COUNTY OF ORANGE

RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

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By E-mail and U.S. Mail

Mr. John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Subject: Revised Tentative Order No. R9-2007-0001; NPDES No. CAS0108740

Dear Mr. Robertus:

We are in receipt of the July 6, 2007 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 Incorporated Cities of Orange County, and the Orange County Flood Control District Within the San Diego Region (Revised Tentative Order No. R9-2007-0001; NPDES No. CAS0108740) (the "Revised Tentative Order"). The Revised Tentative Order was prepared and distributed for public comment by staff of the Regional Water Quality Control Board ("Regional Board"). The County of Orange, as the Principal Permittee, provides these comments for you, Regional Board staff, and members of the Regional Board to consider before the Regional Board adopts the Order. The Copermittees were involved in the development of these comments and the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, San Clemente, San Juan Capistrano, and Rancho Santa Margarita have directed that they be recognized as concurring entities.

As you know, we submitted extensive comments on the initial Tentative Order on April 4, 2007 ("Initial Comments"). For your convenience, our Initial Comments are attached. While these comments clearly have been considered by your staff, our principal legal and strategic technical concerns are not resolved in the Revised Tentative Order or in Regional Board staff's Response to Comments (Section X of the July 6, 2007 Revised Fact Sheet distributed with the Revised Tentative Order). In these comments on the Revised Tentative Order, we re-iterate and emphasize our outstanding concerns. We also comment on the new requirements in the Revised Tentative Order regarding so-called FETDs – facilities that extract, treat and discharge water from waters of the United States and back into waters of the United States.

As with our Initial Comments, the overarching message we wish to convey with these comments is that considerable progress is being made by the Orange County Stormwater Program (the "Orange County Program" or "Program") and the critical need during permit re-issuance is for a fourth-term permit that sustains the Program's momentum. As recognized in the Revised Fact Sheet, Copermittees' storm water programs have improved under the current MS4 permit. "Since adoption of Order No. R9-2002-01, the Copermittees' storm water programs have expanded dramatically." Revised Fact Sheet, p. 8. We recognize that water quality challenges remain. That is why we proposed additional commitments and changes in the 2006 Report of

Waste Discharge ("ROWD") and proposed Drainage Area Management Plan ("DAMP"), the foundational guidance and policy-setting document for the Orange County Program.

Instead, rather than building on the existing Program, the Revised Tentative Order proposes to dismiss the DAMP as mere "procedural correspondence." This dismissal is not the approach recommended by the United States Environmental Protection Agency ("U.S. EPA"). In the context of a MS4 permit renewal such as the current Revised Tentative Order, U.S. EPA states that the focus should be "maintenance and improvements of [the existing] programs." 61 Fed.Reg. 41698 (August 9, 1996). In their permit renewal application, "municipalities should identify any proposed changes or improvements to the storm water management program and monitoring activities for the upcoming five year term of the permit." *Id.* That is precisely what Copermittees proposed in the ROWD. Rather than dismissing an existing, effective program as the Revised Tentative Order does, U.S. EPA states: "The components of the original storm water management program which are found to be effective should be continued and made an ongoing part of the proposed new storm water management program." *Id.* at 41699.

Our principal comments on the Revised Tentative Order follow. We reserve the right to supplement these comments up until the time the Regional Board convenes to adopt the permit.

I. The Restrictions in the Revised Tentative Order Regarding the Placement of Treatment Control BMPs are not Supported By Law and Will Inhibit Effective Storm Water Management on a Regional Level.

In our Initial Comments, we commented that Section D.1.d.(6) of the Tentative Order, which places restrictions on where Copermittees can locate treatment control BMPs, would unduly limit their ability to implement effective regional controls. Because Regional Board staff provided no legal support for the restrictions and because the restrictions amount to an impermissible mandate on how Copermittees are to comply with the "maximum extent practicable" or "MEP" standard, the County asked that Regional Board staff remove the restrictions. In the Revised Tentative Order Regional Board staff have chosen to retain the restrictions.[1] Accordingly, the County renews its request to have the restrictions removed.

