August 22, 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

Subject: Comments on Revised Tentative Order No. R9-2007-0002/NPDES Permit No. CAS0108740

Dear Mr. Robertus:

This letter contains the City of Aliso Viejo's formal comments on Revised Tentative Order No. R9-2007-0002/NPDES Permit No. CAS0108740, 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 ("Permit").

The City would like to commend the San Diego Regional Water Quality Control Board ("Regional Board") and its staff for modifying the Permit in response to comments submitted by the Copermittees. The changes provide a strong indication of the Regional Board's willingness to work with the Copermittees on developing a Permit that is mutually beneficial, and that provides the utmost in environmental protection. The City views many of the changes as positive improvements, and intends this comment letter to be an additional step in the ongoing Permit-development process.

Although there are a number of positive changes in the revised draft of the Permit, the City continues to have concerns regarding certain Permit requirements. A description of the City's specific concerns is set forth below.

COMMENTS

1. THE PERMIT FAILS TO CITE APPLICABLE AUTHORITY OR OTHERWISE SUPPORT THE EXCEEDANCE OF FEDERAL REQUIREMENTS.

Because many of the Permit's requirements exceed those established by EPA regulations, the Regional Board needs to delineate the sources of authority that require the Regional Board to exceed those requirements. This documentation is necessary because those portions of the Permit that exceed the federally required minimum are unfunded State mandates within the meaning of Article XIII B § 6 of the California Constitution.

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Although the Regional Board contends that the Permit does not constitute an unfunded State mandate, the City disagrees with this assessment. (*See City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619-21; and *County of Los Angeles v. Commission on State Mandates*, (2007) 150 Cal. App. 4th 898, 915-18 (stating that whether the Los Angeles County MS4 Permit constitutes an unfunded State mandate is a question for the Commission on State Mandates).)

It is worth noting that the City's request is not a reflection of an unwillingness to implement the Permit. In order to allow the City to seek reimbursement from the State so that it can adequately fund its storm water program, the City needs the Regional Board to accurately support each Permit requirement with citation to the Federal authority that *requires* the Permit to include the relevant section. Those portions of the Permit that are not *required* by any Federal authority represent State mandates, and the City is entitled to reimbursement for the cost of implementing them.

2. THE PERMIT IMPROPERLY REQUIRES THE COPERMITTEES TO REGULATE NUMEROUS ENTITIES THAT THE CITY HAS LITTLE OR NO AUTHORITY OVER.

The Permit continues to hold the Copermittees responsible for inputs into their respective MS4s from local and State agencies that the Copermittees have little to no authority to regulate. These include entities that the EPA and the State Water Resources Control Board have classified as Phase II storm water dischargers, as well as other agencies over which the Copermittees have minimal authority.

School districts provide one example of this lack of authority. Pursuant to the California Government and Education Codes, the Copermittees have little authority to enforce many of the Permit's development approval and site design requirements against school districts. Such exemptions significantly limit the ability of the Copermittees to comply with the terms of the Permit. Nonetheless, the Permit still requires the Copermittees to "control the contribution of pollutants" to the MS4 from other Copermittees, and from other agencies such as Caltrans and the Department of Defense. (*See* Permit section C.1.g.)

While the Regional Board provided a written response to comments on the Copermittees limited authority over other agencies, this response did not adequately address the inability of the Copermittees to regulate such entities. (*See* Response to Comments, pp. 7, 20-22.) At a minimum, the Permit should be amended to reflect the Copermittee's lack of authority over local and State agencies, and should be rewritten to absolve the Copermittees of responsibility for enforcing storm water regulations where the Copermittees lack the legal authority to enforce the conditions of the Permit.

Additionally, Permit section C.1.g. should be amended to remove the requirement that the Copermittees "control" inputs to the shared MS4. As stated above the Copermittees have little authority over other agencies, and certainly lack the authority to require them to enter into any kind of an agreement. Accordingly, this section should be modified to state that the Copermittees are required to "where possible, utilize interagency agreements to reduce or otherwise limit the contribution of pollutants from one portion of the shared MS4 to another."

