



City of Del Mar



November 5, 2012

Honorable Chairman Grant Destache and Board Members
California Regional Water Quality Control Board
San Diego – Region 9
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

SUBJECT: TENTATIVE ORDER R9-2013-0001 REGIONAL NPDES PERMIT FOR MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4S) DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION

Dear Chairman Destache and Board Members:

The City of Del Mar has been pleased with the progressive process used to engage the regional Copermittees and stakeholders in the MS4 Permit reissuance process. RWQCB staff deserves commendation for their efforts to accommodate the Copermittees' written and verbal comments received into the Tentative Order in a quick and timely manner. This effort demonstrates the shared commitment of the RWQCB staff and Copermittees to develop an implementable, cost effective Permit that leads to improvements in water quality conditions. In light of the upcoming Public Workshop on November 13th, 2012 for the NPDES MS4 permit reissuance, the City of Del Mar would like to take the opportunity to address some key issues regarding Tentative Order R9-2013-0001.

In addition to those identified above, the City would like to highlight some of the valued outcomes of the permit reissuance process thus far, namely the Water Quality Improvement Plans (WQIP) as watershed planning documents and the requirement of adaptive management. We also agree with the intended approach for points of compliance with the Permit, as stated by RWQCB staff at the June 27th, 2012 focused meeting with stakeholders. Staff indicated that compliance would be based on the submission of complete Water Quality Improvement Plans (WQIP) and also the implementation and assessment of those WQIPs. Assessment includes adaptation to improve programs and plans to meet the established WQIP goals and ultimately water quality standards.

However, there are areas within the Tentative Order that we feel continue to warrant further consideration. This letter identifies the three primary areas of utmost importance where the process thus far appears to have reached an impasse. For these three topics, the RWQCB staff states that they are either not willing or, contrary to our understanding, not allowed to make further changes. The specific areas include:

- I. Receiving Water Limitations language in **Provision A** of the Tentative Order;

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- II. Expression of Total Maximum Daily Load compliance is **Attachment E** of the Tentative Order, and;
- III. Applicability of hydromodification management requirements in **Provision E** of the Tentative Order.

A technical memorandum is attached with details on these topics of concern.

Our recommendations on these three issues are as follows:

I. Provision A Language Should Be Revised

The City urges you to provide direction to your staff to take an active and lead role on this extremely important issue. The new paradigm shift (WQIPs and required adaptive management) in the Tentative Order should be supported by revised state and local policies that encourage complete participation in the WQIP and adaptive management approach. Receiving water limitations language is driven by state and local policy and with a new standard of permitting upon us, the policies should reflect this new paradigm.

II. TMDL Compliance Should Be Consistent

The City of Del Mar urges you to direct staff to correct this apparent conflict between the RWQCB adopted Bacteria TMDL and the compliance requirements of the Tentative Order, Attachment E, Section 6.

III. Hydromodification Management BMPs Should Be Applied To Mitigate Hydromodification Impacts

The City of Del Mar respectfully requests you as RWQCB Members to direct RWQCB staff to include within the permit, the exemptions that were included in the HMP that RWQCB Members approved by Resolution No. R9-2010-0066 in 2010.

In summary, the City of Del Mar respectfully requests that RWQCB Staff and Copermittees work cooperatively on these three issues to find consensus and resolution. We appreciate your attention to our concerns, and we trust that this letter will be entered into the record at the November 13, 2012 meeting.

Sincerely,



Carl Hilliard
Mayor

cc: Del Mar City Council Members

Attachment: Technical Memo of November 1, 2012



City of Del Mar Memorandum



TO: Scott Huth, City Manager
Kathleen Garcia, Planning and Community Development Director

FROM: Mikhail Ogawa, Clean Water Manager

DATE: November 1, 2012

SUBJECT: San Diego Regional Water Quality Control Board Tentative Order R9-2013-0001

BACKGROUND

The San Diego Regional Water Quality Control Board (RWQCB) issues Municipal Separate Storm Sewer (MS4) permits to the Cities within San Diego County, the County of San Diego, the San Diego County Regional Airport Authority and San Diego Unified Port District (Copermittees). These permits are extensions of the federal Clean Water Act.