A. The Restrictions on Treatment Control BMPs are not Supported by Federal Law and Violate State Law.

As noted in the County's initial comments, Regional Board staff did not articulate the basis for the restrictions on treatment control BMPs. In its response to comments, Regional Board staff cite to U.S. EPA guidance that says that treatment wetlands generally should not be constructed in existing wetlands or other waters of the U.S. *See* Response to Comments, No. 11, pp. 26-28. Regional Board staff state that the restrictions on treatment control BMPs in the Revised Tentative Order are intended to be consistent with this guidance. The County submits that they are not. Not only do the restrictions on all treatment control BMPs go beyond the *treatment wetlands* addressed in the U.S. EPA guidance, the restrictions also are *absolute* whereas the

[1] In its Response to Comments, Regional Board staff provide clarification as to certain types of projects that it would not consider to be "treatment control BMPs" and, therefore, not subject to the restrictions of Section D.1.d.(6). The County appreciates the clarification. However, unless Section D.1.d.(6) itself is clarified, Copermittees could face challenges from other parties (or the Regional Board itself) if they believe Copermittees are not complying with the restrictions.

U.S. EPA guidance only suggests that, *generally*, treatment wetlands are not appropriately located in existing wetlands.[2]

Nor does Regional Board staff explain why the restrictions on treatment control BMPs are not a violation of Section 13360 of the Water Code. As noted in the County's Initial Comments, the Regional Board may order Copermittees to comply with waste discharge requirements (which in this case are to reduce the discharge of pollutants from the MS4 to the maximum extent practicable) but may not specify "the design, location, type of construction, or the particular manner in which compliance may be had" with those requirements. Water Code Section 13360(a).

Accordingly, because Regional Board staff have provided no legal support for the restrictions on treatment control BMPs, and the restrictions would violate Section 13360(a) of the Water Code, the Regional Board should not adopt the restrictions in Section D.1.d.(6) of the Revised Tentative Order.

B. *Effective Regional BMPs Will be Severely Limited If All Natural Drainages that Convey Urban Runoff are Both MS4 and Receiving Waters; the Revised Tentative Order and Response to Comments Do Not Support This Position.*

The restrictions on placement of treatment control BMPs are exacerbated by the proposed finding that all natural drainages or streams that convey urban runoff are both an MS4 and a receiving water. In its response to comments, Regional Board staff did not address the fact that under the federal definition of "MS4" (which definition is adopted verbatim in Attachment C of the Revised Tentative Order) and guidance regarding the same, a natural drainage is only potentially an MS4 where the drainage has been "channelized" or otherwise altered by man. *See* Initial Comments, Attachment A, Issue I.A., pp. 1-2.

Regional Board staff also misconstrue the relevance of the recent United States Supreme Court decision in *Rapanos v. United States*, 126 S.Ct. 2208 (2006). Regardless of whether the controlling opinion from *Rapanos* is the plurality opinion written by Justice Scalia or Justice Kennedy's concurring opinion and regardless of whether the *Rapanos* decision is relevant to determining whether any waters are waters of the U.S. or only whether wetlands may be waters of the U.S., Regional Board staff have not provided support for their blanket assertion that *all* natural drainages or streams that convey urban runoff are receiving waters. At a minimum, Regional Board staff must make a showing that a given drainage or stream has a "significant nexus" to traditionally "navigable" waters.[3]

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[2] It also is worth pointing out that "guidance" is just that; it is not a legal requirement. As U.S. EPA recently stated in guidance on determining jurisdictional wetlands: "This guidance does not substitute for [CWA] provisions or regulations, nor is it a regulation itself. . . . Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation. . ." *See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, U.S. EPA and U.S. Army Corps of Engineers, p. 4, n. 16 (June 5, 2007).