3. BECAUSE THE PERMIT ESSENTIALLY REQUIRES COPERMITTEES TO ENFORCE THE STATEWIDE CONSTRUCTION GENERAL PERMIT, THE REGIONAL BOARD SHOULD PROVIDE FUNDING TO THE COPERMITTEES

The Permit's broad construction inspection and project approval requirements, contained in Permit section D.2. essentially require the Copermittees to enforce the Statewide Construction General Permit. Although the Regional Board contends that this is not the case (*See* Response to Comments, p. 55.), the Regional Board's position on this issue is belied by the fact that the Copermittees are required to:

1. Confirm coverage under the Statewide Construction General Permit;

2. Review the applicant's "construction BMP plan" (which, as a practical matter, is very likely to be the SWPPP required by the Construction General Permit);

3. Require construction sites to implement minimum BMPs that are directed at site management, erosion and sediment controls, and 303(d) impairments; and

4. Inspect large construction sites at least monthly during the wet season for, among other things, BMP effectiveness.

Taken together, these requirements put the Copermittees in the position of enforcing the Statewide Construction General Permit. This is because compliance with the Permit's construction requirements will force the Copermittees to confirm compliance with the Statewide Construction General Permit, which includes many of the same BMP implementation and maintenance requirements. Despite this delegation of inspection duties, the State and Regional Boards continue to retain the funds collected under the Statewide Construction General Permit.

If the Regional Board is going to require the Copermittees to essentially enforce the Statewide Construction General Permit, it should share the funds collected pursuant to the program. Sharing funds with the Copermittees will allow them to perform these inspections and enforcement obligations of the State and Regional Boards. It will additionally contribute to the collaborative

relationship that both the Regional Board and the Copermittees strive to maintain.

4. REGULATION AT THE WATERSHED LEVEL SHOULD BE OPTIONAL UNTIL PROVEN NECESSARY

The Permit establishes a watershed approach to storm water management and requires the Copermittees to implement a WURMP. Many Copermittees have one or more watersheds within their jurisdiction. Requiring the Copermittees to regulate storm water discharges on a watershed basis adds an unnecessary layer of complexity to the storm water program because it requires the Copermittees to implement different BMPs within different parts of their respective jurisdictions. This slows the Copermittees' ability to update, implement, and enforce their respective storm water management programs. For that reason, the institution of regulations on a watershed basis should only be required when it is clear that traditional BMPs are not working. Until that time, the WURMP should be encouraged, not required.

5. THE PERMIT DOES NOT CLEARLY ALLOW FOR SELF CERTIFICATION AND THIRD PARTY INSPECTION OF BMPS

Permit section D.1.f.c. requires the Copermittees to inspect all high priority treatment control BMPs annually, prior to each rainy season. The Regional Board's response to comments on this Permit requirement stated "the Tentative Order has been modified to allow the Copermittees more latitude with verifying treatment control BMP operations through self-certification, third party inspection and/or verification by the Copermittee."

While the Regional Board's comments were helpful, the Regional Board did not amend the Permit to explicitly state that self-certification and third party inspection are permissible means of BMP inspection. In order to ensure that the Permit is clear in this regard, the Permit language should be modified to reflect the Regional Board's response to comments. The Permit should state that the Copermittees have option of using third party inspections, or self certification to satisfy this requirement.

6. THE PERMIT DOES NOT CLEARLY ALLOCATE RESPONSIBILITY FOR BMP IMPLEMENTATION FOR FLOOD CONTROL STRUCTURES.

Permit section D.3.a.(4) requires each Copermittee to implement procedures to assure that flood management projects assess water quality impacts, and requires all Copermittees to evaluate their existing flood control devices for impacts on storm water quality. The Regional Board stated in its Response to Comments that "[e]ach Copermittee must meet the requirements of the Tentative Order for its structural flood control devices." (Response to Comments, p. 58.)

The Regional Board's statement implies that the City will not be held

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responsible for the maintenance and impact of flood control structures that it does not own or have the authority to control, even if they are within its jurisdiction. The Permit language should be revised to clearly reflect this, and state that Copermittees who do not own or operate flood control structures are not responsible for their water quality impacts.

7. THE "MANAGEMENT MEASURES AND PROCEDURES" REQUIREMENT IS INSUFFICIENTLY DEFINED.

Permit section D.4.h. has been modified to state that Copermittees must "implement management measures and procedures to 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)"

This language appears aimed at providing the Copermittees with greater discretion in determining the best means of responding to such discharges. It additionally appears to take into account, at least to some degree, the potential lack of authority that the Copermittees have over local sewer operators and their facilities. For that reason, the City views the change as being entirely appropriate, and requests that Permit section D.3.a.(7) also be modified to reflect this language.

However, because it is not exactly clear what the Regional Board means by "management measures and procedures" the City requests that the Regional Board provide clarification as to what these terms mean in its next Response to Comments.

8. THE PERMIT SHOULD NOT REQUIRE BMP IMPLEMENTATION FOR MOBILE BUSINESSES.

Despite comments from a number of the Copermittees, Permit section D.3.b.(3) still requires the development and implementation of a number of programs to reduce the discharge of pollutants from mobile businesses. As a practical matter, these requirements will be very difficult to enforce.

