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January 24, 2008

By E-mail and U.S. Mail

John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Subject: Revised Tentative Order No. R9-2008-0001; NPDES No. CAS0108740

Dear Mr. Robertus:

We are in receipt of the December 12, 2007 revised draft of the 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, Tentative Order No. R9-2008-0001; NPDES No. CAS0108740 (the "December 2007 Order"). The December 2007 Order was prepared and distributed for public comment by staff of the Regional Water Quality Control Board ("Regional Board"). The County of Orange, as the Principal Permittee, provides these comments for you, Regional Board staff, and members of the Regional Board to consider before the Regional Board adopts the Order. The Copermittees were involved in the development of these comments and the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Niguel, Laguna Woods, Laguna Hills, Mission Viejo, San Juan Capistrano and San Clemente have directed that they be recognized as concurring entities.

As you know, we submitted extensive comments on the initial February 9, 2007 Tentative Order on April 4, 2007 ("Initial Comments"). We also submitted comments on the July 6, 2007 Revised Tentative Order on August 22, 2007 ("August 2007 Comments"). For your convenience, our Initial Comments and August 2007 Comments are attached and incorporated herein. While you and your staff clearly have considered our comments, our principal legal and strategic technical concerns, as raised in our prior comments, remain largely unresolved in the December 2007 Order. Accordingly, our comments in this letter need to be considered in the context of our prior written comments.

In these comments we focus on two issues: (1) the requirements for facilities that extract, treat and discharge water from waters of the United States and back into waters of the United States ("FETDs") which initially were incorporated in the July 2007 Order (and which relate to our concerns with the Order's requirements regarding treatment control BMPs); and (2) staff's new attempt at justifying the provisions in the December 2007 Order that go beyond what is required

by federal law. We reserve the right to supplement these comments up until the time the Water Board convenes to adopt the permit.

I. Requirements for "FETDs" in the December 2007 Order are Not Supported by Law and Provide Disincentives to Improving Water Quality.

The County reiterates its opposition to the FETD requirements originally imposed in the July 6, 2007 Revised Tentative Order. As previously noted, these requirements are not supported by law and will impose unnecessary burdens on Copermittees for attempting to improve water quality.

A. The Regional Board Does Not Have Authority to Impose the Proposed FETD Requirements.

According to the December 2007 Revised Fact Sheet, discharges from FETDs are discharges of non-stormwater. December 2007 Revised Fact Sheet, IX.B. Directives, Section B.5, page 84. As noted in the County's previous comments, Federal law requires that Copermittees "effectively prohibit non-stormwater discharges into the [MS4]." CWA Section 402(p)(3)(B)(ii), 33 U.S.C. Section 1342(p)(3)(B)(ii). Provision B.5 of the December 2007 Order goes beyond this federal requirement. First, it would impose obligations on Copermittees for discharges not *into* the MS4, but *from* a FETD. Nothing in the Clean Water Act or federal regulations provides the Regional Board with such authority. Second, Provision B.5 would make Copermittees absolutely responsible for discharges of non-stormwater from FETDs that cause or contribute to conditions of erosion.[1] Under federal law, Copermittees only are responsible for *effectively prohibiting* discharges of non-stormwater. The December 2007 Revised Fact Sheet provides no authority for imposing requirements that go beyond the federal requirement.

In addition, to the extent FETDs are not part of the MS4, the Regional Board has no authority under the Clean Water Act to regulate them in an MS4 permit. Under the Clean Water Act, the Regional Board only can regulate discharges of pollutants in stormwater from the MS4 and discharges of non-stormwater into the MS4. As currently implemented, and as acknowledged in the December 2007 Revised Fact Sheet, FETDs remove pollutants that have already been discharged into receiving waters *from MS4s*. December 2007 Revised Fact Sheet, VIII.E. Findings, Discussion of Finding E.9, page 78. If this is the case, a FETD cannot be *part of* the MS4. A discharge from a FETD, therefore, is neither a discharge of pollutants *from an MS4* (which must be controlled to the maximum extent practicable) nor as noted above is it a discharge of non-stormwater *into an MS4* (which discharges must be effectively prohibited).

