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COUNTY OF ORANGE AND
ORANGE COUNTY FLOOD CONTROL DISTRICT

Exempt From Filing Fees Pursuant To Gov't Code § 6103

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of:

COUNTY OF ORANGE AND ORANGE COUNTY FLOOD CONTROL DISTRICT FOR REVIEW OF ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, IN ADOPTING ORDER NO. R9-2009-0002, NPDES PERMIT NO. CAS0108740

No. _____

PETITION FOR REVIEW

[Water Code § 13320(a)]

This Petition for Review is submitted on behalf of the County of Orange and the Orange County Flood Control District (collectively "Petitioners") pursuant to California Water Code Section 13320 and California Code of Regulations ("CCR") Title 23, Section 2050, for review of Order No. R9-2009-0002, NPDES Permit No. CAS0108740, which was adopted by the California Regional Water Quality Control Board, San Diego Region (the "Regional Board") on December 16, 2009.

I. NAMES, ADDRESSES AND TELEPHONE NUMBERS OF PETITIONERS

Petitioners are the County of Orange (the "County") and the Orange County Flood Control District (the "District"). All written correspondence and other communications regarding this matter should be addressed as follows:

1) Mary Anne Skorpanich, Director
ATTN: Chris Crompton
County of Orange
OC Watersheds Program
2301 N. Glassell Street
Orange, California 92865

Telephone: 714-955-0601
Email: maryanne.skorpanich@ocpw.ocgov.com
chris.crompton.@ocpw.ocgov.com

2) Jess A. Carbajal, Director
OC Public Works (Orange County Flood Control District)
County of Orange/Orange County Flood Control District
P.O. Box 4048
Santa Ana, California 92702-4048

Telephone: 714-667-3217
Email: jess.carbajal@ocpw.ocgov.com

With a copy to Petitioners' counsel:

3) Geoffrey K. Hunt, Supervising Deputy County Counsel
333 W. Santa Ana Blvd., Suite 407
Post Office Box 1379
Santa Ana, California 92702-1379

Telephone: 714-834-3306
Email: geoff.hunt@coco.ocgov.com

II. SPECIFIC ACTION OF THE REGIONAL BOARD FOR WHICH REVIEW IS SOUGHT

Petitioners request the State Water Resources Control Board ("State Board") to review the Regional Board's Order No. R9-2009-0002, reissuing NPDES Permit No. CAS0108740 (hereafter, the "Permit.") As of January 15, 2010, the Regional Board has not made available a complete and final copy of the adopted Permit. Petitioners will supplement this petition with the final Permit when available from the Regional Board.

III. DATE OF REGIONAL BOARD'S ACTION

The Regional Board adopted the Permit on December 16, 2009.

IV. STATEMENT OF REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER

Petitioners believe the Permit adopted by the Regional Board generally embodies an appropriate approach to improving water quality in the County while reflecting the work the Permittees have initiated during the prior permit terms and the work they have committed to perform in the future. However, several of the Permit provisions are inappropriate or improper. These provisions include the removal of categories of formerly "exempt" non-stormwater discharges, the imposition of retrofitting requirements, the standards applicable to low impact development ("LID") and hydromodification, and implementation of Total Maximum Daily Loads ("TMDLs"). The State Board should review and revise these provisions to conform with federal and state law.

Petitioners also have concerns regarding the Permit's action levels for storm water and non-stormwater discharges. While Petitioners believe action levels may be appropriate to assist Permittees in reducing the discharge of pollutants from the MS4 to the maximum extent practicable and to effectively prohibit the discharge of non-stormwater into the MS4, Petitioners have concerns that the manner in which the action levels are implemented and enforced may be inappropriate or improper. Action levels are not required by federal law and the cost to implement them (which are likely to be significant) has not been adequately evaluated in light of the perceived benefits to water quality.

All of these provisions impose obligations on Petitioners that are not mandated or supported by the Clean Water Act ("CWA") and/or Porter-Cologne Water Quality Control Act ("Porter-Cologne" or "Water Code") and violate provisions of Porter Cologne. A more detailed discussion of these issues is provided in Section VII below.[1] Petitioners have previously raised these and other issues, verbally and in writing, to the Regional Board. Copies of all of Petitioners' written comments on drafts of the Permit are attached hereto as Exhibit A.

[1] Petitioners may provide the State Board with additional reasons why the Permit is inappropriate and/or improper. Any such additional reasons will be submitted to the State Board as an amendment to this Petition. Petitioners also may dispute certain findings that form the basis of the Permit, which similarly will be detailed in any amendment to this Petition.

V. HOW THE PETITIONERS ARE AGGRIEVED

Petitioners are Permittees under the Permit. They, along with the other Permittees, are responsible for compliance with the Permit. Failure to comply with the Permit exposes Petitioners to liability under the CWA and Porter-Cologne, and subjects them to potential lawsuits by the Regional Board and/or third parties. To the extent that certain provisions in the Permit are improper or inappropriate, Petitioners should not be subject to such actions.[2]

VI. ACTION PETITIONERS REQUEST THE STATE WATER BOARD TO TAKE

The issues raised in this Petition may be resolved or rendered moot by actions to be taken by Permittees, Regional Board staff actions, amendment of the Permit, and/or developments in other jurisdictions. Accordingly, Petitioners request the State Board hold this Petition in abeyance at this time. Depending on the outcome of these actions, Petitioners will, if necessary, request the State Board to act on all or some of the issues raised in the Petition and schedule a hearing.

VII. POINTS AND AUTHORITIES

The following is a brief discussion of the issues Petitioners raise in this Petition. In addition to the issues discussed below, to the extent not addressed by the Regional Board, Petitioners also seek review of the Permit on the grounds raised in Petitioners' previous written comments, copies of which are attached hereto as Exhibit A. Petitioners will submit to the State Board a complete statement of points and authorities in support of this Petition, as necessary, if and when Petitioners request the State Board to consider the Petition.

A. The Permit Improperly Deletes Categories of Exempt Non-Stormwater Discharges

Federal law requires that MS4 permits include a requirement that Permittees effectively prohibit the discharge of non-stormwater into the MS4. 33 U.S.C.A. § 1342(p)(3)(B)(ii) (West 2009). Federal regulations exempt certain discharge categories from this effective prohibition requirement. 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). A Permittee only must address a discharge in one of these categories when a Permittee identifies the discharge as a source of pollutants to waters of the United States. *Id.*

[2] Petitioners may provide the State Board with additional information concerning the manner in which they have been aggrieved by the Regional Board's action in adopting the Permit. Any such additional information will be submitted to the State Board as an amendment to this Petition.

The Permit impermissibly deletes three of the non-stormwater discharge categories – landscape irrigation, irrigation water, and lawn watering (collectively, "irrigation"). (*See* Permit Directive B.) 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 Permittees identify a discharge within one of the categories as a source of pollutants.

Accordingly, the State Board should direct the Regional Board to restore the irrigation categories of exempt non-stormwater discharges.

B. The Permit's Retrofitting Requirement Imposes Potentially Significant Costs Without Any Corresponding Gains in Water Quality

The Permit requires permittees to develop and implement a program to retrofit existing development with additional measures to control runoff. (Permit Directive F.3.d.) Petitioners agree that retrofitting existing development could improve water quality. However, because permittees have a limited ability under existing statutes and under the California and the United States Constitutions to force private landowners to retrofit existing developments, the expense entailed in developing and implementing a retrofitting program will not be matched by any gains in water quality. Because federal law does not require retrofitting of existing development (and in fact EPA's regulations acknowledge that MS4 regulation would have to be limited largely to undeveloped sites and sites being developed/redeveloped), Petitioners request that the State Board direct the Regional Board to strike the Permit's retrofitting provision.

C. Permittees Must be Provided Flexibility in Implementing the Permit's Low Impact Development and Hydromodification Requirements

The Permit requires that certain development projects include prescriptive low impact development ("LID") requirements. (*See, e.g.*, Permit Directive F.1.) The Permit also requires permittees to develop and implement a hydromodification management plan ("HMP") for the same development projects. (Permit Directive F.1.h.) Petitioners agree that the concepts of LID and HMPs have the potential to improve water quality by reducing the discharge of pollutants from the MS4. However, the LID and HMP provisions are not required by federal law and violate state law in that,

among other things, they prescribe how Permittees are to comply with the MEP standard. *See* Water Code § 13360(a). Moreover, the LID and HMP provisions in this permit are overbroad and will not necessarily result in improved water quality. For example, the HMP requirement 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 permittees to common law liability.

Because the LID and HMP provisions are not required by federal law and violate state law, Petitioners request the State Board remand the Permit back to the Regional Board to revise the provisions, providing permittees with required flexibility in implementing the LID and HMP requirements.

D. The Permit Improperly Incorporates Total Maximum Daily Load Wasteload Allocations

The Permit includes limitations based on wasteload allocations ("WLAs") developed in fully approved and adopted Total Maximum Daily Loads ("TMDLs"). (Permit Directive I.) The Permit characterizes the limitations as Water Quality Based Effluent Limitations. However, the WLAs are to be achieved in the receiving water. Accordingly, Petitioners consider the limitations to be receiving water limitations. *See, e.g.,* State Board Order WQ 2009-0008. 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. Petitioners submit 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, petitioners submit that the Regional Board has not complied with relevant requirements (e.g., Water Code §§ 13000, 13263(a), 13241, etc.). Accordingly, the State Board should direct the Regional Board to revise the permit's TMDL provisions consistent with federal and state law and policy.

E. The Cost to Implement the Stormwater and Non-Stormwater Action Levels, Which Are Not Required By Federal Law, And the Water Quality Benefits to be Achieved By Them Have Not Been Adequately Considered by the Regional Board

Federal law requires that Permittees effectively prohibit the discharge of non-stormwater into the MS4 and to reduce the discharge of pollutants from the MS4 to the maximum extent practicable. To assist Permittees in meeting these two standards, the Permit imposes action levels on the discharge of stormwater (SALs) and non-stormwater (NALs) from the MS4. (Permit Directives C and D.) Ideally, action levels would be a tool that would help Petitioners focus resources on more significant water quality problems. However, Petitioners are 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 Permittees, the action levels may be used against Permittees.

As an initial matter, Petitioners continue to object to the distinction made in the Permit 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***. Permittees' obligation with respect to non-stormwater is to effectively prohibit the discharge of non-stormwater into the MS4. To the extent the Permit imposes separate requirements on the discharge of 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. A substantial body of evidence exists that suggests several of the proposed SALs and NALs may not be reasonably achievable in South Orange County. Petitioners are hopeful that the Permit's SAL and NAL provisions will provide Permittees with flexibility to prioritize their response to SAL and NAL exceedances. However, if Permittees are 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 State Board should remand the Permit to the Regional Board to conduct 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.

VIII. NOTICE TO REGIONAL BOARD

As indicated in the attached Proof of Service, a copy of this Petition is being simultaneously served by Federal Express upon the Executive Officer of the Regional Board.

IX. ISSUES PREVIOUSLY RAISED

As noted in Section IV above, the substantive issues raised in this Petition were presented to the Regional Board before the Regional Board acted on December 16, 2009.

