do not add DDE monitoring at the San Juan Creek MLS.

**E.II.A1.i. Toxicity Testing at MLSs**

The proposed requirement would result in a change in toxicity testing organisms at MLSs. Presently toxicity of stormwater discharges is measured using multiple dilution tests with marine organisms to assess the impact of stormwater on the coastal

environment. In the Santa Ana Region monitoring program, testing with marine and freshwater organisms is used.

The TDS concentration in at least two (Prima and Segunda Deschecha Channels) of the six MLSs is great enough to negatively affect the toxicity test using *Ceriodaphnia dubia*. The seepage of local saline groundwater into these channels causes these high TDS concentrations.

Proposed Modification:

For dry-weather samples conduct toxicity testing with:

1. Chronic (7-day) survival test with *Ceriodaphnia dubia*. Measure the specific conductance of the sample first. If the conductance exceeds 2500 mhos/cm, substitute *Daphnia magna* and conduct chronic toxicity test (EPA/600/D-87/080, March 1987).
2. Chronic (96-hour) growth test with *Selenastrum capricornutum*
3. Acute survival test with *Hyalella azteca*.

For stormwater samples conduct toxicity testing with:

1. Chronic (7-day) survival test with *Ceriodaphnia dubia*. Measure the specific conductance of the sample first. If the conductance exceeds 2500 mhos/cm, substitute *Daphnia magna* and conduct chronic toxicity test (EPA/600/D-87/080, March 1987).
2. Chronic (96-hr) survival/growth test with *Americamysis bahia*.
3. Chronic (40-min exposure) fertilization test with *Stronglyocentrotus purpuratus.*
4. Chronic (96-hr) survival/growth with larval *Pimphales promelas.*

**E.II.A.4.b. Toxicity Testing at ACRW Sites**

The Tentative Order proposes the use of freshwater organisms for toxicity testing. Historically, the aqueous toxicity tests have been conducted with marine organisms since the intent of the program is to evaluate the impact of urban runoff on the coastal receiving waters.

Proposed Modification:

Continue to use marine organisms for toxicity testing at the ACRW sites.

**E.II.A.5.c.(1) Continue Baseline Monitoring at CSDO Sites**

The list of sites to continue baseline monitoring (weekly sampling of indicator bacteria in the stormdrain and the surfzone) includes four stormdrains (MAINBC, LINDAL, BLULGN and PEARL) which are diverted during the AB-411 season. There should be no requirement to sample while drains are being diverted.

**E.II.A.5.c.(2) Special Investigations**

The Permittees have conducted numerous bacterial source investigations in the Region including:

1. Aliso Creek 13225 Directive Monitoring Plan and J03P02 Cleanup and Abatement Order Monitoring Plan. 2001-2005. Quarterly Progress Reports can be found on the Watershed and Coastal Resources Website at: http://www.ocwatersheds.com/watersheds/Aliso_reports_studies.asp

2. San Juan Creek Microbial Source Tracking Study conducted by the Orange County Health Care Agency and the University of South Florida, 2002. The Report can be found on the Watershed and Coastal Resources Website at: http://www.ocwatersheds.com/watersheds/sanjuan_reports_studies_Qtr1_section1.asp

3. Bacterial Source Tracking Study on Prima Deshecha Channel conducted by MEC/Weston Solutions on behalf of the County and San Clemente, 2006.

These studies need to be explicitly recognized in the Tentative Order and duplicative efforts not required.

Proposed Modification:

Requirements for bacterial source investigations should be stayed pending development of emerging source tracking methodologies.

**E.II.B.1 MS4 Outfall Monitoring During Wet Weather**

The requirement to monitor MS4 outfalls during wet weather does not support source investigations.

Proposed Modification:

Continue to use the Dry-weather Reconnaissance data as the primary monitoring effort to identify potential sources within the watershed.

April 4, 2007

John H. Robertus
Executive Officer
California Regional Water Quality Control Board,
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

**Subject: Tentative Order No. R9-2007-0002; NPDES No. CAS0108740**

Dear Mr. Robertus:

This letter contains the City of Aliso Viejo's formal written comments on Tentative Order No. R9-2007-0002 for NPDES Permit No. CAS0108740 ("Permit").

Since the Permit will govern discharges of storm water from all Large Municipal Separate Storm Sewer Systems (MS4s) in Southern Orange County, the City of Aliso Viejo "City" as a regulated Large MS4 operator is very concerned with a number of the Permit's proposed provisions.

The City is aware that the County, as the Principal Permittee, has also submitted a comment letter to the Regional Board regarding the Permit. The City would like to express its full support for the County's comments and intends the comments contained in this letter to supplement those submitted by the County and the other Co-permittees. Accordingly, please consider the County's comments to be incorporated in the City's letter by this reference.

The purpose of this letter is to continue the open dialogue between the Regional Board and the Co-permittees in order to help the Regional Board develop a Permit that efficiently promotes the mutually held goal of water quality enhancement. Representatives of the City have participated, and will continue to, participate in the Permit renewal process. City representatives will attend the workshop scheduled for April 11, 2007 and will pay close attention to any changes to the Permit that the Regional Board chooses to make.

To facilitate greater public participation, the City hereby requests that the Regional Board delay its proposed closure of the comment period immediately following the April 11, 2007 workshop. This will provide the Regional Board with the opportunity to review all of the submitted comments, and will allow all stakeholders to review any changes to the

CITY OF ALISO VIEJO
INCORPORATED JULY 1, 2001

12 JOURNEY • SUITE 100
ALISO VIEJO
CALIFORNIA 92656-5335
WWW.CITYOFALISOVIEJO.COM

PHONE
949. 425.2500
FAX
949. 425.3899

Permit that the Regional Board chooses to make.

Additionally, while the City shares the Regional Board's goal of water quality enhancement, the City has certain concerns about the way in which the Permit proposes to reach that goal. These concerns include the Permit's overly specific and prescriptive nature, the abbreviated timelines for compliance, and the manner in which it holds the Co-permittees responsible for storm water discharges that are beyond their ability to control. Each of these concerns is discussed more fully below.

## GENERAL COMMENTS REGARDING THE PERMIT

**The Permit is Overly Prescriptive**. Past Permits have provided the Co-permittees with discretion to select the storm water pollution strategies to implement within their jurisdiction. This Permit contains a number of very specific requirements that essentially remove the Co-permittees' ability to decide which solutions work best. This newly prescriptive nature represents a significant departure from the previous permits, as well as the Clean Water Act and its associated regulations. The federal regulations were designed to allow for individualized permits that would provide Co-permittees with the maximum amount of discretion to implement local solutions on a local level.

**Failure to Cite Applicable Authority or otherwise Support Exceedance of Federal Requirements:** The Permit fails to properly identify which requirements are federally mandated and which are required by state law. The federal regulations located at 40 C.F.R. § 122.26 establish the minimum requirements for a Large MS4 permit. Tentative Order R9-2007-0002 greatly exceeds those minimum requirements. Despite the fact that the Regional Board is required to provide the legal and factual basis for each permit provision, the Regional Board has either provided no legal basis for the additional requirements, or erroneously pointed to federal sources of authority.

Such documentation is necessary because those portions of the Permit that exceed the federally required minimum represent state mandates within the meaning of Article XIII B § 6 of the California Constitution. To allow the Co-permittees to seek reimbursement from the State so that they can adequately fund their storm water programs, the Regional Board needs to provide a differentiation of authority. The Regional Board additionally needs to demonstrate why it is necessary to exceed the federal requirements. Without appropriate findings to support the need to go beyond the federal regulations, the Permit is suspect.

**Watershed-based Regulation:** The Permit establishes a watershed approach to storm water management and requires the Co-permittees to implement a Watershed Urban Runoff Management Plan (WURMP). Regulating storm water discharges on a watershed basis adds an unnecessary layer of complexity to the storm water program. Many Co-

permittees have one or more watersheds within their jurisdiction. Requiring the Co-permittees to implement different BMP's in different watersheds will hinder the Co-permittees' ability to update, implement, and enforce their respective storm water management programs.

**Regulation of Phase II and Other Regional and State Board Regulated Entities:** The Permit holds the Co-permittees responsible for discharges into their respective MS4s from what the EPA has classified as Phase II storm water dischargers. The Co-permittees have little to no authority over the conduct of Phase II entities within their jurisdictions. This, in turn, significantly limits the ability of the Copermittees to regulate the quality of the storm water that enters their MS4. The EPA and the State Water Resources Control Board have issued Phase II permit guidelines. The Regional Board should enforce these guidelines rather than forcing the Co-permittees to do so. The Permit should reflect this and not hold the Co-permittees responsible for enforcing storm water regulations by proxy where they have limited ability to do so.

Likewise, Permit Section D.2.c. requires the Co-permittees to both review a project developer's storm water management plan and verify that the developer has obtained coverage under the California Statewide General Construction Permit. It appears that this Section will require the Co-permittees to do the Regional Board's inspection work for it. This is despite the fact that the State and Regional Boards retain the funds that the General Construction permittees pay for coverage. The City would be happy to do the additional inspection work it was reimbursed.

It is additionally unclear whether the Co-permittees must comply with the General Construction Permit themselves. If so, it seems unnecessarily duplicative to require the Co-permittees to obtain coverage under the General Construction Permit when the terms of the Permit basically place the Co-permittees in charge of ensuring compliance. To address these concerns, the Permit should be modified to absolve the Co-permittees of responsibility for enforcing storm water regulations against Phase II and other Regional and State Board regulated entities. It should also clearly state whether the Co-permittees are subject to the California statewide General Construction Permit.

**Findings:** Many of the findings reference data that was collected and analyzed during the 1990s. There have been significant gains in water quality in Southern Orange County since that time. Reliance on data that is over ten years old fails to take these gains into consideration.

## SPECIFIC PERMIT REQUIREMENTS OF CONCERN

### Permit Section D.1.d – Approval Process Criteria and Requirements for Development Projects

Permit Section D. globally requires implementation of all project development elements of the Permit within one year of its adoption. With respect to the new BMP requirements, and the requirement that the Co-permittees update their SUSMP, and WQMP, the one-year deadline does not provide adequate time to develop such program. In order to realistically develop and implement all of the requirements contained in this section of the Permit, the Co-permittees need additional time to accomplish this task. Accordingly, Permit Section D.1.d. should be revised to provide the Co-permittees with a minimum 24 months to develop and implement the program requirements.

### Permit Section D.1.f. – BMP Tracking and Maintenance

This Section requires Co-permittees to maintain a watershed-based database to track and inventory approved treatment control BMP's. It additionally requires Co-permittees to verify, on an annual basis, that the BMP's are being maintained and operated effectively. Compliance with this section will require a significant commitment from Co-permittee staff, and may require the addition of staff. The value of the outlay of funds that compliance with this section will require is questionable in comparison to the overall benefit to storm water quality. The Permit should therefore be revised to require annual certification by owner/operator and verification by the Co-permittees on as needed basis.

### Permit Section D.3.a.(4) – BMP Implementation for Flood Control Structures

This Section requires each Co-permittee to implement procedures to assure that flood management projects assess water quality impacts. It additionally requires Co-permittees to evaluate their existing flood control devices for impacts on storm water quality. This Section thereby places the responsibility for ensuring that flood control devices comply with the terms of the Permit with the Co-permittees. This is despite the fact that the Orange County Flood Control District owns virtually all of the flood control devices in the Permit area. The Permit should not hold the Co-permittees responsible for storm water requirements that are beyond their authority to regulate and relate to other regulated entities.

### Permit Section D.3.a.(5) – BMP Implementation for Street Sweeping in Municipal Areas

This Section requires Co-permittees to design and implement a street sweeping program based on criteria which includes optimizing the

pickup of "toxic automotive byproducts" based on traffic counts. Although the Permit does not specify what pollutants it is trying to capture, one can only assume that this provision is aimed at commonly utilized automotive products such as oil, gasoline, transmission fluid, brake fluid, brake dust and radiator fluids. Because the term is not defined; however, it could be broad enough to include air deposited byproducts of combustion.

Street sweeping, and street sweepers in general, were not designed to be the primary means of collecting these by-products. It is therefore unlikely that street sweeping will be entirely effective at collecting many of these by-products, including any liquids that have soaked into the pavement. Several jurisdictions have found that there is no significant increase in the amount of materials collected when sweeping frequencies were increased from twice monthly to four times per month. Additionally, whether such by-products are deposited on a given street is not necessarily a function of the traffic volume on that street. There does not appear to be a direct correlation between traffic counts and the effectiveness or need for street sweeping. There are other pollutants such as litter, debris, and grass clippings etc. that could be detrimental to storm water quality that are de-emphasized by the Permit's focus on traffic counts. This section should therefore be revised to both specify the types of pollutants the Co-permittees should be seeking to reduce with their street sweeping programs, and to provide the Co-permittees with the discretion to utilize street sweeping in a manner that maximizes its effectiveness.

