CITY OF LAKE FOREST

May 14, 2009

Via US Mail and E-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

Subject: Comments on Tentative Order No. R9-2009-0002, NPDES No. CAS0108740, Waste Discharge Requirements for Discharges for 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

Dear Mr. Robertus:

The City of Lake Forest ("City") submits this letter to the California Regional Water Quality Control Board, San Diego Region ("SDRWQCB") to convey the City's formal written comments for Tentative Order No. R9-2009-0002/NPDES Permit No. CAS0108740 ("Draft Permit"). The City is additionally aware that the County of Orange ("County") is submitting a similar comment letter regarding specific conditions contained in the Draft Permit. The City would like to express its full support for the County's comments and intends the comments contained in this letter to supplement those submitted by the County. Accordingly, please consider the County's comments to be incorporated in the City's letter by this reference. The City's comments follow.

GLOBAL COMMENTS

During the last public hearing on the Draft Permit, in February, 2008, the SDRWQCB Board directed Board Staff to revise the permit to achieve greater consistency with Phase I MS4 permits throughout the state, and to provide stakeholders and the regulated community with a meaningful opportunity to assist in the development of the revisions. Unfortunately, the Draft Permit was released without cooperative input from the regulated community prior to its release and, more significantly, is entirely inconsistent with other Large MS4 Permits issued throughout the state.

Indeed, a brief comparison of the Draft Permit with the North Orange County MS4 Permit that is likely to be adopted by the California Regional Water Quality Control Board, Santa Ana Region ("SARWQCB") on May 22, 2009, reveals that there is a significant disparity between the two permits. The North Orange County MS4 Permit is of particular concern because many of the Copermittees, including the City, are subject to

both the North Orange County Permit, and the Draft Permit. Inconsistencies between the two permits create bureaucratic hurdles that cost the City time and valuable resources. Furthermore, the conspicuous disparity between the permits are likely to cause confusion among the public, and discourage public acceptance and participation in clean water efforts.

In addition to the consistency issues, the Draft Permit largely conflicts with guidance from the State Water Resources Control Board ("State Board") and the United States Environmental Protection Agency ("EPA"). This deviation from agency guidance, and industry practice is most stark in the Draft Permit's Numeric Effluent Limits ("NEL") and Municipal Action Level ("MAL") requirements. As described more fully below, these aspects of the Draft Permit exceed the standards for municipal discharges set forth in the Clean Water Act and/or completely ignore State Board studies on whether such provisions can be feasibly implemented in MS4 permits. The City's specific comments on the Draft Permit follow.

SPECIFIC COMMENTS

HOLDING DRY WEATHER FLOWS TO A DIFFERENT COMPLIANCE STANDARD VIOLATES THE CLEAN WATER ACT

The Draft Permit attempts to impose a higher compliance standard for dry weather discharges. Pursuant to this heightened standard, the Draft Permit imposes NELs for dry weather discharges from the MS4. The Draft Permit states that this heightened standard is warranted because the Clean Water Act requires MS4 permits to prohibit discharges of non-stormwater, and dry weather flows constituted non-stormwater.

The Clean Water Act clearly defines the discharge requirements for MS4 permits. Pursuant to the Clean Water Act, NPDES permits may be issued on a system or jurisdiction-wide basis, and must include a requirement to effectively prohibit non-stormwater discharges into the storm sewer, and must require controls to reduce the discharge of pollutants from the storm sewer to the maximum extent practicable. (33 U.S.C. § 1342(p)(3)(B).) The Clean Water Act does not distinguish between wet weather and dry weather discharges, and thus does not support a heightened standard for discharges of non-stormwater from MS4s.

Moreover, the NELs in the Draft Permit directly conflict with the findings of the State Water Resources Control Board's ("State Board") Blue-Ribbon Panel Report on the feasibility of numeric effluent limits in MS4 permits. After an exhaustive investigation into the feasibility of numeric effluent limits and action levels, the Blue Ribbon Panel found "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges." (Blue Ribbon Panel Report, pp. 8.) Nonetheless, the Draft Permit includes NELs for dry weather flows. When this inconsistency was brought to the attention of Regional Board staff, it was dismissed on

the grounds that the Blue Ribbon Panel report applied only to wet weather flows. As stated above, the Clean Water Act makes no such distinction.

