

EXECUTIVE OFFICER SUMMARY REPORT  
November 13, 2012

- ITEM: 10
- SUBJECT: Public Workshop: The San Diego Water Board will hold a public workshop to receive information and discuss proposed requirements in the public draft of a Regional NPDES Permit for Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region (Tentative Order No. R9-2013-0001, NPDES No. CAS0109266). The San Diego Water Board will not take any formal action on this item at the workshop. (*Christina Arias and Laurie Walsh*).
- PURPOSE: The purpose of this workshop is for the San Diego Water Board to receive information and discuss proposed requirements in the public draft of Tentative Order No. R9-2013-0001 (Tentative Order). The Tentative Order was released for public review and comment on October 31, 2012 (Supporting Document 1).
- RECOMMENDATION: There is no recommendation as this is a public workshop and the San Diego Water Board will take no action.
- KEY ISSUES:
1. The Tentative Order includes discharge prohibitions and receiving water limitations (Provision A) language that is consistent with State Water Board Order WQ 99-05. This precedential Order directed that MS4 permits contain separately enforceable receiving water limitation provisions requiring discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters. The municipal entities regulated under the Tentative Order (Copermittees) assert that they are increasingly vulnerable to San Diego Water Board enforcement action(s) and citizen suits if they are shown to be causing or contributing to an exceedance of water quality standards in violation of the permit provisions.
  2. Provision E.3 of the Tentative Order describes design standards for post-construction structural best

management practices (BMPs) that are required to be implemented by Priority Development Projects. The Tentative Order provides the Copermittees with considerable flexibility in complying with the design standards. The Copermittees have the discretion to authorize Priority Development Projects to use an alternative option meeting specified criteria to comply with the BMP performance requirements stipulated by the design standards. Some stakeholders object to allowing this alternative option to achieve compliance with the BMP performance requirements unless on-site technical infeasibility for meeting the design standards can be established. The Tentative Order does not mandate that the alternative option must be used, but allows the Copermittees to specify it for a Priority Development Project if it provides a greater overall water quality benefit for a Watershed Management Area.

3. Provision E.5 of the Tentative Order describes requirements related to existing development, including implementation of programs for commercial facilities or areas, industrial facilities, municipal facilities, and residential areas. The Tentative Order provides the Copermittees with considerable flexibility to focus their efforts and resources on addressing priority water quality conditions. Some stakeholders are concerned about the reduction in minimum inspection frequencies and the expanded definition of allowable methods of inspection for existing development. The Copermittees have questions on how the retrofitting and stream habitat rehabilitation requirements will fit within their programs. The Tentative Order ties existing development inspections, retrofitting, and stream habitat rehabilitation to watershed planning and addressing priority water quality conditions.
4. Pursuant to the federal Clean Water Act (CWA) and regulations adopted thereunder, the Tentative Order incorporates water quality based effluent limitations (WQBELs) derived from Total Maximum Daily Loads (TMDLs). WQBELs must be met for certain pollutants in receiving waters in accordance with specified compliance schedules.
5. Provision D of the Tentative Order describes requirements for wet weather and dry weather monitoring

and assessment. Many stakeholders objected to the original monitoring and assessment requirements proposed in an Administrative Draft of the Tentative Order. The requirements for wet weather and dry weather monitoring and assessment in the Tentative Order have been significantly revised to include most of the recommended changes proposed by the stakeholders.

#### DISCUSSION:

##### **Need for Innovative Permitting Approach**

Since 1990, the San Diego Water Board has issued four iterations of MS4 permits to the Copermittees in each county within the San Diego Region. The MS4 permit requirements have progressively become more prescriptive and specific. As prescriptive and specific as the MS4 permits have become, however, they include very little detail about what the desired outcomes of the required actions are expected to achieve. Compliance with the MS4 permit requirements has essentially been reduced to tracking numbers of actions rather than tracking progress towards actual improvements in the quality of receiving waters or discharges from the MS4s. The result has been an increase in actions being implemented by the Copermittees, with little or no ability or expectations to determine whether or not improvements in water quality are being achieved.

##### **New Permitting Approach**

The Tentative Order incorporates a new approach to regulating storm water discharges from MS4s that is a significant departure from the approach used in current MS4 permits. The Tentative Order is predicated on a new emphasis on outcomes (i.e., restoration or protection of water quality and beneficial uses) instead of actions (e.g., number of facility inspections). The Tentative Order will be implemented on a regional scale by the Copermittees in San Diego County, Southern Orange County, and Southwestern Riverside County in a phased manner as the current MS4 permits expire. The Tentative Order provides the Copermittees with the flexibility to use their limited resources in the most effective and efficient manner in restoring and protecting the quality of the San Diego Region's receiving waters.

