19, and 03-TC-21. We reserve the right to supplement our comments once the Commission rules on this issue.

A. As Noted in the County's Previous Comments, the Order Does Impose Requirements that Go Beyond Federal Law.

The first reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that the Order implements only federally mandated requirements. This is the same argument made in the prior drafts of the Order. In the County's previous comments, we pointed out that, to the extent the Tentative Order imposed requirements that go beyond what is required by federal law, the Regional Board is required to consider and address among other things the constitutional prohibition on unfunded state mandates. The County provided examples of at least two provisions or areas where the Tentative Order does, in fact, impose requirements that go beyond federal law – the Business Plan requirement and requirements that Copermittees prohibit and/or control discharges into the MS4. The December 2007 Order and Fact Sheet do not address these areas.[3] Instead, the December 2007 Fact Sheet simply reasserts that the Order only implements federally mandated requirements of section 402(p)(3)(B) of the Clean Water Act: (1) to effectively prohibit non-stormwater discharges into the MS4, (2) to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, and (3) *to include such other provisions as the State determines appropriate for the control of such pollutants.*

The County agrees that the first two provisions impose federally mandated requirements. The third provision, however, is not a federal mandate. To the extent it is a separate provision of CWA Section 402(p)(3)(B),[4] it is a discretionary provision; the State *may* impose such additional requirements, but it is not required to do so. *See, e.g., Defenders of Wildlife v. Browner,* 191 F.3d 1159 (9th Cir. 1999). To the extent the State does impose such discretionary requirements in the Order, they cannot be said to be federally mandated.

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

The second reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that the Order regulates discharges of waste from municipal sources more leniently than the Regional Board could regulate discharges from industrial sources. The County fails to see how this statutory distinction between the regulation of municipal and industrial dischargers affects whether the Order imposes requirements on Copermittees that go beyond federal law and, therefore, must be funded by the State.

C. Copermittees Do Not Necessarily Have the Requisite Authority to Levy Fees to Pay For Compliance With the Order.

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[3] The December 2007 Fact Sheet does concede that federal law only requires that Copermittees control the discharge of pollutants in stormwater *from the MS4* to the maximum extent practicable, not discharges *into the MS4.*

[4] The question of whether the "third" provision allows the State discretion to impose conditions that go beyond the MEP standard, or only the discretion to impose conditions to achieve the MEP standard, is a continuing debate. *See, e.g., Building Ind. Assn. of San Diego County v. State Water Resources Control Board,* 124 Cal.App.4th 866 (2004).

The third reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that Copermittees have the authority to levy service fees to pay for compliance with the Order. Pursuant to Government Code Section 17556(d), if a local agency can levy service fees to pay for a State mandate, the State is not required to provide funding for the mandate.

In support for this position, the December 2007 Fact Sheet cites to *County of Fresno v. State of California*, 53 Cal.3d 482 (1991). That case held that Section 17556(d) is facially constitutional under Article XIIIB, Section 6 of the State Constitution. The dispute in *County of Fresno* arose over the implementation of the Hazardous Materials Release Response Plans and Inventory Act ("Act"), which required local governments to implement its provisions. The Act, however, also authorized the local governments to collect fees from hazardous material handlers to cover the costs the local governments might incur in implementing the Act. *County of Fresno*, 53 Cal.4th at 485. Thus, the same legislation that imposed the mandate on the local governments also authorized them to levy fees to pay for the mandated service. In this context, the court found Section 17556(d) facially constitutional.[5] It is not clear that Section 17556(d) would withstand a challenge as applied to the current situation, where the Order imposing the state mandate does not authorize the Copermittees to levy fees to pay for the mandated service.

Moreover, Copermittees do not necessarily have the authority to levy service fees to pay for the State mandate. The December 2007 Fact Sheet presumes, but makes no specific findings, that Copermittees have the authority to levy such service fees. In fact, to the extent such service fees are "property-related," Copermittees can only levy them once approved by the affected property owners or electorate. *See* California Constitution, Article XIIID, Section 6(c); *Howard Jarvis Taxpayers Ass'n. v. City of Salinas*, 98 Cal. App. 4th 1351 (2002). The *City of Salinas* case dealt precisely with this issue. The City of Salinas established a fee to recover costs related to compliance with its MS4 Permit. The fee was based largely on the amount of impervious area on a developed parcel. The Court held that this fee was property-related and, thus, subject to voter-approval requirements. 98 Cal. App. 4th at 1356. Only if the fee was a use-based charge, directly based on use of city services (such as the metered use of water), could the fee avoid the voter-approval requirements of Article XIIID. The City of Salinas' method to allocate the fee based on the amount of impervious area so as to assure that the fee charged would be proportional to the burden being placed on the city's storm drain system was not sufficiently direct to qualify as a use-based fee exempt from the requirements of Article XIIID. 98 Cal. App. 4th at 1355.[6]

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[5] The authority to levy fees also was at issue in *Connell v. Santa Margarita Water District*, 59 Cal. App. 4th 382 (1998). In that case, as in *County of Fresno*, there was no question as to whether the local agency had authority to levy service fees to pay for the increased costs. A provision in the Water Code provided local water districts the authority to levy fees to pay for the increased costs resulting from the new wastewater regulation at issue.

