



CITY of LAGUNA NIGUEL

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Dr. Richard Wright, Chairman
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Comments on the Draft Municipal Stormwater Permit for South Orange County – Revised Tentative Order No. R9-2009-0002, NPDES No. CAS 0108740

Dear Dr. Wright:

The City of Laguna Niguel appreciates the opportunity to provide updated comments on the August 12, 2009 draft of the Municipal Stormwater Permit for South Orange County. We would first like to thank the Board and acknowledge the staff for their efforts to reach consensus through the series of meetings conducted since the previous draft was released in March 2009. We note that the language in several provisions has been modified and that the requirement for submittal of a business plan has been deleted. As such, the current draft represents some progress toward a workable solution.

However, a number of previously identified issues were not adequately addressed, and some of the revised language generates new concerns. Rather than re-iterate previously submitted comments, the City incorporates by reference its written comments on the prior versions of the Tentative Order (both No. R9-2007-0002 and No. R9-2009-0002) dated April 4, 2007 and May 15, 2009, addressed to John Robertus. The City also reserves the right to provide additional comments on the Tentative Order prior to the close of the public comment period.

City Concurrence with Comments submitted by the County of Orange as Lead Permittee

Please note that the City of Laguna Niguel has reviewed the legal, technical and monitoring comments to be submitted by the County of Orange as Lead Permittee. The City of Laguna Niguel concurs with, adopts and incorporates into this letter the comments, concerns, and recommended deletions and modifications to the Draft Permit that have been submitted by the County of Orange.

General Comments and Areas of Concern

The Draft Permit Does Not Address Cost Neutrality, Legal Authority or Consistency Issues as Directed by the Board

At the public hearing on July 1, 2009, the Board members highlighted three issues of general concern that needed further consideration: (1) cost neutrality compared to the 2002 Permit, in the context of the impact that the prevailing economic climate has had on Cities' ability to support expanded programs; (2) legal authority for declaring that non-stormwater discharges are not subject to the Maximum Extent Practicable (MEP) standard of compliance; and (3) consistency with other regional Permits, especially North Orange County. Despite what we understood to be the Board's direction to its staff, it does not appear that these issues have resulted in substantive reconsideration of Permit provisions since the July hearing took place.

Dry Weather Numeric Effluent Limitations are Untenable

We believe that the most critical intersection of the cost neutrality and legal authority issues is the imposition of Dry Weather Numeric Effluent Limitations (NELs) at the end-of-pipe. The City adopts and incorporates herein the legal positions taken by the County of Orange as Lead permittee and the other co-permittees regarding the applicability of the MEP standard. The practical ramifications of the proposed NELs are overwhelming: Dry Weather Monitoring Program measurements taken since 2002 at almost every pipe outfall in our City – and in all our Co-Permittee Cities – have shown that exceedances of the proposed bacteria, nutrients and dissolved solids NELs are the rule rather than the exception; and that exceedances of the metals NELs are common. A growing body of evidence suggests these constituents are largely natural in origin. Nevertheless, the proposed Permit provisions would appear to trigger the investigation requirement each time and every place that “an exceedance” occurs. Our experience has already shown that a single investigation may entail dozens of man-hours and substantial costs in equipment and laboratory analyses, and yet may still be inconclusive as to source, or be unable to confidently differentiate mixed natural versus anthropogenic sources. The way the NELs provisions are currently written, even naturally-occurring concentrations may be considered non-compliant if their “conveyance” is “anthropogenically-influenced” – a definition that would criminalize all dry-weather flow in the MS4, which locally carries spring flows and groundwater. Such stringent provisions and/or fuzzy outcomes would make the City (and all the other Co-Permittees) continuously non-compliant under the Permit provisions as currently drafted, making us subject to third-party lawsuits and/or enforcement actions and Mandatory Minimum Penalties. The potential costs cannot even be estimated. Such an ill-conceived framework will invite litigation on all fronts: even the Board itself could be subject to third-party lawsuits for failure to enforce. The City requests and recommends that the dry-weather NELs be removed from the draft Permit; or at a minimum be re-framed as *Dry Weather Action Levels* in essential conformance to the existing Dry Weather Monitoring Program parameters.

The Draft Permit Continues to be Overly Prescriptive

The current Stormwater Permit (No. R9-2002-0001) imposed a comprehensive set of stormwater management and regulatory requirements on the Co-Permittees. The Draft Permit substantially expands the requirements and prescriptions of the current Permit without clear or compelling supportive findings, evidence or rationale. While some minor adjustments have been made to the Draft Permit language since the previous Draft version in response to these observations, the City believes that the it remains too prescriptive, increases costs, and limits the discretion and flexibility of the City to implement programs and practices that are appropriate, sensible and practical for our community. For example, the requirements for on-site storm retention, coupled with the prioritization scheme for selection of BMPs for new developments, impose procedures and costs that are locally unsuitable; furthermore the BMP maintenance tracking requirements are more detailed than is supportable. The City requests that the Regional Board carefully review and reconsider all the new requirements of the Draft permit, and wherever possible, provide maximum discretion and flexibility to the Co-Permittees.

