City of Temecula

Public Works Department
43200 Business Park Drive▪Temecula, CA 92590▪Mailing Address: P.O. Box 9033▪Temecula, CA 92589-9033
(951) 694-6411 ▪ Fax (951) 694-6475

September 7th, 2010

Mr. David King
Chairman
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123-4353

Chairman King,

The City of Temecula (City) is one of five permittees within Riverside County that would be regulated under the Santa Margarita River (SMR) Municipal Separate Storm Sewer System (MS4) Order (Tentative Order R9-2010-0016). The City has reviewed Tentative Order No. R9-2010-0016, including its findings, attachments, and accompanying Fact Sheet, and submits the following comments for your consideration. There are several extensive new and expanded requirements proposed throughout the Order. These requirements are based on a model permit adopted in Orange County and are in excess of what is necessary to protect receiving waters within the Permit Area. As currently written, these requirements extend far beyond our financial ability to effectively implement them. The City expresses its concern that this Order will pit the limited funds currently available for critical services against unnecessarily stringent requirements mandated throughout this Order.

While the City shares the Regional Board's goal of protecting the quality of water in our local creeks, it is not fiscally responsible to adopt a new Model Permit that does not accurately reflect the needs of the local watershed. The Regional Board must allow the City to prioritize and balance finite public resources in order to provide numerous vital public services. The City's responsibilities also include providing for public safety (police and fire services), installing and maintaining infrastructure (roads, drainage facilities, etc.), public facilities (parks, libraries, community centers, etc.), providing recreational programs, conserving land (MSHCP), promoting habitat conservation, etc. All of these needs are equally important, but public funding mechanisms do not allow any one of them to be funded without consideration to competing needs, priorities, and expected outcomes. New requirements must carefully weigh the benefits achieved against their real costs to implement. From a public agency perspective, all expenditures must be justified and supported by the general public.

Although the Order has been slightly modified from the previous version issued to the South Orange

County permittees, it continues to retain numerous provisions that do not apply to this region and are unnecessarily costly and administratively burdensome to the City and, ultimately, to our citizens. To this end, the City agrees with, and supports, the comments provided by the Riverside County Flood Control and Water Conservation District on behalf of the SMR permitees, and also submits the following information to explain why the requirements in the Order will be difficult to fund and cause unavoidable non-compliance.

Economic conditions have forced significant workforce reductions since 2007. Three rounds of staff reductions have occurred due to the City's severe budget cuts. To date, 75 project-employees and 48 full-time employees were cut from the City budget. In addition, two contract fire-prevention positions had to be cut as well. The City's workforce has been reduced, thus far, by 25%. Consequently, no new positions are being proposed and the City unfunded thirteen previously authorized positions, adding to the 26 existing unfunded positions from last year. In total 39 positions are no longer funded. Furthermore, positions that become vacant from hereon will no longer be refilled.

Historic and ongoing revenue reductions are causing significant cuts in the number and level of service to all other City programs. The City has experienced tremendous losses as a result of the nationwide recession. Preliminary year-end revenues for fiscal year 09-10 are projected to be $50.5M; compared to a $67.7M annual revenue just three years ago. That equates to general fund revenues decreasing nearly 26%. Despite falling revenues, the costs to maintain remaining city services, particularly public safety, continue to rise. Annual expenditures to maintain current levels of service are expected to rise to $59M by the end of the Permit term. If revenues do not increase, or even flat-line as currently projected, the City will not be able to maintain the current level of service for other programs including public safety. Despite this well recognized trend, Tentative Order R9-2010-0016 proposes significant increases in level of service for this program.

One of the harder hit areas is development driven revenue streams. The Planning Department user fee revenue fell by 42%, while that of the Building and Safety Department fell by as much as 49%. The City's Land Development division revenue dropped significantly from $1.8M in fiscal year 06-07 down to $484K in fiscal year 09-10, a 73% decrease due to the drastic reduction in development activity within the City. In like manner, Development Impact Fees (DIF) tumbled from $6.5M to $1.1M, an 83% drop, in that same period. These examples show the true impacts to the City that are crippling our ability to continue providing even the most minimum level of services required by law and expected of the public.