[3] At least one District Court in the Ninth Circuit has held that *Rapanos* is applicable to non-wetlands decisions. *See, e.g., Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F. Supp. 2d 803 (N.D. CA 2007).

Because Regional Board staff have not provided adequate support for the position that all natural streams that convey urban runoff are either an MS4 or a receiving water, Finding D.3.c of the Revised Tentative Order should be deleted.

II. New Requirements for "FETDs" in the Revised Tentative Order are Unwarranted, Burdensome and Unsupported by Law.

As noted above, the County appreciates the clarification as to what will and what will not be considered to be treatment control BMPs. However, the Revised Tentative Order contains new requirements for certain treatment facilities that are even more onerous than the treatment control BMP restrictions. Because these new requirements for so-called "FETDs" (facilities that extract, treat, and discharge water from waters of the U.S. and back into waters of the U.S.) are unwarranted, burdensome and unsupported by law, the County requests that they be deleted from the Revised Tentative Order.

A. FETDs are Part of the Solution to Water Quality Impairments; Copermittees Should Not be Punished with Burdensome and Unnecessary Requirements for Attempting to Improve Water Quality.

Copermittees have constructed FETDs as part of a comprehensive set of measures to address water quality impairments along beaches in Southern Orange County, specifically, impairments due to fecal indicator bacteria. While the FETDs are effective at reducing fecal indicator bacteria levels, they are not designed to remove all pollutants that might be affecting coastal waters. Notwithstanding that FETDs have enabled a number of Copermittees to request 303(d) de-listing for fecal indicator bacteria for Orange County's beaches and that they represent investments of State Board administered Clean Beach Initiative funding, the FETD requirements in the Revised Tentative Order potentially would punish Copermittees for their efforts. If a discharge from a FETD caused or contributed to a condition of pollution or nuisance, from *any* pollutant, Copermittees could be in violation of the Section B.5.c of the Revised Tentative Order. In other words, unless the FETD treats *all* pollutants to acceptable levels, not just the fecal indicator bacteria it was designed to address, Copermittees may be in violation of the Order. This "all or nothing" approach is unwarranted, contrary to a Fact Sheet that makes a compelling case for clean beaches, and clearly counter to the public interest.

The new FETD requirements also impose a burdensome monitoring obligation on the facility's operator. In the context of the Copermittees existing and comprehensive environmental monitoring program, the prescribed suite of analytes and requirements for toxicity testing, toxicity identification evaluations and toxicity source investigations, appear to be simply punitive.

The FETD requirements also are unnecessary. To the extent discharges from FETDs cause or threaten to cause a condition of pollution, contamination, or nuisance (and provided FETDs can be considered part of the MS4), such discharges already would be prohibited by Section A.1 of the Revised Tentative Order If such discharges cause or contribute to a violation of water quality standards, they would be subject to the iterative process provided by Section A.3.a of the Revised Tentative Order Imposing additional requirements on FETDs will not result in additional improvements to water quality. Thus, there is no need for the FETD requirements.

B. The Revised Fact Sheet Provides No Support for Imposing the FETD Requirements.

Regional Board staff have provided no legal support for the new FETD requirements. According to the Revised Fact Sheet, discharges from FETDs are discharges of non-storm water. Revised Fact Sheet, IX.B., Section B.5, p. 81. Federal law requires that Copermittees "effectively prohibit non-stormwater discharges into the [MS4]." CWA Section 402(p)(3)(B)(ii), 33 U.S.C. Section 1342(p)(3)(B)(ii). This requirement is reflected in Provision B.1 of the Revised Tentative Order which states: "Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4" unless such discharges are otherwise authorized or are in a category of non-storm water discharges that are non prohibited.

