

EXECUTIVE OFFICER SUMMARY REPORT
February 11, 2015

ITEM: 10

SUBJECT: NPDES Permit Amendment: An Order to amend Order No. R9-2013-0001, NPDES No. CAS0109266, *National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region* (Regional MS4 Permit or Permit). The amendment includes, but is not limited to, incorporation of the County of Orange, several cities of South Orange County, and the Orange County Flood Control District as Copermittees. (Tentative Order No. R9-2015-0001) (*Laurie Walsh and Christina Arias*)

PURPOSE: To consider adoption of Tentative Order No. R9-2015-0001 amending Order No. R9-2013-0001 (**Supporting Document 1**).

RECOMMENDATION: Adoption of Tentative Order No. R9-2015-0001 is recommended.

KEY ISSUES:

1. An administrative finding has been added to the Tentative Order announcing the San Diego Water Board's intent to consider incorporation of an alternative compliance option, for complying with receiving water limitations, into the Regional MS4 Permit during the Riverside County Copermittees' MS4 Permit reissuance proceedings scheduled for FY 2015-16.
2. The Tentative Order was revised to include a definition of "prior lawful approval" in the Regional MS4 Permit to provide clarity on how the term should be interpreted in determining structural BMP requirements for Priority Development Projects.
3. Pursuant to the federal Clean Water Act and regulations adopted thereunder, Attachment E of Attachment 1 of the Tentative Order incorporates water quality-based effluent limitations (WQBELs) consistent with the assumptions and requirements of approved Total Maximum Daily Load

(TMDL) wasteload allocations. The Copermittees object to the inclusion of WQBELs because they do not believe the WQBELs are achievable.

PRACTICAL VISION: The Regional MS4 Permit directly implements several chapters of the San Diego Water Board's Practical Vision entitled *Healthy Waters, Healthy People*. Multiple provisions of the Permit pertain to the development and implementation of strategies to achieve healthy waters and recovery of stream, wetlands, and riparian ecosystems. These strategies implement an outcome-based approach, with a focus on achieving measureable reductions in MS4 pollutant discharges and improvements in receiving water quality. By extending the coverage of the Regional MS4 Permit to incorporate the Orange County Copermittees, the Tentative Order will enable these Copermittees to more flexibly deploy resources to achieve goals that will yield the greatest water quality improvements.

DISCUSSION: The County of Orange, Orange County Flood Control District and the 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 (collectively referred to as Orange County Copermittees) are currently regulated by MS4 Permit Order No. R9-2009-0002, which expired on December 16, 2014. The Orange County Copermittees jointly submitted a Report of Waste Discharge (RoWD) in application for MS4 permit reissuance on May 20, 2014. A map showing the boundaries of these municipalities and the San Diego Water Board's jurisdiction is provided in **Supporting Document 2**. The recommendations set forth in the RoWD for revised permit requirements are largely consistent with the requirements of the Regional MS4 Permit adopted by the San Diego Water Board on May 8, 2013.

The Tentative Order proposes to amend the Regional MS4 Permit to incorporate the Orange County Copermittees. The Tentative Order also proposes to amend the Regional MS4 Permit to address a variety of other issues including: 1) Regional Water Board designation to consolidate regulation of Phase I MS4 discharges for the Cities of Laguna Hills, Laguna Woods, and Lake Forest pursuant to Water Code section 13228; 2) incorporation of the Los Peñasquitos Lagoon Sediment TMDL requirements; 3) extension of a pollutant reduction deadline for MS4 discharges to Areas of

Special Biological Significance; 4) incorporation of interim exemptions for hydromodification management; and 5) implementation of a uniform approach for monitoring beach water quality in south Orange County. The Executive Officer's Summary Report from the October 8, 2014, workshop contains a summary of these proposed revisions and background information on the Regional MS4 Permit (**Supporting Document 3**). These proposed revisions to the Regional MS4 Permit, which were initially proposed in the draft Tentative Order issued on September 18, 2014, are highlighted in blue underline and ~~red-strikeout~~ text in Attachments 1 and 2 of the Tentative Order.

The San Diego Water Board released the Tentative Order for a 60-day review and comment period that concluded on November 19, 2014. Fourteen comment letters were timely received and are presented in **Supporting Document 4**. In response to comments, the San Diego Water Board made further revisions to the Tentative Order which are highlighted in yellow text. The San Diego Water Board also prepared responses to comments timely received. These responses are presented in **Supporting Document 5**. A summary of the major revisions made to the Tentative Order in response to comments is provided below.

Future Consideration of Alternative Compliance Option

The San Diego Water Board received several comment letters from Copermittees requesting that the discharge prohibitions and receiving water limitations in Provision A of the Regional MS4 Permit be modified to provide an "alternative compliance option" for meeting receiving water limitations that is clearly linked to good faith engagement by the Copermittees in the iterative process for Water Quality Improvement Plan development and implementation. The receiving water limitations are Permit requirements, based on precedential State Water Board orders, that specify MS4 discharges must not cause or contribute to exceedances of water quality standards in the waters of the United States that receive those discharges. The Copermittees are requesting that the Permit language be modified so that development and implementation of the Water Quality Improvement Plans constitute compliance with the prohibitions and receiving water limitations of Provision A.