The Regional Board responded to the City's previous comments on this issue stating:

> The language in the Tentative Order is intended to provide broad flexibility to the Copermittees to account for the individual make-up of each municipality and for the difficulties with identifying and communicating with mobile business operators. This section has not been revised.
>
> (Response to Comments p. 60.)

While the City welcomes the Regional Board's efforts to provide the Copermittees with broad flexibility, the City feels that the difficulties

associated with regulating mobile businesses outweigh any benefits provided by such flexibility.

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 identify them as a significant source of storm water pollution affecting their jurisdiction. As is the case with residential, individual car washing, the City will have the opportunity, and authority to regulate such discharges if they are, or at any time become, a "significant source of pollutants to waters of the U.S."

In the alternative, the Permit could be rewritten to place the responsibility for developing and enforcing restrictions on mobile businesses with those entities that grant such businesses licenses to operate. Because the licensing entities already have the database of business addresses and owners, they are in a unique position to inform mobile business owners of their storm water responsibilities. Accordingly, if the Regional Board insists on including a mobile business requirement in the Permit, the requirement should be at the regional level, and implemented by those entities that grant mobile businesses licenses to operate.

9. THE PERMIT SHOULD NOT REQUIRE A LONG TERM BUSINESS PLAN

The Regional Board declined to change the requirement that the Copermittees develop a business plan for their respective storm water programs. Consequently, Permit section F.3. will still require each Copermittee to submit a business plan that identifies a long term funding strategy for program evolution and funding decisions.

In response to the City's previous comments on this issue, the Regional Board provided the following justification:

> Currently each Copermittee provides an annual estimate of its budget for the upcoming annual reporting period. This does not demonstrate that each proposed program activity will be fully implemented because many proposed activities either have longer construction periods or require future expenditures for operation and maintenance (O&M).
>
> (Response to Comments, p. 68.)

As stated in our previous comment, the City does not always have information on the future sources of funding for its storm water program. This makes production of a "Business Plan" difficult. More importantly, the Regional Board does not need to know the long term 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.

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Notably, the applicable Federal Regulations do not require a long term funding plan such as that currently required by the Permit. The Federal Regulation cited by the Regional Board in its response to comments does not support the requirement that each Copermittee develop a long term funding plan. As written, 40 C.F.R. § 122.26(d)(2)(vi) states:

> For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

Conspicuously absent from this regulation is any mention of funding beyond each fiscal year. In fact, 40 C.F.R. § 122.26(d)(2)(vi) requires nothing more than an annual assessment of funding. Consequently, the current requirement that the Copermittees provide an annual estimate of their budget for the upcoming annual reporting period is fully compliant with federal regulations, and more stringent requirements are unnecessary.

Moreover, the Copermittees have not given the Regional Board any reason to need a long term funding assessment. Although the response to comments cites a number of projects that will require long term funding, to date, the Copermittees have not under-funded any portion of their respective storm water programs.

The City recognizes that there may be benefits to long term financial planning, however, the authority and onus for implementing a long term plan properly resides with the individual Copermittees. The City therefore requests that Regional Board amend the Permit to recommend rather than require a "Business Plan."

10. PERMIT SECTION D.4. SHOULD BE REVISED TO REFLECT THE RESPONSE TO COMMENTS

Permit section D.4. applies to illicit discharges, and requires the Copermittees to investigate obvious illicit discharges immediately, and to take immediate action to eliminate all detected illicit discharges as soon as practicable after detection. In its last comment letter, the City pointed out that it is often not possible for Copermittees to investigate every suspected illicit discharge immediately, or address such discharges immediately after detection.

The Regional Board responded to the City's comments stating:

> The Tentative Order does not define the actions to be included in the investigation because of the varied nature of potential illicit discharges. In some cases, field staff might notify

> appropriate personnel to perform reconnaissance or may begin a field investigation themselves. In other cases, the field staff may need to initiate consultations with experts or begin collecting resources to aid the field investigation.
>
> (Response to Comments, p. 63.)

The Regional Board's response indicates that in instances where it is not possible for an immediate response, so long as the Copermittees take affirmative steps toward remediation of the discharge, they will not be found in violation of the Permit. If that is the case, the Permit should be amended to clearly state that compliance with this provision requires, at a minimum, an affirmative step toward remediation of the illicit discharge.

11. BECAUSE THE PROGRAM ASSESSMENT CRITERIA AT PERMIT SECTION G.1 IS VAGUE, THE VALUE OF THE REQUIRED ASSESSMENTS IS LIMITED

Pursuant to Permit section G.1., each Copermittee must annually assess how effectively its JURMP meets certain objectives. Because this section does not provide a description of how to define success, it will result in different criteria being promulgated by each of the Copermittees. There will be no unified method of determining success, and this will severely limit the value of any assessments, as there will be no basis for determining which BMPs and programs are truly successful.