**Permit Section D.3.b.(3)(a) – Mobile Businesses**

The Permit requires the Co-permittees to develop and implement a program to reduce the discharge of pollutants from various types of mobile businesses. This section requires Co-permittees to develop a listing of mobile businesses, and requires the Co-permittees to develop and implement a number of measures to limit the discharge of pollutants from them. As a practical matter, these requirements will be very difficult to enforce for the following reasons:

1. What constitutes a mobile business is not well defined;

2. The City does not issue business licenses;

3. Mobile businesses operate in multiple jurisdictions and cannot be easily tracked;

4. Mobile businesses may operate on private property out of the City's view; and

5. Additional staff time will be required to tandems the City looking for mobile businesses.

The Fact Sheet that the Regional Board has issued in support of the Permit states that the Permit has targeted mobile businesses for special attention because the Co-permittees reported that discharges from such businesses have been difficult to control with existing programs. Rather than finding a solution for this problem, the Permit directs Co-permittees to implement a number of non-descript solutions that will not necessarily make regulation of mobile businesses any easier. The Regional Board should therefore revise this section of the Permit to provide the Co-permittees with the discretion to focus on mobile sources when they feel it is necessary, or if they identify mobile businesses as a significant source of storm water pollution within their jurisdiction.

**Permit Section D.3.b.(4)(c) – Inspection of Food Service Facilities**

This Section requires Co-permittees to inspect each food service facility within its jurisdiction annually, and to address, among other things, the maintenance of greasy roof vents during those inspections. Annual inspections are costly and may not provide any additional benefit. It is therefore questionable how much benefit requiring inspection of roof vents will bring to the overall storm water program.

Additionally, requiring inspectors to access food service facility roofs will require clearance from the property owner, as well as more time to complete inspections. It will also place inspectors at risk of injury by forcing them to climb onto rooftops that may not be secure or appropriate for access. Lastly, neither the Fact Sheet, nor the Permit's Findings provide any justification for the addition of this requirement. Such a time consuming and dangerous method of storm water pollution control should not be instituted where there is no sound evidence that it will yield an improvement in storm water quality.

**Permit Section D.3.c.(1)(a) – Residential Jurisdictional Urban Runoff Management Plan**

The Permit should balance the need to protect and improve storm water quality against the risk of enforcing restrictive requirements that may not result in significant public benefits. This is particularly true with respect to the Permit's requirement that the Co-permittees designate and implement BMP's to address automobile washing and parking. Such BMP's are likely to severely limit individual activity in residential communities. This creates the risk that residents will resent the BMP's, which will in turn limit their effectiveness. Additionally, this section of the Permit seems to contradict Permit Section B.2.p., which defines individual residential car washing as an acceptable non-storm water discharge. At the very least, the Permit should resolve the apparent conflict between Permit Sections D.3.c.(1)(a) and B.2.p.

**Permit Section D.4. – Elimination of Illicit Discharges and Connections**

This Section of the Permit requires each Co-permittee to investigate obvious illicit discharges immediately, and to take immediate action to eliminate all detected illicit discharges as soon as practicable after detection. This timeline is too aggressive. It is often not possible for Co-permittees to investigate every suspected illicit discharge immediately, or address such discharges immediately after detection. While the Permit uses the term "practicable", that term is ambiguous and does not provide any assurances that a Co-permittee who is unable to immediately address an illicit discharge will not be found in violation of the Permit. The Permit should therefore be revised to state that the Co-permittees must take action to eliminate such discharges "in a timely manner" or within specified time such as 24 or 48 hours.

**Permit Section F.2. – Annual Fiscal Analysis**

This section of the Permit requires the Co-permittees to conduct an annual fiscal analysis of the capital, operation, and maintenance expenditures necessary to implement the Permit's requirements. This section additionally requires each analysis to "include a qualitative or quantitative description of fiscal benefits realized from implementation of the storm water protection program." A review of the Fact Sheet indicates that the Permit is requiring the Co-permittees to conduct an economic benefits analysis of their respective storm water programs.

This requirement is unnecessarily duplicative. The Regional Board is already required to take the economic benefits and burdens of their actions into account when issuing storm water permits. (*See City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613; and California Water Code § 13263.) Requiring the Co-permittees to duplicate this requirement is a misuse of resources that could be better spent on implementing other Permit provisions. Accordingly this section should be modified to encourage rather than require the Co-permittees to conduct such an analysis.

**Permit Section F.3. – Business Plan**

Prior to the expiration of the Permit, each Co-permittee must submit a business plan that identifies a long-term funding strategy for program evolution and funding decisions. The Permit requires that the Business Plan identify planned funding methods and mechanisms for municipal storm water management. This is despite the fact that such funding is not always readily available, and the Co-permittees may not know the future sources of such funding. This makes production of such a document difficult. Additionally, it is not the Regional Board's

responsibility to confirm whether long-term funding sources for each Co-permittee's storm water plan exist. Requiring such a report is overreaching in a manner that will cost the Co-permittees additional time and resources. This section of the Permit should therefore be modified to encourage rather than require the Co-permittees to develop such a plan.

**Permit Section G.1. – Jurisdictional Program Effectiveness Assessments**

Each Co-permittee must annually assess the effectiveness of its JURMP implementation at meeting certain objectives. This Section references the CASQA outcome levels but provides no guidance on how to define success. It also places unnecessary constraints on the Co-permittees fiscal resources. The Permit should clarify how to define the effectiveness of a given program segment or remove this requirement altogether.

## CONCLUSION

As stated at the beginning of this comment letter, the City submits this letter as part of the on-going, open dialogue between the Co-permittees and the Regional Board to help develop a workable permit for this region. The City is committed to the goal of water quality enhancement, and would like to work with the Regional Board in developing the most cost-effective way to reach that goal. We look forward to receiving your response to the above comments and concerns.

Sincerely,

Mark Pulone,
City Manager of the City of Aliso Viejo

cc: Jeremy Haas, Environmental Scientist, SDRWQCB
John Whitman, Director of Public Works, City of Aliso Viejo
Moy Yahya, Storm Water Program Coordinator, City of Aliso Viejo
Scott Smith, Best Best & Krieger

**CITY OF DANA POINT**

DEPARTMENT OF PUBLIC WORKS

April 3, 2007

Mr. John Robertus
California Regional Water Quality Control Board – San Diego Region
9174 Sky Park Court Suite 100
San Diego, CA 92123

**RE: NWU:10-6000.02:haasj, Orange County Municipal Storm Water Permit Reissuance Tentative Order No. R9-2007-0002**

Dear Mr. Robertus:

The City of Dana Point is pleased to submit the comments herein regarding Tentative Order No. R9-2007-0002.

First of all, the City would like to recognize that the joint efforts of our Orange County Water Quality experts and the efforts of Jeremy Haas and other members of board staff have provided major water quality improvements during this permit period. South Orange County represents a small portion of the San Diego Region having only three beach cities, Laguna Beach, Dana Point and San Clemente on the coast. However, all three beach cities are now petitioning for delisting of beaches from the 303d list! We are asking for adjustments in the tentative order to facilitate and enable our successes to continue in this unique San Diego Region Sub-Area.

Second of all, the City of Dana Point asks that the Board refrain from any new prescriptive requirements in this permit regarding bacteria impaired waterbodies until the results of our major Doheny State Park Epidemiological Study and source microbial tracking study are completed. The City of Dana Point is conducting a major epidemiological study and microbial source tracking study of Doheny State Beach which follows the pilot study done at Mission Bay. This study begins in 2007 and will be completed in 2009. This multi-million dollar study, funded in party by the City, is a major effort to improve our scientific knowledge. The majority of the watershed area of Southern Orange County is in the San Juan Creek Watershed, which empties to Doheny State Beach. We believe the seven cities in this 1.33 square mile watershed affected by this study and the Regional Board would want to see if this study supports the Mission Bay Study and alters our current bacteria test driven requirements for our Southern California Beaches before continuing with new bacterial TMDL requirements for this Watershed. However the Federal and State Government timetables will not allow this. The TMDL establishment must precede this important scientific study. The point is that we are already required to develop a twenty-year TMDL plan for a "pollutant" that may not be causing a problem or may be primarily avian and natural in origin. In light of this, we are asking for the Board to consider reducing the amount of new prescriptive requirements addressing bacteria-related impairments for this next permit while we develop the required TMDL work and await the results of this important study.

There are numerous issues raised with this new permit that we ask be amended collegially and carefully over the new few months.

General Themes:

1. The City is pleased to see that the "Prohibitions and Receiving Water Limitations" preserves the "iterative process" as the basis for permit compliance. The iterative process is largely consistent with the CASQA progressive approach which the City has incorporated into its program effectiveness assessment (PEA).

2. The specific prohibition on placing treatment controls within "Waters of the US" would preclude immensely beneficial sub-regional and regional approaches to water quality treatment and management. It also appears to be contradictory to some of the new "in stream" hydro modification requirements, as well as potential flood control structure retrofits. Projects such as the Irvine Ranch Water District (IRWD) Natural Treatment System that may ultimately provide better assurance of sustained WQS attainment, as well as Dana Point's Salt Creek Treatment Plant are examples of projects successfully achieving water quality standards and are therefore appropriate to be placed within "Waters of the U.S". Please clarify the intent of this prohibition and address the conflicts between the prohibition, collective treatment and hydro modification requirements. We believe a balance between source controls and collective treatment processes are necessary to achieve results in the near term and the long term.

3. The permit is too prescriptive in terms of the watershed program from the tax payer's perspective. The City requests a less prescriptive program. This is based upon progress that the co-permittees have demonstrated in successful past watershed efforts, as well as South Orange County's Integrated Regional Watershed Management Plan and the ongoing Smartimer Edgescape Evaluation Program that was funded under the state's consolidated grants program.

4. There is limited consideration of the recent studies and investigations that point to key uncertainties with respect to the current regulatory framework and managing stormwater permit compliance. For example:

    - The epidemiological implications of stormwater discharges are frequently cited. However, recent findings questioning the link between water contact standard exceedances and disease occurrence in Mission Bay and the actual surfzone impact of only a small number of Orange County coastal drains are not mentioned. Although the epidemiological impacts of point source sewage are documented, we ask that this be distinguished from the limited understanding and potential impacts of non-point sources.
    - A number of cost-benefit analyses related to the epidemiological impacts of stormwater discharges on coastal waters with bacterial exceedences are presented. However, there is no discussion of the cost-benefit of controlling other contaminants. Since the stormwater permit addresses a number of pollutants found in urban runoff, we ask that the cost benefit analysis should also address a variety of pollutants instead of just one.

5. Many of the findings provided in the Technical Report reference older studies conducted in the 1990's (with the exception of the monitoring data). Newer studies conducted by organizations such as SCCWRP and UC Berkeley are providing new information, particularly on non-point source discharges. Acknowledging newer studies is highly recommended.

6. Throughout the entire permit there is new language that discusses "violations of water quality objectives" instead of "exceedances of water quality objectives". It is requested that the term "violation" be revised to read "exceedance", since a violation dictates the need for potential enforcement action and exceedance dictates the need for follow up action. In fact, the Fact Sheet (pg.8) identifies that the "monitoring data exhibits persistent exceedances of water quality objectives in most watersheds". We believe this is more appropriate language.

7. Maximum extent practicable (MEP) is presented in terms of economic and technical feasibility only. However, The State Water Board in a 2/11/93 memorandum addressing MEP and the California BMP Handbooks state that MEP is achieved through a more comprehensive process of BMP selection that involves consideration of effectiveness, regulatory compliance, public acceptance, cost and technical feasibility. Public acceptance is a key criterion that needs to be explicitly acknowledged, as programs will seldom be approved and funded without public support and Council approval. Please include "public acceptance" in the criteria.

**Tentative Order No. R9-2007-0002**

More Detailed Comments:

1. Table 2b should be consistent with Table 3 on page 66-

   The City suggests that Table 2b. Common Watersheds and Municipalities provides a better structure of watershed management areas. Specifically, within the Dana Point Coastal Streams, please do not include Laguna Beach, as there is no commingling of any runoff, and all of the Laguna Beach drains drain directly to the Pacific Ocean – not to any Salt Creek tributary.

   Please include the area within the Laguna Beach jurisdiction in Laguna Coastal Streams watershed management area or include it in Aliso Creek. Regardless, reporting of the activities within this area has occurred and will continue to occur; however we propose to reorganize the watershed management areas to optimize management and reporting efficiency.

   Similarly, the small area within Dana Point jurisdiction, designated in the San Clemente Coastal Streams watershed, could be more efficiently managed in either the adjacent San Juan Creek watershed or included in the Dana Point Coastal Streams watershed, as again there is no commingling of runoff within the San Clemente Coastal Streams watershed. Please make this geopolitical boundary change as well.