X. CONCLUSION

For the reasons stated herein, Petitioners have been aggrieved by the Regional Board's action in adopting the Permit. However, issues raised in this Petition may be resolved or rendered moot by Regional Board actions and/or developments in other jurisdictions. Accordingly, until such time as Petitioners request the State Board to consider this Petition, Petitioners request the State Board hold this Petition in abeyance.

DATED: January 15, 2010

Respectfully submitted,

NICHOLAS S. CHRISOS, COUNTY COUNSEL
and GEOFFREY K. HUNT, SUPERVISING DEPUTY

By: _____
Geoffrey K. Hunt, Supervising Deputy

Attorneys for Petitioners COUNTY OF ORANGE and ORANGE COUNTY FLOOD CONTROL DISTRICT

OFFICE OF THE COUNTY COUNSEL
COUNTY OF ORANGE

PROOF OF SERVICE BY EMAIL

I am over 18 years of age, not a party to this action and employed in San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067.

On January 15, 2010, at approximately 3:00 p.m., I served by email a copy of:

PETITION FOR REVIEW
(Re: COUNTY OF ORANGE AND ORANGE COUNTY FLOOD CONTROL DISTRICT FOR REVIEW OF ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, IN ADOPTING ORDER NO. R9-2009-0002, NPDES PERMIT NO. CAS0108740)

on the following:

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst
1001 "I" Street, 22nd Floor
Sacramento, CA 95814
Email: jbashaw@waterboards.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 15, 2010.

Connie L. Noble

OFFICE OF THE COUNTY COUNSEL
COUNTY OF ORANGE

PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067.

I am readily familiar with the practice of this office for collection and processing of correspondence for next business day delivery by Federal Express, and correspondence is deposited with Federal Express that same day in the ordinary course of business.

Today I served the attached:

PETITION FOR REVIEW
(Re: COUNTY OF ORANGE AND ORANGE COUNTY FLOOD CONTROL DISTRICT FOR REVIEW OF ACTION BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, IN ADOPTING ORDER NO. R9-2009-0002, NPDES PERMIT NO. CAS0108740)

by causing a true and correct copy of the above to be delivered by Federal Express from San Francisco, California in sealed envelope(s) with all fees prepaid, addressed as follows:

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst
1001 "I" Street, 22nd Floor
Sacramento, CA 95814

Mr. David W. Gibson
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 15, 2010.

Connie L. Noble

OFFICE OF THE COUNTY COUNSEL
COUNTY OF ORANGE

County of Orange Comment Letter
Dated April 4, 2007

Bryan Speegle, Director

COUNTY OF ORANGE

RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

Environmental Resources
1750 S. Douglass Road
Anaheim, CA 92806

Telephone: (714) 567-6363
Fax: (714) 567-6220

April 4, 2007

By E-mail and U.S. Mail

John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Subject: Tentative Order No. R9-2007-0002; NPDES No. CAS0108740

Dear Mr. Robertus:

We are in receipt of the February 9, 2007, 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 Incorporated Cities of Orange County, and the Orange County Flood Control District within the San Diego Region (Tentative Order No. R9-2007-0002) (NPDES No. CAS0108740). The County of Orange, as the Principal Permittee, welcomes the opportunity to provide comments on the Regional Water Quality Control Board's ("Regional Board") Tentative Order as prepared and distributed by the Regional Board staff. The Copermittees were involved in the development of these comments and the cities of Aliso Viejo, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo and Rancho San Juan Capistrano, Santa Margarita have directed that they be recognized as concurring entities.

The Copermittees reserve the right to submit additional comments up to the close of the public comment period. In order to accommodate the need for discussions with Regional Board staff to attempt to resolve our many concerns, the Copermittees hereby request that the Regional Board extend the comment period beyond the scheduled April 11 hearing.

The Orange County Stormwater Program (the "Orange County Program or Program") has been in existence under a National Pollutant Discharge Elimination System (NPDES) permit since 1990. The permit was reissued in 1996 and 2002. The Program is now a mature program, recognized as a statewide leader in municipal stormwater management. To provide a sound technical basis for the fourth term permit, the Copermittees conducted comprehensive program assessments using a multiple lines of evidence approach, including audit findings and the California Stormwater Quality Association (CASQA) Program Effectiveness Guidance. Based on these assessments, the Copermittees prepared and submitted the 2006 Report of Waste Discharge ("ROWD") to Regional Board staff. The ROWD identified many positive program outcomes, and where the assessments indicated improvements are needed, the Copermittees

proposed changes and added commitments to the Drainage Area Management Plan ("DAMP"), the foundational guidance and policy-setting document for the Program.

The Copermittees developed the ROWD, including the proposed DAMP, to provide strategic direction for the management of future water quality improvements. Given the progress of the Orange County Program to date, the demonstrated commitment of the Copermittees, and the comprehensive assessments of Program effectiveness, the Copermittees expected the ROWD and the revised DAMP would provide the basis for the fourth term permit. Instead, the Tentative Order imposes a management strategy and new technical requirements on the Orange County Program that may confound the ability of the Copermittees to deliver the water quality improvements that the Regional Board and the Copermittees seek to obtain. The Tentative Order imposes unnecessary burdens on the resources of the Copermittees and fails to provide any justification for disregarding many of the approaches set forth in the ROWD and revised DAMP.

We look forward to meeting with you to discuss these matters and achieve a satisfactory resolution. In the meantime, we have summarized our overarching concerns with the Tentative Order as General Comments in this letter and provide additional comments and concerns in the following Attachments:

- Attachment A presents comments on our main legal and policy issues.
- Attachment B presents technical comments and suggested language on specific requirements contained within the Tentative Order.
- Attachment C includes comments on the Monitoring and Reporting Program.

GENERAL COMMENTS

I. The Orange County Program is a Mature and Successful Program – A State Leader in Municipal Stormwater Management

At the inception of the Program the County of Orange and the 12 Copermittees developed a DAMP to serve as the principal policy and guidance document for the entire program. Over successive permit terms the Copermittees have modified the DAMP through an iterative development process designed to better reflect the needs of the Copermittees, ensure Copermittee accountability and deliver positive water quality and environmental outcomes. The DAMP now comprehensively guides each Copermittee in the development of its Local Implementation Plans (LIP), which describes how the program will be implemented on a city/jurisdiction basis. The DAMP also includes for each watershed in the San Diego Region an action plan that details the Copermittees' pollution prevention and control efforts on a watershed level related to constituents of concern, particularly those on the 303(d) List.

The Orange County Program has matured and made significant advances in stormwater pollution prevention and control with the DAMP as its foundational document. The DAMP serves as the basis for organizing our efforts and obtaining the necessary commitments of local governments to a common plan of attack. The result is that the Orange County Program has gained the strong participation and commitment of each of its local government jurisdictions to water quality improvements served by the Program. This level of participation and commitment has enabled the Program achieve many of its goals:

- The Orange County Program is proactive.

- The Copermittees are engaged in the Program and provide valuable input into the process.
- The program uses several separate, but highly inter-related water quality planning processes to address urban sources of pollutants
- The Program recognizes the benefits of watershed-based planning and regional controls and has an increased emphasis to support these approaches as foundational to the success of the program.
- The Copermittees adaptively manage the Program - the iterative process is actively employed and the necessary program modifications proposed and incorporated into the program.
- The existing framework and implementation of the program meets or exceeds the permit requirements.
- Throughout its history, the Program has received and continues to receive the significant funding and resources it requires to ensure its success.

As a result of the long history of Program development and achievement, the Orange County Program has become a statewide leader in municipal stormwater quality management efforts. For example, the Copermittees have been actively involved in the efforts of CASQA in developing and applying the practice of stormwater program effectiveness assessment. In addition, the Program has received statewide recognition for the excellence of its public education program, Project Pollution Prevention, and the South Orange County Integrated Regional Water Management Plan recently prevailed in statewide competition for $25 million in grant funding. This progress points an Orange County Stormwater Program that would now benefit from general regulatory direction rather than prescriptive requirements.

II. Toward Attaining Water Quality Standards – Where Do We Go From Here?

Where we want to get to and how we want to get there during the course of the fourth term permit, is set forth in the 2006 ROWD, which includes the proposed DAMP for the period 2007-2012 ("Proposed DAMP"). The ROWD describes the Copermittees' compliance activities, enumerates Program accomplishments, and based upon comprehensive assessments of program effectiveness and the iterative process for achieving water quality standards, identifies the programmatic changes necessary to address areas of the Program that can be improved.

A. The ROWD and the Proposed DAMP Provide a Sound Basis for the Fourth Term Permit.

The Copermittees spent a significant amount of time and energy developing the ROWD and Proposed DAMP. As a part of this process, the Copermittees conducted comprehensive effectiveness assessments using the CASQA Program Effectiveness Assessment Guidance. The Orange County Program is one of the few programs to date to have actively defined a series of performance metrics and used an assessment framework to define the relationships between compliance actions and positive changes in water quality. This assessment process is important because it measures the success of the Program in terms of its achievement of water quality improvements. It further provides a basis for identifying the changes that are needed to improve the Program's effectiveness in achieving water quality goals. The ROWD and the Proposed DAMP are, therefore, based on rigorous systematic assessments that should provide a sound technical basis for the fourth term permit.

Given the strong technical basis for the recommendations presented in the ROWD and the Proposed DAMP, and the commitments of the Copermittees to the success of the Program, our ROWD and Proposed DAMP deserve the respect and consideration of the Regional Board and its staff. It appears, however, that the Tentative Order, to a large extent, disregards the demonstrated successes of the Program, overrides the thoughtful recommendations in the ROWD without any justification and dismisses the Proposed DAMP as simply "procedural correspondence."

B. The Tentative Order Unreasonably Limits the Use of Regional BMP Treatment Controls and Innovative Approaches.

While the Copermittees and Regional Board are in agreement that, at the end of the day the common goal is to improve stormwater quality, the way in which this is achieved and the necessary timeframes for achieving Program improvements clearly differ. The Attachments to this letter identify and discuss many of these differences in detail. The most troubling of these are the limitations imposed on the location of treatment control BMPs. By its two Findings that (1) natural drainages, whether channelized or not, that are used to convey urban stormwater are both a "receiving waters" and an MS4, and (2) that treatment of urban stormwater must take place prior to discharge from an MS4 to a receiving water, the Tentative Order effectively mandates a "site-by-site" approach to stormwater treatment. This mandate is not supported on a technical basis or required by law, and it severely limits the ability to effectively manage stormwater in a manner that will help ensure attainment of water quality standards and maintain key watershed hydrologic and geomorphological processes.

For example, the Copermittees' efforts to address pathogen indictor bacteria unequivocally demonstrate the need for a regional treatment approach. Because it has been discovered that bacteria are incubated throughout the MS4 and receiving water system, effective treatment designed to improve water quality at Orange County beaches must occur at the end of the system prior to discharge to estuary and ocean receiving waters. Indeed, as a result of the coordinated efforts of the Orange County Program and implementation of regional controls, such as diversions and treatment systems, the Copermittees were able to make data submittals that now support 303(d) delisting of certain Orange County's beaches for pathogen indicator bacteria. While this delisting effort clearly represents a significant outcome, protecting beaches is not the only goal, of course, because the streams also have beneficial uses, including recreation. However, the watershed approach and the iterative process of implementation support the prioritization of efforts and an initial emphasis on protecting recreational uses in the places where the vast majority of those uses occur, which in South Orange County is at the beaches. Moreover, if regional treatment can protect public health by preventing pollution from reaching heavily used beaches, this approach should not be explicitly prohibited because it does not also solve all of the other water quality problems that we have identified.

