



April 4, 2007

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

Via Fax (858) 571-6972

**Mayor**  
Richard T. Dixon

**Mayor Pro Tem**  
Mark Tettemer

**Council Members**  
Peter Herzog  
Kathryn McCullough  
Marcia Rudolph

**City Manager**  
Robert C. Dunek

**Subject:** Comments on Tentative Order No. R9-2007-0002, 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

Dear Mr. Robertus:

The City of Lake Forest (City) respectfully submits this letter to the California Regional Water Quality Control Board, San Diego Region (Regional Board) to convey the City's formal written comments on Tentative Order No. R9-2007-0002/NPDES Permit No. CAS0108740 (Permit). Once adopted, the Permit will govern discharges of storm water from all Large Municipal Separate Storm Sewer Systems (MS4s) in Southern Orange County. As a regulated Large MS4 operator, the City is very concerned with a number of the Permit's proposed provisions.

As an initial matter, the City would like to address the projected timeline for the Permit's renewal. Regional Board staff have proposed closing the public comment period immediately following the April 11, 2007 Regional Board workshop. In order to facilitate greater public participation, the City hereby requests that the Regional Board keep the comment period open beyond this date. This will provide the Regional Board with the opportunity to review all of the submitted comments, and will allow all stakeholders to review any changes to the Permit that the Regional Board chooses to make.

In developing the following comments, the City worked closely with the County of Orange (County) as well as the other Copermittees to identify common concerns among the Copermittees. The City is aware that the County, as the Principle Permittee, has submitted a comment letter to the Regional Board regarding the 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 and the other Copermittees. Accordingly, please consider the County's comments to be incorporated in the City's letter by this reference.



As with the County's letter, the purpose of this letter is to continue the open dialogue between the Regional Board and the Copermittees. It is the City's belief that such a dialogue will help the Regional Board develop a permit that efficiently promotes the mutually held goal of water quality enhancement. Representatives of the City have participated, and will continue to participate in the Permit renewal process. City representatives will attend the workshop scheduled for April 11, 2007, and will pay close attention to any changes to the Permit that the Regional Board chooses to make.

Additionally, while the City shares the Regional Board's goal of water quality enhancement, the City has certain concerns about the way in which the Permit proposes to reach that goal. These concerns include the Permit's overly specific and prescriptive nature, the abbreviated timelines for compliance, and the manner in which it holds the Copermittees responsible for storm water discharges that are beyond their ability to control. Each of these concerns is set forth more fully below.

### **GENERAL COMMENTS REGARDING THE PERMIT**

**The Permit is Unnecessarily Prescriptive.** Past permits have provided the Copermittees with discretion to decide which storm water pollution solutions to implement, and when to implement them. This Permit contains a number of very specific requirements that essentially remove the Copermittees' ability to decide which solutions work best. This newly prescriptive nature represents a significant departure from the previous permit, as well as from the intent of the Clean Water Act and its associated regulations. The plain language of the Clean Water Act clearly indicates that Congress envisioned individualized regulation of storm water that would provide permittees with the discretion to implement local solutions on a local level.

Despite the intent to provide MS4 operators with maximum flexibility, this Permit has increased the number of mandatory provisions and intergovernmental relationships in a manner that the Copermittees feel is counter-productive. Permit Section D.1.d.(9) is one example. That section governs site design and treatment control BMPs. It provides very specific criteria that each Copermittee must develop and require for "Priority Development Projects" and includes very detailed mandates that unnecessarily hinder the Copermittees' ability to decide which Best Management Practices ("BMPs") will work best. By removing the Copermittees' discretion, the Permit limits the ability of the Copermittees to develop and implement any new storm water quality solutions that are not specifically required in the Permit.

A second example is the requirement that the Copermittees regulate storm water discharges on a watershed basis. This requirement adds an unnecessary layer of complexity to the storm water program. Where Copermittees have multiple watersheds within their jurisdictions, watershed based regulation forces the Copermittees to duplicate their efforts in an inefficient manner. This is because many storm water quality problems transcend watershed boundaries. Rather than allowing the Copermittees to implement one

solution to address such problems, the Permit adds an unnecessary layer of bureaucracy to the process by requiring watershed based regulation.

The Orange County Copermittees have invested a significant amount of time, energy, and financial resources into their respective storm water programs. They have worked collaboratively to develop organizational and management structures that work well for them. The program has strong momentum that the overly prescriptive nature of the Permit risks losing to the detriment of clean water throughout the region.