The Tentative Order places a heavy emphasis on defining desired outcomes and the use of watershed planning as a mechanism to achieve those outcomes. Since the

Copermittees cannot effectively address all water quality issues simultaneously, the Tentative Order requires Copermittees to jointly set watershed priorities through the development of Water Quality Improvement Plans. Additionally, the Tentative Order presents requirements in a flexible manner that allows Copermittees to use their discretion in determining how to most effectively and efficiently conduct their jurisdictional runoff management programs to best protect receiving waters. Finally, the Tentative Order requires the Copermittees to monitor and assess the conditions and quality of receiving waters and MS4 discharges to determine whether or not actions to comply with permit terms are resulting in water quality improvements. The Tentative Order provides the Copermittees with considerably more flexibility to manage their storm water programs and deploy resources to achieve goals that will yield the greatest water quality improvements. This approach will require that the San Diego Water Board increase interactions with the Copermittees to assess compliance. This will include an increased emphasis on conducting field inspections, audits, and closely evaluating monitoring data.

The San Diego Water Board expects to achieve efficiencies and economy of resources with the issuance of the Tentative Order. The reissuance of MS4 permits requires significant San Diego Water Board staff time. The San Diego Water Board has spent a significant portion of its time in past years developing and reissuing MS4 permits, with little time for program oversight and enforcement. With the issuance of the Tentative Order, the San Diego Water Board will have more time to oversee and enforce the MS4 permit requirements.

#### **Activities to Date**

Since February 2011, San Diego Water Board has consulted with numerous stakeholders (i.e. United States Environmental Protection Agency, environmental organizations, business groups, the building industry, and Copermittees) in the development of the Tentative Order via meetings, presentations, and written comments (See Supporting Document 2).

On April 9, 2012, an Administrative Draft of the Tentative Order was released to interested persons to facilitate discussion and give an opportunity for stakeholders to

provide feedback on the proposed MS4 permit terms and conditions. A follow-up workshop was held on April 25, 2012 to introduce the Administrative Draft of the Tentative Order to a large diverse group of stakeholders. Following the workshop, the San Diego Water Board held a series of Focused Meetings to ensure an orderly, efficient, and open process to review and discuss the Administrative Draft of the Tentative Order and to provide a fair opportunity for representatives of Copermittees, environmental non-governmental organizations, and the development community to participate in the meetings. The San Diego Water Board also selected a professional facilitator, as requested by the Copermittees, to assist in conducting the Focused Meetings. These Focused Meetings gave stakeholders access to key staff and opportunity for direct input into the permit development process. This uniquely collaborative approach resulted in significant changes and improvements to the Tentative Order.

Between June 27, 2012, and August 22, 2012, four Focused Meetings were held to review the intent of the MS4 permit provisions, discuss specific MS4 permit requirements, and receive feedback and questions from the stakeholders. The San Diego Water Board held a workshop on September 5, 2012 to inform the stakeholders of the significant concepts received during the Focused Meetings that would be incorporated into a revised Administrative Draft of the Tentative Order.

Written comments on the Administrative Draft of the Tentative Order were accepted until September 14, 2012. Thirty-one (31) comment letters were received, reviewed and closely considered by staff. Significant changes were made and a revised Administrative Draft of the Tentative Order was released on October 12, 2012. A final Focused Meeting was held on October 24, 2012 to discuss the many significant changes made to the Administrative Draft of the Tentative Order in response to the stakeholder comments and concerns received during the previous Focused Meetings and in subsequent comment letters.

On October 31, 2012, the finalized Tentative Order was released for formal public review and comment.

**LEGAL CONCERNS:**

Legal concerns were raised in a May 10, 2012 letter from County of Orange, County Counsel and in a May 21, 2012

letter from County of Riverside, County Counsel. Both letters question whether legal authority exists to support a regional MS4 permit such as proposed in the Tentative Order. By letter dated September 7, 2012, San Diego Water Board counsel responded to the concerns and concluded that the Board has the legal authority to issue a regional MS4 permit through its authority in the Clean Water Act (Supporting Document 3).

**SUPPORTING  
DOCUMENTS:**

1. Tentative Order No. R9-2013-0001
2. Regional MS4 Permit Timeline
3. Response from San Diego Water Board Counsel to Orange County Counsel and Riverside County Counsel (September 7, 2012)
4. Notice of Public Workshop

**PUBLIC NOTICE:**

Notice of this item was provided to interested persons via e-mail on October 12, 2012 (Supporting Document 4). Notice was also provided in the Meeting Notice and Agenda for the November 13, 2012 Board meeting, which is posted on the San Diego Water Board website.