



April 4, 2007

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**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

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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 tandem 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