**The Permit Fails to Cite Applicable Authority or otherwise Support the Exceedance of Federal Requirements.** The Permit fails to properly identify which requirements are federally mandated, and which are required by state law. The federal regulations located at 40 C.F.R. § 122.26 establish the minimum requirements for a Large MS4 permit. The Permit greatly exceeds those minimum requirements. Despite the fact that the Regional Board is required to provide the legal and factual basis for each permit provision, the Regional Board has either provided no legal basis for these exceedances, or erroneously pointed to federal sources of authority.

The Regional Board needs to demonstrate why it is necessary to exceed the federal requirements. Without appropriate findings to support the need to go beyond the federal regulations, the Permit is suspect. Additionally, such documentation is necessary because those portions of the Permit that exceed the federally required minimum represent state mandates within the meaning of Article XIII B § 6 of the California Constitution. In order to allow the Copermittees to seek reimbursement from the State so that they can adequately fund their storm water programs, the Regional Board needs to provide a differentiation of authority.

**The Permit Improperly Requires the Copermittees to Regulate Phase II and Other Regional Board Regulated Entities.** The Permit holds the Copermittees responsible for inputs into their respective MS4s from what the EPA has classified as Phase II storm water dischargers. The Copermittees have little to no authority over the conduct of Phase II entities within their jurisdictions. This in turn significantly limits the ability of the Copermittees to regulate the quality of the storm water that enters their MS4. The EPA and the State Water Resources Control Board have issued Phase II permit guidelines. The Regional Board should enforce these guidelines rather than forcing the Copermittees to do so. The Permit should reflect this and not hold the Copermittees responsible for enforcing storm water regulations by proxy where they have a limited ability to do so.

Likewise, Permit Section D.2.c. requires the Copermittees to both review a project developer's storm water management plan and verify that the developer has obtained coverage under the California statewide General Construction Permit. It appears that this Section will require the Copermittees to do the Regional Board's inspection work for it. This is despite the fact that the State and Regional Boards retain the funds that the General Construction permittees pay for coverage.

To address these concerns, the Permit should be modified to absolve the Copermittees of responsibility for enforcing storm water regulations against Phase II and other Regional and State Board regulated entities.

### **SPECIFIC PERMIT PROVISIONS OF CONCERN**

**Finding C.6. – 303(d) Listed Waters.** Finding C.6. improperly states that Aliso Creek has been placed on the 303(d) list for Benzo[b]flouranthene, Dieldrin, and Sediment Toxicity. Aliso Creek is on the 303(d) list for indicator bacteria, phosphorus, and toxicity. Aliso Creek has not been listed for Benzo[b]flouranthene, Dieldrin, and Sediment Toxicity. These pollutants are incorrectly identified and need to be deleted from the finding.

**Permit Section D. – Jurisdictional Urban Runoff Management Plan (JURMP).** Permit Section D. globally requires implementation of all project development elements of the Permit within one year of its adoption. With respect to the new BMP requirements, as well as the requirement that the Copermittees update their SUSMP, and WQMP, the one year threshold is too soon. These requirements, including possible changes to the Municipal Code, may take substantial time to review and modify through City Council action. In order to realistically develop and implement all of the requirements contained in this section of the Permit, the Copermittees need more time. Accordingly, Permit section D. should be revised to provide the Copermittees with 24 months to develop and implement the program requirements.

**Section D.1.f. – BMP Tracking and Maintenance.** This Section 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 storm water quality. This section should be removed, or the Permit should be revised to allow for inspection and verification on an as needed basis.

**Section D.1.h – Requirements for Hydromodification and Downstream Erosion.** This section requires hydromodification site design measures to be implemented on all Priority Development Projects. It should be noted that some development/redevelopment projects (including infill projects) may actually discharge into engineered channels already designed to handle the flows from the development area. The Permit fails to adequately account for such situations. It does allow for conditional waivers where a downstream channel has been hardened all the way to its outfall. Even in those cases, however, the Permit still requires mitigation measures for what is essentially a non-existent impact.

Additionally, where a channel is only hardened in certain areas, and not for its entire length, the Permit provides no such waiver. The Permit still requires hydromodification

site design measures despite the fact that implementation of such measures will have little to no impact on downstream hydrologic conditions. The Permit should therefore be revised to provide a waiver with no mitigation measures in situations where a project discharges into engineered channels already designed to handle the flows from the development area.