The City's Capital Improvement Program (CIP) budget has been decimated. The majority of the projects in the City's CIP are funded with either one-time outside funding sources, DIF or Capital Project Reserves (General funds). The City's ability to supplement or provide matching dollars for this program has been severely impacted. In fiscal year 06-07 the General Fund contributed $11.2M toward the CIP, that figure is down to $2.4M in fiscal year 09-10, a 79% decrease. At this point, only projects with outside funding sources or the most significant traffic circulation projects are moving forward, while many other projects are being postponed indefinitely.

Many of the most significant and inappropriate cost ramifications of the Order are as a result of new requirements that exceed the current "model" Orange County NPDES MS4 Permit. Specifically, there were significant changes to the Monitoring and Reporting Program (MRP) as well as the addition of a series of new special studies requiring special expertise. The City estimates that

the annual cost to support the changes to the regional component of the Order will increase our current cost by 3 times. In addition, there will also be additional annual costs associated with implementing the required changes to the City's NON-regional components. These components have been projected to increase the City's existing annual costs by no less than 1.5 times.

There are no new revenue sources available to fund these program expansions. Revenue reductions are occurring in almost all revenue categories. Although the City's largest single revenue source, Sales Tax, is projected to increase slightly in the coming year, Sales Tax revenues are still over $8.0M below the FY06-07 value of $30.1M. Some of the more significant decreases from last fiscal year alone include: $283K in Property Tax revenue, $232K in Motor Vehicle in Lieu revenue, $499K reduction in Investment Interest revenue, $182K in Development fees, $212K in Franchise Fees, $332K in reimbursement revenues, and $280K in other existing miscellaneous revenue sources. Other potential sources of funding, including taxes, fee increases, surcharges, establishment of utilities, etc., have all been evaluated and determined not to be feasible or realistically available to the City. Further, with the high unemployment and foreclosure rates within Riverside County, the voters are not willing to support new taxes or bonds in the current economic climate.

This information leads to the inevitable conclusion that implementation costs of the new Order will exceed our currently available resources and cause additional impacts to other City departments, which will then begin affecting the number and level of services the City currently provides. **It is important to note that the federal regulations regulating MS4 discharges have not changed since 1987. There is no policy basis for the significant changes proposed by this Tentative Order. The majority of the changes proposed to this Tentative Order are to accommodate Regional Board staff wishes to move to a model MS4 Permit that treats Riverside, Orange and San Diego County's equally. These changes were not specifically designed to address the local needs of this watershed**. Further, the Permit does not reflect the relative resources available to each Permit area. The area regulated by this Tentative Order has only half the taxpaying population of the Orange County NPDES MS4 Permit and 1/10th the taxpaying population of the San Diego County NPDES MS4 Permit. These relative economic discrepancies create not only a social injustice, but impacts that will be exacerbated by the State's reduced funding of other state mandated City services.

There are numerous legal concerns that need to be considered. As such, the following provides ten categorical points for consideration. However, these ten points do not represent all of the legal inconsistencies that exist in the Order. To this end, the City agrees with, and supports, the legal comments provided by the Riverside County Flood Control and Water Conservation District on behalf of the SMR permitees.

The City has serious concerns regarding the legality of the provisions contained in this Tentative Order. The prescriptive nature of this Order will ensure that any resident or business challenging these conditions would not only sue the municipality charged with implementing these requirements, but would also bring suit against the Regional Board itself to obtain the requested relief. The City does not believe this was the intent of the Regional Board.

1. THE TENTATIVE ORDER ATTEMPTS TO REDEFINE WHAT CONSTITUTES A WATER OF THE UNITED STATES

Section 3.C of the Findings section on page 11 of the Tentative Order states:

> "Historic and current development makes use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. In these cases, the urban stream is both an MS4 and a receiving water."

The City does not believe that such a finding is warranted or lawful under either the clear statutory provisions of the Clean Water Act or recent judicial interpretations of the Act. The language in the Tentative Order could be construed as seeking to regulate all discharges into MS4s, changing the very nature of MS4s so as to constitute a receiving water.