While the SDRWQCB may have the authority to impose restrictions in Waste Discharge Requirements that exceed the requirements of the Clean Water Act, when imposing such restrictions, the SDRWQCB must comply with applicable State laws. (*City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613; *see also Defenders of Wildlife v. Brown* (9th Cir. 1999) 191 F.3d, 1159, 1166.) These include but are not limited to the California Environmental Quality Act, and Water Code sections 13241 and 13000. The Draft Permit does not comply with these requirements.

Imposing NELs in the Draft permit will result in numerous unintended consequences, including the possibility that the Copermittees will be held liable for mandatory minimum penalties for exceeding the NELs. For that reason, the City requests that the SDRWQCB remove the NEL requirements from the Draft Permit.

IMPOSING MUNICIPAL ACTION LEVELS IS UNNECESSARY AND CONTRARY TO EPA AND STATE WATER RESOURCES CONTROL BOARD GUIDANCE

The Draft Permit includes MALs. Pursuant to the Draft permit, beginning in the fourth year after adoption of the permit, discharges from the MS4 that exceed the MALs create a presumption that the permittee is not complying with the Maximum Extent Practicable ("MEP") standard. In other words, the permittee would be presumed to be in violation of the permit. The decision to include MALs in the Draft Permit ignores guidance from the State Board and the EPA, as well as the MS4 Permits adopted by other Regional Boards.

The MALs in the Draft Permit directly conflict with the State Board's Blue-Ribbon Panel Report findings. The MALs recommended by the Blue Ribbon Report were to be used as a management tool to indicate when additional Best Management Practices ("BMPs") are necessary, not a point of compliance. In contrast, the MALs in the Draft Permit are tied to MEP compliance and as a result are effectively NELs. As stated above, the Blue Ribbon Panel found that NELs for municipal BMPs and urban discharges are not feasible. By imposing NELs by a different name, the Draft Permit flatly ignores the Blue Ribbon Report's recommendations.

Additionally, the Draft Permit's attempt to tie compliance with the MEP standard to non-compliance with MALs is not supported by the Clean Water Act. The MEP standard is designed to allow the Copermittees flexibility to implement effective and feasible BMPs to address stormwater pollution. This interpretation of the MEP standard is supported by the EPA. (*See* 64 Fed. Reg. 68721, 68754 (Dec. 8, 1999) ["EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in stormwater pollutants on a location-by-location basis"].) It is also endorsed by the State Board. (State Water Board Order WQ 2000-11 at p. 20 ["MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive"].)

Defining MEP compliance with a single MAL standard violates the intent of the Clean Water Act to give the municipal permittees the discretion and flexibility to do use BMPs to prevent and/or treat discharges from their MS4s. This is the approach taken by the other Regional Boards in Southern California when issuing MS4 Permits. Neither the recently adopted Ventura County Large MS4 Permit, nor the North Orange County Large MS4 Permit includes NELs or MALs.[1] The Draft permit should reflect the national and statewide guidelines on MALs. For that reason, the SDRWQCB should either revise the Draft Permit to meet the recommendations from the Blue Ribbon Panel, or remove the MALs from the Draft Permit.

THE DRAFT PERMIT IMPERMISSIBLY ATTEMPTS TO REGULATE AGRICULTURAL SOURCES, NATURAL SOURCES, AND OTHER NON-POINT SOURCE DISCHARGES

The Draft permit has removed the word "urban" from everywhere it formerly modified the word "runoff". This universal change suggests that the Copermittees are responsible not just for urban runoff, but all runoff. Holding the Copermittees to this heightened standard exceeds the jurisdiction and intent of the Clean Water Act.

MS4 Permits are NPDES Permits. Pursuant to the Clean Water Act, NPDES permits regulate point source discharges. By definition, agricultural discharges are not point sources, even when they are discharged from a conveyance that would meet the definition of a point source. By removing the term "urban" from the Draft permit, the Draft Permit would hold the Copermittees liable for agricultural and other non-point source discharges that enter and exit their MS4. Because agricultural discharges are not point sources, they are not subject to regulation with NPDES permits. Attempting to include agricultural discharges in the Draft Permit therefore exceeds the Clean Water Act's jurisdiction.

