City of Mission Viejo

Public Works Department

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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