Another option for more organized and efficient watershed management planning would be to focus more on the priority watersheds in south Orange County, such as San Juan Creek and Aliso Creek, noting that each City's programs will be implemented throughout each jurisdiction; however the greater effort and more collaborative watershed management would be targeted on these significant watersheds, to achieve a better value/benefit for a greater population.

2. Page 9, Item d, states that "Retail Gasoline Outlets (RGOs) are significant [potential] sources of pollutants in urban runoff." The fact sheet should provide justification to support this.

3. Page 11, Item d. – Please clarify the intent of the statement that "....copermittees cannot passively receive and discharge pollutants from third parties." We assume this statement means that should the City find other agencies are discharging pollutants into the City's MS4, the City is obligated to notify the responsible agency, and if no action is taken, the RWQCB will be notified. It appears that this relates to schools, industrial, construction and Caltrans agencies who have/will have their own permits and are not under the jurisdiction of the City but may be under the jurisdiction of the RWQCB and therefore RWQCB would be the enforcing agency. It should be noted that Cities cannot be responsible for halting the discharge of another party. Both legal as well as health and safety issues need to be acknowledged.

4. Page 22, Item 6, Infiltration restrictions. Based on discussion at the public workshop held on March 12, it was indicated that the infiltration restrictions are applicable for large "centralized" infiltration treatment BMPs, not every small scale project. Please confirm and define.

5. Page 26, Item 4(b) (ii) & (iii) Site Design requirements. Based on discussion at the pubic workshop held on March 12, it was indicated that the RWQCB acknowledged that not all site design BMPs can be implemented at all sites due to soil and stability conditions; however the language does not suggest an "as feasible" concept. Please revise the language to reflect that technical/engineering studies may preclude some of the site design BMPs for certain projects.

6. Page 31, Item 9 – The requirements for the co-permittees to develop citing, design and maintenance criteria for each site design and treatment control BMP listed in its local SUSMP is an enormous and complex task. This will need to be a Region-wide effort, allowing co-permittees to modify the list of developed standards to fit their needs. This type of research, coordination and effort, to be conducted properly, with accuracy and best available information will take longer than the 365 days (1 year) plan provided in the permit, especially since each co-permittee will be revising its JURMP. It is requested that the RQWCB please provide two years so that the City can develop good criteria to fulfill this requirement.

7. The expectation that all structural BMPson private property be annually inspected will create a burgeoning and problematic inspection program, for example. Only priority businesses require annual inspection. We ask that a more reasonable frequency be discussed.

8. Page 31, Item (11) – The requirement for the co-permittees to annually review and update the treatment BMPs that are listed in their local SUSMP is a very large task. It should be noted that *categories* of treatment BMPs are provided in the local SUSMPs, not specific

treatment BMPs, and it would not be anticipated that categories of treatment BMPs would be removed. As technology and treatment BMP design improves, it would be expected that the effectiveness of treatment BMP categories could change over time; however an annual update is excess. The City requests that this requirement be conducted twice during the permit term (mid-term and end-term with submittal of ROWD).

9. Page 31, (e.) It is requested that the RWQCB include options for methods of certification of construction of BMPs, similar to what was included in the WQMP section, as was indicated by the RWQCB at the public workshop that this is the intent.

10. Page 39, Item 2 c (2), It was clarified at the public workshop, that "stormwater management plan" was a general term for erosion and sedimentation control plans. It is suggested the clearer language (i.e. use the term erosion and sedimentation control plan) be provided here, as the existing language implies a new document is required.

11. Advanced Sediment treatment is a statewide issue and should be addressed within the context of the Statewide General Construction Permit.

12. Page 41 d. (b) (iii) "Slope stabilization must be used on all active slopes during rain events regardless of the season, on all inactive slopes during the rainy season, and during rain events in the dry season". Slope stabilization on all active slopes during rain events is unworkable.

13. Page 44, Item g.- The new requirement for the co-permittee to notify the RWQCB when the copermittees issue a stop work order or another form of "high level" enforcement to a construction site within its jurisdiction as a result of storm water violations appears to be an additional, but unnecessary, layer of reporting. This information is already provided in the PEAs. Please delete this requirement. If more reporting is required, please provide justification. Define "high level".

14. Page 47 3.a(4)(c)- The permit requires that the permittees evaluate the existing flood control devices to identify those that are causing or contributing to a condition of pollution. There is no reference to this requirement in the Fact Sheet and the Fact Sheet should provide the justification and rationale for this new requirement. Also, many flood control devices are not within the jurisdictional control of the City.

15. Page 48 – The new Permit requires that permittees design and implement the street sweeping program based on criteria which includes optimization the pickup of auto byproducts based on traffic counts. The Fact Sheet does not include any specific justification for this new requirement. It should also be noted that street sweeping is implemented to address pollutants, such as heavy sediments, trash and debris- not all "auto byproducts". Oils and gas absorb into pavement and removal will not be accomplished by street sweeping. No evidence that pollutants such as nickel or asbestos outside travel lanes where street sweepers operate is provided as rationales.

16. Page 53, Item (1) – Both SIC and NCIS codes should be acceptable, as some Cities have already changed to the NCIS system. Please allow both.

17. Page 55 – The new permit requires the addition of a new program to more fully address mobile businesses. This enhances the current efforts undertaken by the Permittees. (Pg.55 b.(3)). The Fact Sheet recognizes the difficulty in developing/managing such a program, yet

states that this is not a significant change within the permit. It is suggested that this program be piloted and phased in as appropriate, addressing high risk mobile services first.

18. Page 63, Item (e), (2) (a) The requirement that "Obvious illicit discharges must be investigated immediately" is a goal of the Cities; however the language is severe, and it may be impossible in certain circumstances. Cities have limited staff and must prioritize tasks on a daily basis. Emergency situations that threaten health and safety would take priority and pull in "on-call" emergency staff, such as Fire, Police and Hazmat. Water quality concerns are of high importance to the City; however a situation that is not life threatening will be prioritized with other activities occurring at the City at that time. The City requests that this language be revised to "timely manner" or "as soon as possible". Noting that investigation of dry weather monitoring data of non-visible pollutants is difficult and generally requires specialty consultants, two days to begin an investigation is extreme, unless the situation is life threatening. The City recommends five business days to pull together required resources, maps, etc.

19. Page 64, Item h (2) – "Each co-permittee must develop and implement a mechanism whereby it is notified of all sewage spills from private sewer laterals and failing septic systems into its MS4. Each co-permittee must prevent, respond to, contain and clean up sewage from any such notification." This statement must acknowledge that some copermittees do not own, operate or maintain the sewage system and that this requirement is the responsibility of the appropriate sewering agency. Therefore the co-permittee has no jurisdiction over this requirement and relies on the sewering agency to prevent, respond to, contain and clean up the spill. This requirement is within the sewering agencies' permit already and does not belong in this permit.

20. Page 67, Item E. The County as principal permittee, has assumed the role of "lead watershed permittee" which has worked well in the past to ensure consistency in reporting and verification that the Permit provision are being met. Please continue.

21. Page 74 – The permit requires reporting on "fiscal benefits realized from the implementation of the stormwater program"; however it is unclear as to how one would do this and the level of analysis that would be required.

    Most requirements listed in the Business Plan are duplicative, as this information is reported in the annual reports, with the exception of item G. Consider item G as a single new requirement.

22. Page 75 – The permit requires that the Permittees annually assess the effectiveness of their JURMPs and provides some objectives that need to be considered. We suggest that the copermittees be provided with a one-year timeline to develop an effectiveness assessment strategy so that the questions, objectives, and data needs for the entire program can be considered and thought through before attempting the assessment.

23. The City supports the comments provided by the County of Orange in regards to the Receiving Waters and Urban Runoff Monitoring and Reporting Program.

Should you have any questions or concerns regarding the comments provided, please do not hesitate to contact Lisa Zawaski at 949-248-3584. We look forward to working cooperatively to develop a permit that is effective and efficient in meeting our goals of protecting and improving the water quality.

Respectfully,

Brad Fowler, P.E.
Director of Public Works & Engineering Services
City of Dana Point

cc: D. Chotkevys, L. Zawaski City of Dana Point
J. Haas, SQRWQCB, via e-mail
C. Crompton, R. Boon, L. McKenney, County of Orange, via e-mail
South Orange County Permittees, via e-mail

# CITY OF LAGUNA HILLS

April 3, 2007

By Email and U.S. Mail

John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

**Subject: Comments for Tentative Order No. R9-2007-0002; NPDES No. CAS0108740**

Dear Mr. Robertus:

The City of Laguna Hills has reviewed the subject order dated February 9, 2007, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District within the San Diego Region (Tentative Order No. R9-2007-0002) (NPDES No. CAS0108740). The City of Laguna Hills as Co-Permittee, welcomes the opportunity to provide comments on the Tentative Order. The City supports the comment letter prepared by the County of Orange (Principal Permittee) and would also like to address specific technical comments that may affect the City locally.

Overall, the Tentative Order establishes general standards of care to be met for water quality as a result of urban runoff. Hence, the permit includes specific regulations affecting City operations including development planning, construction and municipal activities, watershed urban runoff management, fiscal analysis of local NPDES funding, etc. The City of Laguna Hills believes that some of the specific regulations in the Tentative Order may adversely affect our ability to effectively deliver the water quality improvements that the Board and the City are seeking to obtain. Consequently, the City of Laguna Hills working through the Principal Permittee would like to work closely with the Regional Water Board staff to revise the Tentative Order to ensure that the most effective strategies are implemented to ensure water quality.

Throughout the Tentative Order, certain actions are directed to be taken by the Permittees. These directives limit the City's discretion and the flexibility in addressing water quality issues in our community. Some of the directives and provisions of concern are as follows:

- Section (D.1.d) of Tentative Order requires the Permittees to implement an updated local SUSMP within twelve months of adoption of the Order. The City believes this schedule for the update of the SUSMP is aggressive and does not allow sufficient time for the Permitees to

incorporate changes and implement an updated SUSMP. Since the modifications for the SUSMP will take longer than the 12 month period identified in the Tentative Order, the section should be modified to require the Permittees to implement an updated local SUSMP within 24 months of adoption of this Order.

- Section (D.1.f(2)c(iii)) of Tentative Order requires that 100% of projects with treatment control BMPs that are high priority must be inspected annually by the Permittees. This will create an intensive inspection program that is not warranted. The Provision should be amended to reduce the prescriptive nature of the program and allow the Permittees to develop an inspection program that will meet the intent of the provision while balancing the need for a variety of approaches to complete this element of the program in a cost effective manner.

- Section (D.3.a(4)c) of the Tentative Order requires an evaluation of all existing flood control devices to include identifying devices causing or contributing to a condition of pollution, identifying measures to reduce or eliminate the structure's effect on pollution, and evaluation of the feasibility of retrofitting the structural flood control device. This evaluation is to be completed by July 1, 2008. This requirement is new in that the third term NPDES permit only required the Permittees to evaluate the feasibility of retrofitting existing flood control devices where needed. The new requirement places a deadline on the City without clearly defining a "flood control device". City Staff believes the new requirement should more clearly define a flood control device and not place a deadline on performing an evaluation and should give the Permittees the flexibility to upgrade any structures only as needed over time.

- Section (D.3.a(5)a) of the Tentative Order requires that the Permittees design and implement a street sweeping program based on criteria which includes optimizing the pickup of "toxic automotive byproducts" based on traffic counts. The term "toxic automotive byproducts" is not defined and these products are not specifically known to the City as we do not regulate the automobile industry. This is a Federal and State issue. Staff postulates that such byproducts might include commonly utilized automotive products such as oil, gasoline, transmission fluid, brake fluid, brake dust and radiator fluids and could include air deposited byproducts of combustion (an air quality issue). However, none of these products are intended to be the primary refuse to be collected by street sweeping operations and their deposit on a street is not necessarily related to traffic volumes as contrasted with parked vehicles. It is also unlikely that a street sweeper could collect any liquid byproducts that have soaked into the pavements. Traffic counts also seemingly have nothing to do with the frequency of material deposited on a street such as organic plant and tree materials, litter and sediments, the primary constituents suitable for street sweeping pick up. The City of Laguna Hills believes the Tentative Order should delete this provision or propose language that provides objectives for the program instead of strictly defining the criteria. The street sweeping criteria should be determined based on local needs.

- Section (D.3.b(3)a) of the Tentative Order requires the Permittees to develop and implement a program to reduce the discharge of pollutants from Mobile Businesses; to keep a listing of Mobile Businesses within the Co-Permittees jurisdiction; to develop minimum standards and Best Management Practices (BMP's) for the various types of Mobile Businesses; to notify the Mobile Businesses known to operate within the Permittees jurisdiction of the

minimum standards and BMP's; and inspect the Mobile Businesses as needed to implement the program. This provision is problematic for several reasons as described below:

- A mobile Business in not clearly defined.
- The City does not require a business license, leaving the City without a listing of Mobile Businesses;
- The city does not have staff to roam the City looking for Mobile Businesses;
- Mobile Businesses operate in multiple jurisdictions and cannot be tracked as to time and place, and;
- Mobile Businesses may operate on private property out of the City's view.