The history of the Clean Water Act demonstrates that it was intended to regulate urban runoff rather than agricultural sources and other non-point discharges. Indeed, when issuing the MS4 Permit regulations in 1990, EPA stated, "it is the intent of EPA that [stormwater] management plans and other components of the programs focus on the urbanized and developing areas of the county." (55 Fed. Reg. 47989, 48041 (Nov. 16, 1990).) The urban discharge focus is reflected in the San Diego Region Basin Plan which discusses the problem of stormwater runoff in terms of urbanization and cites to EPA Guidance limiting regulation of stormwater to urban sources. (*See* San Diego Basin Plan, pp. 4-78, 4-79.) There is simply no support for the Draft permit's attempt to expand the scope of regulation by adding additional sources of regulated discharges.

By removing the term "urban" from the Draft Permit, the SDRWQCB has potentially enlarged the scope of regulation to include agricultural discharges, other traditional non-point source discharges, and naturally occurring pollutant discharges. As stated above,

[1] While the North Orange County permit incorporates Total Maximum Daily Loads ("TMDLs") that have specific waste load allocations, these TMDLs are being implemented through an iterative BMP process. Thus there are no direct effluent limits in the permit at this time.

regulation of these discharges is not within the scope of the Clean Water Act.[2] The City therefore requests that Draft Permit be revised to make clear that it only pertains to "urban" discharges.

EXISTING DEVELOPMENT RETROFIT REQUIREMENTS

Section F.3.d of the Draft Permit requires the Copermittees to develop a plan to retrofit existing development within their jurisdiction. Specifically, each permittee must implement a retrofitting program that:

- Solves chronic flooding problems,
- Reduces impacts from hydromodification,
- Incorporates Low Impact Development ("LID") principles,
- Supports stream restoration,
- Systematically reduces downstream channel erosion,
- Reduces the discharges of stormwater pollutants from the MS4 to the MEP, and
- Prevents discharges from the MS4 from causing or contributing to a violation of water quality standards.

These requirements are inconsistent with other recently issued MS4 Permits. More importantly, they are infeasible. While the Copermittees have traditional land use authority to impose requirements on new development as a condition of development, there is no similar authority to require property owners to retrofit existing development. The Draft Permit ignores this lack of authority and goes as far as to require the Copermittees to identify existing developments that are sources of pollutants and then evaluate and rank them to prioritize retrofitting. (Draft Permit, section F.3.d(1)-(2).)

Additionally, because the City has limited authority to impose retrofit requirements on existing development within its jurisdiction, the Draft Permit's retrofit provisions will result in an allocation of resources that is not likely to benefit clean water. For example, the City will be required to dedicate significant resources and time to identify and inventory existing sites and then complete evaluations and prioritization of these sites for retrofits. These intensive activities will divert resources, time, and funding away from other vital permit related programs.

Because the Copermittees have little authority to implement the Draft permit's existing development retrofit requirements, the City requests that the be removed from the Draft Permit.

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[2] To the extent that the Draft Permit attempts to regulate these discharges, it does so under the authority of state law, and must comply with other state law requirements including but not limited to Water Code sections 13241, and 13000.

THE DRAFT PERMIT UNNECESSARILY OUTLAWS IRRIGATION RUNOFF

The Draft Permit has eliminated irrigation water as an exempt discharge. The federal stormwater regulations include a list of categories of "exempt" non-stormwater discharges or flows. (40 CFR 122.26(d)(2)(iv)(B)(1).) The Copermittees' illicit discharge and illegal disposal program must address these discharges or flows when they have been identified by the Copermittees as sources of pollutants to waters of the U.S. (*Id.*) Where individual sources of discharge are identified they need to be addressed on an individual basis. This approach is supported by the EPA. (*See* Part 2 Guidance Manual at p. 6-33.)

This is a sound approach to addressing pollutants in irrigation water. While irrigation runoff may act as a conveyance of pollutants in some instances, whether it is a conveyance of pollutants needs to be evaluated on an case by case basis. This is because the tendency of irrigation water to convey pollutants is dependant on the pollutants and the source of those pollutants. Moreover, many of the pollutants that may be conveyed by irrigation overflows are naturally occurring, are regulated by the State under different permits or programs, or are diffuse and uncontrollable by the Permittees. Potable irrigation water itself is not a pollutant. Therefore, it is inappropriate to regulate irrigation runoff as a pollutant.