[6] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830 (2001), cited in the December 2007 Fact Sheet, is not to the contrary. That case simply held that a rental inspection fee imposed on landlords who rent their property is not imposed solely because of property ownership; rather, it is imposed because the property is being rented. Therefore the fee is exempt from the voter-approval requirements of Article XIIID. If the rental ceases, the fee ceases, whether or not property ownership remains in the same hands. 24 Cal. 4th at 838. In the case of stormwater, the need to regulate stormwater runoff continues regardless of the use of the property. Even if a developed property was vacant, stormwater would continue to flow into the MS4. While the use of the property may impact the quality of stormwater runoff, it is the property itself that must be regulated.

Because stormwater running off of real property and into the MS4 is not capable of precise measurement, it would be impossible to meet the direct usage requirements of *City of Salinas*. Accordingly, without voter approval, Copermittees do not have the authority to levy service fees to pay for compliance with the Order. Section 17556(d), thus, is not dispositive on the unfunded mandate issue.

D. Copermittees Do Not Have a Real Choice.

The fourth reason provided in the December 2007 Fact Sheet for why the Order does not constitute an unfunded mandate is that Copermittees chose to apply for coverage under the Order; they have "voluntarily availed themselves of the permit." December 2007 Fact Sheet, Section VIII.E., Discussion of Finding E.6., page 73. Thus, according to the Fact Sheet, Copermittees have not been mandated to do anything. The Fact Sheet suggests that, in lieu of coverage under the Order, Copermittees could cease all discharges from their MS4s. Alternatively, instead of a program-based stormwater permit, Copermittees could seek a permit based on numeric effluent limits.

The County respectfully disagrees that these suggested alternatives provide Copermittees with any real choice. A permit based on numeric limits clearly would go beyond what is required by federal law and trigger even more unfunded mandate issues than the proposed Order. To cease discharging from their MS4s is impossible and, thus, not a real choice. Accordingly, it is disingenuous for Regional Board staff to suggest that Copermittees have voluntarily chosen coverage under the Order and, thus, the Order cannot be considered a state mandate.[7]

E. The Porter Cologne Water Quality Control Act May Predate Article XIIIB, Section 6 of the State Constitution But the Mandates in the Tentative Order Do Not.

The final reason given in the December 2007 Fact Sheet for why the Order does not impose unfunded mandates also is unpersuasive. Section 6(a)(3) of Article XIIIB of the State Constitution provides that the Legislature does not need to provide funding for legislative mandates enacted prior to January 1, 1975. The Porter-Cologne Water Quality Control Act was enacted in 1970. However, it is not the 1970 legislation that imposes the mandates at issue here, it is the proposed Order of the Regional Board, a state agency. Section 6(a) explicitly requires that the State fund mandates of any state agency.

In sum, because none of the five reasons discussed in the December 2007 Fact Sheet provide support for the finding that the Order does not constitute an unfunded state mandate, the County renews its request that the Regional Board remove from the Order all requirements that go beyond federal law or, in the alternative, provide State funding for all such mandates.

* * * *

[7] The stormwater permitting cases cited in the December 2007 Fact Sheet do not support Regional Board staff's position. Both cases address the issue of "choice" in the context of Tenth Amendment challenges, not unfunded state mandate challenges. The issue in these Tenth Amendment decisions is whether the available choices all similarly require the permittees to regulate third parties. *See City of Abilene v. U.S. EPA*, 325 F.3d 657 (5th Cir. 2003) and *Environmental Defense Center, Inc. v. United States Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003).

Thank you for your attention to the County's concerns with the December 2007 Order. As mentioned previously, we appreciate the effort you and your staff have devoted to the development of the fourth-term MS4 permit for the Orange County Program. We look forward to discussing the Order with you and with Regional Board members at the public hearing on February 13, 2008.

