

EXECUTIVE OFFICER SUMMARY REPORT
February 13, 2008

ITEM: 7

SUBJECT: PUBLIC HEARING: Reissuance of NPDES 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 Orange County Flood Control District, and the incorporated Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano within the San Diego Region (South Orange County Municipal Storm Water Requirements). The California Regional Water Quality Control Board, San Diego Region (Regional Board) will consider issuance of Tentative Order No. R9-2008-0001 (formerly Tentative Order No. R9-2007-0002) containing the South Orange County Municipal Storm Water Requirements. A public hearing for this item was held before a Panel of the Regional Board, on April 11, 2007. (Tentative Order No. R9-2008-0001, NPDES Permit No. CAS0108740) (Jeremy Haas)

The public review and comment period for the revised Tentative Order began on December 12, 2007 with the public distribution of the revised Tentative Order. Only written comments received by 5:00 p.m. on January 24, 2008 will be provided to the Regional Board members for their consideration prior to the hearing. Oral comments will be accepted on modifications to the Tentative Order that have been made following the April 11, 2007 hearing. Time allotted for oral comments may be limited at the discretion of the Regional Board presiding officer.

PURPOSE: Today's meeting provides the Regional Board with the opportunity to hear public testimony on revisions to Tentative Order No. R9-2008-0001 and consider issuance of the Order as modified.

PUBLIC NOTICE: Interested persons and the general public have been notified in accordance with California Water Code Section 13167.5,

the State Water Resources Control Board Administrative Procedures Manual (Chapter 1), and Code of Federal Regulations Title 40 CFR Part 25.

- A notice of this item was distributed to all known interested persons and posted on the Regional Board web site on January 8, 2008;
- A notice of this meeting was also posted for the general public in the Orange County Register on January 11, 2008; and
- A notice was included on the February 13, 2008 Regional Board meeting agenda.

DISCUSSION:

Tentative Order No. R9-2008-0001 is the proposed reissuance of the Orange County Municipal Storm Water Permit (Order No. 2002-01). The Tentative Order serves as both Waste Discharge Requirements and a federal National Pollutant Discharge Elimination System permit.

The Tentative Order would, if adopted, require the County of Orange, the Orange County Flood Control District, and the 11 incorporated cities of Orange County in the San Diego Region (Copermittees) (Supporting Document No. 1) to reduce the discharge of pollutants from their municipal separate storm sewer systems (MS4s) to the maximum extent practicable (MEP).

Background and Permitting Approach Summary

The revised Tentative Order No. R9-2008-0001 (Supporting Document No. 2) being considered today was distributed for review and comment on December 12, 2007. This is the second revision based further on public comments.

Nearly a year ago, Tentative Order No. R9-2008-0001 was initially distributed on February 9, 2007 as Tentative Order No. R9-2007-0002. A public workshop was held on March 12, 2007, and a public hearing on the Tentative Order was held before a Panel of four Regional Board members on April 11, 2007 at a meeting in the City Council chambers of the City of Mission Viejo.

At the April 11, 2007 public hearing, the Regional Board panel directed staff to provide written responses to significant comments and distribute a revised Tentative Order approximately 45 days in advance of the meeting at which the full Regional Board would consider adoption of the

revised Tentative Order. The Board panel further directed staff to accept written comments on subsequent revisions made to the Tentative Order. The panel, however, did not specifically direct staff to provide written responses to those later comments. Responses to all significant comments on the revisions to date, however, will be provided in writing and/or verbally to the Regional Board.

On July 6, 2007, a revised Tentative Order, with a revised Fact Sheet and responses to comments, was distributed to interested persons and the public. Comments were accepted on the revisions until August 25, 2007. Consideration by the Regional Board of the revised Tentative Order was scheduled to occur in September 2007, but was delayed until a quorum of voting members would be present. The delay provided an opportunity to distribute the second revised Tentative Order.