Provision B.5 of the Revised Tentative Order goes beyond this federal requirement. First, it would impose obligations on Copermittees for discharges not *into* the MS4, but *from* a FETD. Nothing in the Clean Water Act or federal regulations provides the Regional Board with such authority. Second, Provision B.5 would make Copermittees absolutely responsible for discharges of non-storm water from FETDs that cause or contribute to conditions of erosion, pollution or nuisance. Under federal law, Copermittees only are responsible for *effectively prohibiting* discharges of non-storm water. Accordingly, because the proposed FETD requirements clearly exceed the Regional Board's authority under federal law and Regional Board staff have provided no other specific legal authority for the requirements, the County requests that the FETD requirements be deleted.

III. The Revised Tentative Order Imposes Requirements on Copermittees That Go Beyond Federal Law; The Regional Board Must Comply With State Law Before Imposing Such State Mandates.

In its Initial Comments, the County pointed out that, to the extent the Tentative Order imposed requirements on Copermittees that go beyond the federal MEP requirement, the Regional Board must comply with state law requirements, including the requirement to consider economic factors and the prohibition on unfunded state mandates. *See* Initial Comments, Attachment A, Section III. The basis for this comment was in part Finding E.6 ("[r]equirements in this Order that are *more explicit than* the federal storm water regulations..." [emphasis added]). In its Response to Comments, Regional Board staff denied that the requirements of the Tentative Order exceed federal law. *See* Response to Comments No. 5, p. 13. The County respectfully disagrees with staff's denial.

A. Without Considering Economic Factors, the Regional Board Cannot Adopt the Revised Tentative Order's Business Plan Requirement or the Requirements to Prohibit or Control Discharges Into the MS4, Both of Which Go Beyond Federal Law.

The requirement in the Fiscal Analysis section of the Revised Tentative Order that Copermittees submit a "Municipal Storm Water Funding Business Plan" clearly exceeds the requirements of federal law. *See* Revised Tentative Order, Provision F.3. Federal law requires that, as Part 2 of the MS4 permit application, Copermittees must include fiscal analysis. The regulations provide:

> For each fiscal year to be covered by the permit, [Part 2 of the permit application must include] a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2(iii) and (iv) of this section [i.e., Characterization

> Data and Proposed Management Programs]. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions in the use of such funds.

40 CFR 122.26(d)(2)(vi). Regional Board staff cite to no other specific legal authority in support of the business plan requirements.

Nothing in this fiscal analysis requirement remotely resembles the prescriptive requirement in the Revised Tentative Order to prepare and submit a business plan that "identifies a long-term funding strategy for program evolution and funding decisions" and that identifies "planned funding methods and mechanisms for municipal storm water management." If the Regional Board has the authority to impose such requirements, it does not derive from federal law. Such a requirement exceeds federal law.

Similarly, many of the requirements in the Revised Tentative Order to prohibit and/or control discharges *into* the MS4 exceed federal law. Under federal law, Phase I MS4 Copermittees do have some obligations regarding discharges into the MS4. For example, they must demonstrate in Part 2 of the MS4 permit that they have adequate legal authority to control discharges from industrial sites into the MS4. See 40 CFR 122.26(d)(2)(i)(A). They also must demonstrate legal authority to prohibit illicit discharges into the MS4 and to control the discharge into the MS4 of spills, dumping, or disposal of materials other than storm water. *Id.* at 122.26(d)(2)(i)(B) and (C). The County commented generally on the scope of Copermittees' obligations vis-à-vis discharges into the MS4 in its initial comments. *See* Initial Comments, Attachment A, Section IV, pp. 10-14.

There is a significant difference, however, between an obligation to have legal authority to control certain third party discharges into the MS4 and a requirement to prohibit and/or control discharges from all third parties into the MS4. *See* Revised Fact Sheet, Discussion of Finding D.3.d. *See also* Revised Fact Sheet, Finding D.3.e. ("[P]ollutant discharges into the MS4s must be reduced.") The requirement to prohibit and/or control all third-party discharges into the MS4 exceeds federal law.[4]

