

# RANCHO MISSION VIEJO

August 21, 2007

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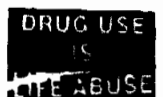
Reference: Tentative Order No. R9-2007-0002; NPDES No. CAS0108740

Subject: Rancho Mission Viejo Comments

Thank you for providing Rancho Mission Viejo (RMV) the opportunity to provide comments on the referenced revised Tentative Order and responses provided by SDRWQCB staff on comments previously submitted. RMV provided comments regarding the prior tentative order (see correspondence dated April 2, 2007) which the revised Tentative Order does address in several instances. We appreciate the Board's clarification on these issues. We remain concerned, however, about several issues that the Board responded to, but did not address in the revised Tentative Order. This letter focuses on these issues which can be summarized as:

1. *Page 23, Section D.1.d Standard Urban Storm Water Mitigation Plans (SUSMPs) – Approval Process Criteria and Requirements for Priority Development Projects.*

The Tentative Order should recognize the resource protection and water quality measures contained in the approved Special Area Management Plan (SAMP) and Habitat Conservation Plan (HCP) in order to maximize the benefits to water quality in Orange County that will accrue through implementation of these significant watershed planning efforts.



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We understand that the Board believes that sufficient flexibility has been written into the current Tentative Order to allow the County of Orange, as a Copermitee, to approve land use plans, site design BMPs and water quality management plans that are based on the watershed planning concepts set forth in the approved SAMP and HCP. As we have previously noted to the Board, site design BMPs applied at the watershed and sub-watershed scale for RMV lands have resulted in, for example:

- Conserving natural areas – 20,868 acres of RMV lands will be preserved as open space and dedicated to a Habitat Reserve over time. Only 5,873 acres will be developed.
- Minimizing disturbances to natural drainages – all mainstem creeks on RMV are preserved, and 8,198 acres of riparian habitats will be protected in the SAMP Study Area, including RMV lands.
- Minimizing soil compaction of permeable soils – development acres are focused in clay soils; sandy soils are generally preserved in open space

We request that the Tentative Order provide the County of Orange with the specific ability to conduct SUSMP review of Priority Projects in the context of approved watershed planning efforts and suggest inclusion of the following language in Tentative Order Section D.1.d:

“Where a JURMP has been prepared and adopted on a watershed or sub-watershed basis employing any adopted WURMP requirements and/or adopted SAMP or HCP requirements and provides for site design and treatment control standards employing fluvial geomorphologic planning principles (hydrology/geomorphology), such standards shall govern SUSMP review of Priority Projects with respect to the site design BMP and Treatment Control BMP requirements of this Order.”

2. Infiltration and Groundwater Protection. Page 22, D.1.c (6) (b): *All dry weather flows containing significant pollutant loads must be diverted from infiltration devices.*

Infiltration of pretreated dry weather flows is an important management method to prevent dry weather flow impacts in receiving waters. As this subsection is written in the Tentative Order, it is difficult to interpret the term “dry weather flows containing significant pollutant loads.” Although per the discussion in the fact sheet, discharge of dry weather flows would be allowed to infiltrate in other types of vegetated BMPs, it is likely that infiltration basins will be a primary component of hydromodification control systems. Accordingly, the requirement to “divert” dry weather flows from these basins will likely pose a problem. We suggest the Board clarify its intent regarding this provision in light of the benefits of infiltration basins in controlling hydromodification effects.

3. Hydromodification Control Requirements, page 36, D.1.h (3) (c) (ii) (b): *Modified channel conditions. Conditional waivers in situations where receiving waters are severely degraded or significantly hardened must include requirements for in-stream*

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*measures designed to improve the beneficial uses adversely affected by hydromodification. The measures must be implemented within the same watershed as the Priority Development Project.*

Please clarify that a project receiving a condition waiver for a hardened channel will have the ability to implement in-stream measures in a location offsite to the Priority Development Project but within the same watershed. The language is unclear as written.

4. Develop and Implement Specific Hydromodification Criteria. Page 36. D.1.h (4). *Criteria must be based upon findings from hydromodification publications produced by the Stormwater Monitoring Coalition (SMC) and Southern California Coastal Water Research Project (SCCWRP), as appropriate to conditions in the San Juan Hydrologic Unit. If SMC and SCCWRP publications include descriptive or numeric criteria applicable to the San Juan Hydrologic Units, then those criteria must be used.*

The Tentative Order requires that the hydromodification criteria, including descriptive or numeric criteria, must be based on findings from hydromodification publications produced by the Stormwater Monitoring Coalition (SMC) and Southern California Coastal Water Research Project (SCCWRP), as appropriate to conditions in the San Juan Hydrologic Unit. While research by SMC and SCCWRP may prove valuable to the study and mitigation of hydromodification impacts, RMV does not believe it is appropriate to require the blanket adoption of such research without the appropriate public review and comment. Such actions are contrary to the California Administrative Procedures Act (the "APA"). The APA specifically prohibits any state agency from issuing, utilizing, enforcing, or attempting to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule under the APA unless it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA (Gov't Code Section 11340.5(a)). Notably, the APA mandates that any proposed regulation must be published/distributed for public review and comment prior to adoption (Gov't Code Section 11346.4).