City Staff believes the Tentative Order should include language that limits the scope of the provision until the costs and benefits of the program are better understood. As such, the Tentative Order should include language that allows the Permittees to identify a mobile business category that may be a significant source of pollutants and develop a pilot program. The pilot program would allow the Permittees to work together on a regional basis to develop an appropriate framework for addressing mobile businesses and identify if the program is effective prior to expending a significant amount of resources on multiple categories of unknown mobile businesses.

- Section (D.3.b(4)c) of the Tentative Order includes new, prescriptive requirements for food facility inspections including the maintenance of roof vents and identification of outdoor sewer and MS4 connections. These are new requirements and the City does not see any justification for these additional requirements. In addition, it is completely infeasible and of a safety concern for staff to access building roofs. The City's current food facility inspection program through the Orange County Health Care Agency has been conducted successfully over the past few years and the inspection program focuses on the critical Stormwater issues including maintenance of trash/disposal areas, floor mat cleaning, disposal methods for food wastes, fats oils and greases, etc. The City believes that the current program is a successful and effective program and does not need to be amended.

- Section (D.3.c(5)a) of the Tentative Order requires the Permittees to force the implementation of specific management measures within common interest area (CIA) developments and home owner associations (HOA) to ensure compliance with the order. The CIA/HOA component of the permit has been modified to become more prescriptive than the third term permit. Section D.3.c(5)b of the Tentative Order requires the Permittees to review their existing water quality ordinance and determine the most appropriate method to implement and enforce urban runoff and management measures within CIA/HOA areas within two years of the adoption of the new permit. City staff believes the requirement should not identify specific measures to enforce, but rather should give the Permittees the flexibility to develop and implement a plan to ensure urban runoff from CIA/HOA activities meets the objectives of the permit.

- Section (D.4.e(2)b) of the Tentative Order imposes new requirements that the Permittees conduct an investigation or document why a discharge does not require an investigation, within

two business days of receiving dry weather field screening results that exceed action levels. City Staff believes two days to begin an investigation is not sufficient and is not warranted. Performing an investigation of dry weather data requires analyzing the data, pulling together the resources, analyzing maps, etc. City Staff suggests that this language be amended to advise Co-Permittees to initiate an investigation rather than to conduct one within two businesses days for both field screen data and analytical data.

- Section (D.4.f) of the Tentative Order requires the Permittees to immediately eliminate illegal discharges that pose a threat to the public's health or environment. As it takes some time to gather resources and respond to illegal discharges/illegal connections, this language should be amended to allow flexibility as to eliminate illegal discharges in a timely manner, rather than immediately.

- Section (F.2.b) of the Tentative Order requires that the Permittees annually explain any budget changes to Stormwater operations of 25% or more and Section F.3. of the Order requires the submission of a "Municipal Stormwater Funding Business Plan" by the end of the permit term. The Plan is to identify the long term funding strategy for program evolution and funding decisions. The Business Plan must identify planned funding methods and mechanisms for Municipal Stormwater Management. Staff believes these requirements are inappropriate. The fact is that the City has consistently funded its Stormwater Management Obligations. The proposed Business Plan becomes subject to review and approval by the Board, a function that is only appropriately a budget function of the City Council. The City believes that the Regional Water Quality Control Board should not be an integral part of the City's budget process.

The Tentative Order will place undue financial burden and prescriptive technical requirements on the City's Stormwater Program, without necessarily achieving the desired water quality improvements. The City believes that a revised Order addressing the City and County comments would assist the City in carrying out a more effective and successful Stormwater Program.

Sincerely,

Kenneth H. Rosenfield, P.E.
Director of Public Services

cc: Bruce Channing, City Manager
Chris Compton, County of Orange, PF&RD

CITY OF LAGUNA NIGUEL
27801 La Paz Road • Laguna Niguel, California 92677
Phone/949•362•4300 Fax/949•362•4340



April 4, 2007

John Robertus, Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego CA 92123-4340

**RE: DRAFT MUNICIPAL STORM WATER PERMIT FOR SOUTH ORANGE COUNTY – TENTATIVE ORDER NO. R9-2007-0002**

Dear Mr. Robertus:

The City of Laguna Niguel appreciates the opportunity to comment on the Draft Municipal Storm Water Permit for South Orange County (Tentative Order No. R9-2007-0002). The Laguna Niguel City Council considered the provisions of the Draft Permit at its regular meeting of April 3, 2007. After review and discussion, the City Council authorized City Staff to submit the comments set forth herein.

## City Concurrence with Comments submitted by the County of Orange as Lead Permittee

The City has reviewed the legal, technical and monitoring comments to be submitted by the County of Orange as Lead Permittee. The City concurs with the County's comments, concerns and recommended deletions and modifications to the Draft Permit.

## General Comments and Areas of Concern

*The Draft Permit is Overly Prescriptive*

The current Storm Water Permit for South Orange County (Order No. R9-2002-0001) imposed a very comprehensive and prescriptive set of storm water management and regulatory requirements on the City of Laguna Niguel and the other Co-Permittees. The Draft Permit substantially expands the requirements and prescriptions of the Current Permit without clear or compelling supportive findings, evidence or rationale. As a general comment, the City believes that the Draft Permit is too prescriptive and limits the discretion and flexibility of the City to implement storm water management programs and practices that are appropriate, sensible and practical for our community. The City requests that the Regional Board carefully review and reconsider the new requirements of the Draft Permit. Wherever possible, maximum storm water management and program discretion and flexibility should be left to the Co-Permittees.

*Prohibition of Structural Treatment Facilities in Waters of the U.S.*

The City is very concerned about Section E (Statutory and Regulatory Considerations), Subsection 7 (Page 14 of the Tentative Order) which essentially prohibits the placement of structural treatment systems or facilities within waters of the U.S. First, this prohibition rekindles reasonable debate over where the "MS4 begins and ends" and what constitutes "waters of the U.S." Second, there appears to be legal disagreement over whether the Clean Water Act really prohibits the placement of such treatment facilities within or near waters of the U.S. The City's concerns are more practically focused. In our opinion, the strategic placement and operation of such treatment systems offers the most promising and practical opportunity to actually improve water quality and support beneficial uses. We are concerned that if such a prohibition had previously been in effect, temporary structural treatment facilities (i.e. Laguna Niguel J03P02 Ultra-Violet Treatment System) and permanent structural treatment facilities (i.e. Dana Point Salt Creek Ozone Treatment Facility) would not have been permitted. If such a prohibition is placed in effect, we are concerned that it will have a significant adverse impact on current plans by the County of Orange and the Co-Permittees to address longstanding bacteria pollution issues and prospective TMDL requirements in the Aliso Creek Watershed. Such a prohibition would also stand in direct conflict with prior State-grant supported projects that were endorsed and supported by the Regional Board and Staff. We strongly urge the Regional Board to delete this proposed prohibition.

*Additional Reports, Studies, Plans, Evaluations, Assessments and Updates*

The Draft Report imposes significant new and ongoing requirements to prepare reports, studies, plans, evaluations, assessments and updates. Some requirements are one-time only; others are annual and recurring. Examples include, but are not limited to:

- Revise General Plan
- Review Environmental Review Process
- Update Standard Urban Storm Water Mitigation Plan (SUSMP)
- Update Grading Ordinance
- Revise Jurisdictional Urban Runoff Management Program (JURMP)
- Update of Watershed Urban Runoff Management Program (WURMP)
- Evaluate Flood Control Structures for Retrofit Feasibility
- Revise SUSMP/WQMP to include Hydromodification Criteria for all Priority Development Projects
- Analyze Fiscal Benefits Realized from Implementation of Storm Water Protection Program
- Submit a Municipal Storm Water Funding Business Plan to the Regional Board

As a general comment, the City is concerned that the Permit requirements are becoming increasingly paperwork intensive, burdensome and expensive. Many of the proposed studies, analyses and plans require the engagement of professional consultants at considerable expense to the Co-Permittees. From a practical standpoint, the allocation of funds for consultants and studies limits the availability of funds for water quality

programs and projects. The City is particularly concerned about the proposed requirements for: (1) An annual analysis of the fiscal benefits realized from the implementation of the storm water program; and (2) The submittal of a Municipal Storm Water Funding Business Plan to the Regional Board. As a practical matter, it is difficult to contemplate how a Co-Permittee would qualitatively or quantitatively analyze the fiscal benefits associated with the local storm water program; presumably, this would require a highly complex and expensive analysis by economic consultants. It is possible that such an analysis, if performed, would identify negative fiscal benefits in such areas as housing affordability, cost of new development, and alternative municipal priorities, projects and services forgone. The requirement to perform such an analysis every year is excessive. Similarly, the proposed requirement to submit a Municipal Storm Water Funding Business Plan to the Regional Board seems excessive and unnecessary. The Co-Permittees are currently required to report on their current and proposed funding sources to carry out the Storm Water Permit Program. The City urges the Regional Board to delete these two proposed new requirements. The City also urges the Regional Board to carefully review and reconsider all of the Permit requirements related to reports, studies, plans, evaluations, assessments and updates. Wherever possible, these requirements should be minimized so that financial resources may be more appropriately directed to water quality programs and projects.

**Specific Comments and Areas of Concern**

*D.1.h. – Requirements for Hydromodification and Downstream Erosion*

This section imposes a significant new requirement on Priority Development Projects on a case-by-case or site-by-site basis. It is unclear how far downstream the hydrologic impacts of a new development must be evaluated. This section seems to permit implementation of in-stream controls which is in direct conflict with other provisions of the Draft Permit. It also seems to discourage watershed-based or regional approaches to the problems of erosion and stream slope undercutting. It is requested that this section be deleted, modified or clarified.

*D.3.a.(4) – BMP Implementation for Flood Control Structures*

This section imposes a requirement to evaluate existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution and evaluate the feasibility of retrofitting the structural flood control device. This section lacks definition and clarity. What is considered a flood control device? How do flood control devices cause or contribute to pollution? What are examples of retrofitting a structural flood control device? It is requested that this section be deleted or clarified.

*D.3.b.(3) – BMP Implementation for Mobile Businesses*

This section imposes a requirement to develop and implement a program to reduce the discharge of pollutants from mobile businesses to the MEP. The City of Laguna Niguel

does not have a business license or registration program. As such, our ability to identify such businesses and implement an effective program is limited. Such businesses, by their very nature, do not limit their services to an individual city, but generally serve a larger area. The development and administration of a Mobile Business Program is better suited to a countywide or regional approach. It is requested that this section be deleted or modified.

*D.3.c.(5) – Common Interest Areas (CIA)/Homeowner Association (HOA) Areas*

This section imposes a requirement to implement urban runoff management measures specific to common interest developments, including areas managed by associations. This section also lists general factors to be considered in implementing appropriate management measures. The intent and scope of this section is not clear. It is requested that this section be deleted or clarified.

*F.1.c. – Annual Analysis of Fiscal Benefits of Storm Water Program*
*F.3. – Municipal Storm Water Funding Business Plan*

As mentioned above, the City urges the Regional Board to delete these new provisions.

## Conclusion

The City of Laguna Niguel has made an extraordinary good faith effort to implement the provisions and requirements of the current South Orange County Municipal Storm Water Permit. With the encouragement and support of the Regional Board and Staff, the City has been a leader in the implementation of several significant water quality improvement projects including:

- JO3P02 Ultra-Violet Treatment Demonstration Project
- Wetland Capture and Treatment Network (WetCAT)
- Middle Sulphur Creek Restoration Project
- Upper Sulphur Creek Ecosystem Restoration Project (City/ACOE/DWR)
- Sulphur Solution Project
- Integrated Regional Water Management Plan
- SmarTimer/Edgescape Evaluation Project

The City remains committed to sustaining our current Storm Water Management Program and enhancing our efforts where reasonable and practical. This letter sets forth our most significant comments and concerns about the Draft Municipal Storm Water Permit for South Orange County. We appreciate the opportunity to submit these comments, and we respectfully request that our comments be fully considered by the Regional Board and Staff.

Yours truly,

Tim Casey
City Manager

Cc: Mayor and City Council
City Attorney
Director of Public Works/City Engineer
Director of Community Development
Senior Water Quality Manager
South Orange County Co-Permittees

**CITY OF LAGUNA WOODS**



April 4, 2007

Mr. John H. Robertus
Executive Officer
Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Tentative Order No. R9-2007-0002

Dear Mr. Robertus:

The City of Laguna Woods appreciates the opportunity to comment on South Orange County Municipal Stormwater Permit Tentative Order No. R9-2007-0002.

The City of Laguna Woods would like to go on record as supporting the comments developed by the County of Orange, as the Principal Permittee, and outlined in their letter dated April 4, 2007.