The second revised Tentative Order (Supporting Document No. 2) was distributed to interested persons and the general public on December 12, 2007. A table of proposed revisions (Supporting Document No. 3), responses to comments (Supporting Document No. 4), and a revised Fact Sheet/Technical Report (Supporting Document No. 5) were also distributed. A notice of today's public meeting (Supporting Document No. 6) was distributed on January 8, 2008. All these documents were concurrently posted on the Regional Board web site. A timeline of the background process is provided as Supporting Document No. 7.

Availability of Documents

The agenda materials for the April 11, 2007 Panel Hearing are available from the Regional Board meetings web page: <http://www.waterboards.ca.gov/sandiego/rb9board/Apr-07.html>.

Other material related to the Tentative Order is available from the Regional Board web page dedicated to the Orange County MS4 Permit: http://www.waterboards.ca.gov/sandiego/programs/oc_storm_water.html. This web page includes copies of all comments, responses to comments, and revisions to the Tentative Order and Fact Sheet.

Revisions to Tentative Order No. R9-2008-0001

Revisions to Tentative Order No. R9-2008-0001 made since the April 11, 2007 Regional Board panel hearing are outlined in Supporting Document No. 3. Key changes are summarized as follows:

1. Facilities that extract, treat, and discharge (FETDs) - Finding E.9 and related requirements (Section B.5 and Monitoring Program Section II.C.4) have been added to address discharges from facilities that extract water from waters of the U.S. and subject it to treatment for pollutants derived from urban runoff.
2. In-stream best management practices (BMPs) - Finding E.7 has been revised to clarify specific circumstances under which BMPs may be implemented within waters of the United States. For instance, FETDs are allowed under certain conditions. Constructed treatment wetlands may be located within waters of the U.S. provided the quality of the source water is sufficient to protect the values and functions of the water body and the treatment wetlands do not adversely affect beneficial uses.
3. Vectors - Several revisions have been made throughout the Tentative Order to address vector-related concerns.
4. Hydromodification Controls (Section D.1.h) -
 - a) The eligibility for hydromodification control waivers for redevelopment projects has been reduced to a 10-percent reduction in impervious area from a 30-percent reduction;
 - b) The timeframes for developing interim and specific hydromodification criteria have been extended to one year from six months and to three years from two years, respectively.
5. Spill response (Section D.4.h) - This section has clarified that management measures and procedures must be implemented to prevent and respond to spills. Commenters had misinterpreted the original language to require that Copermitees prevent all spills and be solely responsible for all cleanup activities.

6. Watershed Urban Runoff Programs (Section E) - Requirements to implement four of six watershed management programs have been deleted. The remaining watershed units include the Aliso Creek and San Juan Creek watersheds only.
7. Fiscal Analysis (Section F) - The requirement to describe fiscal benefits of the urban runoff program has been deleted.
8. Reporting (Section H) - Approximately 36 percent of the previous tentative annual reporting requirements have been removed and replaced with a requirement that each Copermitttee retain documentation, available for review, that Permit requirements have been met.

Comments on the Revised Tentative Order

1. Original Tentative Order. Written comments on the original Tentative Order were accepted through April 25, 2007. Written comments received prior to the April 4, 2007 Panel Hearing were provided to the Board members in the agenda materials for that date. Written comments received after April 5, 2007 are provided in Supporting Document No. 8.
2. First Revised Tentative Order. All written comments received before August 23, 2007 on the July 2007 revised Tentative Order are provided in Supporting Document No. 9.
3. Second Revised Tentative Order. All written comments received through January 24, 2008 on the second revised Tentative Order are provided in Supporting Document No. 10. Written responses to these comments have not been prepared. Significant issues raised by these comments will be addressed verbally at today's meeting.

Written comments on the second revised Tentative Order received before January 24, 2008 were submitted by three municipal Permittees and six third parties. These comments are currently under review. An outline of key issues is provided below. It is anticipated that there may be some proposed revisions to the second revised Tentative Order provided in the Supplemental Executive Officer's Summary Report following review of the comments.

Procedures for Today's Meeting

The purpose of today's item is to consider adoption of Tentative Order No. R9-2008-0001, as modified. Oral comments will be accepted on modifications made to the Tentative Order following the initial public hearing. Staff will provide verbal responses to significant public comments raised on revisions to the Tentative Order.

