

EXECUTIVE OFFICER SUMMARY REPORT
July 1, 2009

ITEM: 8

SUBJECT: PUBLIC HEARING: Reissuance of NPDES 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 Orange County Flood Control District, and the incorporated Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano within the San Diego Region. (Tentative Order No. R9-2009-0002, formerly Tentative Order Nos. R9-2008-0001 & R9-2007-0002, NPDES Permit No. CAS0108740) (*Ben Neill*)

The public review and comment period for Tentative Order began on March 13, 2009 with the public distribution of the fourth version of the Tentative Order. Only written comments received by 5:00 p.m. on June 19, 2009 will be provided to the Regional Board members for their consideration prior to the hearing. Oral comments will be accepted on the fourth version of the Tentative Order. Time allotted for oral comments may be limited at the discretion of the Regional Board presiding officer.

PURPOSE: Today's public hearing provides the Regional Board with the opportunity to hear public testimony on Tentative Order No. R9-2009-0002. Consideration of adoption of the Tentative Order is tentatively planned for the regularly scheduled Board meeting on October 14, 2009 in Temecula.

PUBLIC NOTICE: Interested persons and the general public have been notified in accordance with California Water Code Section 13167.5, the State Water Resources Control Board Administrative Procedures Manual (Chapter 1), and Code of Federal Regulations Title 40 CFR Part 25.

- A notice of this item was distributed to all known interested persons and posted on the Regional Board web site on May 29, 2009;

- A notice of this meeting was also posted for the general public in the Orange County Register on May 29, 2009; and in the San Diego Union Tribune on May 27, 2009; and
- A notice was included on the July 1, 2009 Regional Board meeting agenda.

DISCUSSION:

Tentative Order No. R9-2009-0002 is the proposed reissuance of the Orange County Municipal Storm Water Permit (Order No. 2002-01). The Tentative Order serves as both Waste Discharge Requirements and a federal National Pollutant Discharge Elimination System permit.

The Tentative Order would, if adopted, require the County of Orange, the Orange County Flood Control District, and the 11 incorporated cities of Orange County in the San Diego Region (Copermittees) (Supporting Document No. 1) to prohibit the discharge of non-storm water from their separate storm sewer systems (MS4s) and to reduce the discharge of pollutants in storm water from their MS4 to the maximum extent practicable (MEP).

Background and Permitting Approach Summary

The revised Tentative Order No. R9-2009-0002 (Supporting Document No. 2) being considered today was distributed for review and comment on March 13, 2009. This is the fourth version of the Tentative Order.

Over two years ago, Tentative Order No. R9-2009-0002 was initially distributed on February 9, 2007 as Tentative Order No. R9-2007-0002. A public workshop was held on March 12, 2007, and a public hearing on the Tentative Order was held before a Panel of four Regional Board members on April 11, 2007 at a meeting in the City Council chambers of the City of Mission Viejo.

At the April 11, 2007 public hearing, the Regional Board panel directed staff to provide written responses to significant comments and distribute a revised Tentative Order approximately 45 days in advance of the meeting at which the full Regional Board would consider adoption of the revised Tentative Order. The Board panel further directed staff to accept written comments on subsequent revisions made to the Tentative Order. The panel, however, did not specifically direct staff to provide written responses to those

later comments. Responses to all significant comments on the revisions, however, were provided in writing and/or verbally to the Regional Board.

On July 6, 2007, a second version of the Tentative Order, with a revised Fact Sheet and responses to comments, was distributed. Comments were accepted on the revisions until August 25, 2007. Consideration by the Regional Board of the revised Tentative Order was scheduled to occur in September 2007, but was delayed until a quorum of voting members would be present. The delay provided an opportunity to distribute a third version of the Tentative Order.

A third version of the Tentative Order (R9-2008-0001) was distributed to interested persons and the general public on December 12, 2007. At the February 13, 2008 regular meeting, a third written response to comments was distributed. The Regional Board failed to pass a motion to adopt the third version of the Tentative Order by a vote of 2 to 3. The Regional Board instructed staff:

- to seek greater emphasis on measureable performance based criteria;
- to reevaluate the low impact development and hydromodification requirements;
- to examine consistency between Southern California MS4 permits;
- to remove from the Tentative Order the regulation of facilities that extract, treat and discharge; and
- to include all applicable Total Maximum Daily Load Waste Load Allocations adopted by the Regional Board and approved by the USEPA.