From the perspective of future urban development, applying the proposed BMP site requirements at a project level may lead to poor project design from a broader sub-watershed and watershed level of analysis. The geomorphologic planning principles being given practical expression in the Rancho Mission Viejo project, place considerable emphasis on preserving sources of coarse sediments (e.g., sandy soils and crystalline terrains) important to streamcourse processes and beach sand replenishment by concentrating development in terrains that would otherwise generate fine sediments. Similarly, from a broader sub-watershed and watershed scale, it may be far better to avoid soils with high infiltration capabilities (e.g., sandy soils) by concentrating development in areas with higher levels of natural runoff rates (e.g. clayey soils) than to minimize impervious surface on a project-by-project basis.

These accomplishments and emerging and innovative approaches to surface water management and protection are threatened by overly restrictive and unnecessary limitations on the use of regional treatment BMPs.

C. *The Fourth Term Permit Should be Based on the ROWD and the Proposed DAMP; Any Other Requirements Must Have a Strong Technical and Legal Basis and Be Supported With Appropriate Findings in the Tentative Order.*

The Orange County Program has demonstrated continuous improvement over the past three permit terms. Looking forward, the Copermittees have provided a strong technical basis for the further improvements they have recommended in the ROWD. The Copermittee jurisdictions have the political will and adequate funding to achieve the Program policies and objectives as further detailed in the Proposed DAMP. For these reasons, the Regional Board and its staff should carefully consider the recommendations of the Copermittees as the basis for the fourth term permit. The Regional Board and its staff should incorporate other permit changes, especially more prescriptive programmatic requirements, only where they are necessary to achieve water quality improvements and are supported by strong technical justification and the requirements of the federal CWA. To the extent that such additional changes are incorporated into the fourth term permit, the Regional Board must set forth in the Fact Sheet/Technical Report the legal basis and technical justification for such changes and with appropriate Findings in the Tentative Order.

* * *

We appreciate the effort that you and the Regional Board staff have devoted to development of the fourth term permit for the Orange County Program. We look forward to working with you and the staff to revise the Tentative Order to ensure that it meets our mutual goals. We trust that the comment period will be extended beyond April 11, 2007 in order to accommodate such discussions.

Thank you for your attention to our concerns. Please contact me directly if you have any questions. For technical questions, please contact Chris Crompton at (714)834-6662 or Richard Boon at (714)973-3168.

Sincerely,

Bob Wilson

for Bryan Speegle, Director
Resources & Development Management Department

Attachment A: Legal & Policy Comments
Attachment B: Technical Comments
Attachment C: Technical Comments on Monitoring Program

cc: Technical Advisory Committee
Permittees

ATTACHMENT A

ORANGE COUNTY COMMENTS ON CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION TENTATIVE ORDER No. R9-2007-0002 NPDES NO. CAS0108740

INTRODUCTION

This Attachment A contains the principal legal and policy comments of the County of Orange (the "County") on Tentative Order No. R9-2007-0002 dated February 9, 2007 ("Tentative Order"). Although the supporting Fact Sheet/Technical Report ("Fact Sheet") is referenced in this attachment, the County has not attempted, at this time, to provide detailed legal comments on the Fact Sheet. The County reserves the right to provide additional legal comments, on both the Tentative Order and Fact Sheet, before the close of public comment.

PRINCIPAL LEGAL AND POLICY COMMENTS

I. The Blanket Finding That All Natural Streams That Convey Urban Runoff Are Both An MS4 And A Waters Of The U.S. Is Inconsistent With Federal Law And Unsupported In the Fact Sheet

Tentative Order Finding D.3.c. (page 10) states that:

> 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.* (Emphasis added.)

The Finding has two parts. First, it states that urban streams that are used to convey urban runoff are part of an MS4. Second, it states that such urban streams are both an MS4 and a receiving water. Neither part of this Finding withstands scrutiny.

A. Under The CWA Definition Of MS4, A Natural Stream Is Not An MS4 Unless It Is Channelized And Owned Or Operated By The Copermittee

An MS4 or "municipal separate storm sewer system" is a system of municipal separate storm sewers. "Municipal separate storm sewer" is defined as:

> [A] conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) . . . that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;
(iii) Which is not a combined sewer; [and]
(iv) Which is not part of [a POTW].

40 C.F.R. § 122.26(b)(8). The Tentative Order includes the same definition. Tentative Order at Appendix C-6.

According to the definition of MS4, to the extent that a municipality "channelizes" a natural stream and the man-made channel is owned or operated by a Copermittee and designed or used for collecting or conveying storm water, it might fit within the definition of MS4. Man-made storm drain conduits installed in natural drainages would also be part of an MS4. Otherwise, urban streams are not roads, streets, catch basins, curbs, gutters, ditches, or storm drains and thus are not MS4s. If the USEPA had intended the definition to include "natural streams" that convey storm water, then it would not have limited the relevant specific items included to "ditches and man-made channels." All of the specified conveyances are part of a constructed storm drainage system. Natural streams that also convey storm water are not.[1]

The Fact Sheet discussion of Finding D.3.c. does not support the assertion that "all natural streams" that are used to convey urban runoff are part of the MS4. The Fact Sheet limits its discussion to the circumstance where "an unaltered natural drainage[ ] receives runoff from a point source (channeled by a Copermittee to drain an area within [its] jurisdiction), which then conveys the runoff to an altered natural drainage or a man-made MS4." Fact Sheet at 54. Even with this narrowed focus, the "natural drainage" described still does not fall within the definition of an MS4, and the Fact Sheet provides no legal analysis in support of this finding.

Accordingly, the County recommends that the Regional Board delete Finding D.3.c. from the Tentative Order.

B. *Under Rapanos, A Channel Through Which Water Flows Intermittently Or Ephemerally Or That Periodically Provides Drainage For Rainfall Is Not A Waters Of The U.S.*

Finding D.3.c of the Tentative Order states that natural streams used to convey urban runoff are both a part of the MS4 and a receiving water. The term "receiving waters" is defined in the Tentative Order as "[w]aters of the United States." Tentative Order at Appendix C-7. In 2006, the United States Supreme Court issued its most recent pronouncement as to what is (and is not) a "waters of the United States" under the Clean Water Act ("CWA"). The plurality decision in *Rapanos v. United States* 126 S. Ct. 2208, 2225 (2006) concluded:

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[1] USEPA's proposed definition of an MS4 was limited to conveyances (including roads with drainage systems) "designed solely for collecting or conveying storm water." *See* 53 Fed. Reg. 49416, at 49467 (Dec. 7, 1988). Under the proposed definition, a natural stream clearly could not be an MS4 since it is not "designed." In light of comments that the proposed definition needed to be clarified to state that road culverts, road ditches, curbs and gutters are part of the MS4, USEPA "clarified that municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains" are MS4s. *See* 55 Fed. Reg. 47990, at 48036 (Nov. 16, 1990). Since not all of these man-made features are designed solely for collecting storm water, the final definition of MS4 provides "designed *or used* for collecting or conveying storm water" rather than "designed solely for collecting or conveying storm water." *Id.* at 48065 (emphasis added).

> 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.

Under this definition, the most that the Regional Board can say with respect to natural drainages used to convey urban runoff is that, to the extent they are relatively permanent, standing or continuously flowing bodies of water forming geographic features that would be described as streams or rivers, they might be considered to be waters of the U.S.. To the extent a drainage has only intermittent or ephemeral flows or only periodically provides drainage for rainfall, the finding that the drainage is a waters of the U.S. would be inconsistent with the current U.S. Supreme Court interpretation of the term. Moreover, to make a Finding that any particular drainage used to convey urban runoff is a waters of the U.S. would require a factual analysis on a case by case basis.[2] The Regional Board's blanket Finding D.3.c. is merely a broad declaration unsupported in fact or current law and should be deleted from the Tentative Order.

C. To The Extent A Natural Drainage Is A Waters Of The U.S. It Cannot Also Be An MS4; By Definition An MS4 Discharges To Waters Of The U.S.

As noted above, the Tentative Order and federal CWA regulations define an MS4 as a conveyance that discharges ***to*** waters of the United States. The notion that a drainage can be both part of an MS4 and a receiving water is inconsistent with this definition. Thus, to the extent a natural drainage is a waters of the U.S., it cannot also be an MS4 and vise versa. The Regional Board should revise the Tentative Order to make clear that if a conveyance is deemed part of an MS4 in accordance with the CWA definition, then it cannot also be deemed a waters of the United States.

II. The Proposed Prohibition Of Treatment Control BMPs In Receiving Waters Is Unsupported By Federal Law And Inconsistent With State Law

The Tentative Order Finding E.7 (page 14) states that "[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water." Given Finding D.3.c., which states that all natural drainages that carry urban runoff are "both an MS4 and a receiving water," Finding E.7 presents significant practical issues for the placement of treatment control BMPs and creates a legal conundrum. Moreover, the Finding is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on storm water treatment BMPs.

Finding E.7 apparently is intended to support Tentative Order revisions to the Standard Urban Storm Water Mitigation Plan (SUSMP) requirements for Priority Developments. Tentative Order Section D.1.d.(6)(c) (page 28) is a new provision that provides, "All treatment control BMPs must be located so as to infiltrate, filter, or treat runoff prior to its discharge to any waters of the U.S.," except where multiple projects use shared treatment. Section D.1.d.(6)(f) (page 28) provides that treatment control BMPs for all Priority Development Projects must be

[2] Even under Justice Kennedy's concurring opinion, the determination of a "significant nexus" must be made on a case-by-case basis. *See* 126 S. Ct. at 2250-51.

"implemented close to pollutant sources (where shared BMPs are not proposed), *and* prior to discharging into waters of the U.S." (emphasis added). The corresponding provision in the third term permit, provides that such BMPs be "implemented close to pollutant sources, when feasible, and prior to discharging into *receiving waters supporting beneficial uses*" (emphasis added). Finally, and most directly, Section D.1.d.(6)(g) (page 29) provides that treatment control BMPs must "[n]ot be constructed within a waters of the U.S. or *waters of the State*" (emphasis added). The addition of "waters of the state" to this provision further exacerbates the problem. "Waters of the state" includes "any surface water, groundwater, including saline waters, within the boundaries of the state." Including this expansive term in Section D.1.d(6)(g) would impose extreme limitations on the location of treatment BMPs and greatly interfere with Copermittees' ability to achieve needed water quality improvements.

The revised language of the Tentative Order severely limits the potential locations for installation of treatment control BMPs. See Attachment B (pages 6-7). Given the lack of any proper legal or factual basis for these limitations, the Regional Board should strike Finding E.7 and the corresponding SUSMP revisions from the Tentative Order.

A. Neither The USEPA Regulation Nor The USEPA Guidance Cited In The Finding Provide Legal Support For The Finding or the Revised SUSMP Provisions

1. 40 CFR 131.10(A) Addresses Only Designated Beneficial Uses; It Does Not Prohibit The Use Of A Water Body For Incidental Waste Assimilation Or Conveyance

Tentative Order Finding E.7 and the corresponding discussion in the Fact Sheet cite to regulations in 40 CFR Part 131, which govern the development of water quality standards. Section 131.10(a) provides:

> Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. *In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.* (Emphasis added.)