Intolerable Impacts on Municipal Co-Permittee Budgets

In addition to the ongoing budgetary ‘wild card’ represented by the Dry Weather NELs as discussed above, the City will incur significant extra one-time costs during the FY09-10 fiscal year for the development of new ordinances, plans, and assessments. Each of the new local requirements - revising the General Plan, updating the Environmental Review process, updating the Grading Ordinance, adopting Homeowner Association regulations, prohibiting irrigation runoff, reworking the Jurisdictional Urban Runoff Management Plan, setting up the Best Management Practices (BMP) Maintenance Tracking system, and developing an Existing Development Retrofitting Plan – may require dozens and in some cases hundreds of staff and/or consultant hours to be expended by *each* Co-Permittee City for *each* task. Additionally, each City will be charged its cost-share for development by the Lead Permittee of new regional documents, including the Watershed Workplans, the Model Hydromodification Criteria and Waiver Programs, Regional Monitoring Programs, TMDL Load Reduction Plans, etc. The cumulative FY09-10 cost of all this is likely to be well over \$150,000 just in our City – more than doubling our Program Administration budget, without directly achieving any water quality improvement.

The City will also incur new costs on an annual basis for implementing all these new programs. While the City recognizes that the Regional Board has made some effort to ‘cost-neutralize’ the regional monitoring requirements by reducing some prior commitments while adding new ones in the Draft Permit, the City will still incur higher operational obligations for investigating NEL and Storm Water Action Level exceedances, inspecting existing developments, training staff, educating the public, enforcing the irrigation runoff prohibition, tracking BMP maintenance and reviewing new development proposals. Operational costs are estimated to go up by about 15%, or an additional \$200,000+ annually in this City alone. Capital improvement costs fluctuate year-to-year and cannot really be estimated before the planning efforts defining

the projects are completed, but implementing retrofitting at existing developments may cost additional hundreds of thousands of dollars per year.

These cost increases could not come at a worse time for the City budget. The City has experienced a 6% decline overall in municipal revenues this year due to decreases in property tax, sales tax, real property transfer tax, planning and building fees, and interest income, so that we have had to draw on reserves just to maintain our current programs. Most of our planned capital improvement projects have been put on hold and no new ones are being scheduled for this year. Staff furloughs have been imposed in many Co-Permittee cities. Against this backdrop, it is challenging for the Co-Permittees to maintain current funding levels for our existing Stormwater Programs, let alone increase funding. The City requests that the Regional Board make every effort to ensure that the new Permit is, at most, cost-neutral to the Co-Permittees. At the very least, we recommend substantially extending the timeframes for developing and deploying any new program plans and components, in order to reduce financial impacts concentrated during this lowest (we hope) point for local government operating revenues.

Impacts on New Development and Re-Development

The Draft Permit's imposition of substantial additional requirements on New Development and Significant Redevelopment projects will create substantial cost impacts for developers as well as for existing businesses, institutions and residents in the City. The current economic climate – when property values are down by 30% or more – suggests that this is a most inappropriate time to create larger financial disincentives to the spread of low-impact design and re-design across the City. In particular, we note that the requirements continue to be more onerous than defined for North Orange County or for San Diego; and that new requirements to evaluate water rights and sediment loads have been added in the August Draft to the already-substantive burden of retroactively mitigating hydromodification impacts. The City requests that the Regional Board carefully review and reconsider the necessity, appropriateness and timing of these new requirements.

Impacts on Residents

The Draft Permit's defining of landscape irrigation runoff as an illicit discharge that must be eliminated will overnight convert a large percentage of the City's 20,000 landowners into unintentional scofflaws. Whether they react voluntarily or in response to enforcement actions, eliminating irrigation runoff will cost homeowners money. A new single-family controller with automatic weather-based scheduling and multi-short-cycle capacity costs \$300 to \$500. Correcting overspray and distribution problems even on a flat home lot may cost a homeowner \$200 to \$1,200. If a homeowners' association has to retrofit thousands of feet of sprinkler lines on common areas, each resident will have to pay a share of potentially tens of thousands of dollars. Enforcement against residents who do not or cannot afford to comply will not be 100% because watering happens at night, half-hidden in back yards, for a few minutes at a time; and Cities cannot issue a

citation without actually seeing the offense being committed. The reality is that irrigation runoff can only be controlled to the *maximum extent practicable*.

Porter Cologne Act and Unfunded State Mandates

The City believes that many of the new regulations and requirements in the Draft Permit exceed the requirements of the Clean Water Act. As such, these new regulations and requirements must be considered and evaluated in accordance with applicable provisions of the State Porter Cologne Act. If such regulations and requirements are included in the Final Permit, the City believes that they would constitute unfunded State mandates.