Following considerable revision, a fourth version of the Tentative Order (R9-2009-0002) (Supporting Document No. 2) incorporating the Regional Board's directions was distributed to interested persons and the general public on March 13, 2009. A public workshop was held on April 3, 2009 at the City of Mission Viejo. At the request of the Copermitees, Regional Board staff met separately with them on April 16, 2009, April 20, 2009, and May 12, 2009. Further public meetings were held on May 6, 2009 and May 26, 2009.

Based on those meetings and public comments, a draft update and errata to the fourth version of the Tentative

Order (R9-2009-0002) was included (Supporting Document No. 3). A draft response to comments received prior to May 15, 2009 is included (Supporting Document No. 4). The fact sheet for the fourth version of the Tentative Order is included as Supporting Document No. 5. A notice of today's public meeting (Supporting Document No. 6) was distributed on May 29, 2009. All these documents were concurrently posted on the Regional Board web site. A timeline of the background process is provided as Supporting Document No. 7. Written comments on the fourth version of the Tentative Order received prior to May 15 are provided as Supporting Document No. 8.

Availability of Documents

The agenda materials from the April 11, 2007 Panel Hearing and the February 13, 2008 adoption hearing are available from the Regional Board meetings web page:
http://www.waterboards.ca.gov/sandiego/board_info/agendas/

Other material related to the Tentative Order is available from the Regional Board web page dedicated to the Orange County MS4 Permit:
http://www.waterboards.ca.gov/sandiego/programs/oc_storm_water.html. This web page includes copies of all comments, responses to comments, and revisions to the Tentative Order and Fact Sheet.

Revisions to Tentative Order No. R9-2009-0002

Revisions to Tentative Order No. R9-2008-0002 made since the February 13, 2009 Regional Board adoption are summarized as follows:

1. The term "urban runoff" has been changed to be simply "runoff". This is consistent with the Code of Federal Regulations and other MS4 permits in California.
2. Over-irrigation and associated discharges have been removed from the list of discharges that are exempt from prohibition (Section B.2). The Code of Federal Regulations requires any exempted non-storm water discharge to be prohibited when found to be causing or contributing to an exceedance of a water quality standard.

3. Facilities that extract, treat, and discharge (FETDs) - Finding E.9 and related requirements (Section B.5 and Monitoring Program Section II.C.4) have been removed from the Tentative Order.
4. Numeric effluent limitations (Section C) have been included as a measureable performance criteria for dry weather, non-storm water discharges.
5. Municipal action levels (Section D) have been included as a measureable performance criteria for wet weather, storm water discharges. The municipal action levels were developed following guidance from the State Board's blue ribbon panel report on the feasibility of numeric effluent limits applicable to discharges of storm water.
http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/numeric/swpanel_final_report.pdf
6. Low impact development (Section F.1.d) has been extensively modified to be more consistent with recently adopted MS4 permits for Ventura County and northern Orange County. The requirements include a measurable design standard for the 24-hour 85th percentile storm event.
7. The hydromodification control requirements (Section F.1.h) have been rewritten to be more consistent with the San Diego County MS4 permit, R9-2007-0002.
8. Exploring retrofitting of existing development (Section F.3.d) has been added to address pollutant discharges in high priority areas.
9. The requirements of the Watershed Urban Runoff Programs Section (G) have been rewritten to include work plans and greater accountability.
10. Fiscal Analysis (Section H) - The requirement to develop a business plan of the storm water program has been removed.
11. Total Maximum Daily Loads (Section I) – The Waste Load Allocations of the Baby Beach Bacterial Indicator TMDL have been included in the Tentative Order.

12. Monitoring (Attachment E) – The monitoring requirements have been changed as necessary to implement the wet weather storm water municipal action levels and the dry weather non-storm water numeric effluent limitations. Other monitoring requirements have been deleted while flexibility included in the new requirements in an effort to keep the changes cost-neutral.