On its face, this provision clearly does not prohibit or support the prohibition of construction of treatment control BMPs in waters of the U.S.. It merely prohibits a state from adopting "waste transport" or "waste assimilation" as a *designated use for purposes of developing water quality standards*. It says nothing about, and has nothing to do with, the incidental use of a water body for those purposes.

The "legislative history" of 40 CFR 131.10(a) does not indicate that the "In no case" language was meant to prohibit the construction of treatment control BMPs in receiving waters. USEPA adopted Part 131 in 1983. It revised and consolidated in the new Part 131 existing regulations previously found in 40 CFR Parts 120 and 35, which governed the development, review, revision and approval of water quality standards. In 1982, Section 35.1550(b)(2) provided that the water quality standards of each state should:

> Specify appropriate water uses to be achieved and protected, taking into consideration the use and value of water for public water supplies, propagation of fish, shellfish, and wildlife, recreation purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

In USEPA's proposed rule to establish Part 131, the language from 40 CFR 35.1550(b)(2) was maintained:

> Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.

47 Fed. Reg. 49234, at 49247 (October 29, 1982). In the final rule, USEPA added the "In no case" language without discussion. In a "Summary of the Changes Made in the Proposed Regulation" table, USEPA simply stated: "Statement added to [131.10(a)] prohibiting *designating a stream* for waste transport or assimilation." 48 Fed. Reg. 51400, at 51404 (November 8, 1983) (emphasis added). The most that can be said, therefore, is that USEPA added the "In no case" language to avoid the prospect of states developing water quality standards to protect a stream for the beneficial use of waste assimilation or transport. There is nothing in the preambles to either the proposed or final rules to suggest USEPA intended the provision to prohibit construction of treatment control BMPs in receiving waters. Finding E.7 suggests that allowing construction of treatment control BMPs in a receiving water would be "tantamount to accepting waste assimilation as an appropriate use for that water body." The extent to which any assimilation and transport of waste is "appropriate" as an existing or incidental use is determined in accordance with state policy and water quality standards, including TMDLs. The CWA regulations cited in the Finding speak only to those uses that should and should not be identified as "designated uses" for the purpose of developing such water quality standards.

2. *USEPA's Part 2 Guidance Clearly Contemplates That Construction Of Treatment Control BMPs In Receiving Waters May Be The Best If Not Only Option*

The USEPA guidance cited in Finding E.7 and the Fact Sheet does not support prohibition of treatment control BMP construction in receiving waters. The Finding cites USEPA's *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems* (November 1992) ("Part 2 Guidance"). Section 6 generally discusses the proposed management program and Section 6.4 specifically addresses structural controls. Because a CWA Section 404 permit might be required for some structural controls, including control projects that involve the discharge of dredged or fill material into waters of the U.S., including wetlands, the guidance suggests that municipalities should try to avoid locating such controls in natural wetlands:

> Applicants should note that CWA Section 404 permits may be required for some structural controls, including any control

> projects that involve the discharge of dredged or fill material into waters of the United States, including wetlands. States may also require permits that address water quality and quantity. ***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, and that the use of other nonstructural or source controls are not practicable or as effective. In addition, impacts to wetlands should be minimized by identifying those wetlands that are severely degraded or that depend on runoff as the primary water source. Moreover, ***natural wetlands should only be used in conjunction with other practices***, so that the wetland serves a "final polishing" function (usually targeting reduction of primary nutrients and sediments). Finally, practices should be used that settle solids, regulate flow, and remove contaminants prior to discharging storm water into a wetland.

Part 2 Guidance at p. 6-21 (emphasis added). Rather than supporting a prohibition of constructing structural BMPs in receiving waters, this guidance clearly contemplates that construction of such controls sometimes will be the best, if not only, option for treating storm water. Moreover, rather than an overriding concern for water quality, the guidance appears primarily concerned with the burden of having to obtain a CWA Section 404 permit if construction results in dredged or fill material being discharged into wetlands.

Thus Finding E.7 and the additional and revised SUSMP provisions at Section D.1(d)(6) of the Tentative Order are made without legal or factual support. This Finding and the proposed prohibitions on construction of structural treatment BMPs in receiving waters should be stricken from the Tentative Order.

B. The Proposed Prohibition Is Inconsistent With Water Code 13360(a)'s Prohibition On Specifying How Discharge Requirements Are To Be Met

The Tentative Order establishes waste discharge requirements for discharges of urban runoff. In establishing these requirements, the Porter Cologne Water Quality Control Act makes it abundantly clear that the Regional Board may order Copermittees to comply with the requirements, but it may not specify *how* they comply with the order. Water Code Section 13360(a) provides:

> 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 the 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 discussed above, it is *not* unlawful for Copermittees to construct treatment control BMPs in receiving waters. Accordingly, Section 13360(a) prohibits the Regional Board from specifying

that such BMPs must be located prior to discharge into receiving waters in an effort to achieve desired reductions in storm water pollution as required by the Tentative Order. Thus Finding E.7 and the proposed prohibitions on construction of structural treatment BMPs in receiving waters at Tentative Order Section D.1.(d)(6) should be stricken from the Tentative Order.

III. The Finding That All Requirements In The Order Are Necessary To Meet The MEP Standard Is Unsubstantiated And Appears Designed To Avoid The Requirements Of California Law Applicable To Permit Requirements Imposed By The State In The Exercise Of Its Reserved Jurisdiction

Finding E.6 of the Tentative Order provides:

> Requirements in this Order that are *more explicit* that the federal storm water regulations in 40 CFR 122.26 are prescribed in accordance with the CWA Section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard. (Emphasis added.)

Finding E.6 is made without any identification of the "more explicit" provisions to which it refers and without the necessary analysis to support its conclusion that each such requirement is "necessary to meet the MEP standard." Moreover, Finding E.6 appears to be a "defensive finding" designed to avoid the requirements of Water Code Section 13241, which, together with Water Code Section 13263, requires the Regional Board to take economic considerations into account before adopting permit requirements that are more stringent than federal law requires. Moreover, to the extent that the Tentative Order imposes requirements more stringent than federal law requires, such requirements may be unfunded mandates prohibited by the California Constitution.

Because Finding E.6 refers to unspecified provisions of the Tentative Order and is not supported by any factual analysis of such provisions, it must be removed from the Order.

A. The Regional Board Cannot Simply Declare That All "More Explicit" Requirements In The Order Are Necessary To Meet MEP; It Must Identify Such Provisions and Demonstrate Why Each Requirement Is Mandated By Federal Law And Support Each Requirement With An Appropriate Finding

Relying on California Supreme Court precedent, the State Board has held that, not only must waste discharge requirements or an NPDES permit be supported by findings, but also, in order to withstand challenge, the findings must be supported by substantial evidence. In Order No. WQ 95-4, reviewing an NPDES permit issued by the San Francisco Bay Regional Board, the State Board agreed with petitioners' contention that the findings (particularly Findings 17 and 18) were inadequate. Citing *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974), the State Board found that Findings 17 and 18 did not "bridge the analytic gap between the raw evidence and ultimate decision or order." Order No. WQ 95-4 at p. 23.

In *Topanga*, the California Supreme Court analyzed Section 1094.5 of the Code of Civil Procedure, which addresses the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. "11 Cal. 3d at 514-15. Section 1095.4 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." *Id.*

Without identifying each of the "more explicit" requirements of the Tentative Order and demonstrating such requirements are necessary to meet the MEP standard, the Tentative Order lacks the requisite substantial evidence to support the conclusion that all such requirements are necessary to meet the MEP standard.

B. *In Particular, The MEP Finding is Not Supported By Any Analysis in the Fact Sheet*

In order to provide the substantial evidence necessary to support the MEP finding, the Regional Board would have to identify each "more explicit" requirement and establish that each such requirement in fact meets the definition of MEP. The Fact Sheet discussion of Finding E.6 makes no attempt to provide any factual analysis in support of the Finding. Fact Sheet at 68. The Fact Sheet is merely a summary of the Regional Board's reserved authority to implement its own standards and requirements, provided they are at least as stringent as those mandated by the CWA and federal regulations. The Fact Sheet further discusses the Regional Board's authority under CWA Section 402(p)(3)(B)(iii), which provides the statutory basis for the MS4 permitting program. Finally, the Fact Sheet refers to USEPA guidance, which "supports increased specificity in storm water permits . . . and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards." *Id.* at 69.

This Fact Sheet discussion may support increased specificity and more tailored BMPs, where needed, provided that the need for more specificity is supported by an evaluation of need for more specificity. The Fact Sheet does nothing to support the broad conclusion that all such "more specific" or "more explicit" requirements are "necessary to meet the MEP standard."[3] Accordingly, Finding E.6 is not supported by substantial evidence and should be deleted from the Tentative Order.

C. *To The Extent The Tentative Order Imposes Requirements That, Rather Than Meeting MEP, Go Beyond MEP, Or Otherwise Represent The Exercise Of The State's Reserved Jurisdiction To Impose Requirements That Are Not Less Stringent Than The Federal CWA Mandate, The City of Burbank Decision Requires The Regional Board To Comply With State Law, Including The Requirement To Consider Economic Factors*

In *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005), the California Supreme Court held that when a regional board issues an NPDES permit with requirements more stringent than what federal law requires, state law requires that the regional board take into account economic factors, including the discharger's cost of compliance. *Id.* at 618. Specifically, the court ruled that, where permit restrictions exceed the requirements of the Clean Water Act, the regional board must comply with Sections 13263 and 13241 of the Porter Cologne Water Quality Control Act. *Id.* at 626. Read together, Sections 13263 and 13241 require regional boards to take into account economic considerations when adopting waste discharge requirements.

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[3] Given that the Fact Sheet and Tentative Order provide no analysis of the Tentative Order requirements in relation to the MEP standard, the County reserves its right to comment on the definition of MEP contained in the Tentative Order at C-5, and the Fact Sheet at 35-36, should the need for analysis of requirements in light of the MEP standard arise in the future.

As noted above, by stating that the "more specific" or "more explicit" requirements in the Tentative Order are necessary to meet the MEP standard (*i.e.,* the federal requirement), without any support in the Fact Sheet, Regional Board staff appear to be making a defensive finding designed to ward off challenges that, in adopting the Tentative Order, the Regional Board failed to take into account economic considerations for those requirements that exceed the federal CWA mandate.

However, the California Supreme Court made clear in *City of Burbank* that whether, on the one hand, a permit requirement is mandated by federal law, or, on the other hand, is the exercise of the state's reserved jurisdiction to impose its own requirements so long as they are at least as stringent, is an issue of fact. *Id.* at 627. Thus the Regional Board cannot seek to cloak its more stringent requirements in the broad assertion that all such requirements are required to meet the MEP standard. That finding cannot be supported without a factual determination whether each such requirement is indeed "necessary to meet the MEP standard." The finding that all more "explicit" requirements in the Tentative Order are "necessary to meet the MEP standard" is an example of this. The Court in *City of Burbank* remanded the case to the trial court to decide whether certain requirements were "more stringent" and thus should have been subject to economic considerations in accordance with California law. *Id.*

To the extent the Tentative Order does include requirements that, in fact, do go beyond the federal mandate (which Copermittees believe it does), the Regional Board must subject such requirements to the required economic analysis as required by state law. Many such requirements are identified in Attachment B. For example, see the discussion of the Tentative Order's prescriptive JURMP provisions in Attachment B (pages 8-21) and the Fiscal Analysis provisions in Attachment B (pages 23-26).