This is contrary to the plain language of section 402(p)(3)(B) of the Clean Water Act, which requires: "Permits for discharges from municipal storm sewers . . ." 33 U.S.C. § 1342(p)(3)(B) (emphasis added.). Based on this assertion, the Regional Board does not have the authority to regulate water entering into MS4s as receiving waters of the United States.

Furthermore, even if the statutory language indicated that Permits were required for discharges into MS4s, recent holdings from the United States Supreme Court conclusively show such structures would not constitute a water of the United States. According to the plurality decision in *Rapanos v. United States* (2006) 126 S. Ct. 2208, 2225:

> "In sum, on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.' *See* Webster's Second 2882. ***The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.*** The Corps' expansive interpretation of the 'the waters of the United States' is thus not 'based on a permissible construction of the statute."

(Emphasis added.). The MS4 systems and urban streams that the Regional Board is seeking to regulate as receiving waters are intermittent, ephemeral, and used only periodically as drainage for rainfall. As such, these systems and streams would not constitute a water of the United States. Because the Clean Water Act extends solely to waters of the United States, the Regional Board has no authority to regulate MS4s or urban streams as defined in its Permit.

Even under Justice Kennedy's more lenient interpretation of what constitutes a water of the United States, the Regional Board has still not adequately met the requirements for establishing that an MS4 or urban stream is subject to regulation as a Water of the United States. According to Justice Kennedy, the Regional Board must establish that the MS4 system and urban streams bear a significant nexus to the other regulated waters so as to qualify for regulation as a water of the United States. *Rapanos,* 126 S. Ct. at 2249. Such a determination must be made on a case-by-case basis, and must contain some measure of the significance of the connection for downstream water quality. *Id.* at 2250-2251. In other words, the Regional Board must conduct an analysis of the "quantity and regularity of flow" in the relevant MS4s and urban streams prior to holding that these structures merit regulation under the Clean Water Act. *Id.* at 2251. Absent conclusive findings, the Regional Board is without authority to regulate MS4s and urban streams as receiving waters under the Clean Water Act.

The City requests that the Board members direct staff to modify the language in the Tentative Order to ensure regulations of only those systems and streams discharging directly into waters of the United States as defined according to the Supreme Court's holding in *Rapanos* in order to avoid random interpretations of the CWA.

2. THE TENTATIVE ORDER UNLAWFULLY PURPORTS TO RESTRICT THE LOCATION OF TREATMENT OPTIONS

Section F.1.d.(6)(d) on page 35 of the Tentative Order states:

> "All treatment control BMPs for Priority Development Projects must, at a minimum, be implemented close to pollutant sources (where shared BMPs are not proposed), and prior to discharging into waters of the U.S."

The implementation of this provision presents a number of potentially serious problems.

First, this provision of the Tentative Order violates Water Code section 13360. According to Water Code section 13360(a):

> "No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, ***location***, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner."

(Emphasis added.) As noted above, the Regional Board is already attempting to define MS4s and urban streams as waters of the United States. *Supra*, p. 11. The proposed regulation would therefore effectively limit the ability for Permittees to implement any BMPs in any area except at the exact location of the source generating pollutants and would exclude Permittees from choosing to implement what may be less-costly, more effective BMPs in other areas. But Water Code section 13360(a) expressly prohibits this type of regulation.

Second, the comparison to wetlands regulation misconstrues USEPA guidance on this issue. The USEPA guidance document referenced by the Regional Board does not preclude Permittees from locating structural controls within a natural wetland. Rather, the guidelines simply state:

> "***To the extent possible***, municipalities should avoid locating structural controls in natural wetlands. Before considering siting of controls in a natural wetland, the municipality should demonstrate that it is not possible or practicable to construct them in sites that do not contain natural wetlands...."

(Fact Sheet, p. 96, fn. 154, *citing* USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002. (Emphasis added.)) While the Permittees may agree that they should generally avoid in stream treatment to the extent possible, outright prohibition of an option would be counterproductive.

The City requests that the Board members direct staff to modify the language in the Tentative Order to allow permittees to make the determination of the exact placement location of BMPs.