Furthermore, enforcing discharges of potable irrigation water from residential homes presents numerous challenges for the City. Residents without a significant water quality background are unlikely to agree that potable irrigation water is a pollutant. This will discourage public acceptance and participation in the water quality program, a program whose foundation is outreach and public education.

Lastly, it is also important to recognize that irrigation runoff is a significant water supply issue. The City, the other Copermittees, and water districts throughout the region are working toward limiting excessive irrigation runoff through numerous water conservation programs and ordinances. Therefore, reduction of irrigation runoff will be achieved through other means, and does not need to be regulated in the Draft Permit. Regulation as a water supply issue has the added benefit of public acceptance and participation in conservation programs. This will allow the benefits of fewer irrigation overflow discharges to occur without undermining public support for the City's water quality program. The City therefore requests that the exemption for landscape irrigation be restored.

THE DRAFT PERMIT'S BMP DATABASE REQUIREMENTS ARE UNNECESSARY

Draft Permit Section D.1.f. requires Copermittees to maintain a watershed based database to track and inventory approved treatment control BMPs. It additionally requires Copermittees to verify, on an annual basis, that the BMPs are being maintained and operated effectively. Compliance with this section will require a significant commitment from Copermittee staff, and may require the addition of staff. The value of the outlay of funds that compliance with this section will require is questionable in comparison to the

overall benefit to stormwater quality. This section should be removed, or the Permit should be revised to allow for inspection and verification on an as needed basis.

THE DRAFT PERMIT'S HYDROMODIFICATION AND LID REQUIREMENTS SHOULD BE CONSISTENT WITH THE NORTH ORANGE COUNTY LARGE MS4 PERMIT

During preparation of the Fourth Draft of the North Orange County Permit, the land development provision of the permit were the subject of a series of stakeholder meetings and subsequent comments by the EPA. These sections of the SARWQCB permit containing the land development provisions were revised and are currently scheduled for consideration of adoption by the SARWQCB on May 22, 2009. The City requests that SDRWQCB staff include the same or very similar land development provision within the SDRWQCB Draft Permit to facilitate consistency and feasible implementation between the two regions within Orange County.

As state above, this issue is very important to the City as it will be required to implement both programs within its jurisdiction. The North Orange County Permit's development provisions are more flexible than those currently included in the Draft Permit. It was nonetheless accepted by the EPA, the Copermittees, the building industry, and interested environmental groups. Those provisions represent mutually agreeable design standards that should be adopted in the Draft Permit.

THE DRAFT PERMIT'S STREET SWEEPING REQUIREMENTS ARE AN UNNECESSARY ALLOCATION OF RESOURCES

Draft Permit Section D.3.a.(5) requires Copermittees to design and implement a street sweeping program based on criteria which includes optimizing the pickup of "toxic automotive byproducts" based on traffic counts. Although the Permit does not specify what pollutants it is trying to capture, one can only assume that this provision is aimed at commonly utilized automotive products such as oil, gasoline, transmission fluid, brake fluid, brake dust and radiator fluids. Because the term is not defined, however, it could be broad enough to include air-deposited byproducts of combustion.

Street sweeping, and street sweepers in general, were not designed to be the primary means of collecting these by-products. It is therefore unlikely that street sweeping will be effective at collecting many of them, including any liquids that have soaked into the pavement. Additionally, whether such by-products are deposited on a given street is not necessarily a function of the traffic volume on that street. There does not appear to be a direct correlation between traffic counts and the effectiveness or need for street sweeping.

There are other pollutants such as litter, debris, and grass clippings etc. that could be detrimental to stormwater quality that are de-emphasized by the Permit's focus on traffic counts. This section should therefore be revised to both specify the types of pollutants the Copermittees should be seeking to reduce with their street sweeping programs, and to provide the Copermittees with the discretion to utilize street sweeping in a manner that maximizes its effectiveness.

THE DRAFT PERMIT'S MOBILE BUSINESS REQUIREMENTS ARE IMPRACTICAL

The North Orange County permit, which the City will also be required to implement, no longer includes a mobile business tracking requirement. Instead, the North Orange Permit requires the County, as the principle permittee to develop a program over the next permit term that could be implemented by all of the Copermittees. This approach is preferable to the language in the Draft Permit because it gives the Copermittees the flexibility to develop a program they mutually agree upon. For that reason, the City requests that the SDRWQCB either remove the mobile business provisions from the Draft Permit, or replace them with language similar to that in the North Orange County permit.