Finally, to the extent FETDs do not add any pollutants to waters of the U.S. that are not already present in the influent to the FETDs, there is no basis for regulating FETDs under the federal NPDES permit program. Under federal law, the Regional Board only can regulate discharges of pollutants, meaning the addition of pollutants to receiving waters. *See, e.g.,* CWA Section 502(12)(A), 33 U.S.C. Section 1362(12)(A). Where the pollutants being discharged from a

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[1] We note that Regional Board staff removed from the December 2007 Order the absolute prohibitions vis-à-vis contributing to conditions of pollution or nuisance. By removing this prohibition, we understand that a discharge from a FETD that causes or contributes to a condition of pollution or nuisance will be subject to the iterative approach described in Section A.3 of the Tentative Order. *See* Response to Comments II, Response No. 14, page. 13. As noted above, the County disagrees that FETDs necessarily are part of the MS4.

FETD simply are being passed through, without the addition of pollutants to the receiving water, there is no basis for regulating the discharge.

B. Copermittees Should Not be Unnecessarily Burdened for Attempting to Improve Water Quality.

As a policy matter, the Regional Board should encourage the use of FETDs, as well as other regional BMPs, as a tool in improving water quality. As noted in the County's previous comments, Copermittees have constructed FETDs as part of a comprehensive set of measures to address water quality impairments along beaches in Southern Orange County, specifically, impairments due to fecal indicator bacteria. With the help of State Board administered Clean Beach Initiative funding, FETDs have enabled a number of Copermittees to request 303(d) de-listing for fecal indicator bacteria for Orange County's beaches. Copermittees currently monitor these FETDs as part of their existing and comprehensive environmental monitoring program. Notwithstanding the success of the FETDs, the December 2007 Order would impose burdensome and unnecessary monitoring obligations on the facility's operator.[2] Moreover, to the extent a FETD is a form of regional BMP used to reduce the discharge of pollutants from the MS4. the current MS4 permit already addresses such BMPs through the iterative process; there is no need for separate FETD-specific requirements. Similarly, to the extent a FETD is more accurately considered a "diverted stream flow," there is no need for FETD-specific requirements because diverted stream flows already are addressed in Section B.2 of the current MS4 permit.

Accordingly, because the proposed FETD requirements clearly exceed the Regional Board's authority under federal law and would be unnecessarily burdensome and prescriptive, the County renews its request that the FETD requirements be deleted.

II. The December 2007 Order Imposes Requirements on Copermittees That Go Beyond Federal Law and Constitute Unfunded State Mandates.

In the previous drafts of the Tentative Order, Finding E.6 stated that requirements in the Order that were more explicit than federal regulations were nonetheless necessary to meet the federal MEP standard. *See, e.g.,* July 6, 2007 Revised Tentative Order, Finding E.6. This appeared to the County to be an attempt by Regional Board staff to get around the unfunded state mandate problem and other state law requirements; if the Order imposed state-law requirements, the Regional Board would have to comply with state-law economic analyses in adopting the Order and any state mandates would have to be funded.

In the December 2007 Order, Finding E.6 has been revised. It now explicitly provides that, for no less than five reasons, the Order does not constitute an unfunded mandate. Because the County disagrees with all five stated reasons, we ask that the Regional Board remove from the Order all requirements that go beyond federal law or, in the alternative, agree that all such mandates will be funded by the State. As an initial matter, we note that the issue of unfunded state mandates and municipal stormwater permits currently is before the California Commission on State Mandates. *See Commission on State Mandates, Test Claim Nos. 03-TC-04, 03-TC-*

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[2] The County acknowledges that preventing pollution at its source often is preferable to treating pollutants downstream before they can adversely affect beneficial uses in receiving waters. However, in a highly developed region, it may take many decades before real source reduction goals may be achieved. In the meantime, treatment control BMPs such as FETDs provide a very useful tool for improving water quality and should be encouraged, not discouraged, by the Regional Board.

19, and 03-TC-21. We reserve the right to supplement our comments once the Commission rules on this issue.

A. As Noted in the County's Previous Comments, the Order Does Impose Requirements that Go Beyond Federal Law.

The first reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that the Order implements only federally mandated requirements. This is the same argument made in the prior drafts of the Order. In the County's previous comments, we pointed out that, to the extent the Tentative Order imposed requirements that go beyond what is required by federal law, the Regional Board is required to consider and address among other things the constitutional prohibition on unfunded state mandates. The County provided examples of at least two provisions or areas where the Tentative Order does, in fact, impose requirements that go beyond federal law – the Business Plan requirement and requirements that Copermittees prohibit and/or control discharges into the MS4. The December 2007 Order and Fact Sheet do not address these areas.[3] Instead, the December 2007 Fact Sheet simply reasserts that the Order only implements federally mandated requirements of section 402(p)(3)(B) of the Clean Water Act: (1) to effectively prohibit non-stormwater discharges into the MS4, (2) to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, and (3) *to include such other provisions as the State determines appropriate for the control of such pollutants.*

