

State of California
Regional Water Quality Control Board
San Diego Region

EXECUTIVE OFFICER SUMMARY REPORT
Wednesday, December 13, 2006

- ITEM: 10
- SUBJECT: Consideration of adoption of the San Diego County Municipal Storm Water Permit, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority (NPDES Permit No. CAS0108758). A public hearing for this item was held June 21, 2006: Oral comments will be accepted on modifications to the Tentative Order that have been made following the public hearing. Time allotted for oral comments may be limited at the discretion of the Chairman. The written comment period for this item is closed. (Tentative Order No. R9-2006-0011) (*Phil Hammer*)
- PURPOSE: To discuss and consider adoption of Tentative Order No. R9-2006-0011. Also, if appropriate, to receive limited oral comments on modifications made to the Tentative Order following the public hearing held June 21, 2006.
- PUBLIC NOTICE: A public hearing on the Tentative Order was held June 21, 2006. A revised Tentative Order, with supporting documents and a Notice of Availability, was issued to interested parties on August 30, 2006. Notification of the issuance of the revised Tentative Order was also posted on the Regional Board's webpage on August 30, 2006 and in the San Diego Union Tribune on September 8, 2006. The notification indicated the Regional Board's intent to consider adoption of the Tentative Order at the December 13, 2006 Regional Board meeting. The December 13, 2006 Regional Board meeting Agenda notified interested parties that adoption of the Tentative Order would be considered.

DISCUSSION:

Overview

Tentative Order No. R9-2006-0011 (Tentative Order) is the proposed reissuance of the San Diego County Municipal Storm Water Permit (Order No. 2001-01). Like many state Waste Discharge Requirements, the Tentative Order also serves as a federal National Pollutant Discharge Elimination System permit. The Tentative Order requires the County of San Diego, the 18 incorporated cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority (Copermittees) to reduce the discharge of pollutants from their municipal separate storm sewer systems (MS4s). Pollutant discharge reduction is accomplished through the Copermittees' implementation of comprehensive urban runoff management programs. These urban runoff management programs are to be implemented on jurisdictional, watershed, and regional bases, depending upon the scale of the water quality issues being addressed.

The Tentative Order has undergone an extensive development and review process spanning over two years. Through the implementation of this process, the vast majority of the technical issues concerning the Tentative Order's specific requirements have been resolved. For example, the Copermittees provided only eight relatively minor technical comments on the latest iteration of the Tentative Order, in contrast to their 93 substantive technical comments on the initial version of the Tentative Order.

While there remains some disagreement on a few technical issues, most comments at this point in the permit development and adoption process focus on legal issues. The legal issues being raised are generally not new. Most of these legal issues were previously raised during administrative and legal challenges to the current San Diego County Municipal Storm Water Permit (Order No. 2001-01). A wide array of requirements in the current Order were challenged all the way up to the State Supreme Court level, with the vast majority of the requirements

successfully withstanding administrative and legal review. This is significant because the Tentative Order incorporates the same regulatory approach as Order No. 2001-01. Most of the Tentative Order's requirements simply expand upon or refine the pre-existing requirements of Order No. 2001-01.

The extensive public process followed in drafting the current Tentative Order has provided ample opportunity for legal arguments to be aired. Each legal comment has been reviewed and responded to in detail. Moreover, many of the legal comments have been reiterated during each of the progressive stages of the reissuance process, and therefore have been formally responded to on multiple occasions. While every effort has been made to appropriately address legal issues where possible, some of the legal arguments that have been raised cannot be addressed in the Tentative Order in a manner that would preserve the Tentative Order's regulatory approach and effectiveness. In these cases, however, the Regional Board has ample legal authority to adopt the Tentative Order's requirements that are at issue. The Regional Board's legal authority in relation to the key legal issues that have been raised is discussed in detail in Supporting Document # 7, "Key Issues Regarding Adoption of Tentative Order No. R9-2006-0011." Detailed discussion of other legal issues can be found in the Responses to Comments documents (Supporting Documents # 3 and 6).