KEY ISSUES:

Based on a preliminary review of written comments submitted on the second revised Tentative Order, the following issues are of continued significant concern: Additional issues may be identified in the Supplemental Executive Officer's Summary Report following review of the written comments provided in Supporting Document No. 8.

1. Facilities that extract, treat, and discharge (FETDs) – The Copermittees are concerned with requirements to address pollutants other than the one(s) specifically targeted by the facility. The principal concern is that the Tentative Order requirements would restrict the use of FETDs, thus limiting opportunities for municipalities to improve the quality of surface waters.
2. Regional Storm Water Treatment – Municipalities and the building industry reiterate concerns that the revised Tentative Order restricts the use of regional, shared practices to remove pollutants from storm water discharges. Issues associated with the use of regional controls include the placement of BMPs within waters of the U.S. (Finding E.7) and the use of FETDs (Finding E.9). Regional treatment measures are not prohibited as long as treatment occurs prior to the discharge of pollutants to receiving waters. Finding E.7 has been revised to clarify the circumstances under which in-stream BMPs may be considered appropriate.
3. Hydromodification Criteria – Commenters support requirements to develop hydromodification control criteria. However, third parties contend that the requirement to base criteria on a future report by the Stormwater Monitoring Coalition (Section D.1.h.4) are inappropriate without public and Regional Board review of that report. Additionally, some commenters object to hydromodification control waiver provisions that require in-stream measures for projects discharging to degraded streams (Section D.1.h.3.c.ii).

However, a broad exemption for projects that discharge to waters that have been modified to accommodate storm flows is contrary to the strategy of incremental improvements to urban receiving waters during redevelopment.

4. Storm Water Business Plan - Several Copermittees remain opposed to preparing a Municipal Storm Water Funding Business Plan (Section F.3) that identifies a long-term funding strategy for program implementation. This requirement is intended to improve long-term viability of urban runoff management programs by identifying sources of funding associated with implementing proposed management measures.
5. Role of the Drainage Area Management Plan (DAMP) - Municipalities contend that the DAMP should serve as the primary component of the Order. The DAMP serves as a collection of model program components from which Copermittees have chosen to base their own program components. The DAMP was prominently considered when drafting the Tentative Order, and, where appropriate, measures proposed in the DAMP have been incorporated into the Tentative Order.
6. Low-Impact Development – The U.S. Environmental Protection Agency and Natural Resources Defense Council recommended that requirements pertaining to low-impact development (LID) should include specific performance criteria. The Tentative Order establishes narrative standards based on the inherent variability of runoff processes and receiving waters in the permit area.
7. Federal Regulations And Unfunded State Mandates - Several Copermittees and the Building Industry Association assert that the requirements within the Tentative Order represent unfunded mandates subject to subvention under Article XIII B, Section (6) of the California Constitution. However, the Tentative Order does not constitute an unfunded local government mandate subject to subvention. Finding E.6 and the Fact Sheet have been revised for clarification.

LEGAL CONCERNS: None.

SUPPORTING
DOCUMENTS:

1. Map of Orange County within the San Diego Region
2. Revised Tentative Order No. R9-2008-0001, with attachments
3. Table of Revisions within the revised Tentative Order
4. Responses to comments received on Tentative Order No. R9-2008-0001
5. Revised Fact Sheet / Technical Report for Tentative Order No. R9-2008-0001
6. Notice of Public Meeting and Revised Tentative Order
7. Timeline of Events
8. Comments received between April 5, 2007 and April 25, 2007 on the original Tentative Order
9. Comments received before August 23, 2007 on the first revised Tentative Order
10. Comments received on January 24, 2008 on the second revised Tentative Order
11. Audio recording of the April 11, 2007 Panel Hearing. This item is provided to Board Members Weber and Rayfield, who were appointed subsequent to the first hearing on this reissuance.

RECOMMENDATION:

It is recommended that the Board receive public testimony and adopt Tentative Order No. R9-2008-0001 as revised, as modified.