D. To The Extent The Requirements Of The Tentative Order Exceed Federal Law, They Are Unfunded Mandates Under The California Constitution

In addition to considering economic factors, to the extent the Regional Board has true choice or discretion in the manner it implements federal law, and chooses to impose costs on Copermittee that are not mandated by federal law, the state will have to fund the costs of complying with the requirements.

Under article XIII B, Section 9(b) of the California Constitution, federally mandated appropriations include "mandates of . . . the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the providing of existing services more costly*." *Sacramento v. California (Sacramento II)*, 50 Cal. 3d 51, 71 (1990) (quoting Cal. Const. art. XIII B, § 9(b)) (emphasis in original). In contrast, federal mandates that impose costs on local agencies do not require reimbursement by the state. *Hayes v. Commission on State Mandates*, 11 Cal. App. 4th 1564, 1593 (1992). This includes when a state implements a statute or regulation in response to a "federal mandate so long as the state had no 'true choice' in the manner of implementation of the federal mandate." *Id.* (citing *Sacramento II*).

In contrast, article XIII B, Section 6 of the California Constitution requires the state to reimburse local governments for the costs associated with a new program or higher level of service mandated by the Legislature or any state agency. Cal. Const. art. XIII B, § 6. Costs imposed on local agencies by the federal government "are not mandated by the state and thus would not require a state subvention." *Hayes*, 11 Cal. App. 4th at 1593.

Thus, under both *Hayes* and *Sacramento II*, if the state has a "true choice" or discretion in the implementation of the federal law, then the state cannot avoid its reimbursement function under Section 6. "If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." *Hayes*, 11 Cal. App. 4th at 1594. Therefore, federal law giving discretion to the states does not constitute a federal mandate.

In relation to Finding E.6 regarding "more explicit requirements," the Fact Sheet states that "CWA section 402(p)(3)(B)(iii) *clearly provides states with wide-ranging discretion*, stating that municipal storm water permits "[s]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." Fact Sheet at 68 (emphasis added).

In the Report of Waste Discharge (ROWD) for the Tentative Permit, Copermittees described the extensive evaluations they have performed to identify weaknesses in their MS4 program. Where weaknesses were identified, the Copermittees recommended additional and more stringent BMPs to address them. While Regional Board staff accepted some of these recommendations in the Tentative Order, the Tentative Order includes other new requirements that lack any similar foundation in program analysis and evaluation. We would argue that these are not only "discretionary," but impose unnecessary financial burdens on the Copermittees.

The Regional Board should require its staff to identify those requirements that are not based upon Copermittee recommendations in the ROWD and determine whether such requirements indeed are necessary to meet the federal standard. If not, they should be deleted from the Order.

IV. The Tentative Order Impermissibly Imposes Third-Party Obligations On Copermittees

Finding D.3.d of the Tentative Order states that MS4 operators "cannot passively receive and discharge pollutants from third parties" and that where these operators do so, they "essentially accept[ ] responsibility" for such illicit discharges. Section D.3.h. of the Tentative Order would hold Copermittees responsible for sewage overflows and infiltration that may discharge into their MS4s, regardless of whether Copermittees owned or controlled the sewage system

To the extent the Tentative Order imposes obligations on Copermittees that are properly the responsibility of others (*e.g.*, the Regional Board, sanitary sewer districts, etc.) or over whom Copermittees otherwise have no control, the County objects.

A. Although The Copermittees May Have A Role In Regulating Industrial And Construction Sites, The Order Impermissibly Requires Copermittees To Assume Responsibilities Duplicating The Regional Board's Responsibilities Under The Statewide General Storm Water Permitting Programs

Under the Tentative Order, discharges from industrial and construction sites are subject to dual (state and local) regulation. *See* Tentative Order, Finding D.3.a. The Finding and Fact Sheet acknowledge that many industrial and construction sites are subject to the General Industrial Permit[4] and the General Construction Permit,[5] adopted by the State Board and enforced by the Regional Board, but claim that USEPA supports an approach holding the Copermittees responsible for the control of discharges from industrial and construction sites in their jurisdictions.

While the Copermittees may have a role in regulating industrial and construction sites, to the extent that the Tentative Order requires the Copermittees to assume responsibilities which either duplicate the Regional Board's responsibilities for the statewide general permitting program or are more extensive than those mandated under the CWA regulations applicable to MS4s, the County objects.

1. *Duplication Of The Regional Board's Responsibilities Under Statewide General Permits*

Contrary to the assertion made in the Fact Sheet at 51-51 and Finding D.3.a, USEPA in fact rejected placing responsibility for regulating discharges from industrial sites (including certain construction sites[6]) with municipalities. In USEPA's proposed Phase I storm water regulations, USEPA actually *considered* placing responsibility for industrial discharges through MS4s with the local municipalities (*see* 55 Fed. Reg. 47990, at 47997 (Nov. 16, 1990)), but ultimately rejected this approach, placing the responsibility for regulating industrial discharges through MS4s with the state and/or regional boards and requiring industrial dischargers to obtain their own permits. *Id.* at 48000. According to USEPA, "this approach . . . address[ed] the concerns of municipalities that they lack sufficient authority and resources to control all industrial contributions to their storm sewers and will be liable for discharges outside of their control." *Id.* at 48001. Instead of having *responsibility* for industrial site discharges, municipalities would only have "an important role in source identification and the development of pollutant controls" for industries that discharged through MS4s. *Id.* at 48000.

Furthermore, the Fact Sheet's reliance on the Phase II storm water regulations is misplaced. First, the Phase II regulations do apply to Phase I permits. Even if they are relevant to medium and large MS4s, the Phase II regulations only provide that small MS4s are to develop and implement ordinances or other regulatory mechanisms to require *erosion and sediment controls* for construction sites, as well as sanctions to ensure compliance, to the extent allowable under state, local or tribal law. 40 C.F.R. § 122.34(b)(4)(ii)(A) (emphasis added). This provision clearly does not make the Copermittees *responsible* for erosion and sediment from construction

[4] The "General Industrial Permit" refers to State Water Resources Control Board Water Quality Order No. 97-03-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000001, Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities.

[5] The "General Construction Permit" refers to State Water Resources Control Board Order No. 99-08-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000002, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity.

[6] "Industrial activity" is defined to include construction activity that results in the disturbance of more than five acres of total land area. 40 C.F.R. § 122.26(b)(14)(x).

sites. Nor does it provide the Regional Board with authority to shift its responsibility for regulating construction site storm water to the Copermittees by requiring them to establish a duplicative program.

In fact, in the USEPA Storm Water Phase II Compliance Assistance Guide cited to in the Fact Sheet, USEPA explicitly says that in order to aid construction site operators to comply with both local requirements and their own NPDES permit, the Phase II Final Rule includes a provision that "allows the NPDES permitting authority to reference a 'qualifying . . local program' in the NPDES general permit for construction." USEPA Storm Water Phase II Compliance Assistance Guide, p. 4-32. This means that *if* a small municipality has a construction permit program that satisfies the NPDES requirements of the general construction permit program, then the site operator's compliance with the local program would constitute compliance with the General Construction Permit. In other words, USEPA does not *require* small MS4s to assume the construction permit obligations of the Regional Board; it simply allows small MS4s to take on those obligations. *Id.*

Thus, rather than supporting an approach that would have municipalities duplicating the responsibilities of the State under the statewide general industrial and construction permits, USEPA's regulations seek to avoid such duplication, clearly placing responsibility for discharges from industrial and construction sites with the State and the site discharger.

2. Proper Limits Of The Copermittees' Obligations

The scope of obligations that can be legitimately imposed on the Copermittees with respect to discharges from industrial and construction sites is narrow. The Copermittees are required to demonstrate adequate *legal authority* to control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity (which includes certain construction sites). 40 C.F.R. § 122.26(d)(2)(i)(A). They are also required, to the extent practicable and applicable, to describe in their MS4 permit application a proposed program to monitor and control pollutants in storm water discharges to MS4s from certain industrial sites and a proposed program to implement and maintain structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to MS4s. 40 C.F.R. §§ 122.26(d)(2)(iv)(C) and (D); 40 C.F.R. § 122.26(d)(2)(viii). Tentative Order requirements that have the Copermittees duplicating the State's program for industrial and construction sites and diverting resources to sites that are not significant sources of pollutants are poor public policy.

B. Simply Because A Municipality Has An Obligation To Establish And Enforce Prohibitions Against Illicit Discharges Does Not Mean It Ise "Responsible For" Such Discharges; Copermittees Only Have The Power To Establish And Enforce Prohibitions Against Illicit Discharges And To Pursue Violations Of Such Prohibitions When They Are Identified

Finding D.3.d. states that operators of MS4s "cannot passively receive and discharge pollutants from third parties" and that where these operators do so, they "essentially accept[ ] responsibility" for such illicit discharges. As support for this contention, the Fact Sheet cites to Section 402(p) of the CWA, which requires municipal NPDES permits to "include a requirement to effectively prohibit non-storm water discharges into the storm sewers." *See* 33 U.S.C. § 1342(p)(3)(B)(ii).

Simply because a municipality has an obligation to establish and enforce prohibitions against illicit discharges does not mean they are "responsible for" such discharges. Nor does anything in the Porter Cologne Act or the CWA support such a contention. The Copermittees do not and cannot physically control discharges into their MS4s, and short of blocking all storm drains, cannot prevent all illicit discharges from occurring. Rather, the Copermittees only have the power to establish and enforce prohibitions against illicit discharges, to educate the public concerning the prohibitions and to pursue violations of such prohibitions when they are identified.

USEPA made this clear in the preamble to the Phase I Storm Water Regulations when it stated that under the regulations, municipal applicants would be required "to develop a recommended site-specific management plan to detect and remove illicit discharges (or ensure they are covered by an NPDES permit) and to control improper disposal to municipal separate storm sewer systems." 55 Fed. Reg. 47990, at 48037 (Nov. 16, 1990) ("Phase I Storm Water Rulemaking").

Moreover, Copermittees may lack legal jurisdiction over storm water discharges into their systems from some state and federal facilities, utilities and special districts, Native American tribal lands, waste water management agencies and other point and non-point source discharges otherwise permitted or controlled by the Regional Board. Similarly, certain activities that generate pollutants present in storm water runoff may be beyond the ability of the Copermittees to control. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear and leaching of naturally occurring minerals from local geography.

Accordingly, the County recommends the modification of Finding D.3.d. to acknowledge the limitations of the Copermittees' authority to control certain discharges and activities beyond their regulatory jurisdiction.