3. THE TENTATIVE ORDER IMPROPERLY INTRUDES UPON THE CITY'S LAND USE AUTHORITY IN VIOLATION OF THE TENTH AMENDMENT OF THE U.S. CONSTITUTION

To the extent that this Tentative Order relies on federal authority under the Clean Water Act to impose land use regulations and dictate specific methods of compliance, it violates the Tenth Amendment of the U.S. Constitution. Furthermore, to the extent the Tentative Order **requires** a Municipal Permittee to modify its city ordinances in a specific manner; it also violates the Tenth Amendment.

According to the Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article XI, section 7 of the California Constitution, California guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." The United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. *See **Berman v. Parker*** (1954) 348 U.S. 26, 32-33. Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

From the City's perspective, under the guise of federal law, the Regional Board is attempting to dictate the precise manner in which cities must exercise their police powers. The City does not believe that such a requirement is consistent with the Tenth Amendment.

The City requests that the Board members direct staff to modify the language in the Tentative Order to ensure consistency with the Tenth Amendment, rather than applying random interpretations of it, with regard to issuing requirements which dictate the precise method of compliance.

4. THE TENTATIVE ORDER CONSTITUTES AN UNFUNDED STATE MANDATE

The Regional Board seeks to impose new provisions that require a higher level of service of existing programs that are not required or mandated under the Clean Water Act or any federal regulations thereunder. Yet, according to the Fiscal Analysis provided in Section H.1. of the Tentative Order:

> "Each Copermittee must exercise its full authority to secure the resources necessary to meet all requirements of this Order."

(Tentative Order, p. 74.) To the extent the Tentative Order imposes additional programs on the Permittees without providing additional funds, they are unfunded mandates.

The Commission on State Mandates recently held that both the Los Angeles County MS4 Permit and the San Diego County MS4 Permit contained provisions that constituted unfunded state mandates. *In re Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182* (July 31, 2009); *In re Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-0001* (March 26, 2010). As such, the Regional Board cannot merely dismiss the suggestion that the Tentative Order does contain provisions that constitute unfunded state mandates.

The imposition of unfunded programs and mandates in the Tentative Order is inconsistent with the provisions of the California Constitution, specifically Article XIII B, Section 6, which requires a state agency mandating a new program or a higher level of service to provide a "subvention" of funds to reimburse local governments for the costs of the program or increased level of service.

Article XIII B, Section 6 of the Constitution prevents the state from shifting the cost of government from itself to local agencies without providing a "subvention of funds to reimburse that local government for the costs of the program or increased level of service . . ." State agencies are not free to shift state costs to local agencies without providing funding merely because those costs were imposed upon the state by the federal government. If the state freely chooses to impose additional costs upon a local agency as a means of implementing its policy, then those costs should be reimbursed by the state agency. *See Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593-1594. If the state refuses to appropriate money to reimburse a city, the enforcement of the state mandate can potentially be enjoined by a court. *See Lucia Mar Unified School District v. Honig* (1988) 44 Cal. 3d 830, 833-834.

The Tentative Order will require a substantial capital investment, which individual cities will have to fund, despite the fact that no funding mechanism, nor any assistance, financial or otherwise, from the Regional Board is provided to the Permittees. To our knowledge, the Regional Board has made no provision to provide any level of financial relief to the permittees for any of the provisions proposed in the Tentative Order.

The Tentative Order explicitly provides that the Tentative Order does not constitute an unfunded state mandate for four reasons in paragraph 6 of page 14 of the Tentative Order. The City disagrees with all four stated reasons. . To the extent the Tentative Order imposes additional programs on the City and its co-permittees without providing additional funds, they are unfunded mandates.

A. The Tentative Order Imposes Requirements that Go Beyond Federal Law

To the extent the Tentative Order imposes 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. In fact, there are many specific obligations in the Tentative Order that are not federally mandated.

For example, Section E, on page 24 of the Tentative Order, requires that each permittee submit a certification statement, signed by its chief legal counsel, that the permittee has taken the steps necessary to obtain and maintain full legal authority to implement and enforce each of the requirements in 40 CFR 122.26(d)(2)(i)(A-F) and the Tentative Order. The Clean Water Act does not require the certification statement mandated by the Regional Board. 40 CFR 122.26(d)(2)(i) only requires "[a] demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts...." Arguably, the City can demonstrate its legal authority by submitting copies of ordinances, resolution or contracts certified by the City Clerk. The Clean Water Act does not require permittees to submit a certification statement.