In addition, it is our hope that the Regional Board and their Staff would provide the copermittees the opportunity to address the response to comments (from the April 4th letter) in the official public hearing record. Therefore, we would request that the public hearing remain open for a reasonable period of time after the Regional Board staff's response to comments.

If you have questions or comments, I can be contacted at 949-639-0521.

Respectfully,

Lauren Barr
Community Development Director
City of Laguna Woods

CC: Richard Boon, County of Orange, via e-mail
Jeremy Haas, SDRWQCB, via e-mail

# FACSIMILE COVER SHEET

25550 Commercentre Drive
Lake Forest, California 92630
Telephone: (949) 461-3400
Public Works Fax: (949) 461-3511 or (949) 461-3512

**TO:** Mr. John H. Roberts

**COMPANY/ORGANIZATION:** SDRWQCB

**FACSIMILE NO:** 858 571-6972 **TEL. NO:** _____

**FROM:** Bob Woodings **DATE:** 4.4.07

**TOTAL NUMBER OF PAGES INCLUDING THIS ONE:** 9

**MESSAGE:**

Here are our comments on Tentative Order No. R9-2007-0002. Please call me if you have any questions regarding this transmittal.

Thanks,

Bob Woodings, DPW/CE
(949) 461-3481

CITY OF LAKE FOREST



April 4, 2007

Mr. John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Via Fax (858) 571-6972

Subject: Comments on Tentative Order No. R9-2007-0002, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District Within the San Diego Region

Dear Mr. Robertus:

The City of Lake Forest (City) respectfully submits this letter to the California Regional Water Quality Control Board, San Diego Region (Regional Board) to convey the City's formal written comments on Tentative Order No. R9-2007-0002/NPDES Permit No. CAS0108740 (Permit). Once adopted, the Permit will govern discharges of storm water from all Large Municipal Separate Storm Sewer Systems (MS4s) in Southern Orange County. As a regulated Large MS4 operator, the City is very concerned with a number of the Permit's proposed provisions.

As an initial matter, the City would like to address the projected timeline for the Permit's renewal. Regional Board staff have proposed closing the public comment period immediately following the April 11, 2007 Regional Board workshop. In order to facilitate greater public participation, the City hereby requests that the Regional Board keep the comment period open beyond this date. This will provide the Regional Board with the opportunity to review all of the submitted comments, and will allow all stakeholders to review any changes to the Permit that the Regional Board chooses to make.

In developing the following comments, the City worked closely with the County of Orange (County) as well as the other Copermittees to identify common concerns among the Copermittees. The City is aware that the County, as the Principle Permittee, has submitted a comment letter to the Regional Board regarding the Permit. The City would like to express its full support for the County's comments and intends the comments contained in this letter to supplement those submitted by the County and the other Copermittees. Accordingly, please consider the County's comments to be incorporated in the City's letter by this reference.





25550 Commercentre Dr., Suite 100
Lake Forest, CA 92630
(949) 461-3400
City Hall Fax: (949) 461-3511
Building/Planning/Public Works Fax: (949) 461-3512

As with the County's letter, the purpose of this letter is to continue the open dialogue between the Regional Board and the Copermittees. It is the City's belief that such a dialogue will help the Regional Board develop a permit that efficiently promotes the mutually held goal of water quality enhancement. Representatives of the City have participated, and will continue to participate in the Permit renewal process. City representatives will attend the workshop scheduled for April 11, 2007, and will pay close attention to any changes to the Permit that the Regional Board chooses to make.

Additionally, while the City shares the Regional Board's goal of water quality enhancement, the City has certain concerns about the way in which the Permit proposes to reach that goal. These concerns include the Permit's overly specific and prescriptive nature, the abbreviated timelines for compliance, and the manner in which it holds the Copermittees responsible for storm water discharges that are beyond their ability to control. Each of these concerns is set forth more fully below.

## GENERAL COMMENTS REGARDING THE PERMIT

**The Permit is Unnecessarily Prescriptive.** Past permits have provided the Copermittees with discretion to decide which storm water pollution solutions to implement, and when to implement them. This Permit contains a number of very specific requirements that essentially remove the Copermittees' ability to decide which solutions work best. This newly prescriptive nature represents a significant departure from the previous permit, as well as from the intent of the Clean Water Act and its associated regulations. The plain language of the Clean Water Act clearly indicates that Congress envisioned individualized regulation of storm water that would provide permittees with the discretion to implement local solutions on a local level.

Despite the intent to provide MS4 operators with maximum flexibility, this Permit has increased the number of mandatory provisions and intergovernmental relationships in a manner that the Copermittees feel is counter-productive. Permit Section D.1.d.(9) is one example. That section governs site design and treatment control BMPs. It provides very specific criteria that each Copermittee must develop and require for "Priority Development Projects" and includes very detailed mandates that unnecessarily hinder the Copermittees' ability to decide which Best Management Practices ("BMPs") will work best. By removing the Copermittees' discretion, the Permit limits the ability of the Copermittees to develop and implement any new storm water quality solutions that are not specifically required in the Permit.

A second example is the requirement that the Copermittees regulate storm water discharges on a watershed basis. This requirement adds an unnecessary layer of complexity to the storm water program. Where Copermittees have multiple watersheds within their jurisdictions, watershed based regulation forces the Copermittees to duplicate their efforts in an inefficient manner. This is because many storm water quality problems transcend watershed boundaries. Rather than allowing the Copermittees to implement one

solution to address such problems, the Permit adds an unnecessary layer of bureaucracy to the process by requiring watershed based regulation.

The Orange County Copermittees have invested a significant amount of time, energy, and financial resources into their respective storm water programs. They have worked collaboratively to develop organizational and management structures that work well for them. The program has strong momentum that the overly prescriptive nature of the Permit risks losing to the detriment of clean water throughout the region.

**The Permit Fails to Cite Applicable Authority or otherwise Support the Exceedance of Federal Requirements.** The Permit fails to properly identify which requirements are federally mandated, and which are required by state law. The federal regulations located at 40 C.F.R. § 122.26 establish the minimum requirements for a Large MS4 permit. The Permit greatly exceeds those minimum requirements. Despite the fact that the Regional Board is required to provide the legal and factual basis for each permit provision, the Regional Board has either provided no legal basis for these exceedances, or erroneously pointed to federal sources of authority.

The Regional Board needs to demonstrate why it is necessary to exceed the federal requirements. Without appropriate findings to support the need to go beyond the federal regulations, the Permit is suspect. Additionally, such documentation is necessary because those portions of the Permit that exceed the federally required minimum represent state mandates within the meaning of Article XIII B § 6 of the California Constitution. In order to allow the Copermittees to seek reimbursement from the State so that they can adequately fund their storm water programs, the Regional Board needs to provide a differentiation of authority.

**The Permit Improperly Requires the Copermittees to Regulate Phase II and Other Regional Board Regulated Entities.** The Permit holds the Copermittees responsible for inputs into their respective MS4s from what the EPA has classified as Phase II storm water dischargers. The Copermittees have little to no authority over the conduct of Phase II entities within their jurisdictions. This in turn significantly limits the ability of the Copermittees to regulate the quality of the storm water that enters their MS4. The EPA and the State Water Resources Control Board have issued Phase II permit guidelines. The Regional Board should enforce these guidelines rather than forcing the Copermittees to do so. The Permit should reflect this and not hold the Copermittees responsible for enforcing storm water regulations by proxy where they have a limited ability to do so.

Likewise, Permit Section D.2.c. requires the Copermittees to both review a project developer's storm water management plan and verify that the developer has obtained coverage under the California statewide General Construction Permit. It appears that this Section will require the Copermittees to do the Regional Board's inspection work for it. This is despite the fact that the State and Regional Boards retain the funds that the General Construction permittees pay for coverage.

To address these concerns, the Permit should be modified to absolve the Copermittees of responsibility for enforcing storm water regulations against Phase II and other Regional and State Board regulated entities.

## SPECIFIC PERMIT PROVISIONS OF CONCERN

**Finding C.6. – 303(d) Listed Waters.** Finding C.6. improperly states that Aliso Creek has been placed on the 303(d) list for Benzo[b]flouranthene, Dieldrin, and Sediment Toxicity. Aliso Creek is on the 303(d) list for indicator bacteria, phosphorus, and toxicity. Aliso Creek has not been listed for Benzo[b]flouranthene, Dieldrin, and Sediment Toxicity. These pollutants are incorrectly identified and need to be deleted from the finding.

**Permit Section D. – Jurisdictional Urban Runoff Management Plan (JURMP).** Permit Section D. globally requires implementation of all project development elements of the Permit within one year of its adoption. With respect to the new BMP requirements, as well as the requirement that the Copermittees update their SUSMP, and WQMP, the one year threshold is too soon. These requirements, including possible changes to the Municipal Code, may take substantial time to review and modify through City Council action. In order to realistically develop and implement all of the requirements contained in this section of the Permit, the Copermittees need more time. Accordingly, Permit section D. should be revised to provide the Copermittees with 24 months to develop and implement the program requirements.

**Section D.1.f. – BMP Tracking and Maintenance.** This Section requires Copermittees to maintain a watershed based database to track and inventory approved treatment control BMPs. It additionally requires Copermittees to verify, on an annual basis, that the BMPs are being maintained and operated effectively. Compliance with this section will require a significant commitment from Copermittee staff, and may require the addition of staff. The value of the outlay of funds that compliance with this section will require is questionable in comparison to the overall benefit to storm water quality. This section should be removed, or the Permit should be revised to allow for inspection and verification on an as needed basis.

**Section D.1.h – Requirements for Hydromodification and Downstream Erosion.** This section requires hydromodification site design measures to be implemented on all Priority Development Projects. It should be noted that some development/redevelopment projects (including infill projects) may actually discharge into engineered channels already designed to handle the flows from the development area. The Permit fails to adequately account for such situations. It does allow for conditional waivers where a downstream channel has been hardened all the way to its outfall. Even in those cases, however, the Permit still requires mitigation measures for what is essentially a non-existent impact.

Additionally, where a channel is only hardened in certain areas, and not for its entire length, the Permit provides no such waiver. The Permit still requires hydromodification

site design measures despite the fact that implementation of such measures will have little to no impact on downstream hydrologic conditions. The Permit should therefore be revised to provide a waiver with no mitigation measures in situations where a project discharges into engineered channels already designed to handle the flows from the development area.

**Section D.3.a.(4) – BMP Implementation for Flood Control Structures**. This Section requires each Copermittee to implement procedures to assure that flood management projects assess water quality impacts. It additionally requires Copermittees to evaluate their existing flood control devices for impacts on storm water quality. This Section thereby places the responsibility for ensuring that flood control devices comply with the terms of the Permit with the Copermittees. This is despite the fact that the Orange County Flood Control District owns, operates and maintains virtually all of the flood control devices in the Permit area. The Permit should not hold the Copermittees responsible for storm water requirements that are beyond their authority to regulate.

**Section D.3.a.(5) – BMP Implementation for Sweeping of Municipal Areas.** This Section requires Copermittees to design and implement a street sweeping program based on criteria which includes optimizing the pickup of "toxic automotive byproducts" based on traffic counts. Although the Permit does not specify what pollutants it is trying to capture, one can only assume that this provision is aimed at commonly utilized automotive products such as oil, gasoline, transmission fluid, brake fluid, brake dust and radiator fluids. Because the term is not defined, however, it could be broad enough to include air deposited byproducts of combustion.

Street sweeping, and street sweepers in general, were not designed to be the primary means of collecting these by-products. It is therefore unlikely that street sweeping will be effective at collecting many of them, including any liquids that have soaked into the pavement. Additionally, whether such by-products are deposited on a given street is not necessarily a function of the traffic volume on that street. There does not appear to be a direct correlation between traffic counts and the effectiveness or need for street sweeping. There are other pollutants such as litter, debris, and grass clippings etc. that could be detrimental to storm water quality that are de-emphasized by the Permit's focus on traffic counts. This section should therefore be revised to both specify the types of pollutants the Copermittees should be seeking to reduce with their street sweeping programs, and to provide the Copermittees with the discretion to utilize street sweeping in a manner that maximizes its effectiveness.

**Section D.3.a.(7) - Infiltration from Sanitary Sewer to MS4/Provide Preventive Maintenance of Both**. This section requires implementation of controls to prevent and eliminate infiltration of seepage from sanitary sewers to MS4s. This requirement fails to recognize that the City, as well as most of south Orange County, is serviced by numerous water districts that own, operate, and maintain their own sanitary sewer infrastructure. Therefore, while these requirements may be appropriate for public agencies that own, operate, and maintain sanitary sewer infrastructure, it is infeasible for the City to operate

and maintain another agency's infrastructure. This Permit section should therefore be revised to apply only to those Copermittees that own and operate their own sanitary sewer systems.