C. *The Tentative Order Would Impose Requirements With Respect To Sewage Overflows And Infiltration That The State Board Specifically Stayed In The Current Permit And Which Are Duplicative To Requirements Imposed By the State Board And Regional Board*

Section D.4.h. of the Tentative Order would hold Copermittees responsible for sewage overflows and infiltration that may discharge into their MS4s, regardless of whether Copermittees owned or controlled the sewage system. The current permit contains a similar provision. *See* Section F.5.f. of R9-2002-0001. However, because the owners of sewage systems at issue already were regulated by sanitary sewer NPDES permits, the State Board issued a stay of this provision. *See* State Board Order No. WQ 2002-0014. Having a dual system of regulation of the sanitary sewers, the Board found, could lead to "significant confusion and unnecessary control activities." WQ 2002-0014 at p. 8. With the State Board's adoption of statewide general waste discharge requirements for sanitary sewer systems (Order No. 2006-0003-DWQ) and the Regional Board's own waste discharge requirements for sewage collection agencies (R9-2007-0005), the newly proposed requirements of the Tentative Order would likely result in even greater "confusion and unnecessary control activities."

Given the previous findings of the State Board on this same issue, and given that none of the factual reasons supporting the State Board's decision have changed, the Regional Board should remove this provision so as to reduce duplicity of effort and the implementation of unnecessary control activities.[7]

V. The Tentative Order's Requirements For Fiscal Analysis Exceed Federal Law And Have No Foundation In State Law

Section F (at p. 74) of the Tentative Order requires the Copermittees to secure the resources necessary to implement the permit and conduct a fiscal analysis of the capital and operating costs of its program, as required by the federal regulations. However, in addition, Section F requires the fiscal analysis to include "a qualitative or quantitative description of fiscal benefits realized from implementation of the storm water protection program." Section F further requires each Copermittee to submit to the Regional Board a "Business Plan that identifies a long-term funding strategy for program evolution and funding decisions." While the County agrees with Regional Board staff that there is an identified need to prepare a fiscal reporting strategy to better define the expenditure and budget line items and to reduce the variability in the reported program costs (and have committed to do so in the ROWD), the County takes exception to the requirements to identify the fiscal benefits realized from the program and develop a long-term funding strategy and business plan. These requirements are not required by federal law and

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[7] The Regional Board also should delete Finding D.3.e., which provides that "pollutant discharges ***into*** MS4s must be reduced to the MEP" (emphasis supplied). This statement is inconsistent with federal law and State Board precedent. MS4 permit requirements are dictated by CWA section 402(p)(3)(B), which provides that permits for discharges "from" MS4s shall require controls to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B)(iii). Such permits also must include a requirement to effectively prohibit non-storm water discharges "into" the storm sewers. 33 U.S.C. § 1342(p)(3)(B)(ii). The CWA is thus very clear that except for non-storm water discharges, municipal storm water permits may only apply the MEP standard to discharges *from* MS4s, not *into* MS4s.

This was the conclusion of the State Board in *In re Building Industry Association of San Diego County*, Order WQ 2001-15. Agreeing with petitioner's argument that the CWA authorizes permits only for discharges "from" MS4s, the State Board stated:

> We find the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. . . . [T]he specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.

Order WQ 2001-15 at p. 9-10. Finding D.3.e., accordingly, should be deleted.

are not based upon any analysis of whether they are necessary for the Copermittee programs, which the Copermittees have funded successfully for 16 years. *See* discussion in Attachment B (pages 23-26).

Federal law requires neither a business plan nor identification of fiscal benefits of the MS4 program. The federal regulations require only that Copermittees provide, for each fiscal year to be covered by the permit,

> [A] fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the program under paragraphs (d)(2)(iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

40 CFR 122.26(d)(2)(vi).

Nor does state law require a business plan or identification of fiscal benefits. Section 13377 of the Water Code, which the Fact Sheet cites in support for the fiscal analysis requirement, simply requires the Regional Board to issue waste discharge requirements that apply and ensure compliance with all applicable provisions of the CWA. Because the CWA does not require a business plan or identification of fiscal benefits, neither does Section 13377 of the Water Code.

According to the Fact Sheet, the requirement for a business plan, including a long-term funding strategy, and the requirement to identify fiscal benefits are based on recommendations in guidance from the National Association of Flood and Storm water Management Agencies (NAFSMA). Fact Sheet at 111. These recommendations were prepared for small MS4s as a basis for developing fee-based programs and have no relevance to the Copermittees MS4 programs. This is discussed in more detail in the Attachment B (page 26).

Given that these Section F requirements are not required by state or federal law and are based on recommendations by NAFSMA that were not intended for Phase I MS4s, the County requests that Provision F of the Tentative Order be revised consistent with the requirements of applicable law.

VI. The Proposed Order Is Increasingly Prescriptive Without The Appropriate Findings Of Fact And Legal Or Technical Justification

A. The Prescriptive Nature of the Tentative Order is Inconsistent with Both State and Federal Law

The Tentative Order, both generally and particularly with respect to the JURMP/SUSMP requirements, is unlawfully prescriptive under Section 13360 of the Water Code and does not comport with the MS4 programs envisioned by USEPA in the CWA implementing regulations and subsequent USEPA guidance.

1. *The Tentative Order Mandates The Particular Manner Of Achieving Compliance, Rather Than Allowing Compliance "In Any Lawful Manner" as Required by State Law*

In its current form, the Tentative Order, not including its five separate attachments, is over 80 pages in length. By comparison, the current permit is approximately 80 pages in length *including* its five attachments. The principal reason for this added length is that the Regional Board staff continues to add detailed requirements that usurp the Copermittees' right to determine how best to achieve the performance goals set out in the CWA regulations and the Tentative Order. This approach is unduly prescriptive and in direct conflict with Water Code Section 13360 which, as previously discussed, states:

> 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.*

Cal. Water Code § 13360(a) (emphasis added).

Section 13360 grants a Copermittee unlimited authority to determine how best to meet the substantive obligations imposed under its storm water permit. This authority enables a Copermittee to constantly improve its programs while ensuring that its resources are used in the most efficient manner possible. During the term of the third-term permit, the Copermittees extensively evaluated the effectiveness of their programs. Based on these assessments, the Copermittees determined that most aspects of their programs were working well and identified areas that could be improved. Based on these assessments, the Report of Waste Discharge recommended the Regional Board reissue the permit substantially in its current form with the recommended changes designed to address needed improvements. While the Tentative Order reflects some of the Copermittees' recommendations, it also includes many additional requirements that increase the burdens on Copermittees' resources without any demonstration that they will achieve commensurate water quality improvements.[8]

The Regional Board cannot and should not ignore the limitations on its statutory authority. While the Regional Board may set performance goals for the Copermittees, it cannot tell the Copermittees how to achieve these goals.

2. *The Clean Water Act Regulations Were Designed To Preserve Flexibility And Allow Municipal Copermittees To Fashion Storm Water Management Programs Meeting Their Local Needs And Circumstances*

When enacting the 1987 amendments to the CWA, which added the municipal storm water permit requirements, Congress was aware of the difficulties in regulating discharges from MS4s solely through traditional end-of-pipe treatment. *See* 55 Fed. Reg. at 48037-38. In earlier

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[8] Ironically, the issue of prescriptive MS4 permits has been addressed by the Regional Board's own legal counsel. As noted in the County of San Diego's comments on Tentative Order No. 2001-01 ("San Diego Comments"), in December 1997 the Regional Board staff sought advice concerning the permissible level of detail for municipal storm water permits. *See* San Diego Comments, p. A-3. In response, the Regional Board's legal counsel stated that while storm water permits could set forth certain performance goals, they could not specify the manner of complying with such goals. *Id.* Similarly, legal counsel advised that storm water permits could not prescribe the particular pollution control strategies to be used by the permittees. *Id.*

rulemakings, much of the criticism of the concept of subjecting discharges from MS4s to NPDES permits focused on the perception that "the rigid regulatory program applied to industrial process waters and effluents from [POTWs] was not appropriate for the site-specific nature and sources which are responsible for the discharge of pollutants from [MS4s]." *Id.* at 48038.

The water quality impacts of discharges from MS4s depend on a wide range of factors, including: the magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharge to receiving water flow. *Id.* In enacting the 1987 amendments, Congress recognized that:

> [P]ermit requirements for [MS4s] should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges. . . . "All types of controls listed in subsection [402(p)(3)(C)] are not required to be incorporated into each permit."

Id. (*quoting* from 132 Cong. Rec. HI0576 (Daily Ed. Oct. 15, 1986) Conference Report).

Consistent with Congressional intent, the Phase I Storm Water regulations "set[] out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions." *Id.* While USEPA believed that all municipalities should face essentially the same responsibilities and commitments for achieving the goals of the CWA, it "agree[d] that as much flexibility as possible should be incorporated into the [MS4] program." *Id.*[9]

USEPA's *Interim Permitting Approach* is not inconsistent with the requirement of flexibility in MS4 permits.[10] The guidance simply (and logically) provides that where existing BMPs are not adequately controlling the discharge of pollutants from MS4s, "expanded or better-tailored BMPs in subsequent permits" should be implemented. 61 Fed. Reg. at 43761. More specific conditions or limitations may be appropriate in MS4 permits only where "adequate information exists" and only where "necessary and appropriate." *Id.* In other words, USEPA does not suggest each iteration of the MS4 should necessarily become increasingly prescriptive; more detailed MS4 conditions only may be prescribed where necessary and appropriate. The *Interim Permitting Approach* does not provide support for the Regional Board to make Copermittees' MS4 permit ever more prescriptive simply for the sake of, for example, making it easier to enforce.

The prescriptive approach mandated by the Tentative Order clearly is at odds with both Congress' intent in enacting the municipal storm water program and with USEPA's intent in implementing it. Rather than allowing the Copermittees the flexibility to develop and implement

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[9] Notwithstanding that the Fact Sheet cites to the guidance in support of the prescriptive Tentative Order, USEPA's mandate of *flexibility* is confirmed in USEPA's Part 2 Guidance: "The Part 2 application requirements provide each MS4 with the flexibility to design a program that best suits its site-specific factors and priorities. . . . [F]lexibility in developing permit conditions is encouraged by allowing municipalities to emphasize the controls that best apply to their MS4." Part 2 Guidance, *supra*, at p. 6-1.

[10] *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 43761 (August 26, 1996).

their own storm water management programs within the parameters set forth by USEPA, the Tentative Order would dictate more and more prescriptive programmatic requirements that are not warranted in the context of the Orange County Storm Water Program. Attachment B identifies numerous such overly prescriptive requirements.

B. To The Extent The Tentative Order's Prescriptive Requirements Are Permissible And Appropriate, They Must Be Supported By Findings And A Fact Sheet Providing Legal And Technical Justification

As discussed above, the requirements of the Tentative Order must be supported by a fact sheet and findings, which in turn must be supported by substantial evidence. *See, e.g.,* State Board Order No. WQ 95-4; State Board Order No. WQ 2001-15; *Topanga Association for a Scenic Community v. County of Los Angeles, et al.*, *supra* at p. 8. Even assuming the prescriptive nature of the Tentative Order did not run afoul of state and federal law as discussed above, it still would be fatally flawed in that the prescriptive requirements are not supported by a fact sheet providing legal or technical justification for the specific requirements nor are the requirements supported by adequate findings.