Furthermore, the Tentative Order goes beyond federal law in that it is at least twice as long, and in some cases, three times as long as other MS4 Permits developed by other Regional Boards in the State of California such as the Lahonten Regional Board and the Central Valley Regional Board. This means that either some Regional Boards are failing to impose federally mandated requirements pursuant to the Clean Water Act, or the San Diego Regional Board is imposing requirements that go

beyond federal law.

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

The Tentative Order asserts that the Order does not constitute an unfunded mandate because the Order regulates discharges of waste from municipal sources more leniently than they could regulate discharges from non-governmental dischargers. *See* paragraph 6 on page 14 of Tentative Order. The City fails to see how this statutory distinction between the regulation of municipal dischargers and industrial dischargers affects whether the Order imposes requirements on co-permittees that go beyond federal law. Municipalities are not industrial sites. Municipal discharges are not industrial discharges.

C. The City Does Not Have the Authority to Randomly Levy Fees at Will to Pay For Compliance With the Order

The Tentative Order also alleges that the Order does not constitute an unfunded mandate because co-permittees have the authority to levy service fees to pay for compliance with the Order. *See* paragraph 6 on page 14 of Tentative 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.

The City does not have the authority to levy service fees to pay for the State mandate. The Tentative Order presumes, but makes no specific findings that co-permittees have the authority to levy such service fees. In fact, to the extent such service fees are "property-related," co-permittees 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. *Salinas*, 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's 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. *Id.* at 1355.

Because storm water running off of real property and into the MS4 is not a precise measurement, it would be impossible to meet the direct usage requirements of the *City of Salinas*. Accordingly, without voter approval, which would be almost impossible to successfully obtain during the current economic crisis, the City of Temecula does not have the authority to levy service fees to pay for compliance with the Order.

D. The City Does Not Have a Real Choice in Requesting Permit Coverage

The fourth reason provided in the Tentative Order for why the Order does not constitute an unfunded mandate is that co-permittees requested permit coverage under the Order. Thus, according to the

Tentative Order, co-permittees have not been mandated to do anything.

The City adamantly disagrees. It is disingenuous for Regional Board staff to suggest that co-permittees have voluntarily chosen coverage under the Order and that the Order cannot be considered a State mandate.

The City requests that the Board members direct staff to modify the language in the Tentative Order to include State-sponsored relief for the permittees to carry out the requirements in the Order. To the extent that these requirements will require additional funds, the Board should direct staff to assist the permittees in securing such funds.

5. THE TENTATIVE ORDER IMPROPERLY ATTEMPTS TO HOLD THE CITY RESPONSIBLE FOR SEWAGE SPILLS WHEN THIS RESPONSIBILITY HAS BEEN CLEARLY ASSIGNED TO LOCAL WATER DISTRICTS

Section F.4.h. of the Tentative Order states:

> "Each Copermittee must implement management measures and procedures (including a notification mechanism) to prevent, respond to, contain and clean up all sewage (see below) and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems.) Copermittees must coordinate with spill response teams to prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times."

(Tentative Order, p. 69).

For many cities, implementation of this provision is simply not feasible. The City of Temecula does not own or operate its own sewage system. All of the sewer systems in the City's jurisdiction are owned, operated, and maintained by water districts, specifically the Rancho California Water District and Eastern Municipal Water District. These water districts have their own separate Regional Board Orders/NPDES permits. The City does not have the equipment or expertise to manage a sewage spill of any size, and its staff is not adequately trained to respond to potential spills. All of the water districts in the City's jurisdiction already respond to sewer spills (including sewer spills from private laterals). Furthermore, this provision is duplicative because the Regional Board is seeking to make the City responsible for a task already delegated to the water districts. By making the City responsible for sewer spills, there is a high risk of creating confusion in determining who (water districts or the City) will respond to a spill and who is responsible for associated costs and reporting requirements. Such an act would result in a tremendous waste of scarce public resources.