Additionally, determining the effectiveness of specific permit provisions such as those covering Low Impact Development and Hydromodification BMPs, will be extremely difficult. There are no established criteria that the Copermittees can rely on, and developing such criteria will be time consuming and expensive. As stated above, to the extent that this will result in multiple methods of determining effectiveness, the value of individual results will be limited.

While the City favors maximum flexibility and discretion where possible, there are instances where such flexibility will increase costs for the Copermittees without providing a corresponding increase in value. Because developing individual success criteria will not only be expensive for the Copermittees, but will also limit the value of JURMP assessments, the City requests that the Regional Board either: 1) establish specific criteria that can be used to determine success; 2) encourage rather than require the program effectiveness assessments required by Permit section G.1.; or 3) provide funding for the Copermittees to develop a practical means of assessing the effectiveness of the JURMP on a regional level.

12. FETD LIMITATIONS DO NOT BELONG IN AN MS4 PERMIT

The Permit has been modified to include limitations on the use of facilities that

extract and treat water from the waters of the U.S. before discharging it back to the waters of the U.S. (FETD). The regulation of such facilities in an MS4 permit is wholly inappropriate. FETDs extract and discharge water directly to and from the waters of the U.S. They do not discharge into the MS4, and they are not part of the MS4. Accordingly, including limitations on their use in the Permit is improper, and these limitations should be removed.

Additionally, it is questionable whether the Regional Board has the authority to regulate FETDs under the NPDES program. The Clean Water Act prohibits "the discharge of any pollutant by any person" unless done in compliance with the Act. (33 U.S.C. § 1311(a).) The Act's NPDES program allows for the discharge of pollutants, so long as dischargers obtain permits limiting the type and quantity of pollutants they release into the Nation's waters. (33 U.S.C. § 1342.) The Act defines "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source." (33 U.S.C. § 1362(12))

Although an FETD is likely to be a point source within the meaning of the Clean Water Act, because it merely takes water from a water of the U.S., treats it, and discharges it back to the same waters of the U.S., an FETD does not discharge pollutants within the meaning of the Clean Water Act. (*See South Florida Water Management District v. Miccosukee Tribe of Indians* (2004) 541 U.S. 95, 109-110; and *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York* (2001) 273 F.3d 481 (holding "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not added soup or anything else to the pot.").) To the contrary, an FETD removes pollutants. Accordingly, FETDs are not subject to the requirements of 33 U.S.C. § 1342, and they do not need an NPDES permit to operate. Their inclusion in an NPDES permit designed to regulate MS4s is therefore inappropriate.

As a practical matter, the restrictions currently drafted into the Permit will severely limit the Copermittees' ability to utilize FETDs. For example, Permit Finding E.9 states:

> Without sufficient treatment processes, facilities that extract, treat, and discharge (FETDs) to waters of the U.S. may discharge effluent that does not support all designated beneficial uses. [In the near future] the FETD discharges will be expected to meet all applicable water quality standards.

Additionally, Permit section B.5.c. states that discharges from an FETD "must not cause or contribute to a condition of pollution or nuisance." Where a water body is impacted for a number of pollutants, Finding E.9. and Permit section B.5.c. indicate that FETDs will be required to treat extracted water for the full range of impacted pollutants prior to discharge back to the waters of the U.S.

Because it will be largely impracticable to treat water for a full range of pollutants, the usefulness of FETDs will be severely limited. This is especially

true in water-bodies subject to TMDLs, such as the proposed Bacteria TMDL for Beaches and Creeks in the San Diego Region. Consequently, the limitations in Finding E.9 and Permit section B.5. will remove a powerful BMP from the Copermittees' toolbox.

In order to provide the Copermittees with more options and a greater ability to improve water quality in the region, the Regional Board should remove the FETD requirements from the Permit. At a minimum, however, rather than requiring full treatment, the Regional Board should allow treatment for individual pollutants of concern. This will still have a positive impact on water quality, and will allow the Copermittees to address water quality issues where they are most acute.

CONCLUSION

We appreciate your attention to our comments. The City views them as part of the on-going, open dialogue between the Copermittees and the Regional Board. The City is committed to the goal of water quality improvement, and wants to work with the Regional Board in developing the best means of achieving that goal. We look forward to receiving your response to the above comments and concerns. If you should have any questions, please contact Moy Yahya, Water Quality Specialist, at (949) 273-0272.

Very truly yours,
CITY OF ALISO VIEJO

Mark Pulone
City Manager

cc: Jeremy Haas, Environmental Scientist, SDRWQCB
John Whitman, Director of Public Works
Moy Yahya, Storm Water Program Manager