The County agrees that the first two provisions impose federally mandated requirements. The third provision, however, is not a federal mandate. To the extent it is a separate provision of CWA Section 402(p)(3)(B),[4] it is a discretionary provision; the State *may* impose such additional requirements, but it is not required to do so. *See, e.g., Defenders of Wildlife v. Browner,* 191 F.3d 1159 (9th Cir. 1999). To the extent the State does impose such discretionary requirements in the Order, they cannot be said to be federally mandated.

B. The Fact That Industrial Dischargers are More Strictly Regulated Than Municipal Dischargers is Irrelevant to the Unfunded Mandate Issue.

The second reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that the Order regulates discharges of waste from municipal sources more leniently than the Regional Board could regulate discharges from industrial sources. The County fails to see how this statutory distinction between the regulation of municipal and industrial dischargers affects whether the Order imposes requirements on Copermittees that go beyond federal law and, therefore, must be funded by the State.

C. Copermittees Do Not Necessarily Have the Requisite Authority to Levy Fees to Pay For Compliance With the Order.

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[3] The December 2007 Fact Sheet does concede that federal law only requires that Copermittees control the discharge of pollutants in stormwater *from the MS4* to the maximum extent practicable, not discharges *into the MS4.*

[4] The question of whether the "third" provision allows the State discretion to impose conditions that go beyond the MEP standard, or only the discretion to impose conditions to achieve the MEP standard, is a continuing debate. *See, e.g., Building Ind. Assn. of San Diego County v. State Water Resources Control Board*, 124 Cal.App.4th 866 (2004).

The third reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that Copermittees have the authority to levy service fees to pay for compliance with the Order. Pursuant to Government Code Section 17556(d), if a local agency can levy service fees to pay for a State mandate, the State is not required to provide funding for the mandate.

In support for this position, the December 2007 Fact Sheet cites to *County of Fresno v. State of California,* 53 Cal.3d 482 (1991). That case held that Section 17556(d) is facially constitutional under Article XIIIB, Section 6 of the State Constitution. The dispute in *County of Fresno* arose over the implementation of the Hazardous Materials Release Response Plans and Inventory Act ("Act"), which required local governments to implement its provisions. The Act, however, also authorized the local governments to collect fees from hazardous material handlers to cover the costs the local governments might incur in implementing the Act. *County of Fresno*, 53 Cal.4th at 485. Thus, the same legislation that imposed the mandate on the local governments also authorized them to levy fees to pay for the mandated service. In this context, the court found Section 17556(d) facially constitutional.[5] It is not clear that Section 17556(d) would withstand a challenge as applied to the current situation, where the Order imposing the state mandate does not authorize the Copermittees to levy fees to pay for the mandated service.

Moreover, Copermittees do not necessarily have the authority to levy service fees to pay for the State mandate. The December 2007 Fact Sheet presumes, but makes no specific findings, that Copermittees have the authority to levy such service fees. In fact, to the extent such service fees are "property-related," Copermittees can only levy them once approved by the affected property owners or electorate. *See* California Constitution, Article XIIID, Section 6(c); *Howard Jarvis Taxpayers Ass'n, v. City of Salinas*, 98 Cal. App. 4th 1351 (2002). The *City of Salinas* case dealt precisely with this issue. The City of Salinas established a fee to recover costs related to compliance with its MS4 Permit. The fee was based largely on the amount of impervious area on a developed parcel. The Court held that this fee was property-related and, thus, subject to voter-approval requirements. 98 Cal. App. 4th at 1356. Only if the fee was a use-based charge, directly based on use of city services (such as the metered use of water), could the fee avoid the voter-approval requirements of Article XIIID. The City of Salinas' method to allocate the fee based on the amount of impervious area so as to assure that the fee charged would be proportional to the burden being placed on the city's storm drain system was not sufficiently direct to qualify as a use-based fee exempt from the requirements of Article XIIID. 98 Cal. App. 4th at 1355.[6]

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[5] The authority to levy fees also was at issue in *Connell v. Santa Margarita Water District*, 59 Cal. App. 4th 382 (1998). In that case, as in *County of Fresno*, there was no question as to whether the local agency had authority to levy service fees to pay for the increased costs. A provision in the Water Code provided local water districts the authority to levy fees to pay for the increased costs resulting from the new wastewater regulation at issue.