The State Water Resources Control Board has previously issued a stay on this exact issue. After extensive hearings and briefing on the matter, the State Board issued Order WQO 2002-0014 on August 15, 2002, granting a stay as to this provision. In that Order, the State Board held:

> "The record shows that three separate water districts operate these sewers within Mission Viejo, and are regulated by a sanitary sewer NPDES permit issued by the Regional Board. Mission Viejo alleged that the duplication of effort that would

ensue by having Mission Viejo also be responsible for preventing and responding to sanitary sewage spills could lead to delayed responses as agencies try to determine jurisdiction and primary responsibility. Orange County's cost table for the upcoming year estimated total copermittee costs at $56,512 to implement this requirement. While these costs, by themselves do not constitute substantial harm, we find that the duplicative nature of the costs, combined with potential response delay and confusion, do."

(State Board Order WQO 2002-0014, p. 6).

In deciding to grant a stay as to this provision, the State Board concluded:

> "**The regulation of sanitary sewer overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities.** For example, the Permit appears to assign primary spill prevention and response coordination authority to the co-permittees. While the federal regulations clearly assign some spill prevention and response duties to the co-permittees, we find that the extent of these duties is a substantial question of law and fact."

(State Board Order WQO 2002-0014, p. 8. (Emphasis added)).

Given the previous findings of the State Board on this same issue, the City requests that the Board members direct staff to modify the language in the Tentative Order to reduce duplicity of effort and the implementation of unnecessary control activities.

6. THE TENTATIVE ORDER IMPROPERLY DELETES CATEGORIES OF EXEMPT NON-STORMWATER DISCHARGES

Federal law requires that MS4 permits include a requirement that the Permittees effectively prohibit the discharge of non-stormwater into the MS4. 33 U.S.C. 1342(p)(3)(B)(ii). Federal regulations exempt certain discharge categories from this effective prohibition requirement. 40 C.F.R. 122.26(d)(2)(iv)(B)(1). A Permittee must address a discharge in one of these exempt categories only when a Permittee identifies the discharge as a source of pollutants to waters of the United States. *Id.*

The Tentative Order impermissibly deletes three of the non-stormwater discharge categories – landscape irrigation, irrigation water, and lawn watering (collectively, "irrigation"). (See subparagraphs a-n on page 19 of Tentative Order.) The federal regulations require that permittees address discharges within an exempt category when they identify a discharge as a source of pollutants to waters of the United States. Neither the regulations nor EPA's guidance allow the Regional Board to delete entire categories of exempt non-stormwater discharges when the Permittees identify a discharge within one of the categories as a source of pollutants.

Accordingly, since the permittees have not identified irrigation runoff as a source of pollutants, the City requests that the Board members direct staff to restore the irrigation categories of exempt non-stormwater discharges in the Tentative Order.

7. THE TENTATIVE ORDER'S RETROFITTING REQUIREMENT IMPOSES POTENTIALLY SIGNIFICANT COSTS WITHOUT ANY CORRESPONDING GAINS IN WATER QUALITY

The Tentative Order requires the Permittees to develop and implement a program to retrofit existing development with additional structural measures to control runoff. (See Section F.3.d (Retrofitting Existing Development) on page 64 of the Tentative Order). This new provision is in addition to the New Development/Redevelopment provisions in the Tentative Order. However, the City does not have the ability under existing statutes and under the California and the United States Constitutions to force private landowners to retrofit existing developments to improve water quality when these landowners didn't have any plans to retrofit their properties in the first place. As such, the expense entailed in developing and implementing a retrofitting program will not be matched by any gains in water quality. Federal law does not require retrofitting of existing development. In fact, EPA's regulations acknowledge that MS4 regulation would have to be limited largely to undeveloped sites and sites being developed/redeveloped. Accordingly, the City requests that the Board members direct staff to either remove this provision in its entirety from the Tentative Order, or modify the language to exclude private property.

