



City of Mission Viejo

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May 15, 2009

By E-mail and U.S. Mail

John Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Subject: Comment Letter on Tentative Order No. R9-2009-0002 - NPDES No. CAS0108740

Dear Mr. Robertus:

The City of Mission Viejo is in receipt of the March 13, 2009, Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District within the San Diego Region, Tentative Order No. R9-2009-0002, NPDES No. CAS0108740.

The City of Mission Viejo fully supports the County of Orange's comments on the Tentative Order.

In addition, the City wishes to highlight a few keys areas of concern on the Tentative Order that we feel are inherently problematic and will erode public credibility of the City's Storm Water Program and County's Storm Water Program.

GENERAL COMMENTS

I. Inconsistency with the North Orange County Draft MS4 Permit

The City of Mission Viejo shares its concerns with the County of Orange over the lack of permitting consistency with the North Orange County draft MS4 permit (Tentative Order R8-2009-0030). We believe the lack of permitting consistency will lead to confusion by private developers, businesses, and residents over storm water regulatory requirements. While your staff has acknowledged that they will likely incorporate the North Orange County permit's land development provisions, they are reluctant to eliminate other areas of inconsistency. As the County points out, this disinclination will erode the credibility of the regulatory framework for stormwater in California and will confound the ability of local governments, including Mission Viejo, and the regulated community to effectively address a key environmental mandate at a time of unprecedented fiscal constraint. It is therefore necessary for us to continue to seek revisions to the Tentative Order supportive of a cohesive and cogent alignment of the North and South



County permits on the basis that consistency is important to the credibility of our respective efforts to manage urban runoff and is vital to sustaining the obvious cost effectiveness of a single and coordinated Countywide program in Orange County.

II. Inclusion of Effluent Limits

The City of Mission Viejo and as well the other Permittees' have presented our concerns with the imposition of Municipal Action levels (MALs) and Numeric Effluent Limits (NELs) on multiple occasions to Regional Board staff. Our main arguments are as follows:

- The insertion of MALs and NELs is inconsistent with the State Water Board's Blue Ribbon panel report on the feasibility of numeric effluent limits. And, this conclusion continues to be the published position of USEPA on this issue.
- The finding by the Regional Board staff that non-stormwater discharges are not subject to the maximum extent practicable standard and therefore subject to water quality based effluent limits is not supported by law. Clean Water Act section 402(p) (3) (B) (ii) clearly states that discharges from municipal storm sewers shall include a requirement to *effectively* prohibit non-stormwater discharges into the storm sewer. We argue that the section does not require a full prohibition but rather an effective prohibition. The City agrees with the County in that the technology based standard for non-stormwater discharges is "effectively prohibit" just as "maximum extent practicable" is the technology based standard for stormwater discharges.
- The City is concerned with exposure to significant risk in complying with the Tentative Order. The County of Orange has completed a comparison of existing dry weather discharges with the selected NELs noted below.

Constituent	Hydrologic Unit	Percentage of time > NELs
Total Dissolved Solids*	Group 1	74.5
Total Dissolved Solids*	Group 2	97.1
Total Phosphorus [@]	Group 1 and 2	93.0
Nitrate + Nitrite	Group 1 and 2	93.8
Fecal coliform	Group 1 and 2	90.0
Nickel (dissolved)	Group 1 and 2	0.3
Copper (dissolved)	Group 1 and 2	9.5
Cadmium (dissolved)	Group 1 and 2	18.1

*A factor of 0.6 was multiplied by the specific conductance measurements to estimate TDS [@]Proposed NEL was compared to measurements of reactive orthophosphate as P

As a result, the City of Mission Viejo could face enforcement action for not complying with all the NELs. Where there is exceedance, the City may be faced with mandatory minimum penalties (MMPs) under Water Code §§ 13385 and 13385.1. In addition, non-compliance with the NELs may subject the City to additional enforcement actions imposed by the Regional Water Board and through third party actions under the citizen suit provisions of the Clean Water Act.

- The use of numeric limits for non-stormwater discharges is premature. Extensive work has already been performed by the Stakeholders Advisory Group on the Bacteria I TMDL for San Diego Region Beaches and Creeks, which involved multiple parties – environmental groups and the regulated community alike. The TMDL program provides the safety net for ensuring that our water bodies are protected in the most reasonable and effective manner. The direct translation of water quality objectives into numeric effluent limits bypasses the TMDL process. It is likely that some of our non-stormwater discharges will exceed the NEL but have no effect on the receiving water quality or beneficial uses. But under the proposed Order, the City may be obligated to expend considerable resources without a reciprocal water quality benefit. This is poor public policy and use of public funds.

III. Erosion of the Credibility of the Storm Water Program

The prescribed prohibition on irrigation runoff also needs to be very carefully considered. The City believes this outright prohibition would erode general public support for the City's and County's Storm Water Program. We believe implementation of the prohibition would risk eroding general public support for a Program that is successfully fostering a stewardship ethic in residential environments. For example, cities may be faced with issuing citations to a homeowner for irrigation runoff; whereas, the neighbor next door is free to wash his car in his driveway under the current Tentative Order exemption for residential car washing. There is also concern that the provision would force the expenditure of scarce resources on an issue that is already being addressed by water districts dealing with water conservation imperatives.