**Section D.3.b.(3) – BMP Implementation for Mobile Businesses**. The Permit requires the Copermittees to develop and implement a program to reduce the discharge of pollutants from various types of mobile businesses. This section requires Copermittees to develop a listing of mobile businesses, and requires the Copermittees to develop and implement a number of measures to limit the discharge of pollutants from them. As a practical matter, these requirements will be very difficult to enforce for the following reasons:

1. What constitutes a mobile business is not well defined;

2. Mobile businesses operate in multiple jurisdictions and cannot be tracked as to time and place;

3. Mobile businesses may operate on private property out of the City's view; and

4. Additional staff time will be required to roam the City looking for mobile businesses.

The Fact Sheet that the Regional Board has issued in support of the Permit states that the Permit has targeted mobile businesses for special attention because the Copermittees reported that discharges from such businesses have been difficult to control with existing programs. Rather than finding a solution for this problem, the Permit directs Copermittees to implement a number of non-descript solutions that will not necessarily make regulation of mobile businesses any easier. The Regional Board should therefore revise this section of the Permit to provide the Copermittees with the discretion to focus on mobile sources when they feel it is necessary, or if they identify mobile businesses as a significant source of storm water pollution within their jurisdiction.

**Section D.3.b.(4)(c) – Inspection of Food Service Facilities**. This Section requires Copermittees to inspect each food service facility within their jurisdictions annually, and to address, among other things, the maintenance of greasy roof vents during those inspections. Requiring inspectors to access food service facility roofs will require clearance from the property owner, as well as more time to complete inspections. It will also place inspectors at risk of injury by forcing them to climb onto roof tops that may not be secure or appropriate for access.

Additionally, the Copermittees currently contract with the Orange County Health Care Agency (OCHCA) to inspect food service facilities for storm water compliance. The addition of inspections of roof vents will severely limit, if not eliminate, the Copermittee's ability to utilize OCHCA services. It will therefore add significant new costs to each Copermittee's storm water program. Furthermore, grease discharges from

food service facilities are already regulated by the Fats, Oils and Grease ("FOG") programs implemented and enforced by sewering districts/agencies. The FOG programs include requirements for proper handling of these potential pollutants. It is therefore unlikely that requiring roof vent inspections will add any additional benefit to overall storm water quality.

Lastly, neither the Fact Sheet, nor the Permit's Findings provide any justification for the addition of this requirement. Such a time consuming and dangerous method of storm water pollution control should not be instituted where there is no sound evidence that it will yield an improvement in storm water quality.

**Section E.1.a. – Lead Permittee Identification.** This Section requires Copermittees to designate the Lead Permittee for each watershed, and designates a Lead Permittee in the event that the Copermittees fail to designate one. It is unclear how much time the Copermittees will have to designate the Lead Permittee, and at what point the Regional Board will designate one for them. The Permit should provide the Copermittees with sufficient discretion to decide whether they need a Lead Permittee for each watershed. This provision should therefore be removed from the Permit.

**Section F. – Fiscal Analysis.** This section of the Permit requires the Copermittees to conduct an annual fiscal analysis of the capital, operation, and maintenance expenditures necessary to implement the Permit's requirements. This section additionally requires each analysis to "include a qualitative or quantitative description of fiscal benefits realized from implementation of the storm water protection program." A review of the Fact Sheet indicates that the Permit is requiring the Copermittees to conduct an economic benefits analysis of their respective storm water programs.

This requirement is unnecessarily duplicative. As described in the Report of Waste Discharge, the Copermittees have already committed to develop a fiscal reporting strategy to better define the expenditure and budget line items included in the fiscal report. Furthermore, the Regional Board is already required to take the economic benefits and burdens of their actions into account when issuing storm water permits. (*See City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613; and California Water Code § 13263.) Requiring the Copermittees to duplicate these requirements is a waste of resources that could be better spent on implementing other Permit provisions. Accordingly, this section should be modified to encourage rather than require the Copermittees to conduct such an analysis.

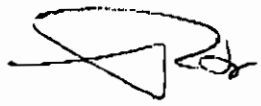
This section of the Permit additionally requires each Copermittee to submit a business plan that identifies a long term funding strategy for program evolution and funding decisions. The Copermittees do not always have information on the future sources of funding as it is not often readily available. This makes production of such a document difficult. The Regional Board does not need to know the funding sources for each Copermittee's storm water program. Requiring such a report is overreaching in a manner that will unnecessarily cost the Copermittees additional time and resources. This section

of the Permit should therefore be modified to encourage rather than require the Copermittees to develop a business plan.

## CONCLUSION

We appreciate your attention to our comments. As stated at the beginning of this letter, the City submits these comments as part of the on-going, open dialogue between the Copermittees and the Regional Board to help develop a workable Permit for this region. The City is committed to the goal of water quality enhancement, and wants to work with the Regional Board in developing the most cost-effective way to reach that goal. We look forward to receiving your response to the above comments and concerns. If you should have any questions, please contact Devin Slaven, Water Quality Specialist, at (949) 462-3436.

Sincerely,
CITY OF LAKE FOREST



Robert L. Woodings, P.E.
Director of Public Works/City Engineer

cc: Jeremy Haas, Environmental Scientist, SDRWQCB
Robert C. Dunek, City Manager
Chris Crompton, County of Orange, RDMD
Theodore G. Simon, P.E., Engineering Services Manager
Devin E. Slaven, REA, Water Quality Specialist

# City of Mission Viejo

Public Works Department

Gail Reavis
*Mayor*
John Paul "J.P." Ledesma
*Mayor Pro Tempore*
Trish Kelley
*Council Member*
Lance R. MacLean
*Council Member*
Frank Ury
*Council Member*


April 4, 2007

Mr. John Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4353

**Re:** ***Legal and Technical Comments Relating to California Regional Water Quality Control Board, San Diego Region, Tentative Order No. R9-2007-0002***

Dear Mr. Robertus:

The City of Mission Viejo is pleased to provide comments to the San Diego Regional Water Quality Control Board ("Regional Board") regarding Tentative Order No. R9-2007-0002, NPDES No. CAS0108740. The City of Mission Viejo is committed to improving storm water quality and preserving and protecting our natural resources. To accomplish this goal the City has and will continue to dedicate significant financial resources and staff time to our NPDES programs. However, we have an obligation to our residents and businesses to accomplish this goal in the most practical and cost-effective manner. As such, we have serious concerns regarding the legality and viability of some of the provisions contained in this Tentative Order. Therefore, we are providing comments which we hope the Regional Board will take into consideration prior to adopting the new NPDES Permit. For your convenience, we have bulleted our concerns below and described each topic in detail later in the letter. Our concerns are as follows:

- In holding the City responsible for sewage spills, the Tentative Order fails to consider the limitations of the City, the duplication of effort by other agencies, and prior State Board rulings pertaining to this issue. (Comment A, page 3)

- The Tentative Order improperly attempts to redefine and expand upon what properly constitutes a water of the United States. This directly contradicts existing statutory, judicial, and even the Tentative Order's own definition of what a water of the United States is. (Comment B, page 5)


200 Civic Center • Mission Viejo, California 92691
http://www.cityofmissionviejo.org

949/470-3056
FAX 949/581-5394

- The Tentative Order's attempt to construe all Permit provisions as required by federal law was a concept expressly rejected by the California Supreme Court. (Comment C, page 7)

- The Tentative Order violates the Tenth Amendment of the United States Constitution to the extent it relies on federal authority to require the City to modify its ordinances in a specific manner, create a business licensing program to monitor mobile businesses, and dictate the specific method of compliance. (Comment D, page 8)

- The Tentative Order's attempt to restrict in-stream and MS4 treatment options violates the California Water Code, limits the Permittees' ability to effectively reduce pollution, and misinterprets USEPA guidance on the matter. (Comment E, page 8)

- Those portions of the Tentative Order requiring the City to create new and additional programs constitute an unfunded state mandate in violation of the California Constitution. (Comment F, page 10)

- The Tentative Order language requiring an *immediate* response to every incident of illicit discharge may not be practicable for every circumstance. (Comment G, page 11)

- The Tentative Order requires the City to review a project proponent's Storm Water Management Plan (SWMP) potentially unfairly assigning responsibility for the review and enforcement of Storm Water Pollution Prevention Plans (SWPPP) to the City (Comment H, page 11)

- The Tentative Order requires the City to verify that slope stabilization is used on active slopes during rain events but fails to define the term "slope stabilization." (Comment I, page 12)

- The Tentative Order improperly requires to the City to identify flood control devices causing or contributing to a condition of pollution. (Comment J, page 12)

- The Tentative Order improperly requires to the City to evaluate the feasibility of retrofitting flood control devices. (Comment K, page 13)

- The Tentative Order's hydromodification conditional waiver language for hardened receiving water conditions requires revisions in order to be effective. (Comment L, page 13)

- The Tentative Order will increase the cost of carrying out the monitoring program without providing a comparable increase in the quality of data. (Comment M, page 14)

- The Tentative Order's requirement to test for organochlorine pesticide DDE at the San Juan Creek Station is improper based on actual use conditions and testing circumstances. (Comment N, page 15)

- The wet weather monitoring of MS4 outfalls required under the Tentative Draft is dangerous and will likely provide little to no scientific value. (Comment O, page 15)

- The Tentative Order is overly prescriptive and dismisses the importance of the Drainage Area Management Plan (DAMP). (Comment P, page 15)

- The Tentative Order implies that Permittees are responsible for anything that enters their storm drain system. (Comment Q, page 16)

- The Tentative Order requires that each Permittee develop a long-term funding strategy and business plan. (Comment R, page 17)

## A. The Tentative Order Improperly Attempts to Hold the City Responsible for Sewage Spills

Page 64, Part D.3.h., of the Tentative Order states:

> "Each Copermittee must prevent, respond to, contain and clean up all sewage and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems.) Spill response teams must prevent entry of spills into the MS4 and contamination of surface water, ground water and soil to the maximum extent practicable. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times."

For many cities (including the City of Mission Viejo), implementation of this provision is simply not feasible. For example, the City does not own or operate its own sewage system. All of the sewer systems in Mission Viejo are owned, operated, and maintained by water districts. These agencies have their own separate NPDES Permit. The City does not have the equipment or expertise to manage a sewage spill of any size, and its staff is not adequately trained to respond to potential spills. All of the water districts in Mission Viejo already respond to sewer spills (including sewer spills from private laterals). Furthermore, this provision is duplicative in the sense that the Regional Board is seeking to make the Permittees responsible for a task already delegated to the water districts. By making the City responsible for sewer spills, there is a high risk of creating confusion in determining who will respond to a spill (water district or City), who is responsible for the associated cost and reporting, etc.

This issue is made even more troubling by the fact that the State Water Resources Control Board ("State Board") previously issued a stay of this very same issue in the prior generation of the

NPDES Permit.[1] After extensive hearings and briefing on the matter, the State Board issued Order WQO 2002-0014 on August 15, 2002, granting a stay as to this provision. In that Order, the State Board held:

> "The record shows that three separate water districts operate these sewers within Mission Viejo, and are regulated by a sanitary sewer NPDES permit issued by the Regional Board. Mission Viejo alleged that the duplication of effort that would ensue by having Mission Viejo also be responsible for preventing and responding to sanitary sewage spills could lead to delayed responses as agencies try to determine jurisdiction and primary responsibility. Orange County's cost table for the upcoming year estimated total copermittee costs of $56,512 to implement this requirement. While these costs, by themselves do not constitute substantial harm, we find that the duplicative nature of the costs, combined with potential response delay and confusion, do."
> (State Board Order WQO 2002-0014, p. 6.)

In deciding to grant a stay as to this provision, the State Board concluded:

> "**The regulation of sanitary sewer overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities.** For example, the Permit appears to assign primary spill prevention and response coordination authority to the copermittees. While the federal regulations clearly assign some spill prevention and response duties to the copermittees, we find that the extent of these duties is a substantial question of law and fact."
> [State Board Order WQO 2002-0014, p. 8. (emphasis added.)]

Given the previous findings of the State Board on this same issue, and given that none of the factual reasons supporting this decision have changed, the Regional Board should remove or modify this provision so as to reduce duplicity of effort and the implementation of unnecessary control activities.

As an alternative, the City recommends that the Regional Board consider adopting language similar to that contained in State Board Order No. 2006-0003 titled: "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems" ("Order"). This Order applies solely to municipalities and other public entities that own or operate sanitary sewer systems greater than one mile in length that collect and/or convey untreated or partially treated wastewater. Adopting this caveat would not only serve to accomplish the primary goals behind the provision, but would also ensure Statewide consistency among Water Board regulations.

If the Regional Board is concerned that the City will not work in cooperation with the water districts or provide notification to the water districts regarding spills that are initially reported to the City, the Regional Board could add additional language/requirements. For example, the

[1] The requirement for Permittees to regulate sanitary sewer discharges was initially adopted as provision F.5.f. in the prior NPDES Permit.

following condition could be added, "For the Permittees that do not own or operate sanitary sewer systems and are exempt from the responsibility for spills, said Permittees shall develop a program to notify the Agency responsible for the sewage spill and shall provide assistance to the responsible Agency as necessary to prevent sewage from entering the MS4." Please note for the record that the City of Mission Viejo already has these procedures in place.