8. THE TENTATIVE ORDER LACKS FLEXIBILITY IN IMPLEMENTING LOW IMPACT DEVELOPMENT AND HYDROMODIFICATION REQUIREMENTS

The Tentative Order requires that development projects include prescriptive Low Impact Development ("LID") requirements. (*See, e.g.*, Section F.1 of the Tentative Order). The Tentative Order also requires the Permittees to develop and implement a Hydromodification Management Plan ("HMP") for the same development projects. (Section F.1.h. of the Tentative Order) However, the LID and HMP provisions are not required by federal law and violate state law in that, among other things, they prescribe how the Permittees are to comply with the MEP standard. *See* Water Code § 13360(a). Moreover, the LID and HMP provisions in this Tentative Order are overbroad and will not necessarily result in any improvement to the quality of water entering Waters of the U.S.. For example, HMP requirements for hardened channels will not have any water quality benefits. Finally, to the extent the LID requirements would interfere with downstream or upstream water rights holders, compliance with the requirements potentially expose the Permittees to common law liability.

In addition, the Regional Board's imposition of a highly prescriptive Low Impact Development strategy may have an unintended consequence—potential lawsuits from downstream users of the surface water that the City is now purportedly "diverting for reuse or infiltration." As one attorney expert in the field of water law has put it:

> "First, to the extent that one can obtain a right to capture diffuse surface waters . . . any capture of diffuse surface waters without a permit from the State Water Resources Control Board could well be a trespass against the State of California. Second, even if one cannot obtain a 'right' to diffuse surface waters, though, the capture of such waters in a manner that interferes with the diversion of the same water once it reaches a watercourse constitutes injury to legal users of water that rely on such diffuse surface water contributing to the water that they are able to divert."

D. Aladjem, "Who Owns the Water? The Looming Conflict Between Low Impact Development and the Water Rights System" at p.5 (Paper presented at American Bar Association 17th Environmental Law Fall Section Meeting, Sept. 24, 2009).

The City believes that the law in this area, particularly with respect to ownership of diffuse surface waters, is quite uncertain. The City also believes that, to the extent that the Regional Board imposes these additional obligations upon the City pursuant to the Permit, then the Regional Board should insert sufficient findings and authorization for the capture of surface water through LID systems to protect the City against claims of either a trespass against the State or claims of unlawful diversion of stormwater that would otherwise flow into watercourses that might be the subject of claims of diversion rights by downstream users.

Because the LID and HMP provisions are not required by federal law and violate state law, the City requests that the Board members direct staff to insert sufficient findings and authorization for the capture of surface water through LID systems to protect the City against claims of either a trespass against the State or claims of unlawful diversion of stormwater. In addition, the City also requests that the Board members direct staff to modify the language in the Tentative Order to provide the Permittees with required flexibility in implementing the LID and HMP requirements.

9. THE TENTATIVE ORDER DOES NOT CONSIDER COSTS TO IMPLEMENT THE STORMWATER AND NON-STORMWATER ACTION LEVELS AS REQUIRED BY FEDERAL LAW, AND THE WATER QUALITY BENEFITS ACHIEVED BY THESE REQUIREMENTS HAVE NOT BEEN ADEQUATELY CONSIDERED BY THE REGIONAL BOARD

Federal law requires that permittees effectively prohibit the discharge of pollutants in non-stormwater into the MS4 and to reduce the discharge of pollutants in stormwater from the MS4 to the maximum extent practicable. To assist the Permittees in meeting these two standards, the Tentative Order imposes action levels on pollutants in the discharge of stormwater (SALs) and non-stormwater (NALs) from the MS4. (Sections C and D on pages 20 and 23, respectively, of the Tentative Order.). Ideally, action levels would be a tool that would help the City focus resources on more significant water quality problems. However, the City is concerned that, depending on how the provisions are interpreted, the cost to implement the action levels may far outweigh any benefit to water quality. Moreover, rather than a tool to help the Permittees, the action levels may be used against the Permittees.

As an initial matter, the City objects to the distinction made in the Tentative Order between the discharge of stormwater from the MS4 and the discharge of non-stormwater from the MS4. Federal law does not support this distinction. Under federal law, permittees must control the discharge of ***pollutants*** from the MS4 to the maximum extent practicable, regardless of whether the pollutants are in ***stormwater*** or ***non-stormwater***. Permittee's obligation with respect to non-stormwater is to effectively prohibit the discharge of pollutants in non-stormwater into the MS4. To the extent the Permit imposes separate requirements on the discharge of pollutants in non-stormwater from the MS4, such requirements must be supported by state law.