Comments on the Revised Tentative Order

1. Original Tentative Order. Written comments on the original Tentative Order were accepted through April 25, 2007. Written comments received prior to the April 4, 2007 Panel Hearing were provided to the Board members in the agenda materials for that date. Written comments received after April 5, 2007 are provided in Supporting Document No. 10.
2. Second Version of the Tentative Order. All written comments received before August 23, 2007 on the July 2007 revised Tentative Order are provided in Supporting Document No. 11.
3. Third Version of the Tentative Order. All written comments received before January 24, 2008 on the second revised Tentative Order are provided in Supporting Document No. 12.
4. Written responses to comments received prior to March 13, 2009 on the first three versions of the Tentative Order are provided in Supporting Document No. 9.
5. Fourth Version of the Tentative order. All written comments received before May 15, 2009 are provided in Supporting Document No. 8. Written comments on the fourth version of the Tentative Order received before May 15, 2009 were submitted by eight municipal Copermittes and eleven third parties. A draft response to those comments is provided in Supporting Document No. 3. An outline of key issues is provided below.

Procedures for Today's Meeting

The purpose of today's item is to consider comments on Tentative Order No. R9-2009-0002, as modified. Oral comments will be accepted on modifications made to the Tentative Order following the initial public hearing. Staff will provide verbal responses to significant public comments raised on revisions to the Tentative Order.

KEY ISSUES:

Based on a preliminary review of written comments submitted on the fourth revision of the Tentative Order, the following issues are of continued significant concern: Additional issues may be identified in the Supplemental Executive Officer's Summary Report following review of additional comments received after May 15, 2009.

1. Removal of the term "urban runoff" – The Copermittees are concerned with potential Regional Board enforcement actions for the discharge of natural pollutants passed through their MS4 system. Copermittees are opposed to removing the term "urban runoff." The USEPA supports this revision since it is actually more consistent with the terminology used in the EPA stormwater regulations at 40 CFR 122.26.
2. Overirrigation prohibition – The Copermittees are concerned about the practicality of enforcing such a prohibition. Copermittees are opposed to prohibiting overirrigation discharges.
3. Facilities that extract, treat, and discharge (FETDs) – The Copermittees are concerned with how discharges from FETDs will be regulated since they are no longer regulated as a BMP through the MS4 permit.
4. Numeric Effluent Limitations – Copermittees are concerned with potential Regional Board enforcement actions resulting from violation of the effluent limitations. Copermittees are opposed to using numeric effluent limitations as a measureable performance based criteria. The USEPA supports the proposed numeric effluent limitations for non-stormwater discharges.
5. Municipal Action Levels – Copermittees are concerned with the development of the action levels. Copermittees are

opposed to using municipal action levels as a measureable performance based criteria.

6. Retrofitting Existing Development – The Copermittees are concerned about the feasibility of implementing a retrofitting program for privately owned development. The Copermittees are opposed to the requirement to explore retrofitting opportunities for existing development.
7. Low-Impact Development – The U.S. Environmental Protection Agency and Natural Resources Defense Council recommended that requirements pertaining to low-impact development (LID) should include specific performance criteria. The Tentative Order establishes a numeric design storm standard.
8. Federal Regulations And Unfunded State Mandates - Several Copermittees assert that the requirements within the Tentative Order represent unfunded mandates subject to subvention under Article XIII B, Section (6) of the California Constitution. However, the Tentative Order does not constitute an unfunded local government mandate subject to subvention. Finding E.6 and the Fact Sheet have been revised for clarification.

LEGAL CONCERNS: None.

SUPPORTING
DOCUMENTS:

1. Map of Orange County within the San Diego Region
2. Revised Tentative Order No. R9-2009-0002, with attachments
3. Draft Update and Errata for the revised Tentative Order
4. Draft Responses to comments received on Tentative Order No. R9-2009-0002 received prior to May 15, 2009.
5. Fact Sheet / Technical Report for Tentative Order No. R9-2009-0002 and Supplemental Fact Sheet.
6. Notice of Public Hearing
7. Timeline of Events
8. Comments received between March 13, 2009 and May 15, 2009 on the fourth version of the Tentative Order.
9. Responses to comments received prior to March 13, 2009 on the pervious versions of the Tentative Order.
10. Comments received between April 5, 2007 and April 25, 2007 on the original Tentative Order
11. Comments received before August 23, 2007 on the second version of the Tentative Order
12. Comments received on January 24, 2008 on the third version of the Tentative Order

RECOMMENDATION:

It is recommended that the Board receive public testimony at today's hearing.