## B. The Tentative Order Attempts to Redefine What Constitutes a Water of the United States

Part D.3. of the Findings section of the Tentative Order states:

> "Historic and current development makes use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. In these cases, the urban stream is both an MS4 and a receiving water."

The City does not believe that such a finding is warranted or lawful under either the clear statutory provisions of the Clean Water Act, recent judicial interpretations of the Act, or even the Regional Board's own Tentative Order.

The language in the Tentative Order could be construed as seeking to regulate all discharges **into** MS4s, changing the very nature of MS4s and other "urban streams" so that they constitute a receiving water. This is contrary to the plain language of Section 402(p)(3)(B) of the Clean Water Act, which requires: "Permits for discharges **from** municipal storm sewers. . ." 33 U.S.C. §1342(p)(3)(B) (emphasis added). Because the Clean Water Act regulates discharges **from** municipal storm sewers, the Regional Board does not have the authority to regulate water entering **into** MS4s as receiving waters of the United States.

Furthermore, even if the statutory language indicated that Permits were required for discharges into MS4s, recent holdings from the United States Supreme Court conclusively show such structures would not constitute a water of the United States. According to the plurality decision in ***Rapanos v. United States*** (2006) 126 S. Ct. 2208, 2225:

> "In sum, on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.' *See* Webster's Second 2882. **The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.** The Corps' expansive interpretation of 'the waters of the United States' is thus not 'based on a permissible construction of the statute.'"
> (Emphasis added.)

The MS4 systems and urban streams that the Regional Board is seeking to regulate as receiving waters are intermittent, ephemeral, and used only periodically as drainage for rainfall. As such, these systems and streams would not constitute a water of the United States. Because the Clean Water Act, extends solely to waters of the United States, the Regional Board has no authority to regulate MS4s or urban streams as defined in its Permit.

Even under Justice Kennedy's more lenient interpretation of what constitutes a water of the United States, the Regional Board has still not adequately met the requirements for establishing that an MS4 or urban stream is subject to regulation as a water of the United States. According to Justice Kennedy, the Regional Board must establish that the MS4 system and urban streams bear a significant nexus to the other regulated waters so as to qualify for regulation as a water of the United States. ***Rapanos***, 126 S. Ct. at 2249. Such a determination must be made on a case-by-case basis and must contain some measure of the significance of the connection for downstream water quality. ***Id.*** at 2250-2251. In other words, the Regional Board must conduct an analysis of the "quantity and regularity of flow" in the relevant MS4s and urban streams prior to holding that these structures merit regulation under the Clean Water Act. ***Id.*** at 2251. Absent conclusive findings, the Regional Board is without authority to regulate MS4s and urban streams as receiving waters under the Clean Water Act.

Finally, the City would like to also point out that the Regional Board's own definitions of MS4s and receiving waters are contradictory to this proposed finding. In fact, the Tentative Order's definitions *support* the City's assertion that the Regional Board does not have the authority to regulate discharges into the MS4s as waters of the United States. According to the Tentative Order, an MS4 is defined as:

> "A conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or draining district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or designated and approved management agency under section 208 of the CWA **that discharges to waters of the United States**. . ."
> [Tentative Order, p. C-6 (emphasis added)]

At the same time, the Regional Board defines a receiving water as "waters of the United States." (Tentative Order, p. C-7.)

When considered in conjunction with the language in Finding D.3., these two definitions are completely contradictory. On one hand, the Regional Board is stating that an MS4 is something that discharges into the waters of the United States. On the other hand, the Regional Board is now taking the position that an MS4 is a water of the United States. From the City's perspective, these two definitions are mutually exclusive.

The City recommends that the Regional Board modify the language in the Tentative Order to ensure regulation of only those systems and streams discharging directly to waters of the United States as defined according to the Supreme Court's holding in ***Rapanos***.

## C. The Tentative Order Improperly Attempts to Construe All Conditions as Mandated by Federal Law

Part E.6 of the Findings provision of the Tentative Order states:

> "Requirements in this Order that are more explicit than the federal storm water regulations in 40 CFR 122.26 are prescribed in accordance with the CWA section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard."
> (Tentative Order, page 13.)

Through this statement, the Regional Board purports to hold that state water policy and directives are automatically incorporated as conditions of the federal Clean Water Act. Such an argument was expressly rejected by the California Supreme Court in ***City of Burbank v. State Water Resources Control Bd.*** (2005) 35 Cal. 4th 613. In that case, the Supreme Court stated that:

> "The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to 'enforce any effluent limitation' that is not 'less stringent' than the federal standard (id. §1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state—when imposing effluent limitations that are more stringent than required by federal law—from taking into account the economic effects of doing so."
> ***City of Burbank***, 35 Cal. 4th at 627.

The mere fact that the State has the authority under Section 402(p)(B) of the Clean Water Act to prescribe conditions in excess of those specifically enumerated by Congress or the U.S. EPA does not mean that those requirements automatically fall under the umbrella of federal regulation. To the extent that a requirement contained in the Tentative Order is more prescriptive or specific than those outlined in the Clean Water Act and accompanying regulations, the Regional Board must comply with the statutory requirements set forth in the California Porter-Cologne Water Quality Control Act.[2] ***Id.***

---

[2] The Porter-Cologne Water Quality Control Act requires that all regulations adopted pursuant to State law must be "reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." Water Code §13000. Furthermore, any regulations relating to discharges must be based on water quality objectives that are "reasonably required for that purpose." Water Code §13263. All water quality objectives adopted by the Regional Board must be reasonably achievable and take into account a variety of factors including, but not limited to, those factors enumerated in Water Code Section 13241.

## D. The Tentative Order Improperly Intrudes Upon the City's Land Use Authority in Violation of the Tenth Amendment of the U.S. Constitution

To the extent that this Tentative Order relies on federal authority under the Clean Water Act to impose land use regulations and dictate specific methods of compliance, it violates the Tenth Amendment of the U.S. Constitution. [See Tentative Order at 71, paragraph (h).] Furthermore, to the extent the Tentative Order **requires** a Municipal Permittee to modify its city ordinances in a specific manner [Tentative Order at 65(j)(1)] it also violates the Tenth Amendment.

According to the Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article XI, Section 7, of the California Constitution guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." The United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. [See ***Berman v. Parker*** (1954) 348 U.S. 26, 32-33.] Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

An example of where the Permit intrudes upon local police powers in violation of the Tenth Amendment is in Part D.3.b. of the Tentative Order. This section requires the City to perform source inventories of all mobile businesses operating within its jurisdiction. Because the City does not have a business licensing program, it has no way of knowing which mobile businesses are operating within the City. As the Tentative Order is presently written, the City may be required to create such a program.

From the City's perspective, under the guise of federal law, the Regional Board is attempting to dictate the precise manner in which cities must exercise their police powers. The City does not believe that such a requirement would pass muster under the Tenth Amendment.

Rather than adopting programs which dictate the precise method of compliance, the Regional Board should collaborate with the City and other Permittees to develop a range of model programs that each municipality could then modify and adopt according to their own individual circumstances.

## E. The Tentative Order Unlawfully Purports to Restrict In-Stream and MS4 Treatment Options

Part E.7. of the Findings provision of the Tentative Order states, in part:

> "Authorizing the construction of an urban runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a

> treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. This is consistent with USEPA guidance to avoid locating structural controls in natural wetlands."
> (Tentative Order, p. 14.)

Similarly, Part D.1.d.(6)(d) states:

> "All treatment control BMPs for Priority Development Projects must, at a minimum. . . Be implemented close to pollutant sources (where shared BMPs are not proposed), and prior to discharging into waters of the U.S."

Although the goals behind these provisions are laudable, the actual implementation of them presents a number of potentially serious problems. First, this provision of the Tentative Order violates Water Code Section 13360. According to Water Code Section 13360(a):

> "No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, **location**, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner."
> (Emphasis added.)

As noted above, the Regional Board is already attempting to define MS4s and urban streams as waters of the United States. ***Supra***, pg. 3. The proposed regulation would therefore effectively limit the ability for Permittees to implement any BMPs in any area except at the source and would exclude Permittees from choosing to implement what may be less-costly, more-effective BMPs within the storm system, urban streams, or "in-stream" areas. But Water Code Section 13360(a) expressly prohibits this type of location regulation.

Second, the reasoning offered in support of these provisions, especially as it relates to the Findings provision, is flawed in that it assumes Permittees will be increasing the amount of pollution already present in the waters of the United States. In reality, the very purpose for an in-stream treatment option, if implemented, is to remove pollutants already present in the water body. There is no indication or support for the Regional Board's proposition that Permittees would in any way be increasing the amount of pollutants contained in the water body. Furthermore, the implementation of an in-stream treatment BMP, if implemented, would likely be one of many different BMPs, both distributed and regional. The collective effect of these BMPs would not only reduce pollution at the point of entry and at the point of in-stream treatment, but in subsequent downstream reaches as well.

Third, the comparison to wetlands regulation misconstrues USEPA guidance on this issue. The USEPA guidance document referenced by the Regional Board does not preclude Permittees from locating structural controls within a natural wetland. Rather, the guidelines simply state:

> "**To the extent possible**, municipalities should avoid locating structural controls in natural wetlands. Before considering siting of controls in a natural wetland, the municipality should demonstrate that it is not possible or practicable to construct them in sites that do not contain natural wetlands. . ."
> [Fact Sheet, p. 70, *citing* USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002. (Emphasis added.)]

While the Permittees may agree that they should generally avoid in-stream treatment to the extent possible, outright prohibition of an option would be counterproductive.

Rather than dictating the exact placement of BMPs, the Regional Board should modify the language of this provision to recommend limiting in-stream controls to the extent possible.

## F. The Tentative Order Constitutes a State Mandate

Many of the additional programs the Regional Board seeks to impose require a higher level of service of existing programs that are not required or mandated under the Clean Water Act or any federal regulations thereunder. (Comment C, page 7) Yet according to the Fiscal Analysis provided in section F.1. of the Tentative Order:

> "Each Copermittee must secure the resources necessary to meet all requirements of this Order."
> (Tentative Order, p. 74.)

To the extent the Tentative Order imposes additional programs on the Permittees without providing additional funds, they are unfunded mandates.

The imposition of unfunded programs and mandates in the Tentative Order is inconsistent with the provisions of the California Constitution, specifically Article XIII B, Section 6, which requires a state agency mandating a new program or a higher level of service to provide a "subvention" of funds to reimburse local governments for the costs of the program or increased level of service.

Article XIII B, Section 6, of the Constitution prevents the state from shifting the cost of government from itself to local agencies without providing a "subvention of funds to reimburse that local government for the costs of the program or increased level of service . . ." State agencies are not free to shift state costs to local agencies without providing funding merely because those costs were imposed upon the state by the federal government. If the state freely chooses to impose additional costs upon a local agency as a means of implementing its policy, then those costs should be reimbursed by the state agency. [See ***Hayes v. Commission on State***

***Mandates*** (1992) 11 Cal. App. 4th 1564, 1593-1594.] If the state refuses to appropriate money to reimburse a city, the enforcement of the state mandate can potentially be enjoined by a court. [See ***Lucia Mar Unified School District v. Honig*** (1988) 44 Cal. 3d 830, 833-834.]

The Tentative Order will require a substantial capital investment, which individual cities will have to fund, despite the fact that no funding mechanism, nor any assistance, financial or otherwise, is provided to the Permittees. To our knowledge, the Regional Board has made no provision for funding the massive public works projects it has proposed in the Tentative Order.

Rather than mandate programs, the Regional Board should work collaboratively with the Permittees to develop programs acceptable to and capable of implementation by the Permittees. To the extent that these programs will require additional funds, the Regional Board should assist the Permittees in securing such funds. Clean water is a goal that all public agencies share. The responsibilities and challenges involved with achieving this goal is something that all agencies should take part in.

## G. The Tentative Order Unrealistically Requires that Obvious Illicit Discharge Exceedances of Action Levels be Investigated Immediately

Part D.4.e.(2)(a) of the Tentative Order states:

> "Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) must be investigated immediately."

The City does not believe that an *immediate* response to every incident of exceedance may be possible. Instead, the City believes that it can initiate investigation of obvious illicit discharges within two business days after the reporting of the illicit discharge.

## H. The Tentative Order Unrealistically Requires Illicit Discharges that Pose a Serious Threat to the Public's Health or the Environment to be Eliminated Immediately

Part D.4.f of the Tentative Order states:

> "Each Copermittee must take immediate action to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections as soon as practicable after detection. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately."

The City does not believe that an illicit discharge can be eliminated *immediately* directly after the illicit discharge is observed. Immediate elimination would require responding City personnel to immediately know the source of the discharge, carry containment equipment at all times, and deploy it immediately. Instead, the last sentence of this paragraph should read: "Illicit discharges

that pose a serious threat to the public's health or the environment shall receive immediate attention from the City and be eliminated as soon as practicable."