Specifically, the Board has indicated that the future hydromodification criteria, which must be based on SMC and SCCWRP findings, will be generally binding upon all future permittees under the Tentative Order. Thus, the criteria -- following establishment -- will become an intrinsic and inseparable part of the Board's Tentative Order and will represent a specific regulatory element to be enforced by the Board. Accordingly, the criteria are no different than the terms/provisions of the Tentative Order and must be available for public review and comment. Were the Board to adopt the criteria without the benefit of public review/comment (*i.e.*, without complying with the express provisions of the APA), the effectiveness and applicability of the criteria may be subject to legal challenge. State Water Resources Control Board v. Office of Administrative Law, 12 Cal. App. 4th 697 (1993) (if an agency rule looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated by the courts as a regulation).

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Furthermore, the Board's adoption of SMC and SCCWRP findings without review, consideration and express approval in accordance with the APA represents an unlawful delegation of authority to SMC and SCCWRP. Specifically, the delegation of the Board's legislative police power to the SMC and SCCWRP through the blind adoption of SMC and SCCWRP findings/criteria is expressly prohibited under California state law. Although the Board is entitled to accept a recommendation, report or set of criteria produced by the criteria, the Board may not declare that the recommendation, report or criteria represent the policy of the Board without the benefit of complying with applicable administrative laws. Kugler v. Yocum, 69 Cal 2d 371 (1968).

5. Construction component, page 41, D.2.d(1)(vi): *Limitation of grading to a maximum disturbed area as determined by each Copermittee before either temporary or permanent erosion controls are implemented to prevent storm water pollution. The Copermittee has the option of temporarily increasing the size of disturbed soil areas by a set amount beyond the maximum, if the individual site is in compliance with applicable storm water regulations and the site has adequate control practices implemented to prevent storm water pollution.*

RMV has provided comments to the State Board on the draft NPDES General Construction Permit (dated May 3, 2007) in which we detailed the practical implications of limiting grading to a specific acreage as set forth in the draft General Construction Permit. We have reviewed the section noted above in the Tentative Order and are unsure how this requirement would be implemented. Can the Board clarify or better explain how the Copermittee is to determine the "maximum disturbed area"?

6. Advanced Sediment Treatment, page 42, D.2.d(1)(c): *Each Copermittee must require implementation of advanced treatment for sediment at construction sites (or portions thereof) that are determined by the Copermittee to be an exception threat to water quality.*

Although the Tentative Order leaves it vague as to when it would be mandated, the use of Advanced Sediment Treatment (ATS) is being mandated in this permit. RMV has expressed its concerns to the State Board in the context of the NPDES General Construction Permit regarding the use of ATS and repeats its concerns as applicable to the Tentative Order.

The report by the State Water Resource Control Board's Stormwater Panel on Numeric Limits (SWRCB, 2006) included the following "reservations and concerns" on Active Treatment Systems:

*In considering widespread use of active treatment systems, full consideration must be given to whether issues related to toxicity or other environmental effects of the use of chemicals has been fully answered. Consideration should*

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*be given to longer-term effects of chemical use, including operational and equipment failures or other accidental excess releases.*

We at RMV share the same concerns with the Panel. The approved HCP addresses the needs for 32 Covered Species, including seven threatened or endangered species, among which are aquatic/riparian habitat dependent species such as the arroyo toad, least Bell's vireo and southwestern willow flycatcher. Through implementation of the Habitat Reserve Management and Monitoring Program, we will be managing our aquatic/riparian habitat for the benefit of these and other species. It seems contrary to us that the Board should mandate the widespread use of active treatment systems adjacent to Waters of the U.S./State that support designated beneficial uses of RARE and HABITAT when low risk, proven performance erosion control alternatives are available. Existing research has shown many types of erosion controls (e.g., compost blankets, straw mulch, hydraulic matrices, bonded fiber matrices, and many types of erosion control blankets) to be up to 95-99% effective. Given the unknowns related to toxicity or other environmental effects of the use of chemicals, the Board should reconsider the requirement for ATS and instead focus on the proper implementation and monitoring of proven BMPs that do not have unknown risks to sensitive species.

We appreciate the opportunity to provide these comments and look forward to the Board's responses. Should you have any questions regarding these comments, please feel free to contact Laura Coley Eisenberg of my staff at (949) 240-3363.

Sincerely,



Richard Broming  
Senior Vice President  
Planning & Entitlement

Cc: Jeremy Haas, SDRWQCB