**Section D.3.a.(4) – BMP Implementation for Flood Control Structures.** This Section requires each Copermittee to implement procedures to assure that flood management projects assess water quality impacts. It additionally requires Copermittees to evaluate their existing flood control devices for impacts on storm water quality. This Section thereby places the responsibility for ensuring that flood control devices comply with the terms of the Permit with the Copermittees. This is despite the fact that the Orange County Flood Control District owns, operates and maintains virtually all of the flood control devices in the Permit area. The Permit should not hold the Copermittees responsible for storm water requirements that are beyond their authority to regulate.

**Section D.3.a.(5) – BMP Implementation for Sweeping of Municipal Areas.** This Section 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 storm water 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.

**Section D.3.a.(7) - Infiltration from Sanitary Sewer to MS4/Provide Preventive Maintenance of Both.** This section requires implementation of controls to prevent and eliminate infiltration of seepage from sanitary sewers to MS4s. This requirement fails to recognize that the City, as well as most of south Orange County, is serviced by numerous water districts that own, operate, and maintain their own sanitary sewer infrastructure. Therefore, while these requirements may be appropriate for public agencies that own, operate, and maintain sanitary sewer infrastructure, it is infeasible for the City to operate

and maintain another agency's infrastructure. This Permit section should therefore be revised to apply only to those Copermittees that own and operate their own sanitary sewer systems.

**Section D.3.b.(3) – BMP Implementation for Mobile Businesses.** The Permit 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 Regional Board 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 Regional Board 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 storm water pollution within their jurisdiction.

**Section D.3.b.(4)(c) – Inspection of Food Service Facilities.** This Section requires Copermittees to inspect each food service facility within their jurisdictions annually, and to address, among other things, the maintenance of greasy roof vents during those inspections. Requiring inspectors to access food service facility roofs will require clearance from the property owner, as well as more time to complete inspections. It will also place inspectors at risk of injury by forcing them to climb onto roof tops that may not be secure or appropriate for access.

Additionally, the Copermittees currently contract with the Orange County Health Care Agency (OCHCA) to inspect food service facilities for storm water compliance. The addition of inspections of roof vents will severely limit, if not eliminate, the Copermittee's ability to utilize OCHCA services. It will therefore add significant new costs to each Copermittee's storm water program. Furthermore, grease discharges from

food service facilities are already regulated by the Fats, Oils and Grease (“FOG”) programs implemented and enforced by sewerage districts/agencies. The FOG programs include requirements for proper handling of these potential pollutants. It is therefore unlikely that requiring roof vent inspections will add any additional benefit to overall storm water quality.

Lastly, neither the Fact Sheet, nor the Permit’s Findings provide any justification for the addition of this requirement. Such a time consuming and dangerous method of storm water pollution control should not be instituted where there is no sound evidence that it will yield an improvement in storm water quality.

**Section E.1.a. – Lead Permittee Identification.** This Section requires Copermittees to designate the Lead Permittee for each watershed, and designates a Lead Permittee in the event that the Copermittees fail to designate one. It is unclear how much time the Copermittees will have to designate the Lead Permittee, and at what point the Regional Board will designate one for them. The Permit should provide the Copermittees with sufficient discretion to decide whether they need a Lead Permittee for each watershed. This provision should therefore be removed from the Permit.

**Section F. – Fiscal Analysis.** This section of the Permit 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 storm water 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 storm water 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 Regional Board is already required to take the economic benefits and burdens of their actions into account when issuing storm water permits. (*See City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613; and California Water Code § 13263.) Requiring the Copermittees to 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 to conduct such an analysis.

This section of the Permit additionally requires each Copermittee to 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 Regional Board does not need to know the funding sources for each Copermittee’s storm water program. Requiring such a report is overreaching in a manner that will unnecessarily cost the Copermittees additional time and resources. This section

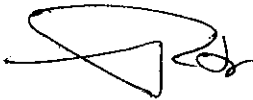
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of the Permit should therefore be modified to encourage rather than require the Copermitees to develop a business plan.

## CONCLUSION

We appreciate your attention to our comments. As stated at the beginning of this letter, the City submits these comments as part of the on-going, open dialogue between the Copermitees and the Regional Board to help develop a workable Permit for this region. The City is committed to the goal of water quality enhancement, and wants to work with the Regional Board in developing the most cost-effective way to reach that goal. 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) 462-3436.

Sincerely,  
CITY OF LAKE FOREST



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

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