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,

Mary Anne Skorpanich, Director
Watershed & Coastal Resources Division

Attachment A: Letter of April 4, 2007
Attachment B: Letter of August 22, 2007

cc: Technical Advisory Committee
Permittees

COUNTY OF ORANGE

RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

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August 22, 2007

By E-mail and U.S. Mail

Mr. 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: Revised Tentative Order No. R9-2007-0001; NPDES No. CAS0108740

Dear Mr. Robertus:

We are in receipt of the July 6, 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 (Revised Tentative Order No. R9-2007-0001; NPDES No. CAS0108740) (the "Revised Tentative Order"). The Revised Tentative Order was prepared and distributed for public comment by staff of the Regional Water Quality Control Board ("Regional Board"). The County of Orange, as the Principal Permittee, provides these comments for you, Regional Board staff, and members of the Regional Board to consider before the Regional Board adopts the Order. The Copermittees were involved in the development of these comments and the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, San Clemente, San Juan Capistrano, and Rancho Santa Margarita have directed that they be recognized as concurring entities.

As you know, we submitted extensive comments on the initial Tentative Order on April 4, 2007 ("Initial Comments"). For your convenience, our Initial Comments are attached. While these comments clearly have been considered by your staff, our principal legal and strategic technical concerns are not resolved in the Revised Tentative Order or in Regional Board staff's Response to Comments (Section X of the July 6, 2007 Revised Fact Sheet distributed with the Revised Tentative Order). In these comments on the Revised Tentative Order, we re-iterate and emphasize our outstanding concerns. We also comment on the new requirements in the Revised Tentative Order regarding so-called FETDs – facilities that extract, treat and discharge water from waters of the United States and back into waters of the United States.

As with our Initial Comments, the overarching message we wish to convey with these comments is that considerable progress is being made by the Orange County Stormwater Program (the "Orange County Program" or "Program") and the critical need during permit re-issuance is for a fourth-term permit that sustains the Program's momentum. As recognized in the Revised Fact Sheet, Copermittees' storm water programs have improved under the current MS4 permit. "Since adoption of Order No. R9-2002-01, the Copermittees' storm water programs have expanded dramatically." Revised Fact Sheet, p. 8. We recognize that water quality challenges remain. That is why we proposed additional commitments and changes in the 2006 Report of

Waste Discharge ("ROWD") and proposed Drainage Area Management Plan ("DAMP"), the foundational guidance and policy-setting document for the Orange County Program.

Instead, rather than building on the existing Program, the Revised Tentative Order proposes to dismiss the DAMP as mere "procedural correspondence." This dismissal is not the approach recommended by the United States Environmental Protection Agency ("U.S. EPA"). In the context of a MS4 permit renewal such as the current Revised Tentative Order, U.S. EPA states that the focus should be "maintenance and improvements of [the existing] programs." 61 Fed.Reg. 41698 (August 9, 1996). In their permit renewal application, "municipalities should identify any proposed changes or improvements to the storm water management program and monitoring activities for the upcoming five year term of the permit." *Id.* That is precisely what Copermittees proposed in the ROWD. Rather than dismissing an existing, effective program as the Revised Tentative Order does, U.S. EPA states: "The components of the original storm water management program which are found to be effective should be continued and made an ongoing part of the proposed new storm water management program." *Id.* at 41699.

Our principal comments on the Revised Tentative Order follow. We reserve the right to supplement these comments up until the time the Regional Board convenes to adopt the permit.

I. The Restrictions in the Revised Tentative Order Regarding the Placement of Treatment Control BMPs are not Supported By Law and Will Inhibit Effective Storm Water Management on a Regional Level.

In our Initial Comments, we commented that Section D.1.d.(6) of the Tentative Order, which places restrictions on where Copermittees can locate treatment control BMPs, would unduly limit their ability to implement effective regional controls. Because Regional Board staff provided no legal support for the restrictions and because the restrictions amount to an impermissible mandate on how Copermittees are to comply with the "maximum extent practicable" or "MEP" standard, the County asked that Regional Board staff remove the restrictions. In the Revised Tentative Order Regional Board staff have chosen to retain the restrictions.[1] Accordingly, the County renews its request to have the restrictions removed.