ATTACHMENT B

ORANGE COUNTY TECHNICAL COMMENTS ON CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION TENTATIVE ORDER No. R9-2007-0002 NPDES NO. CAS0108740

INTRODUCTION

Attachment B contains the principal technical comments of the County of Orange (the "County") on Tentative Order No. R9-2007-0002 dated February 9, 2007 ("Tentative Order"). Although the supporting Fact Sheet/Technical Report dated February 9, 2007 ("Fact Sheet") is referenced occasionally in this attachment, the County has not attempted to provide detailed comments on the Fact Sheet.

These comments are divided into three sections: (1) General Comments, (2) Findings, and (3) Permit Provisions. The first section discusses the County's global concerns with the Tentative Order, whereas the latter two sections address issues relating to specific parts of the Tentative Order. At times, the issues and concerns raised will pertain to more than one section of the Tentative Order.

The County has endeavored to provide a complete set of comments on the Tentative Order. However, the County reserves the right to submit additional comments relating to Tentative Order No. R9-2007-0002 and the supporting Fact Sheet/Technical Report to the Regional Board up to the close of the public comment period.

GENERAL COMMENTS

TENTATIVE ORDER INAPPROPRIATELY USES THE TERM "VIOLATION" INSTEAD OF "EXCEEDANCE"

In several instances the language in the Tentative Order has been changed from the prior Order (R9-2002-0001) to replace the term "exceedance" with the term "violation". For example, "exceedances of water quality objectives" has been replaced with "violations of water quality objectives" (emphasis added). In some cases, the change is inappropriate.

The Tentative Order should use the term "exceedance" where it refers to a comparison of data with criteria such as water quality objectives that are relevant to evaluation of the data. The Tentative Order should use the term "violation" when it is referring to a failure to comply with a prohibition or other requirement of the Tentative Order. Careful use of these terms is important, because an "exceedance" does not equate with a "violation." For example, while it may be useful to compare water quality monitoring data to receiving water quality objectives and use identified "exceedances" to target potential

problems areas and pollutants, it is inappropriate to make this same comparison and determine that there is a "violation".

The use of the term "violation" to refer to any exceedance detected would, in effect, be using the water quality objectives or other relevant reference criteria as de-facto numeric effluent limitations.

The County requests modification of the Tentative Order language to use the word "exceedance" instead of "violation" when referring to the comparison of water quality monitoring data to reference criteria. The locations in the permit where these changes should be made are:

- Page 5, Finding C.7.
- Page 7, Finding D.1.b.
- Page 11, Finding D.3.d.
- Page 12, Finding E.1.
- Page 15, A.3.
  The term "violation" in this section is inconsistent with SWRCB Order WQ 99-05 and needs to be modified to "exceedance ". The iterative language in the receiving water limitations speaks to exceedances of water quality standards, not violations.
- For Monitoring and Reporting Program Page 12.B.1., we recommend the following alternative language:

  "The wet weather program must, at a minimum, include collection of samples for those pollutants <u>on the 303(d) list and/or are Permittee pollutants of concern</u> ~~causing or contributing to violations of water quality standards within the watershed~~."

TENTATIVE ORDER IS OVERLY PRESCRIPTIVE AND DISMISSES THE IMPORTANCE OF THE DRAINAGE AREA MANAGEMENT PLAN

The Fact Sheet states that the Tentative Order includes sufficient detailed requirements to ensure compliance and seemingly dismisses the DAMP as "procedural correspondence" which guides implementation and is not a substantive component of the Order.

This permitting approach fundamentally shifts the level of program detail to the permit instead of the Drainage Area Management Plan (DAMP). The increasingly prescriptive and detailed permits provisions continue to erode the flexibility and local responsibility of Copermittees for continued development and improvement of the MS4 program based upon their extensive and collective experience in managing the program. This shift runs counter to the purpose and intent of the federal stormwater management program and as set forth in the federal CWA regulations and USEPA guidance.

The CWA regulations speak to the necessity and importance of the stormwater management plan in the permitting process. The management program "shall include a comprehensive planning process.....to reduce the discharge of pollutants to the

maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.....Proposed management program shall describe priorities for implementing controls". 40 CFR 122.16(d)(2)(iv).

A more flexible permitting approach sets the foundation for the Orange County Program and places upon the Copermittees the continuing responsibility of weighing economic, societal, and equity issues as they define the policies, standards and priorities to be employed in implementing the program.

In fact the DAMP and local JURMPs are fundamental and necessary elements of the MS4 program since they serve as the primary policy and guidance documents for the program and describe the methods and procedures that will be implemented to reduce the discharge of pollutants to the maximum extent practicable and achieve compliance with the MS4 permit performance standards. While the management plans must effectively address and be in compliance with the permit requirements, the necessary detail and prioritization of efforts in doing so must remain at the local level and be described within the Drainage Area Management Plan, not the permit.

The increasingly top down approach reflected in the Tentative Order also inadvertently reduces the ability of the Copermittees to adaptively manage their programs to meet the MEP standard. This seems contrary to the discussion of MEP in the Fact Sheet, which stresses the dynamic aspects the MEP standard and the need for continuous response to assessments of the program. "This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP). However, since MEP is a dynamic performance standard which evolves over time as urban runoff management knowledge increases, the Copermittees' urban runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard."[1] and "Reducing the discharge of stormwater pollutants to the MEP requires Copermittees to assess each program component and revise activities, control measures, best management practices (BMPs), and measurable goals, as necessary to meet MEP"[2]. Finally, "....the Copermittees' urban runoff management programs to be developed under the Order are the Copermittees' proposals of MEP.....The Order provides a minimum framework to guide the Copermittees in meeting the MEP standard."[3]

These statements acknowledge that it is incumbent upon the Copermittees to ensure that the program is effective and adaptively managed to meet the ever-evolving MEP standard. The ability of the Copermittees to adaptively manage and develop their programs is undermined by the statement within the Fact Sheet that the DAMP is "procedural correspondence" and not a substantative component of the Order. In the

[1] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 34
[2] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 34
[3] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 35

comments below the Copermittees request a number of language changes so that the necessary programmatic detail is developed within the DAMP instead of the permit.

FINDINGS

DISCHARGE CHARACTERISTICS

- **Categories of Pollutants (Finding C.2. Page 3)**
  Finding C.2. identifies common categories of pollutants in urban runoff. For some, but not all pollutants, the finding identifies sources [total suspended solids, sediment (due to anthropogenic activities)]. Since the Copermittees are not responsible for pollutants from all types of sources (atmospheric deposition, etc.), this Finding should be modified to identify the pollutants commonly found in urban runoff without specifying sources unless a more thorough discussion of sources is provided.

- **Clean Water Act 303(d) Impaired Waters (Finding C.6. Page 4)**
  Finding C.6. includes Table 2a. which is titled "Common Watersheds and CWA Section 303(d) Impaired Waters". By paraphrasing the 303(d) list Table 2a unfortunately connotes systemic water quality issues that are, in fact, limited to specific water quality segments. In addition, a number of contaminants are incorrectly identified as causes of impairment. For example, Aliso Creek is not listed for benzo[b]flouranthene, dieldrin, and sediment toxicity. The table needs to present the 303(d) list exactly in accordance with the 303(d) list approved by the State Board on 10/25/06 or be deleted.

- **Water Quality Monitoring Data (Finding C.7. Page 5)**
  Finding C.7. states in part that ". . . water quality data submitted to date documents persistent violations . . .". For the reasons discussed above and to be consistent with the Fact Sheet (page 8), the term "violation" should be changed to "exceedances."

  In addition, the Finding states that the water quality monitoring data collected to date indicates that there are exceedances of Basin Plan water quality objectives for a number of pollutants and that the data indicates that urban runoff discharges are the leading cause of impairment. While the receiving water quality may exceed Basin Plan objectives for constituents identified by the municipalities as pollutants of concern, there is inadequate data to make such a definitive statement that the urban discharges are the leading cause of impairment in Orange County. This statement does not take into account the other sources within the watershed or the uncertainty within many of the studies that have been conducted. Accordingly, the last sentence of that paragraph should be modified to read,

"In sum, the above findings indicate that urban runoff discharges ~~are~~ may be causing or contributing to water quality impairments, and ~~are a~~ warrant ~~leading cause of such impairments in Orange County~~ special attention.

URBAN RUNOFF MANAGEMENT PROGRAMS

- **New or Modified Requirements (Finding D.1.c. Page 7)**
  Finding D.1.c. states that the Tentative Order "contains new or modified requirements that are necessary to improve the Copermittees' efforts to reduce the discharge of pollutants to the MEP and achieve water quality standards". The Finding further states some of these new or modified requirements "address program deficiencies that have been noted in audits, report reviews, and other Regional Board compliance assessment activities." In fact, in many cases the new or modified requirements do not have adequate findings of fact and technical justification.

  In many instances the Fact Sheet not only provides little or no justification of the need for the new requirement, it also does not identify the "program deficiency" that warrants the modification. In many cases the Fact Sheet also ignores the thorough program analysis that the Copermittees conducted as a part of their preparation of the ROWD and the deficiencies and program modifications that Copermittees themselves identified as necessary for the program. The Permit Provisions comments in the next section of these comments identify many of the areas where new or modified provisions of the Tentative Order lack factual or technical support in the Fact Sheet.

- **Development Planning - Treatment Control BMPs (Finding D.2.b. Page 9)**
  Finding D.2.b. states that end-of-pipe BMPs are more effective when used as polishing BMPs. Treatment BMPs are not particularly effective as polishing BMPs and work best when the pollutant load is high. The finding should be modified to remove the statement that end-of-pipe BMPs are more effective when used as polishing BMPs.

- **Heavy Industrial Sites (Finding D.2.e. Page 9)**
  Finding D.2.e. states that the one-acre threshold for heavy industrial sites is appropriate "since it is consistent with the requirements in the Phase II NPDES stormwater regulations that apply to small municipalities". The Phase II stormwater regulations do not apply to the Phase I communities. 40 CFR 122.32. The reference to Phase II NPDES regulations and, as discussed below, the corresponding change in the permit provisions should be deleted.

- **Discharges "Into" the MS4 (Finding D.3.e Page 11)**
  Finding D.3.e. states that pollutants discharged "into" an MS4 must be reduced to the MEP. This appears to be an error. The corresponding Tentative Order Section A.2 prohibits only discharges "from" an MS4 that contain pollutants which have not been reduced to the MEP. Finding D.3.e should be revised accordingly.

STATUTE AND REGULATORY CONSIDERATIONS

- **Treatment and Waters of the U.S. (Finding E.7. Page 14)**
  Finding E.7. states that,"[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water." We believe that Finding E.7. is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on storm water treatment BMPs. This is discussed in detail in Attachment A (Pages 1-7). We wish to comment here on the implications it has for watershed restoration activities.

  Prohibiting treatment and mitigation in receiving waters severely limits the potential locations for installation of treatment control BMPs and will adversely affect many watershed restoration projects. For example, this Finding may have unintended adverse effects for the Aliso Creek Water Quality SUPER Project.

  The Aliso Creek Water Quality SUPER Project proposes a multi-objective approach to Aliso Creek watershed development and enhancement, accommodating channel stabilization, flood hazard reduction, economic uses, aesthetic and recreational opportunities, water quality improvements, and habitat concerns. The project is aimed at water supply efficiency and system reliability through reclamation, along with benefits for flood control and overall watershed management and protection. The ecosystem restoration and stabilization component of the project will include:
  - Construction of a series of low grade control structures and reestablishment of aquatic habitat connectivity;
  - Shaving of slide slopes to reduce vertical banks; and
  - Invasive species removal and riparian revegetation and restoration of floodplain moisture.