Because the Revised Tentative Order would impose obligations on Copermittees that exceed federal law, state law requires that it include an analysis of the costs of such obligations. *See City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005); Initial Comments, Attachment A, Section III.C., pp. 8-9. Because the Revised Tentative Order does not include such an analysis, the business plan requirement must be deleted. Similarly, all requirements that would impose obligations vis-à-vis third-party discharges into the MS4 that exceed federal law must be deleted.[5]

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[4] As noted in the County's Initial Comments, Regional Board staff's reliance on Phase II storm water regulations and guidance to support imposing requirements in the Revised Tentative Order not required by the Phase I regulations is misplaced. *See* Initial Comments, Attachment A, Section IV.A.1., p. 11. Even if Phase II regulations and/or guidance are relevant to a Phase I permit, the Phase II regulations require only that small MS4 Copermittees develop and implement ordinances to require erosion and sediment controls at construction sites. *See* 40 CFR Section 122.34(b)(4)(ii)(A). They do not impose absolute obligations on Copermittees to prohibit or control all discharges into the MS4.

[5] It also is worth noting that, to the extent the Revised Tentative Order imposes federal requirements on Copermittees requiring them to regulate third parties, it runs afoul of the Tenth Amendment of the United States Constitution. *See, e.g., Environmental Defense Center, Inc. v. United States Environmental Protection Agency*, 344 F.3d 832, 847 (9th Cir. 2003).

B. Orders Issued by the Regional Board Must Comply With the State Constitution's Ban on Unfunded Mandates.

Even if the Regional Board did consider the required state-law economic analysis with respect to the requirements that exceed federal law, unless the state is going to fund the requirements, they would run afoul of the constitutional ban on unfunded state mandates. *See* Initial Comments, Attachment A, Section III.D., pp. 9-10 In its Response to Comments, Regional Board staff dismiss the County's unfunded state mandate claim, claiming that the State Regional Board has heard and repeatedly denied similar claims and that since the State Regional Board last decided the issue, "nothing has occurred that would change how unfunded state mandates are determined." *See* Response to Comments, No. 5, pp. 14-15. In fact, there recently has been a significant development in how unfunded state mandates are determined.

In *County of Los Angeles v. Commission on State Mandates*, 150 Cal.App.4th 898 (2007), the Court of Appeals held that Government Code Section 17516 is unconstitutional to the extent that it exempts Regional Regional Boards from the constitutional state mandate subvention requirement.[6] Government Code 17516 defines "executive order" which is a prerequisite for asserting an unfunded state mandate claim. It excludes from the definition any order or requirement issued by the State Regional Board or a Regional Regional Board. With the holding that the statutory exemption is unconstitutional, there no longer is a statutory basis for excluding orders issued by Regional Boards from state unfunded mandate claims. Accordingly, the Regional Board must adhere to the constitutional requirement to fund state mandates.

C. Copermittees Must Be Allowed to Comply With the MEP Standard in Any Manner They Choose.

Finally, regarding the proposed obligations on discharges into the MS4, even if Regional Board staff believe that the best way for Copermittees to meet the MEP standard for discharges from the MS4 is by controlling discharges into the MS4, as noted previously, Water Code Section 13360 prohibits the Regional Board from specifying the manner in which Copermittees are to comply with the MEP standard.

IV. Without Justification, Inconsistencies Between the Revised Tentative Order and Other MS4 Permits Adopted by the Regional Board are Arbitrary.

As discussed above, the requirement in the Revised Tentative Order to develop and submit a Business Plan exceeds federal law. This requirement also exceeds the requirements set forth in other Phase I MS4 permits adopted by the Regional Board. For example, on January 24, 2007, the Regional Board renewed the MS4 permit for San Diego County (Order No. R9-2007-0001). Notwithstanding, however, that the Regional Board largely has developed the permitting programs for San Diego and Orange Counties in tandem, the Regional Board chose not to adopt a Business Plan requirement in the new San Diego permit. If Regional Board staff believe a Business Plan is necessary for Orange County Copermittees, why was such a requirement not necessary just eight months ago for San Diego County Copermittees? The Revised Fact Sheet and Tentative Order provide no explanation. Without justification for why the requirement is proposed in the Revised Tentative Order but was not proposed in R9-2007-

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[6] "Subvention" generally means a grant of financial aid or assistance, or a subsidy. *See County of Los Angeles v. Commission on State Mandates, supra,* at 906.