Specific Areas of Concern

Finding E.14 and E.1, B.2 Removing Exemption of Non-Stormwater Discharges

The Draft Permit removes landscape irrigation, irrigation water and lawn watering from the categories of non-stormwater discharges that are not prohibited, and further declares that non-stormwater discharges are not subject to the MEP standard. The City does not believe that the Regional Board has the legal authority to unilaterally declare that these categories of urban runoff are now to be deemed prohibited discharges and must be completely eliminated. Even if the City passed an ordinance to prohibit such discharges, the most cost-intensive “zero tolerance” enforcement still could only achieve compliance to the MEP, and would likely be politically unacceptable to the public. The City also notes that our Dry Weather Monitoring Program investigations have shown that it is typically reclaimed water – not potable water from residents – that causes the most common water quality problems. The producers, purveyors and users of reclaimed water are separately regulated under permits that require them to control such discharge; Cities should not be required to shoulder the primary burden in their stead. The City requests that the Regional Board keep landscape irrigation on the non-prohibited list, and remove the language asserting that non-stormwater discharges are not subject to the MEP standard.

F.1.d.(4) & F.1.d.(7) – Low Impact Development (LID) Requirements

The City is very concerned about the proposed Low Impact Development (LID) requirement that stormwater be retained on-site. Many areas of South Orange County, including Laguna Niguel, have experienced slope failures and landslides. The proposed LID Site Design BMPs, which emphasize infiltration, could in combination with local soil and geological conditions have the potential to increase the risk of such events. As mentioned before, the City is concerned that the significant financial impacts associated with the various reviews, assessments and site improvements necessary to comply with the proposed LID requirements would discourage New Development and Significant Redevelopment, the primary means by which water quality objectives are currently achieved. The proposed requirements also would impose additional demands on the City’s water quality program both in terms of staff resources and budgetary impacts. Given the potential negative impacts of such requirements as noted above, the City is

particularly concerned with the underlying and inadequately supported presumption that LID methods are superior to conventional treatment methods in achieving water quality objectives.

G. Hydromodification Limitations

The inclusion of hydromodification requirements in the current draft permit represents a significant shift away from the regulatory framework of prior permits. As stated in the draft permit, the purpose of this shift is to reduce erosion and/or facilitate removal of existing hardened channels. This justification however fails to address the fact that hardened channels are necessary to safeguard public health and safety and the general welfare in the event of a large storm event. The requirements also place a significant burden on the limited resources of the Copermitees to develop and implement a Hydromodification Management Plan, which includes on-going financial obligations and labor intensive tasks such as assessment of channel conditions, modifications to development review and approval processes, additional field inspections of development sites, and assessment of cumulative impacts within the watershed on channel morphology. As previously noted, these additional requirements also have the potential to inhibit the City's ability to achieve water quality objectives by discouraging New Development and Significant Redevelopment.

F.3.d – Retrofitting Existing Development

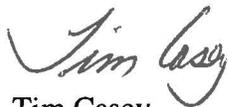
This section requires each Co-Permittee to implement a retrofitting program that reduces impacts from hydromodification, promotes Low Impact Development, supports riparian and aquatic habitat, reduces the discharges of storm water pollutants from the MS4 to the MEP, and prevents discharges from the MS4 from causing or contributing to a violation of water quality standards. First, it is difficult to image the scope and cost of performing the retrofitting evaluation required by Section F.3.d. Second, even if such an evaluation was performed, the Co-Permittees have no legal authority to compel private landowners of existing developments to implement or cooperate on retrofit projects. The City requests that the Regional Board delete Section F.3.d from the Storm Water Permit.

Finding E.11 and E.1, and I. Total Maximum Daily Loads

The Draft Permit imposes strict concentration-based numeric targets for a bacteria TMDL in addition to strict load-based targets, for both dry and wet weather. This language disregards years of painstaking work by staff and stakeholders in crafting TMDL documents firmly promoting the need for better science and iterative-BMP-based WQBELs; and completely contradicts the implementation provisions of the Basin Plan Amendment approved last year, establishing bacteria TMDL implementation provisions under a Reference System/Natural Source Exclusion approach. The City requests and recommends that the concentration-based numeric targets and the load-based allocations both be qualified as “*subject to adjustment in accordance with the bacteria TMDL implementation provisions contained in the Reference System/Natural Source Exclusion Basin Plan Amendment approved by the Board in 2008.*”

The City appreciates the opportunity to submit these comments and respectfully requests that our comments be fully considered by the Regional Board and Staff.

Yours truly,

A handwritten signature in cursive script that reads "Tim Casey".

Tim Casey
City Manager

Cc: Mayor and City Council
City Attorney
Director of Public Works/City Engineer
Director of Community Development
Senior Water Quality Manager