Draft Permit Section D.3.b.(3) requires the Copermittees to develop and implement a program to reduce the discharge of pollutants from various types of mobile businesses. This section requires Copermittees to develop a listing of mobile businesses, and requires the Copermittees to develop and implement a number of measures to limit the discharge of pollutants from them. As a practical matter, these requirements will be very difficult to enforce for the following reasons:

1. What constitutes a mobile business is not well defined;

2. Mobile businesses operate in multiple jurisdictions and cannot be tracked as to time and place;

3. Mobile businesses may operate on private property out of the City's view; and

4. Additional staff time will be required to roam the City looking for mobile businesses.

The Fact Sheet that the SDRWQCB has issued in support of the Permit states that the Permit has targeted mobile businesses for special attention because the Copermittees reported that discharges from such businesses have been difficult to control with existing programs. Rather than finding a solution for this problem, the Permit directs Copermittees to implement a number of non-descript solutions that will not necessarily make regulation of mobile businesses any easier. The SDRWQCB should therefore revise this section of the Permit to provide the Copermittees with the discretion to focus on mobile sources when they feel it is necessary, or if they identify mobile businesses as a significant source of stormwater pollution within their jurisdiction.

THE DRAFT PERMIT'S BUSINESS PLAN REQUIREMENTS ARE UNLIKELY TO BENEFIT WATER QUALITY

Draft Permit Section F. requires the Copermittees to conduct an annual fiscal analysis of the capital, operation, and maintenance expenditures necessary to implement the Permit's requirements. This section additionally requires each analysis to "include a qualitative or quantitative description of fiscal benefits realized from implementation of the stormwater protection program." A review of the Fact Sheet indicates that the Permit is requiring the Copermittees to conduct an economic benefits analysis of their respective stormwater programs.

This requirement is unnecessarily duplicative. As described in the Report of Waste Discharge, the Copermittees have already committed to develop a fiscal reporting strategy to better define the expenditure and budget line items included in the fiscal report. Furthermore, the SDRWQCB is already required to take the economic benefits and burdens of their actions into account when issuing stormwater permits. (*See City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613; and California Water Code § 13263.) Requiring the Copermittees duplicate these requirements is a waste of resources that could be better spent on implementing other Permit provisions. Accordingly, this section should be modified to encourage rather than require the Copermittees conduct such an analysis.

This section of the Permit additionally requires each Copermittee submit a business plan that identifies a long term funding strategy for program evolution and funding decisions. The Copermittees do not always have information on the future sources of funding as it is not often readily available. This makes production of such a document difficult. The SDRWQCB does not need to know the funding sources for each Copermittee's stormwater program. Requiring such a report is overreaching in a manner that will unnecessarily cost the Copermittees additional time and resources. This section of the Permit should therefore be modified to encourage rather than require the Copermittees develop a business plan.

THE DRAFT PERMIT INCLUDES NUMEROUS REQUIREMENTS THAT EXCEED FEDERAL LAW AND DOES NOT MAKE THE FINDINGS OR INCLUDE THE ANALYSES REQUIRED BY WATER CODE SECTION 13241

The Draft Permit includes numerous requirements that exceed the requirements of federal law. While the SDRWQCB has the authority to include such requirements in the Draft Permit, it must comply with the statutory requirements set forth in the California Porter-Cologne Water Quality Control Act. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal. 4th 613.) This includes making the findings required by Water Code sections 13000, 13241 and 13263. Additionally, as these requirements represent state, rather than federal, mandates, if they are included the final permit, the Copermittees are entitled to reimbursement from the State for the costs associated with implementing them. (California Constitution, Article XIII B, § 6.)

CONCLUSION

We appreciate your attention to our comments. The City is committed to the goal of water quality improvement and wants to work with the SDRWQCB in developing the most prudent and cost effective permit possible. We look forward to receiving your response to the above comments and concerns. If you should have any questions, please contact Devin Slaven, Water Quality Specialist, at (949) 461-3436.

Sincerely,
CITY OF LAKE FOREST

Robert L. Woodings, P.E.
Director of Public Works/City Engineer

cc: Robert C. Dunek, City Manager
Theodore G. Simon, P.E., Engineering Services Manager
Devin E. Slaven, REA, Water Quality Specialist
Chris Crompton, County of Orange, RDMD

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