In April 2012, the RWQCB staff initiated an informal process by releasing an Administrative Draft of the forthcoming permit. The intent was to engage the Copermittees and stakeholders through focused meetings to allow the opportunity for a dialog to occur. The focused meeting process included five focused meetings, two public workshops, and a workshop sponsored by Orange County Copermittees focused on Hydromodification Management. The process has culminated in the release of a Tentative Order for public review on October 31, 2012. Public comments on the Tentative Order must be submitted by January 11, 2013. In addition, the RWQCB will hold a public workshop as a part of their regularly scheduled Board meeting on November 13th, 2012 to receive input from the public.

Two outcomes of the permit reissuance process thus far include Water Quality Improvement Plans (WQIP) as watershed planning documents and the requirement of adaptive management. The use of WQIPs as planning documents and allowing modifications to MS4 implementation programs, the Tentative Order offers a paradigm shift from previous prescriptive permits that may have led to unfocused programs not directed towards improvements in water quality.

In abridged terms, the WQIPs will be watershed planning documents intended to direct program implementation to focus on the highest of watershed specific water quality issues. The WQIP process requires Copermittees to establish interim and final goals where the objective is to bring MS4 discharges and waterbodies into compliance with water quality standards. The goals must be measureable so that progress towards them can be demonstrated. The WQIPs require schedules to be established for achievement of the interim and final goals. In some cases, these schedules may extend beyond the intended five-year life of the MS4 permit. Specific programmatic strategies are also prescribed to identify the means of achieving the established goals within the schedules. Lastly, the WQIPs also require adaptive management, so that Copermittees may learn from special studies and past efforts to use the most efficient and effective strategies and Best Management Practices to achieve water quality goals. The stated intent of the Permit is to have compliance based on the development, implementation and

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adaptation of the strategies in WQIPs to meet the established goals and ultimately water quality standards.

CONCERNS REGARDING TENTATIVE ORDER

Provision A – Prohibitions and Limitations

The present use of the limitations in Provision A of the Tentative Order presents a dichotomy between requiring adaptive management BMP programs (i.e., WQIPs) and including receiving water limitations that prohibit discharges from the MS4s causing or contributing to violations of water quality standards¹. The dichotomy may discourage the City from supporting the WQIP process, including adaptive management, if there is enforcement exposure based on the prohibition of discharges from the MS4s causing or contributing to violations of water quality standards. The City could be in violation immediately and continuously regardless of the efforts put towards the WQIPs and therefore may be discouraged from funding and participating in the adaptive management process that could ultimately work towards achieving water quality standards.

Board staff has verbalized that they have the discretion as to whether or not to enforce the receiving water limitations provision and intend not enforce this provision as long as the Copermittees demonstrate adequate progress through WQIP implementation and adaptation of program strategies. Furthermore, Board staff stated they have been directed to take a passive role and allow the State process² to be completed prior to making changes to the San Diego Regional MS4 Permit.

Attachment E – Specific Provisions for Total Maximum Daily Loads Applicable to Order No. R9-2013-0001

The Bacteria TMDL³ states that for watersheds where there are no longer any impairments listed on the 2008 303(d) List (for REC-1 water quality standards), the Phase I MS4s are not required to submit a load reduction plan and are not subject to any further action under the TMDL as long as monitoring continues to support compliance with REC-1 water quality standards. However, if the impairment returns for REC-1 water quality standards, the Responsible Parties will be required to submit a load reduction plan to the RWQCB.

