

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** February 5, 2008

**TO:** Jay M. Goldstone, Chief Operating Officer

**FROM:** City Attorney

**SUBJECT:** Storm Water Best Management Practices for Irrigation Water

---

This replies to your memorandum dated January 23, 2008 concerning the City's potential for legal liability stemming from its adoption of the Jurisdictional Urban Runoff Management Plan [JURMP] which contains a Best Management Practice [BMP] for irrigation runoff. You note that the irrigation BMP language that the Staff had proposed was modified on the motion of Councilmember Frye at the January 22, 2008 Council meeting. The Staff's recommendation was that the BMP require dischargers to "take all reasonable steps to eliminate" irrigation runoff into storm drains; the Council's adopted alternative would simply require that such discharges be eliminated. You have asked, with second reading of the Ordinance pending, whether there may be greater legal exposure for the City resulting from this modification. As explained below, the Council's amendment actually diminishes the City's exposure to liability.

**The Municipal Permit**

The Storm Water regulation changes currently before the Council arise from the City's Municipal Separate Storm Sewer System Permit, Regional Water Quality Control Board Order No. R9-2007-001 [MS4 Permit]. The MS4 Permit provides, "Each Copertmittee shall implement, or require implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order for each municipal area or activity within its jurisdiction." In addition, the City must "establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract, or similar means."

**The Status of Irrigation Water Under the Permit and the Ordinance**

Section B.1 of the MS4 Permit requires the Copermittee to "*effectively* prohibit" all types of "non-storm water," including irrigation water, from entering into its storm drains. Section B.2 lists a set of categories of discharges of non-storm water discharges that "are not prohibited

unless a Copermittee or the Regional Board identifies the discharge category as a significant source of pollutants to waters of the U.S.” Category (I) on the list of non-prohibited discharges is “landscape irrigation.” The City may therefore permit irrigation runoff to enter the MS4 if, and only if, it is not a significant conveyor of pollutants to receiving waters.

Under the existing Ordinance, irrigation water is a non-prohibited discharge without limitation or condition. This is an untenable situation under the new MS4 Permit and cannot be sustained. Irrigation water almost certainly is a significant conveyor of pollutants to the MS4.<sup>1</sup> The new permit requires that the City give itself *adequate legal authority to enjoin discharges conveying pollutants*. Yet, the City presently has no legal authority to prohibit any irrigation discharges – even those that convey pollutants. If left unchanged, this could lead to a violation of the MS4 Permit. Violation of any term of the MS4 Permit may result in civil penalties under Water Code section 13385 (\$10,000 per day per violation, generally), injunction under section 13386, or even criminal liability under section 13387. In addition, third parties and organizations have standing to sue to compel compliance under section 505 of the Clean Water Act. To remedy this situation, section 43.0305 (b)(12) of the proposed Ordinance would provide that irrigation water discharges are permitted *only if the discharger complies with BMPs*.

#### **Analysis of Exposure to Liability**

Your memo asks whether the irrigation BMP language introduced and approved by the Council on the motion of Councilmember Frye (“eliminate”) subjects the City to greater potential liability than the BMP language submitted by Staff (“all reasonable steps”).

The opposite is true. The language established by the Council comports with the MS4 Permit requirements because it provides the City with clear and adequate legal authority to prohibit any and all discharges of pollutants from irrigation water. The Permit requires this. In contrast, the Staff’s proposal would have allowed a discharger of polluted irrigation water to offer the defense that he or she took “all reasonable steps” to avoid the discharge. If “all reasonable steps” were taken, the City would arguably be without authority to prevent pollutant-laden discharges, even though the new MS4 Permit requires the City to have authority to actually prevent discharges conveying pollutants. Allowing for this possibility would expose the City to *greater* potential for liability than the alternative adopted by the Council.

---

<sup>1</sup> The City has never made a formal determination as to whether irrigation runoff is a significant conveyor of pollutants to receiving waters. However, given that irrigation runoff is by far the most significant source of discharges into the City’s system during dry weather, and that it is known to carry pollutants such as fertilizer, pesticides, and animal waste, it must be assumed that a study of this issue would result in a finding that irrigation runoff conveys significant pollutants to the system, or at least that this will be the case in the absence of aggressive BMPs.

Mr. Goldstone  
February 5, 2008  
Page 3

Your memorandum does not indicate the nature of the potential liability for which “concerns (were) raised.” The foregoing analysis focuses on liability to the Regional Board or under citizen suits. These are clearly the areas of greatest potential concern. To the extent that you may be concerned with establishing a standard that is clear but may be impossible to universally enforce, there is little reason for concern about liability arising from the exercise of discretion in enforcing the law. The City has police power immunities that allow for selective enforcement and prosecutorial discretion. There is no legal requirement that the City be capable of enforcing the regulation at all times in all places for all irrigation discharges, regardless of circumstances.

The City must, under the terms of the MS4 Permit, be in the position to effectively prohibit the conveyance of pollutants by irrigation water. The Council’s language provides this. The City can only be responsive to the extent that resources and opportunity allow. The law allows for this.

#### **Conclusion**

The BMP language for irrigation introduced by Councilmember Frye and approved by the Council likely will reduce, not heighten, the City’s exposure to liability or suits.

If we have misconstrued your concerns, or if you have further questions in this area, we would be happy to assist you further.

MICHAEL J. AGUIRRE, City Attorney

By

Frederick M. Ortlieb  
Deputy City Attorney

FMO:mb  
MS-2008-2