Process and Documentation

Following over a year of negotiation and multiple workshops with interested parties, the Tentative Order was presented to the Regional Board on June 21, 2006 for a public hearing. At that time, the Regional Board accepted written and oral comments on the Tentative Order. Following the Regional Board's consideration of all comments, the Regional Board closed the public hearing on the Tentative Order.

Staff was then directed to respond to all written comments and modify the Tentative Order where warranted. Staff was also directed to reissue the

revised Tentative Order for a second 60-day round of public review and comment on the revisions.

The Tentative Order presented for consideration of adoption is the result of this lengthy process. The Tentative Order dated December 13, 2006 (Supporting Document # 1) is the most current iteration of the Tentative Order. It incorporates modifications made in response to both rounds of comments. Modifications made in response to the most recent round of comments are found in underline/strikeout format.

In conjunction with the most current Tentative Order, the revised "Fact Sheet/Technical Report for Tentative Order No. R9-2006-0011," dated December 13, 2006, is also provided (Supporting Document # 2). Since the second round of comments resulted in virtually no modifications to the Fact Sheet, all modifications that have been made to the Fact Sheet following the public hearing are provided in underline/strikeout format.

The most recent comments made on the Tentative Order, together with responses to those comments, are also presented (Supporting Documents # 3 and 4). These are comments and responses which have not previously been provided to the Regional Board.

In addition to the current documentation discussed above, past documents reflecting the initial round of comments and responses are also included as Supporting Documents to this Executive Officer Summary Report. The first revision of the Tentative Order, modified in response to the first round of comments and dated August 30, 2006, is provided as Supporting Document # 5. The first "Responses to Comments" document, which responds to comments received by the Regional Board at the June 21, 2006 public hearing, is provided as Supporting Document # 6.

Documentation that will help identify and explain the key issues concerning adoption of the Tentative Order is also included. While all issues that have been raised by commenters are responded to in detail in

the “Responses to Comments” documents, some of the key issues have been collected into one document, titled “Key Issues Regarding Adoption of Tentative Order No. R9-2006-0011” (Supporting Document # 7). This document briefly describes commenter’s issues with the Tentative Order and provides responses that address the issues. In addition, because the Tentative Order includes requirements that have been modified from the current San Diego County Municipal Storm Water Permit (Order No. 2001-01), the most significant modifications are described in detail in the document titled “Discussion of Significant Modifications to the Directives of Order No. 2001-01 Found in Tentative Order No. R9-2006-0011” (Supporting Document # 8). This document describes the most significant changes that were made and provides the rationale for each of the changes. Supporting Document # 9 is the Executive Officer Summary Report for the June 21, 2006 public hearing, which provides background information on the regulatory approach incorporated into the Tentative Order. Finally, Supporting Document # 10 is a copy of a recent court decision confirming the Regional Board’s exemption from conducting California Environmental Quality Act review when adopting National Pollutant Discharge Elimination System permits.

KEY ISSUES:

Many issues have been resolved as the Tentative Order has evolved during the comment and response process. Listed below are the remaining key issues. These issues are discussed in detail in Supporting Document # 7, “Key Issues Regarding Adoption of Tentative Order No. R9-2006-0011.”

The first four key issues listed are predominantly legal issues:

1. Commenters contend that the urban runoff management plans required by the Tentative Order are functionally equivalent to the requirements of the Tentative Order, and therefore must be approved by the Regional Board following a public hearing.
2. Commenters contend that the requirements of the Tentative Order exceed federal law, and therefore

constitute an unfunded state mandate.

3. Commenters contend that the Tentative Order's Total Maximum Daily Load section inappropriately includes numeric effluent limits.

4. Commenters contend that the Regional Board must comply with the California Environmental Quality Act when adopting the Tentative Order.

The remaining three key issues are predominately technical issues:

5. Commenters contend that the Tentative Order does not require treatment of urban runoff from a wide enough range of development projects.

6. Commenters contend that the Tentative Order's requirements for implementation of low-impact development strategies at development projects are inadequate and do not meet the maximum extent practicable standard.

7. Commenters contend that the Tentative Order does not provide adequate time to develop various components of the monitoring program.

LEGAL CONCERNS:

See Key Issues # 1 – 4 above. Additional legal issues are discussed in Supporting Documents # 3 and 6.