Because neither the SALs or NALs are required by federal law, the Regional Board must comply with state law in imposing these requirements. For example, in issuing waste discharge requirements under State law, the Regional Board must consider certain factors, including the water quality conditions that could be reasonably achieved and economic considerations. Water Code §§ 13263(a) and 13241. The City is hopeful that the Tentative Order's SAL and NAL provisions will provide the City with flexibility to prioritize its response to any actual exceedances. However, if the City is required to respond to and address all exceedances without reasonable prioritization, the cost will be significant. Because some exceedances will not be indicative of impacts to water quality, the cost to implement the SALs and NALs may have little if any commensurate environmental benefit. There is

nothing in the record that suggests that the Regional Board has considered these water quality and economic factors.

Accordingly, the City requests that the Board members direct staff to provide the analysis required under state law to ensure that economic factors are considered and that the water quality goals are reasonably achievable through implementation of the SALs and NALs.

10. THE TENTATIVE ORDER IMPROPERLY INCORPORATES TOTAL MAXIMUM DAILY LOAD WASTELOAD ALLOCATIONS

The Tentative Order includes limitations based on wasteload allocations ("WLAs") developed in fully approved and adopted Total Maximum Daily Loads ("TMDLs"). (Section I of the Tentative Order.) The Tentative Order characterizes the limitations as Water Quality Based Effluent Limitations. However, the WLAs are to be achieved in the receiving water. Accordingly, the City considers the limitations to be receiving water limitations. *See, e.g.*, State Board Order WQ 2009-0008. The Permittees are to comply with the limitations by implementing best management practices ("BMPs").

Federal and state policy provide that an iterative BMP approach is appropriate in MS4 permits for achieving receiving water limitations. *See, e.g.*, State Board Order WQ 99-05. Where existing BMPs are not sufficient to meet the receiving water limitations, permittees are to implement more effective BMPs. This approach is consistent with the MEP standard governing the discharge of all pollutants from the MS4. The City submits that to be consistent with federal and state policy, the Permit must be clarified to provide for compliance with WLAs through an iterative BMP approach. To the extent the Regional Board can rely on state law to support the TMDL provisions, the City submits that the Regional Board has not complied with relevant requirements (*e.g.*, Water Code §§ 13000, 13263(a), 13241, etc.). Accordingly, the City requests that the Board members direct staff to revise the Tentative Order's TMDL provisions to be consistent with federal and state law and policy.

As a public agency, we have the obligation to carry out our duties in a responsible, realistic, and reasoned manner. Requirements that tether public agencies to impractical positions are counterproductive and violate our sacred charge as representatives of the people. It must be emphasized that the City is very committed to water quality protection, but in a manner that balances this goal with the resources, needs, and expected results of the community. In submitting these comments, the City hopes it has provided a better perspective, from a local level, of the impacts that the current state of the economy has had on the City, the additional hardships that will be incurred to fund and implement the Order at this time, and the magnitude of legal liability it will expose both of our agencies to.

The City recommends that the Permit be remanded to staff with direction to address the unnecessary economic impacts imposed by the Permit. The monitoring program, unfunded roads mandates, retrofitting, and changes to the various existing inspection programs must, at minimum, be addressed. We request that the Board members direct staff to continue meeting with the permittees prior to adopting the permit and to work through these concerns, or at least defer the costly provisions until the permittees can adequately fund the requirements rather than fall into unavoidable non-compliance. The 2007 ROWD prepared by the Permittees addressed necessary changes to Water Quality Protection programs by building on existing programs and leveraging other available local resources. The programs in the 2007 ROWD should be carefully reconsidered in lieu of the model program elements proposed by Board staff. Thank you.

If you have any questions regarding this information, please contact Aldo Licitra, our Associate Engineer for NPDES, at 951-308-6387.

Sincerely,

Greg Butler
Director of Public Works/City Engineer

Cc: Shawn Nelson, City Manager
City Council