A. The Restrictions on Treatment Control BMPs are not Supported by Federal Law and Violate State Law.

As noted in the County's initial comments, Regional Board staff did not articulate the basis for the restrictions on treatment control BMPs. In its response to comments, Regional Board staff cite to U.S. EPA guidance that says that treatment wetlands generally should not be constructed in existing wetlands or other waters of the U.S. *See* Response to Comments, No. 11, pp. 26-28. Regional Board staff state that the restrictions on treatment control BMPs in the Revised Tentative Order are intended to be consistent with this guidance. The County submits that they are not. Not only do the restrictions on all treatment control BMPs go beyond the *treatment wetlands* addressed in the U.S. EPA guidance, the restrictions also are *absolute* whereas the

[1] In its Response to Comments, Regional Board staff provide clarification as to certain types of projects that it would not consider to be "treatment control BMPs" and, therefore, not subject to the restrictions of Section D.1.d.(6). The County appreciates the clarification. However, unless Section D.1.d.(6) itself is clarified, Copermittees could face challenges from other parties (or the Regional Board itself) if they believe Copermittees are not complying with the restrictions.

U.S. EPA guidance only suggests that, *generally*, treatment wetlands are not appropriately located in existing wetlands.[2]

Nor does Regional Board staff explain why the restrictions on treatment control BMPs are not a violation of Section 13360 of the Water Code. As noted in the County's Initial Comments, the Regional Board may order Copermittees to comply with waste discharge requirements (which in this case are to reduce the discharge of pollutants from the MS4 to the maximum extent practicable) but may not specify "the design, location, type of construction, or the particular manner in which compliance may be had" with those requirements. Water Code Section 13360(a).

Accordingly, because Regional Board staff have provided no legal support for the restrictions on treatment control BMPs, and the restrictions would violate Section 13360(a) of the Water Code, the Regional Board should not adopt the restrictions in Section D.1.d.(6) of the Revised Tentative Order.

B. *Effective Regional BMPs Will be Severely Limited If All Natural Drainages that Convey Urban Runoff are Both MS4 and Receiving Waters; the Revised Tentative Order and Response to Comments Do Not Support This Position.*

The restrictions on placement of treatment control BMPs are exacerbated by the proposed finding that all natural drainages or streams that convey urban runoff are both an MS4 and a receiving water. In its response to comments, Regional Board staff did not address the fact that under the federal definition of "MS4" (which definition is adopted verbatim in Attachment C of the Revised Tentative Order) and guidance regarding the same, a natural drainage is only potentially an MS4 where the drainage has been "channelized" or otherwise altered by man. *See* Initial Comments, Attachment A, Issue I.A., pp. 1-2.

Regional Board staff also misconstrue the relevance of the recent United States Supreme Court decision in *Rapanos v. United States*, 126 S.Ct. 2208 (2006). Regardless of whether the controlling opinion from *Rapanos* is the plurality opinion written by Justice Scalia or Justice Kennedy's concurring opinion and regardless of whether the *Rapanos* decision is relevant to determining whether any waters are waters of the U.S. or only whether wetlands may be waters of the U.S., Regional Board staff have not provided support for their blanket assertion that *all* natural drainages or streams that convey urban runoff are receiving waters. At a minimum, Regional Board staff must make a showing that a given drainage or stream has a "significant nexus" to traditionally "navigable" waters.[3]

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[2] It also is worth pointing out that "guidance" is just that; it is not a legal requirement. As U.S. EPA recently stated in guidance on determining jurisdictional wetlands: "This guidance does not substitute for [CWA] provisions or regulations, nor is it a regulation itself. . . . Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation. . ." *See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, U.S. EPA and U.S. Army Corps of Engineers, p. 4, n. 16 (June 5, 2007).

[3] At least one District Court in the Ninth Circuit has held that *Rapanos* is applicable to non-wetlands decisions. *See, e.g., Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F. Supp. 2d 803 (N.D. CA 2007).

Because Regional Board staff have not provided adequate support for the position that all natural streams that convey urban runoff are either an MS4 or a receiving water, Finding D.3.c of the Revised Tentative Order should be deleted.

II. New Requirements for "FETDs" in the Revised Tentative Order are Unwarranted, Burdensome and Unsupported by Law.

As noted above, the County appreciates the clarification as to what will and what will not be considered to be treatment control BMPs. However, the Revised Tentative Order contains new requirements for certain treatment facilities that are even more onerous than the treatment control BMP restrictions. Because these new requirements for so-called "FETDs" (facilities that extract, treat, and discharge water from waters of the U.S. and back into waters of the U.S.) are unwarranted, burdensome and unsupported by law, the County requests that they be deleted from the Revised Tentative Order.

A. FETDs are Part of the Solution to Water Quality Impairments; Copermittees Should Not be Punished with Burdensome and Unnecessary Requirements for Attempting to Improve Water Quality.