## I. The Tentative Order Requires the City to Review a Project Proponent's Storm Water Management Plan (SWMP) Potentially Unfairly Assigning Responsibility for the Review and Enforcement of Storm Water Pollution Prevention Plans (SWPPP) to the City

Part D.2.c.2 of the Tentative Order states:

> "Prior to permit issuance, the project proponent's storm water management plan must be required and reviewed to verify compliance with the local grading ordinance, other applicable local ordinances, and this Order."

The Tentative Order requires that the City review a project proponent's SWMP without defining what constitutes an SWMP. The City assumes that without a definition of an SWMP that the Tentative Order is referring to a Storm Water Pollution Prevention Plan (SWPPP), which is the responsibility of the State to review under the State General Construction Permit. Instead, the language should be revised to state that the project proponent's erosion and sediment control plan and other locally required submittals must be reviewed and approved to verify compliance with the local grading ordinance, other applicable local ordinances, and this Order.

## J. The Tentative Order Requires the City to Verify that Slope Stabilization is Used on Active Slopes During Rain Events without Defining the Term "Slope Stabilization"

Part D.2.d.(1).(b).(iii) of the Tentative Order states:

> "Slope stabilization must be used on all active slopes during rain events regardless of the season, on all inactive slopes during the rainy season, and during rain events in the dry season."

The Tentative Order should define the term "slope stabilization"; otherwise, the Permittees will be left on their own to determine what constitutes an acceptable slope stabilization method. Without a definition, Regional Board staff could later find the City in violation of the intent of this section of the Order. To resolve this issue, the City suggests that slope stabilization could be defined as using "polyacrylamide or an equal as determined by the Permittees." The County of Orange conducted an erosion control BMP effectiveness study showing this to be an acceptable method of stabilizing slopes during single-storm rain events.

## K. The Tentative Order Requires the City to Identify Flood Control Devices Causing or Contributing to a Condition of Pollution and to Evaluate the Feasibility of Retrofitting the Device

Part D.3.a.(4).(c) of the Tentative Order states:

> "Each Copermittee must evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device."

Flood control devices do not inherently generate pollution. Rather, flood control devices convey storm water or urban runoff from a facility to a discharge point and the storm water or urban runoff itself may or may not contain pollutants.

The Tentative Order requires the City to evaluate the feasibility of retrofitting a flood control device; however, this conflicts with Part D.3. and Part E.7. of the Findings provision of the Tentative Order. The City suggests that evaluating the feasibility of retrofitting flood control structures is fruitless unless the Regional Board changes the language in the Tentative Order to actually allow structural flood control device retrofits.

## L. The Tentative Order's Hydromodification Conditional Waiver Language for Hardened Receiving Water Conditions Requires Clarification

Part D.1.h.(3).(c).(ii) of the Tentative Order states:

> "Modified channel conditions: Conditional waivers in situations where receiving waters are severely degraded or significantly hardened must include requirements for in-stream measures designed to improve the beneficial uses adversely affected by hydromodification. The measures must be implemented within the same watershed as the Priority Development Project."

This section of the Tentative Order could be construed to mean that developers would be required to pay for removal of portions of concrete in hardened channels in order to comply with the conditional waiver requirements. Instead, the language should specifically state: "Conditional waivers in situations where receiving waters are severely degraded or significantly hardened must include requirements for in-stream measures in the project's receiving waters or in-stream measures in other waters of the watershed designed to improve the beneficial uses within that receiving water. The measures must be implemented within the same watershed as the Priority Development Project." In this way, the Co-Permittees can direct developers to restore less-degraded channels identified by the Co-Permittees as needing immediate attention in order to prevent the channels from becoming severely degraded channels.

## M. The Tentative Order Will Increase Costs of the San Diego Region Water Quality Monitoring Program Without Providing a Comparable Increase in the Quality of Data

Attachment E, Part E.II.A.1.d (Receiving Waters and Urban Runoff Monitoring & Reporting Program) of the Tentative Order states:

> "Dry weather event sampling must be flow-weighted composites, collected for a duration adequate to represent changes in pollutant concentrations and runoff flows which may occur over a typical 24 hour period. A minimum of 3 sample aliquots, separated by a minimum of 15 minutes, must be taken for each hour of monitoring, unless the Regional Board Executive Officer approves an alternate protocol.
>
> (1) Automatic samplers must be used to collect samples from mass loading stations.
>
> (2) Grab samples must be analyzed for temperature, Ph, specific conductance, biochemical oxygen demand, oil and grease, total coliform, fecal coliform, and enterococcus."

The City objects to these proposed changes because:

- Water quality monitoring data between the Third Term Permit and the proposed Fourth Term Permit will not be comparable;
- The City and the County will lose the ability to determine long-term trends;
- The County will need additional sampling equipment to complete monitoring which will increase costs to the City.

Additionally, the City believes implementing these requirements will be impractical because commercially available power supplies for automated sampling units are not reliable beyond 36–48 samples per day. This procedure requires servicing auto-samplers at night and potentially to increased County staff labor costs, which will result in increased costs to the City. As an alternative, the City suggests that the protocol should be uniform with the Santa Ana Regional Board Municipal Permit of 24 samples per day. The technical basis for the 36–48 samples per day frequency is not consistent with results from special projects conducted during previous permit periods.

## N. The Tentative Order Improperly Includes a Provision for Testing for Organochlorine Pesticide DDE at the San Juan Creek Station

Attachment E, Part E.II.A.1.h (Receiving Waters and Urban Runoff Monitoring & Reporting Program) of the Tentative Order states:

> "Watershed-Specific 303(d) parameters: In addition to the constituents listed in Table 1 above, monitoring stations in the following watersheds must also analyze the following constituents as described for each monitoring event:
>
> (1) DDE must be monitored at the San Juan Creek station."

The City strongly objects to this inclusion based upon the 2006 303(d) list. The 303(d) list cites an incorrect Beneficial Use designation (commercial and sport fishing) for San Juan Creek with questionable California Toxics Rule criterion (human health—10-6 carcinogenic risk) to establish the impairment listing. The current Mass Loading station is not within the 1-mile water quality limited segment defined by Surface Water Ambient Monitoring Program. The analytical capabilities to detect concentrations less than the California Toxics Rule criterion (0.00059 µg/L) is not readily available from commercial labs and will be very expensive.

## O. The Tentative Order Requires that MS4 Outfalls be Monitored in Wet and Dry Weather Producing Little to No Scientific Value

Attachment E, Part E.II.B.1 (Urban Runoff Monitoring Program) of the Tentative Order states:

> "The Copermittees must collaborate to develop and implement a monitoring program to characterize pollutant discharges from MS4 outfalls in each watershed during wet and dry weather."

The City strongly objects to this inclusion because there is no significant added value for wet weather monitoring of storm drains. The volume of storm event runoff would obscure any possible source identification. And, wet weather information will be gathered through the Mass Loading or Ambient Coastal Receiving Waters Program. County staff may be at great risk of injury by entering flood channels during storm events to sample outfalls that would be inundated by storm flows.

## P. The Tentative Order Is Overly Prescriptive and Dismisses the Importance of the Drainage Area Management Plan (DAMP)

All of the municipalities within the County of Orange (including the City of Mission Viejo) have actively participated in the development of the Drainage Area Management Plan (DAMP), and this document forms the backbone of Orange County's NPDES Storm Water Program. In addition, the Permittees have spent a significant amount of taxpayer dollars developing and refining the DAMP into a document that works effectively with local NPDES programs. The Tentative Order Fact Sheet states that the Order includes sufficient detailed requirements to

ensure compliance and seemingly dismisses the DAMP as "procedural correspondence" which guides implementation and is not a substantive component of the Order.

This permitting approach fundamentally shifts the level of detail within the program to the permit provisions instead of the DAMP and sets up a scenario for increasingly prescriptive permits while eliminating the flexibility and local responsibility of the MS4 program. This shift also downplays the importance of the DAMP and the role that it has in defining local performance standards for the storm water program and is counter to the purpose and intent of the storm water management program.

The DAMP sets the foundation for a more flexible permitting approach for the Orange County NPDES Storm Water Program and places upon the Permittees the continuing responsibility of weighing economic, societal, and equity issues as they define the policies, standards and priorities to be employed in implementing the program. In fact, the DAMP and local JURMPs are fundamental and necessary elements of the MS4 program since they serve as the primary policy and guidance documents for the program and describe the methods and procedures which will be implemented to reduce the discharge of pollutants to the maximum extent practicable and in compliance with the MS4 permit provisions. While the management plans must effectively address and be in compliance with the permit requirements, the necessary detail and prioritization of efforts in doing so must remain at the local level and be described within the DAMP—not the permit.

## Q. The Tentative Order Implies That Permittees are Responsible for Anything That Enters Their Storm Drain System

Finding D.3(d) (Page 11) identifies that "by providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control." Since the City owns and operates the majority of the storm drain systems within our respective jurisdiction, this statement has profound implications regarding the City's potential liability for any pollutant that enters the MS4.

This Finding needs to be modified to recognize that the Permittees may lack legal jurisdiction over storm water discharges into their systems from some state and federal facilities, utilities and special districts, Native American tribal lands, wastewater management agencies, and other point and non-point source discharges otherwise permitted by the Regional Water Board. In addition, the Regional Water Board should recognize that the Permittees should not be held responsible for such facilities and/or discharges and that certain activities that generate pollutants present in storm water runoff may be beyond the ability of the Permittees to eliminate. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear, and leaching of naturally occurring minerals from local geography.

## R. The Tentative Order Requires That Each Permittee Develop a Long-Term Funding Strategy and Business Plan

The Tentative Order requires that each Permittee submit a funding business plan that identifies the long-term strategy for program funding decisions. The Fact Sheet identifies that this requirement is based on the need to improve the long-term viability of the program and is based on the 2006 *Guidance for Municipal Stormwater Funding* from the National Association of Flood and Stormwater Management Agencies (NAFSMA). The Fact Sheet further indicates that, without a clear plan, the Board has uncertainty regarding the implementation of the program.

The City believes that this requirement (which is, perhaps, more reasonable for a newly developing storm water program) is an unnecessary and burdensome requirement for the Orange County Permittees which will yield no commensurate benefit to water quality and divert precious resources away from the implementation of the program.

* * *

In closing, we appreciate the time and effort that went into the drafting of the Tentative Order. However, we believe the Tentative Order discards much of the work and progress the City has made in developing its NPDES Program. Instead of building on and refining our existing permit, the Tentative Order creates more bureaucracy and paperwork, which will do little or nothing to improve water quality. In addition, the Tentative Order will place undue financial burden and prescriptive technical requirements on the City's NPDES Program.

Hopefully the Regional Board will take into consideration our comments prior to adopting the Tentative Order. We would welcome the opportunity to work with Regional Board staff to revise the Tentative Order to ensure that it meets our mutual goal of improving water quality and protecting our precious natural resources. We look forward to your response to these comments as well as other comments submitted by the County and other cities and agencies.

If you require any further clarifications on our comments or have any questions, please contact me at (949) 470-3079.

Respectfully,

Richard Schlesinger, P.E.
City Engineer

cc: Dennis Wilberg, City Manager
Loren Anderson, Director of Public Works
Joe Ames, Associate Civil Engineer
Deborah Carson, Program Engineer
Jeremy Haas, San Diego RWQCB
William P. Curley III, Esq., Richards, Watson & Gershon
Norman A. Dupont, Esq., Richards, Watson & Gershon
Matthew E. Cohen, Esq., Richards, Watson & Gershon
Geoff Hunt, Esq., Richards, Watson & Gershon

32400 PASEO ADELANTO
SAN JUAN CAPISTRANO, CA 92675
(949) 493-1171
(949) 493-1053 FAX
*www.sanjuancapistrano.org*



April 4, 2007

By e-mail and U.S.Mail

John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Subject: Tentative Order No. R9-2007-0002; NPDES No. CAS0108740

Dear Mr. Robertus

The City of San Juan Capistrano is submitting this letter relative to the proposed Tentative Order No. R9-2007-0002. Prior to its adoption, and as a matter of good public policy, we believe the Regional Board should take the time to thoroughly examine the accuracy and relevance of the information used to develop the Tentative Order and the information that has been provided by the County of Orange. We support the comments in the letter from the County of Orange and consider this request to be reasonable considering the scope and complexity of the program being prescribed by the Tentative Order.

The City is committed to working with the State and Regional Board in order to achieve our mutual goals and looks forward to engaging in a constructive dialogue with Regional Board staff on the issues addressed in the County letter.

We look forward to your response to the County comments as well as other comments submitted by other neighboring cities and agencies.

Respectfully,

Dave Adams
City Manager

cc: Chris Crompton
Ziad Mazboudi