SUPPORTING DOCUMENTS:

1. Tentative Order No. R9-2006-0011 dated December 13, 2006. Proposed renewal of Order No. 2001-01. This document has been modified in response to both rounds of comments. This is the document the Regional Board is to consider for adoption.

2. Fact Sheet/Technical Report for Tentative Order No. R9-2006-0011 dated December 13, 2006. A comprehensive document providing background information and justification for the Tentative Order. It has been modified from its original March 10, 2006 version to include additional legal authority citations.

3. Responses to Comments II. A document responding to the second round of comments received on the Tentative Order.
4. Written Comments from Copermitttees and Interested Parties. The second round of comment letters received on the Tentative Order. The first round of comment letters were provided with the Agenda package for the June 21, 2006 public hearing on the Tentative Order.
5. Tentative Order No. R9-2006-0011 dated August 30, 2006. Proposed renewal of Order No. 2001-01. This document includes modifications made in response to the first round of comments.
6. Responses to Comments. A document responding to the first round of comments received on the Tentative Order.
7. Key Issues Regarding Adoption of Tentative Order No. R9-2006-0011. A document discussing the key technical and legal issues currently remaining regarding the Tentative Order.
8. Discussion of Significant Modifications to the Directives of Order No. 2001-01 Found in Tentative Order No. R9-2006-0011. A document discussing the significant changes that have been made to the requirements of the current permit (Order No. 2001-01) in Tentative Order No. R9-2006-0011.
9. Executive Officer Summary Report dated June 21, 2006. The Executive Officer Summary Report for the June 21, 2006 public hearing on the Tentative Order. This document includes background information on the regulatory approach incorporated into the Tentative Order.
10. County of Los Angeles et al. v. California State Water Resources Control Board, et al. California Court of Appeal, Second Appellate District decision finding the Regional Board to be exempt from conducting California Environmental Quality Act review during adoption of National Pollutant

Discharge Elimination System permits. The pertinent discussion begins on page 22.

In addition to the above Supporting Documents, the Regional Board was provided with the following Supporting Documents with the Executive Officer Summary Report and Supplemental Executive Officer Report for the June 21, 2006 public hearing on the Tentative Order:

1. Tentative Order No. R9-2006-0011 dated March 10, 2006. Proposed renewal of Order No. 2001-01. Released for public review and comment on March 13, 2006.
2. Fact Sheet/Technical Report for Tentative Order No. R9-2006-0011 dated March 10, 2006. A comprehensive document providing background information and justification for each of the changes to Order No. 2001-01 included in the Tentative Order.
3. Summary of the Public Process for Reissuance of the San Diego County Municipal Storm Water Permit (Tentative Order No. R9-2006-0011). A document describing the public process undertaken in the development and reissuance of the Tentative Order. Key issues are also briefly discussed.
4. Summary of Modifications to the Directives of Order No. 2001-01 Found in Tentative Order No. R9-2006-0011. A document in table format summarizing the significant changes made to the directives of Order No. 2001-01, as found in Tentative Order No. R9-2006-0011.
5. Regional Board Letter to Copermittees Responding to Their Preliminary Comments. A May 15, 2006 letter to the Copermittees responding to their preliminary comments raised at the first public workshop on the Tentative Order. The discussions included in this letter served as the basis for further discussions at the second public workshop.
6. Preliminary Responses to Questions on Tentative Order No. R9-2006-0011 from the Building Association of San Diego County. A document

providing preliminary responses to questions raised by BIA at the first public workshop on the Tentative Order.

7. Regional Copermittee Comments on Tentative Order No. R9-2006-0011: 4/25/2006 – Priority Issues for April 26, 2006 Workshop. A table created by the Copermittees identifying their initial main issues with the Tentative Order.

8. County of San Diego Proposed Permit Language. A November 1, 2005 County of San Diego submittal which includes language proposed for use in the Tentative Order.

9. Written Comments from Copermittees. The first round of comment letters from the Copermittees on the Tentative Order.

10. Written Comments from All Other Interested Parties. The first round of comment letters from interested parties on the Tentative Order.

RECOMMENDATION(S): Adoption of Tentative Order No. R9-2006-0011 is recommended.