[6] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830 (2001), cited in the December 2007 Fact Sheet, is not to the contrary. That case simply held that a rental inspection fee imposed on landlords who rent their property is not imposed solely because of property ownership; rather, it is imposed because the property is being rented. Therefore the fee is exempt from the voter-approval requirements of Article XIIID. If the rental ceases, the fee ceases, whether or not property ownership remains in the same hands. 24 Cal. 4th at 838. In the case of stormwater, the need to regulate stormwater runoff continues regardless of the use of the property. Even if a developed property was vacant, stormwater would continue to flow into the MS4. While the use of the property may impact the quality of stormwater runoff, it is the property itself that must be regulated.

Because stormwater running off of real property and into the MS4 is not capable of precise measurement, it would be impossible to meet the direct usage requirements of *City of Salinas.* Accordingly, without voter approval, Copermittees do not have the authority to levy service fees to pay for compliance with the Order. Section 17556(d), thus, is not dispositive on the unfunded mandate issue.

D. Copermittees Do Not Have a Real Choice.

The fourth reason provided in the December 2007 Fact Sheet for why the Order does not constitute an unfunded mandate is that Copermittees chose to apply for coverage under the Order; they have "voluntarily availed themselves of the permit." December 2007 Fact Sheet, Section VIII.E., Discussion of Finding E.6., page 73. Thus, according to the Fact Sheet, Copermittees have not been mandated to do anything. The Fact Sheet suggests that, in lieu of coverage under the Order, Copermittees could cease all discharges from their MS4s. Alternatively, instead of a program-based stormwater permit, Copermittees could seek a permit based on numeric effluent limits.

The County respectfully disagrees that these suggested alternatives provide Copermittees with any real choice. A permit based on numeric limits clearly would go beyond what is required by federal law and trigger even more unfunded mandate issues than the proposed Order. To cease discharging from their MS4s is impossible and, thus, not a real choice. Accordingly, it is disingenuous for Regional Board staff to suggest that Copermittees have voluntarily chosen coverage under the Order and, thus, the Order cannot be considered a state mandate.[7]

E. The Porter Cologne Water Quality Control Act May Predate Article XIIIB, Section 6 of the State Constitution But the Mandates in the Tentative Order Do Not.

The final reason given in the December 2007 Fact Sheet for why the Order does not impose unfunded mandates also is unpersuasive. Section 6(a)(3) of Article XIIIB of the State Constitution provides that the Legislature does not need to provide funding for legislative mandates enacted prior to January 1, 1975. The Porter-Cologne Water Quality Control Act was enacted in 1970. However, it is not the 1970 legislation that imposes the mandates at issue here, it is the proposed Order of the Regional Board, a state agency. Section 6(a) explicitly requires that the State fund mandates of any state agency.

In sum, because none of the five reasons discussed in the December 2007 Fact Sheet provide support for the finding that the Order does not constitute an unfunded state mandate, the County renews its request that the Regional Board remove from the Order all requirements that go beyond federal law or, in the alternative, provide State funding for all such mandates.

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[7] The stormwater permitting cases cited in the December 2007 Fact Sheet do not support Regional Board staff's position. Both cases address the issue of "choice" in the context of Tenth Amendment challenges, not unfunded state mandate challenges. The issue in these Tenth Amendment decisions is whether the available choices all similarly require the permittees to regulate third parties. *See City of Abilene v. U.S. EPA,* 325 F.3d 657 (5th Cir. 2003) and *Environmental Defense Center, Inc. v. United States Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003).

Thank you for your attention to the County's concerns with the December 2007 Order. As mentioned previously, we appreciate the effort you and your staff have devoted to the development of the fourth-term MS4 permit for the Orange County Program. We look forward to discussing the Order with you and with Regional Board members at the public hearing on February 13, 2008.

Thank you for your attention to our concerns. Please contact me directly if you have any questions. For technical questions, please contact Chris Crompton at (714)834-6662 or Richard Boon at (714)973-3168.

Sincerely,

FOR

Mary Anne Skorpanich, Director
Watershed & Coastal Resources Division

Attachment A: Letter of April 4, 2007
Attachment B: Letter of August 22, 2007

cc: Technical Advisory Committee
Permittees