0001, the Business Plan requirement appears to be arbitrarily imposed only on Orange County Copermittees.

Another example of an unjustified inconsistency between the two permits is the use of "violation" versus "exceedance." As noted in the County's initial comments, the Tentative Order inappropriately used the term "violation" in several instances instead of "exceedance." For example, in Finding C.7., the Tentative Order provided that data submitted by Copermittees documents "persistent violations" of Basin Plan water quality objectives. This is not accurate. The data may have shown *exceedances* of water quality objectives, but they do not show *violations* of water quality objectives. In its Response to Comments, Regional Board staff stated that the word "violation" was appropriately used in Finding C.7. However, in a nearly identical finding in the San Diego County permit (Order R9-2007-0001), staff correctly used "exceedance" rather than "violation." *See* Order R9-2007, 0001, Finding C.7 ("... data submitted to date documents persistent *exceedances* of Basin Plan water quality objectives.") (Emphasis added.) If "exceedance" was correct in R9-2007-0001 why is it not correct now?

The County appreciates that the two permits need not be the same in all respects. There are differences between the two counties' storm water programs that may warrant differences in their respective permits. However, where, as here, there appears to be no basis for imposing different requirements (*e.g.,* the Business Plan requirement) or for using different terms (*e.g.,* "violation" instead of "exceedance"), the inconsistencies between the two permits are arbitrary and should be resolved.

V. The Drainage Area Management Plan (DAMP) is an Effective and Integral Part of the Orange County Storm Water Program; Without It, the Revised Tentative Order Becomes Unnecessarily Prescriptive.

As noted above and described in detail in the County's Initial Comments, the Revised Tentative Order dismisses the DAMP as mere "procedural correspondence." The County strongly disagrees with any attempt to undermine the significance and importance of the DAMP. The DAMP is the principal policy, programmatic guidance and planning document for the Orange County Storm Water Program. The main objectives of the DAMP are to fulfill the commitment of the Copermittees to present a plan that satisfies federal storm water permitting requirements (*i.e.,* NPDES requirements) and to evaluate the impacts of urban storm water discharges on receiving waters.

By dismissing the DAMP while incorporating some of the DAMP's provisions directly into the permit, the Revised Tentative Order unnecessarily limits the required flexibility of the Orange County Storm Water Program. With programmatic elements memorialized in the permit rather than the living DAMP, the iterative nature of effective storm water management is lost. For all of the above reasons, and as discussed in detail in the Initial Comments, the County respectfully requests that Revised Tentative Permit be fully revised as described in Attachment B of the Initial Comments. *See* Initial Comments, Attachment B, pp. 2-30.

* * * *

Thank you for your attention to the County's concerns with the Revised Tentative Order. We appreciate the effort you and your staff have devoted to the development of the fourth-term MS4 permit for the Orange County Program. While we believe the Revised Tentative Order is deficient in several significant respects, as discussed above and in our Initial Comments, we believe it should be fairly simple to significantly improve the permit. With respect to the "FETD"

issue, because these new requirements only were added to the proposed permit in the Revised Tentative Order, we believe it would be appropriate to allow for additional time for public comment on this issue before the Regional Board convenes to adopt the order.

We look forward to discussing the Revised Tentative Order with you and with Regional Board members at the public hearing on September 12, 2007. Please feel free to contact me if you have any questions. For technical questions, please contact Chris Crompton at (714) 834-6662 or Richard Boon at (714) 973-3168.

Sincerely,

Mary Anne Skorpanich, Acting Director
Watershed & Coastal Resources Division

Attachment: Initial Comments

cc: Regional Board Members
Technical Advisory Committee
Copermittees