City of Mission Viejo

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August 21, 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

Subject: Comments Relative to Regional Water Quality Control Board Revised 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 ("Board") regarding the Revised Tentative Order No. R9-2007-0002, NPDES No. CAS0108740. The City appreciates the Board's consideration of its earlier comments submitted by letter to you dated April 4, 2007, and will not repeat those comments. The City further appreciates the Board's modifications of the initial draft Tentative Order as reflected in the Revised Tentative Order ("Revised T.O."). However, the City continues to have serious concerns regarding the legality and viability of some of the provisions contained in the Revised T.O. We provide these additional comments, which we hope the Board will take into consideration prior to adopting the new NPDES permit.

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

The City has reviewed the legal and technical comments to be submitted by the County of Orange as Lead Permittee. The City concurs with the County's comments and concerns. The City adopts the County's comments without repeating them herein.

City Additional Comments on Legal Issues

(1) The City notes that the Board ignored its comments on the improper definition of "waters of the United States" contained in the Finding D.3.c. now contained in the Revised T.O. at

p.10. The Board's response to the City's comments (and those of many other commentators) was an effort to suggest that nothing in the Supreme Court's decision in ***Rapanos v. U.S.***, 126 S. Ct. 2208 (2006) defining the term "waters of the United States" under the Clean Water Act precluded the Board from finding that *all* urban runoff "streams" that are part of "natural drainage patterns" constitute waters of the United States for purposes of regulation. The Board's comments cite in support of this a recently issued "Guidance" document issued on June 5, 2007, by the U.S. EPA and the Army Corps of Engineers. The City notes that this Guidance document expressly *excludes* discussion of provisions of the Clean Water Act pertinent to this NPDES permit, Section 402. The Guidance states: "EPA is considering whether to provide additional guidance on these and other provisions of the CWA that *may be affected by the Rapanos decision."* (EPA/Army Corps Guidance Memo: "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States." at 4, n.17 (emphasis added) (June 5, 2007). The City submits that the Board cannot rely upon "Guidance" that expressly disclaims its applicability to the scope of jurisdiction pursuant to Clean Water Act Section 402 in interpreting that Guidance. Indeed, agency "guidance" that is not formally adopted by notice-and-comment rulemaking procedures is not entitled to traditional judicial deference to agency pronouncements. Rather, it is entitled only to "respect proportional to its 'power to persuade.'" ***U.S. v. Mead Corp.***, 533 U.S. 218, 234-35 (2001); ***Sierra Club, Inc. v. Leavitt***, 488 F.3d 904, 915 (11th Cir. 2007). The City respectfully submits that EPA's June 5, 2007, "guidance" that expressly disclaims applicability to Clean Water Act Section 402 has absolutely no persuasive power with respect to a proposed permit to be issued pursuant to that Section. Finally, as noted in the County's comments, no matter how one reads the various opinions in ***Rapanos***, it is impossible to read those opinions without concluding that the effort to change ephemeral streams for urban runoff into "waters of the United States" simply cannot be done without a case-by-case review of the facts related to a specific stream. The Board has not done so and Finding D.3.c. and all related provisions of the Revised T.O. must be stricken.

(2) As the City previously noted in its April 4, 2007, comment letter at p.8, various portions of the T.O. (now the Revised T.O.) purports to command the City to enact various local zoning laws and restrictions, to perform "source inventories" of all "mobile businesses" even though the City does not track such mobile businesses, and to compel the use of a "watershed-based land use planning" in its planning departments. (Revised T.O. at E.1.D.h. (p.72). The Revised T.O. states that all such mandates are "prescribed in accordance with the CWA section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard." Of course, the federal government cannot coerce a state (or a city) to carry out federal mandates. ***Printz v. United States***, 521 U.S. 898, 925 (1977). In this case, the Board, purporting to act to effectuate federal law delegated to it, is seeking to compel the City (and other cities) to change or modify local zoning laws, ordinances, and regulate others (such as developers). This coercive mandate violates the Tenth Amendment.

City Request for Modification of Revised T.O. Language on Sanitary Sewer Overflows

Although the City appreciates the Board's initial modification of language in the Order, Part D.4.h.1 (p. 65 of Revised T.O.) providing for a copermittee to implement "management measures and procedures" to respond to sewer and other spills, it requests that the Board also modify the language within Part D.4.h.2.

Specifically, the City requests that the Regional Board modify the language within Part D.4.h.2 to read as: "Each Copermittee must *implement management measures and procedures* to prevent, respond to, contain and clean up sewage from any such notification.

For the record, the City of Mission Viejo does not agree with the Regional Board's findings that the concerns expressed by the State Water Board are no longer warranted as written in the Response to Comments. The Response to Comments states:

> "When the State Water Board stayed the sewage provision from Regional Board Order No. R9-2002-01, it found that the costs of the requirement did not constitute harm, but agreed that harm could ensue from potential response delay and confusion (Order WQO 2002-0014). Subsequently, the Copermittees and the local sewer agencies have developed mature relationships regarding sewage spill response. As a result, the concerns expressed by the State Water Board are no longer warranted."
> [Response to Comments, p. 64]

To reiterate, the State Water Board previously 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 City of Mission Viejo would still prefer that the Regional Board remove this provision so as to reduce duplicity of effort and the implementation of unnecessary control activities. The water districts serving the City of Mission Viejo are still charged with the responsibility of regulating sanitary sewer overflows

and they still serve as the primary spill prevention and response coordination authority, including responses to sewer spills from private laterals.

City Joinder in Proposed Alternative Language for Proposed Regulation of Facilities that Extract, Treat, and Discharge ("FETD") into waters of the U.S.

The cities of Dana Point and Laguna Niguel are in the process of proposing alternative language for the regulation of FETD systems, as suggested in Finding No. 9 (Revised T.O. at p.14), and Order B.5 (Revised T.O. at pp.17-18). While the City agrees with the County's general observations about the lack of legal authority for the Board to issue regulations concerning "FETDs", it also joins with the cities of Dana Point and Laguna Niguel in supporting alternative language, particularly with respect to Finding No. 9.

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In closing, we appreciate the time and effort that went into the drafting of the Revised Tentative Order and the accompanying responses to our initial comments. But, we believe that the Board must still deal with the fundamental legal issues that we initially raised and that both the County's comments and these supplemental comments continue to raise. We also request that the Board adopt additional language with respect to the regulation of illicit discharges from sewer systems that are run and controlled by third-party districts and that the Board either delete in its entirety the language concerning FETD systems or, alternatively, adopt the alternative language suggested by the cities of Dana Point and Laguna Niguel.

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

Respectfully,

Loren Anderson
Director of Public Works

cc: Dennis Wilberg, City Manager
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