On November 21, 2014, the State Water Resources Control Board (State Water Board) released a Draft Order in

response to petitions challenging the 2012 Los Angeles County MS4 Permit, which includes an alternative compliance option. The current version of the Draft Order affirms the concept of an alternative compliance option and recommends that Regional Water Boards consider inclusion of the option in MS4 permits. On December 16, 2014, the State Water Board held a public workshop to receive comments and discuss the Draft Order. No decision regarding whether or not it was appropriate to include the alternative compliance option was made at the workshop, and the State Water Board did not indicate when a final Order may be issued. The San Diego Water Board provided comments on the Draft Order by memorandum dated January 21, 2015 (**Supporting Document 6**).

During adoption of the Regional MS4 Permit in 2013, commenters from environmental organizations were strongly opposed to the concept of an alternative compliance option, and asserted that such modifications to Provision A would a) “weaken” the requirements, b) inappropriately exempt the Copermittees from enforcement for receiving water limitations violations (commonly referred to as a “safe harbor”), and c) violate federal anti-backsliding requirements. The San Diego Water Board considered inclusion of an alternative compliance option during the adoption proceedings for the Regional MS4 Permit, but ultimately voted against including one at the time. Based on the change of direction on this issue the State Water Board appears to be taking in their Draft Order, the alternative compliance option should be revisited again. The San Diego Water Board will be considering incorporation of the Riverside County Copermittees into the Regional MS4 Permit in late 2015 or early 2016. As part of this process, the San Diego Water Board should also consider the incorporation of a well-defined, transparent, and finite alternative compliance option similar to the option proposed in 2013, but also consistent with any decisions/guidance that may be forthcoming from the State Water Board. A rigorous alternative compliance option would allow the Copermittees that are willing to pursue significant receiving water quality improvements beyond the iterative process to be deemed in compliance with the receiving water limitations. Inclusion of the alternative compliance option during the proceedings for the Riverside County Copermittees will provide stakeholders with the necessary opportunity to discuss, comment, and suggest changes to any proposed language. A proposed

administrative finding (Finding 18) addressing these considerations has been added to the Tentative Order.

Definition of Prior Lawful Approval

The San Diego Water Board received two comment letters, one from the City of San Diego and one from the Construction Industry Coalition on Water Quality (a non-profit group representing the land development community), requesting that the Tentative Order be revised to incorporate a definition for the term “prior lawful approval” as it pertains to the Permit requirement to implement structural BMPs on Priority Development Projects. The San Diego Water Board also received one comment letter from San Diego Coastkeeper and Coastal Environmental Rights Foundation cautioning that including a definition could allow for vested rights that run counter to widely accepted law.

After careful consideration of the issue, the Tentative Order was revised to include a definition for the term “prior lawful approval” that is intended to provide guidance and clarification to San Diego, Orange, and Riverside County Copermittees in determining structural BMP requirements for Priority Development Projects. The definition will also assist the San Diego Water Board in assessing the Copermittees’ compliance with implementing the structural BMP requirements for Priority Development Projects to the maximum extent practicable (MEP) standard. A proposed finding (Finding 15) addressing these considerations has been added to the Tentative Order. The proposed definition of the term can be found in Attachment 1 of the Tentative Order at page 97 of 132.

Other Modifications

The San Diego Water Board also made other, less substantial, changes to the Tentative Order in response to comments. The San Diego Water Board added a requirement to include water quality equivalency calculations for San Diego Water Board approval before Copermittees are allowed to administer an offsite alternative compliance program (i.e. an alternative to implementing structural BMPs onsite). This will ensure consistency in administering these programs among the Copermittees. This revision can be found in Attachment 1 of the Tentative Order at page 92 of 132.

The San Diego Water Board also made revisions to the language in the Los Peñasquitos Lagoon Sediment TMDL in response to suggestions made by the City of San Diego and the City of Del Mar. Most notably, the wasteload allocation was modified to clarify that it is assigned to all responsible parties identified during TMDL development, not just the MS4 Copermittees. This revision can be found in Attachment 1 of the Tentative Order at page E-54.

LEGAL CONCERNS: Responses to legal comments received during the public comment period are included in the Response to Comments document at Lgl-1 through Lgl-5 and Fnd-1 through Fnd-9.

SUPPORTING DOCUMENTS:

1. Tentative Order No. R9-2015-0001 with Attachments:
 - 1) Revised Order No. R9-2013-0001
 - 2) Revised Fact Sheet to Order No. R9-2013-0001
2. Map – San Juan Hydrologic Unit Showing Copermittee Boundaries
3. October 8, 2014 Workshop Executive Officer Summary Report
4. Comment Letters Received on Tentative Order No. R9-2015-0001 and Attachments thereto
5. San Diego Water Board Response to Comments
6. January 21, 2015 San Diego Water Board comment submittal on State Water Board Draft Order in review of the Los Angeles County MS4 Order
7. Notice of Public Hearing

PUBLIC NOTICE: Notice of this item was provided to interested persons via the San Diego Water Board e-mail subscription list on January 9, 2015 (**Supporting Document 7**). Notice was also published in the Riverside Press Enterprise, San Diego Union, and Orange County Register newspapers. It was also provided in the Meeting Notice and Agenda for the February 11, 2015 Board meeting, which is posted on the San Diego Water Board's website.