  The Copermittees are concerned that some of these activities may be deemed "urban runoff treatment and/or mitigation" in a receiving water and, thus, may not be allowed, compromising the project objectives.

  In addition, this Finding seems to conflict with Section 3.a.(4) of the Tentative Order, which requires the Copermittees to evaluate their flood control devices and identify the feasibility of retrofitting the devices to provide for more water quality benefits.

  Given the lack of any proper legal or factual basis for these limitations as well as the adverse impacts on watershed restoration efforts, the Finding should be deleted from the Tentative Order.

PERMIT PROVISIONS

LEGAL AUTHORITY

- **Effectiveness of BMPs (Section C.1.j. Page 19)**
  The Tentative Order includes a new provision that requires the Copermittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. This provision is inappropriate. It ignores the fact that the New Development/Significant Redevelopment section of the DAMP (Section 7.0) establishes a process for the selection, design, and long-term maintenance of permanent BMPs for new development and significant redevelopment projects and requires development to select BMPs that have been demonstrated as effective for their project category. In addition, it ignores the fact that the Copermittees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs. This Section C.1.j. should be deleted from the Order.

JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

Development Planning Component

- **Infiltration and Groundwater Protection (Section D.1.c.(6) Page 22)**
  Section D.1.c.(6)(a) requires urban runoff to undergo pretreatment prior to infiltration. This is problematic for several reasons. First, this requirement unnecessarily constrains the use of infiltration devices, which should be at the discretion of the designer, and diminishes the beneficial aspects of infiltration devices. At the same time, the volume of stormwater that can be treated will be reduced since the volume will be limited to the sizing of the pretreatment device and not the sizing of the infiltration device. Besides, pollution prevention and source control BMPs are required prior to infiltration.

  Second, the Fact Sheet provides no technical basis for the requirement to provide pretreatment before infiltration. This restriction on the use of infiltration technology should not be included in the Tentative Order without a strong technical basis for the requirement that details the necessity of pretreatment before infiltration and the concerns related to infiltrating stormwater.

  Since the Fact Sheet does not currently provide a any technical basis for the requirement, Section D.1.c.(6)(a) should be deleted from the Tentative Order.

  Section D.1.c.(6)(g) restricts the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic. High vehicular traffic is defined as 25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway. There is no technical basis for this restriction or the definition of "high vehicular traffic" included within the Fact Sheet. As such, prescriptive

requirements should not be included in the Tentative Order unless there is a strong technical basis. Although SWRCB Order WQ 2000-11 provides guidance on some of the restrictions on the use of infiltration treatment control BMPs contained in the Tentative Order, there is no mention of restrictions related to areas subject to high vehicular traffic. Moreover, we are not aware of any demonstrated relationship between traffic counts and frequency of materials deposited on the street.

Since the Fact Sheet does not currently provide a technical basis for restricting the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic, Sections D.1.c.(6)(a) and D.1.c.(6)(g) should be deleted from the Tentative Order.

- **Standard Urban Storm Water Mitigation Plans (SUSMPs) (Section D.1.d. Page 23)**
  Section D.1.d. requires each Copermittee to implement an updated local SUSMP within twelve months of adoption of the Order. The schedule for the update of the SUSMP is overly aggressive and does not allow the time necessary for the Copermittees to incorporate changes and implement an updated SUSMP. Since the modifications for the SUSMP will take longer than the 12-month period identified in the Tentative Order, the provision should be modified to require each Copermittee to implement an updated local SUSMP within 24 months of adoption of the Order.

- **Definition of Priority Development Project (Section D.1.d.(1)(b) Page 23)**
  Section D.1.d.(1)(b) defines Priority Development Projects as "redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)". This Section is not clear on whether the "already developed site" or the redevelopment project must fall under one of the categories in section D.1.d.(2) in order for the project to be considered a Priority Development Project. The Copermittees request clarification regarding this Section.

  The project categories listed in section D.1.d.(2) includes "single-family homes". Requiring SUSMP requirements for re-development projects of single-family homeowners presents an unnecessary burden in terms of cost and complexity and likely minimal water quality benefit. This provision should be modified to exclude single-family homes from SUSMP requirements.

- **Priority Development Project Categories (Section D.1.d.(2) Page 24)**
  Section D.1.d.(2) defines Priority Development Project Categories. In an introduction to the listed categories, this section states that, where a new development project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements. As currently written this provision would require a new

development that has a 5,000 square foot parking lot feature and 100,000 square feet of other land uses that are not Priority Development Project Categories, to provide treatment for the entire project (105,000 square feet). This requirement would unduly burden the landowner in this case with the cost of treating runoff from 105,000 square feet when only 5,000 square feet should be subject to SUSMP requirements and treatment controls.

The need to treat runoff from a greatly increased land area will require an increase in the size of treatment controls, which will increase the volume of water treated without a likely commensurate increase in pollutant removal. This requirement will unnecessarily increase the cost of treatment control BMPs without commensurate pollutant removal benefits and likely discourage re-development.

The Fact Sheet fails to provide any information showing that development land uses that are not in the Priority Development Project Category contribute pollutants to the MS4 and are a threat to water quality. The Fact Sheet (page 78) states that this provision "is included in the Order because existing development inspections by Orange County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partially treated runoff from redevelopment sites. This explanation does not demonstrate any connection between development land uses that are not in the Priority Development Project Category and the observed "threats to water quality." In addition, although the explanation focuses on the water quality benefits for redevelopment projects, the Section is for "new development" projects".

Since the Fact Sheet does not provide any technical information showing that land uses that are not Priority Development Project Categories are a significant source of pollutants and a threat to water quality, the introductory paragraph of Section D.1.d.(2) subjecting the entire project footprint to SUSMP requirements should be removed from the permit.

- **Commercial Developments (Section D.1.d.(2)(b) Page 24)**
  Section D.1.d.(2)(b) lowers the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 square feet (2.3 acres) to one acre. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. However EPA Phase II guidance is not relevant to a Phase I permit.

  The Fact Sheet also states that this Provision is based on Copermittee findings that smaller commercial facilities pose high threats to water quality. This is not the case. The Copermittees indicated that commercial facilities of 100,000 square feet or less receive a score of 3 out 5 (a medium threat) in Table 9-8 in the 2007 DAMP. Since the Fact Sheet does not provide any technical basis for

lowering the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 (2.3 acres) square feet to one acre, the category should be described as, "Commercial developments greater than 100,000 square feet."

- **Industrial Developments (Section D.1.d.(2)(c) Page 24)**
  Section D.1.d.(2)(c) requires industrial developments of greater than one acre to comply with SUSMP requirements. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. Again EPA Phase II guidance is not relevant to a Phase I permit. In addition, the Fact Sheet does not provide a technical basis for adding industrial sites to the Priority Development Project Categories and consequently Section D.1.d.(2)(c) should be deleted from the permit.

- **Streets, Roads, Highways, and Freeways (Section D.1.d.(2)(i) Page 25)**
  Section D.1.d.(2)(i) includes as a Priority Development Project Category streets, roads, highways, and freeways including any paved surface of 5,000 square feet or greater that is used for transportation. It is unclear whether a project such as the addition of a right turn pocket to a roadway would subject the entire roadway to SUSMP requirements and treatment controls. This provision should be revised to include language clarifying that only the subdrainage area where the roadway improvements are occurring is subject to SUSMP requirements and required to include BMPs, not the entire roadway.

- **Retail Gasoline Outlets (Section D.1.d.(2)(j) Page 25)**
  Section D.1.d.(2)(j) includes as a Priority Development Project Category Retail Gasoline Outlets (RGOs) that meet the criteria of 5,000 square feet or more or have a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. SWRCB Order WQ 2000-11 provides guidance on whether RGOs are subject to SUSMP requirements. The State Board states in this Order that "In considering this issue, we conclude that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. Moreover, in light of the small size of many RGOs and the proximity to underground tanks, treatment may not always be feasible, or safe." Although the State Board does not prohibit subjecting RGOs to SUSMP requirements, the State Board provides a number of reasons for not doing so, including that fact that RGOs are already heavily regulated. It should also be noted that the DAMP already prescribe a suite of BMPs specific to RGOs. Subjecting RGOs to SUSMP requirements imposes duplicity where it is not needed. Section D.1.d.(2)(j) should be removed from the permit.

- **Treatment Control BMP Requirements (Section D.1.d.(6)(ii)(f) and (g) Page 28)**
  Section D.1.d.(6)(ii)(f) require treatment control BMPs be implemented prior to discharging into waters of the U.S. and provision D.1.d.(6)(ii)(g) requires that treatment controls not be constructed within waters of the U.S. or waters of the

State. These provisions of the Tentative Order greatly limit the use of regional BMP and watershed-based approaches. The provisions demand a lot-by-lot approach in implementing BMPs that is analogous to the site-by-site septic tank approach that has been discredited as an effective strategy for sewage treatment in urban areas. Similarly, the Copermittees submit that such an approach is also ineffective for stormwater and will lead to a diversion of limited resources to managing thousands of site-by-site treatment controls, which are managed by parties that have limited or no experience, instead of hundreds of regional controls, that are managed by parties and governmental agencies that have expertise in BMP management.

The Tentative Order encourages a renewed focus on the 'watershed approach' but the proposed restriction on regional BMPs is antithetical to a watershed approach. The USEPA in its *National Management Measures Guidance to Control Nonpoint Source Pollution from Urban Areas, Management Measure 5: New Development Runoff Treatment* dated November 2005 (page 5-38) states that "regional ponds are an important component of a runoff management program." and that the costs and benefits of regional, or off-site, practices compared to on-site practices should be considered as part of a comprehensive management program. The EPA guidance acknowledges that a regional approach can effectively be used for BMPs.

In addition, the Fact Sheet does not provide any technical justification for these provisions. Since neither the Findings nor the Fact Sheet provide any technical basis for precluding regional BMPs and EPA guidance recommends the use of regional BMPS, these provisions should be deleted from the permit.

- **Low Impact Development (LID) Site Design BMP Substitution Program (Section D.1.d (8) Page 30)**
  Section D.1.d.(8)(e) states that the LID Site Design BMP Substitution Program must not apply to automotive repair shops or streets, roads, highways, or freeways that have high levels of average daily traffic. The Copermittees do not design, construct or operate freeways. It is suggested that the word "freeways" be removed from this provision.

- **Treatment Control BMP Maintenance Tracking (Section D.1.f Page 32)**
  Section D.1.f.(2)(c) requires a very prescriptive and resource intensive inspection program for the treatment controls. For example, (iii) requires Copermittees to annually inspect of 100% of projects with treatment control BMPs that are high priority. Annual inspection of structural BMPs will create a burgeoning and resource intensive inspection program that is not warranted. The Provision should be amended to reduce the prescriptive nature of the inspection program and allow the Copermittees to develop an inspection program that will meet the intent of the provision while balancing the need for a variety of approaches to complete this element of the program in a cost effective manner. This is important because such approaches include not only inspections but also