IV. Requirement to Respond to Sanitary Sewer Overflows

Page 69, Part F.3.h., of the Tentative Order states:

“Each Copermitttee 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. Each Copermitttee 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 copermitttee 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 copermitttees. While the federal regulations clearly assign some spill prevention and response duties to the copermitttees, 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

¹ The requirement for Permittees to regulate sanitary sewer discharges was initially adopted as provision F.5.f. in the prior NPDES Permit.

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 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.

V. Land Development Requirements

In February 2008, at the permit adoption hearing held at the City of Mission Viejo, there was a considerable amount of discussion on the issue of a performance standard for low impact development (LID). Since that time, LID has become the defining issue of fourth term MS4 permits in California. Indeed, at the end of 2008 a stakeholder group convened to look specifically at this issue. Comprising regulatory agency, local government, environmental advocacy group and development industry representation, this group was initially able to identify a number of early general areas of agreement.

1. Performance standards for implementing LID BMPs other than an Effective Impervious Area (EIA) percentage (3-5%) are acceptable if a technically equivalent standard can be identified.
2. Sizing LID BMPs to capture the 85th percentile storm event (current DAMP criteria for water quality volume) is an acceptable alternative to EIA as a performance standard provided that technically-based, strict, and clear feasibility criteria are developed for any project that cannot meet the LID BMP requirements.
3. Prioritized LID/SUSMP BMPs for water quality volume capture are represented by: a) infiltration BMPs; b) harvesting and reuse BMPs; c) vegetated (or evapotranspiration) BMPs including bioretention and biofiltration. Water quality volume not captured by LID BMPs shall be treated consistent with DAMP requirements

The County on behalf of the Permittees endorsed these areas of agreement in a letter of February 13, 2009, to the Executive Officer of the Santa Ana RWQCB and the City supports the County's belief that they should represent the basis of a fourth term permit's land development provisions.

More recently the County provided the Santa Ana RWQCB with a more detailed conception of a framework for land development. It predicates permit compliance on management of the 85th percentile storm volume, presumes the application of LID BMPs based upon a prioritized consideration of infiltration, capture and re-use, evapo-transpiration, and bio-retention/bio-filtration, and requires treatment of residual runoff volumes for which the application of LID BMPs has been determined to be infeasible at site, sub-regional and regional scales. The

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framework also integrates options for water quality credits and provides for alternate compliance approaches including participation in a watershed project and contributions to an "in-lieu" fund. It also explicitly recognizes bio-retention/bio-filtration BMPs as LID BMPs and the continued and entirely legitimate contribution of effective structural BMPs such as constructed wetlands and detention ponds to the practice of stormwater quality management.

The City agrees with the County and the other Permittees that it is imperative that there be a uniform countywide development standard for water quality protection. Consequently, the framework language that is currently being supported by both the North Orange County Permittees and staff of the Santa Ana Regional Board should be the starting point for discussion with respect to the subject Tentative Order.

In conclusion, the City appreciates the effort that Regional Board staff has devoted to the development of the fourth term permit for the Orange County Stormwater Program. The City looks forward to continuing to meet with your staff to try to resolve the City's concerns regarding the Tentative Order to ensure that it meets our mutual goals.

Thank you for your attention to our comments. Please contact Joe Ames at (949) 470-8419 or me at (949) 470-3079 with any questions on this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Rich Schlesinger", followed by a long horizontal line extending to the right.

Rich Schlesinger, P.E.
City Engineer

cc: Dennis Wilberg, City Manager
William P. Curley, III, City Attorney
Mark Chagnon, Director of Public Works
Joe Ames, Associate Civil Engineer
Deborah Carson, Program Engineer
File: NPDES - 4th Term Permit

From: "Rich Schlesinger" <rschlesinger@cityofmissionviejo.org>
To: "James Smith" <JSmith@waterboards.ca.gov>
CC: "Deborah Carson" <dcarson@cityofmissionviejo.org>, "Mark Chagnon" <mchag...>
Date: 5/19/2009 10:34 AM
Subject: RE: City of Mission Viejo Comments on Tentative Order No.R9-2009-0002
Attachments: SSO-requirements.doc

Hi Jimmy, at our meeting on May 12, one of the items we discussed was the requirement for the Co-permitees to respond to Sanitary Sewer Overflows (see Page 69, Part F.3.h.). You requested that I provide you some background related to the Stay on this section the State Water Resources Control Board issued in our previous permit, and proposed changes we recommend. Attached is this information. We also included this information in our comment letter. Please let me know if I you need any additional information. Thank you for your consideration on this matter.

Richard Schlesinger, P.E.

City Engineer

City of Mission Viejo

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