The City of Del Mar and other Responsible Parties in the San Dieguito and Los Peñasquitos watersheds demonstrated to the RWQCB that the two watersheds are within this scenario where the Pacific Ocean Shoreline of the two watersheds are no longer listed as impaired for indicator bacteria under REC-1 water quality standards. The Responsible Copermittees received written confirmation (see attached two email) that they are “not subject to further action under Resolution No. R9-2010-0001 as long as monitoring data continues to support compliance with the REC-1 water quality standards.” This scenario essentially places our two watersheds in a “dormant TMDL”, unless the Pacific Ocean shoreline of the one or both of the watersheds are relisted on future 303(d) lists for indicator bacteria⁴.

¹ Tentative Order R9-2013-0001 Provision A.2.a.

² State Water Resources Control Board is holding a Public Workshop on MS4 permits Receiving Water Limitations (RWL) Language on November 20, 2012. There is currently no schedule as to when and if the SWRCB will develop revised positions on RWL for MS4 permits.

³ Revised TMDL for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek) adopted by SDRWQCB Resolution No. R9-2010-0001

⁴ Page A66 of SDRWQCB Resolution No. R9-2010-0001

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Attachment E, Section 6⁵ of the Tentative Order requires, amongst other provisions, the compliance with Water Quality Based Effluent Limitations (WQBELs). The WQBELs as described in the Tentative Order are expressed as Receiving Water Limitations, Effluent Limitations and as Best Management Practices requirements. As written, the Responsible Copermittees in the two watersheds are required to meet the listed WQBELs even while under the "dormant TMDL" condition.

There is a conflict between relisting of the Pacific Ocean shoreline and the more strict WQBEL limitations. Relisting of the Pacific Ocean shoreline would be done under the criteria established in the 2004 SWRCB Listing Policy⁶ which allows for a certain number of water quality standard exceedances prior to listing. The WQBEL limitations allow **zero** water quality standard exceedances under dry weather conditions – a much higher bar with which to comply. If the WQBELs are included in the final adopted Permit, at a minimum, the WQBEL compliance is only applicable when the TMDL is in an active phase – i.e., the waterbody is impaired and listed on the 303(d) list as specified in the Bacteria TMDL (SDRWQCB Resolution R9-2010-0001). Otherwise, the Copermittees will be required to focus intense resources to address bacteria at the Pacific Ocean shorelines where water quality monitoring has demonstrated that it is not an issue. This ironic paradox would be contradictory to the watershed based adaptive management process where the objective is to focus limited resources on the highest water quality issues.

Provision E.3.c.(2) Hydromodification Management BMP Requirements

The Tentative Order defines hydromodification as:

The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, such as stream channelization, concrete lining, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes.

The Tentative Order requires that priority development projects, including redevelopment projects, are required to control post-project runoff flow rates and durations so as not to result in increased potential for erosion, or degraded instream habitat conditions downstream of the projects. There are several explicit exemptions for these requirements identified in the Tentative Order. However, these exemptions are not inclusive of many of the exemptions identified in the San Diego Regional Copermittees Final Hydromodification Management Plan⁷ (HMP). The exemptions identified in the HMP include, but are not limited to, projects that discharges to an exempt river reach, or a tidally-influenced area and other areas where there was little or no increased potential for erosion, or degraded instream habitat conditions downstream of the projects.

Over 95% of the City of Del Mar's MS4 system drains directly to either the Pacific Ocean or to tidally influenced areas of the San Dieguito estuary and river. The areas that drain to the Pacific

⁵ Attachment E, Section 6 of the Tentative Order is the Specific Provisions for Total Maximum Daily Loads Applicable to Order R9-2013-0001 for the Revised TMDL for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

⁶ State Water Resources Control Board – Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List, adopted September 2004

⁷ Approved on July 14, 2010 by San Diego RWQCB Resolution No. 2010-0066

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Ocean will remain exempt per the Tentative Order, however, those areas that drain to tidally influenced areas of the San Dieguito estuary and river will not be exempt even though they have no Hydromodification impacts. The City will be forced to require priority development projects to mitigate for impacts they will not have.