Copermittees have constructed FETDs as part of a comprehensive set of measures to address water quality impairments along beaches in Southern Orange County, specifically, impairments due to fecal indicator bacteria. While the FETDs are effective at reducing fecal indicator bacteria levels, they are not designed to remove all pollutants that might be affecting coastal waters. Notwithstanding that FETDs have enabled a number of Copermittees to request 303(d) de-listing for fecal indicator bacteria for Orange County's beaches and that they represent investments of State Board administered Clean Beach Initiative funding, the FETD requirements in the Revised Tentative Order potentially would punish Copermittees for their efforts. If a discharge from a FETD caused or contributed to a condition of pollution or nuisance, from *any* pollutant, Copermittees could be in violation of the Section B.5.c of the Revised Tentative Order. In other words, unless the FETD treats *all* pollutants to acceptable levels, not just the fecal indicator bacteria it was designed to address, Copermittees may be in violation of the Order. This "all or nothing" approach is unwarranted, contrary to a Fact Sheet that makes a compelling case for clean beaches, and clearly counter to the public interest.

The new FETD requirements also impose a burdensome monitoring obligation on the facility's operator. In the context of the Copermittees existing and comprehensive environmental monitoring program, the prescribed suite of analytes and requirements for toxicity testing, toxicity identification evaluations and toxicity source investigations, appear to be simply punitive.

The FETD requirements also are unnecessary. To the extent discharges from FETDs cause or threaten to cause a condition of pollution, contamination, or nuisance (and provided FETDs can be considered part of the MS4), such discharges already would be prohibited by Section A.1 of the Revised Tentative Order If such discharges cause or contribute to a violation of water quality standards, they would be subject to the iterative process provided by Section A.3.a of the Revised Tentative Order Imposing additional requirements on FETDs will not result in additional improvements to water quality. Thus, there is no need for the FETD requirements.

B. The Revised Fact Sheet Provides No Support for Imposing the FETD Requirements.

Regional Board staff have provided no legal support for the new FETD requirements. According to the Revised Fact Sheet, discharges from FETDs are discharges of non-storm water. Revised Fact Sheet, IX.B., Section B.5, p. 81. Federal law requires that Copermittees "effectively prohibit non-stormwater discharges into the [MS4]." CWA Section 402(p)(3)(B)(ii), 33 U.S.C. Section 1342(p)(3)(B)(ii). This requirement is reflected in Provision B.1 of the Revised Tentative Order which states: "Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4" unless such discharges are otherwise authorized or are in a category of non-storm water discharges that are non prohibited.

Provision B.5 of the Revised Tentative Order goes beyond this federal requirement. First, it would impose obligations on Copermittees for discharges not *into* the MS4, but *from* a FETD. Nothing in the Clean Water Act or federal regulations provides the Regional Board with such authority. Second, Provision B.5 would make Copermittees absolutely responsible for discharges of non-storm water from FETDs that cause or contribute to conditions of erosion, pollution or nuisance. Under federal law, Copermittees only are responsible for *effectively prohibiting* discharges of non-storm water. Accordingly, because the proposed FETD requirements clearly exceed the Regional Board's authority under federal law and Regional Board staff have provided no other specific legal authority for the requirements, the County requests that the FETD requirements be deleted.

III. The Revised Tentative Order Imposes Requirements on Copermittees That Go Beyond Federal Law; The Regional Board Must Comply With State Law Before Imposing Such State Mandates.

In its Initial Comments, the County pointed out that, to the extent the Tentative Order imposed requirements on Copermittees that go beyond the federal MEP requirement, the Regional Board must comply with state law requirements, including the requirement to consider economic factors and the prohibition on unfunded state mandates. *See* Initial Comments, Attachment A, Section III. The basis for this comment was in part Finding E.6 ("[r]equirements in this Order that are *more explicit than* the federal storm water regulations..." [emphasis added]). In its Response to Comments, Regional Board staff denied that the requirements of the Tentative Order exceed federal law. *See* Response to Comments No. 5, p. 13. The County respectfully disagrees with staff's denial.

A. Without Considering Economic Factors, the Regional Board Cannot Adopt the Revised Tentative Order's Business Plan Requirement or the Requirements to Prohibit or Control Discharges Into the MS4, Both of Which Go Beyond Federal Law.

The requirement in the Fiscal Analysis section of the Revised Tentative Order that Copermittees submit a "Municipal Storm Water Funding Business Plan" clearly exceeds the requirements of federal law. *See* Revised Tentative Order, Provision F.3. Federal law requires that, as Part 2 of the MS4 permit application, Copermittees must include fiscal analysis. The regulations provide:

> For each fiscal year to be covered by the permit, [Part 2 of the permit application must include] a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2(iii) and (iv) of this section [i.e., Characterization

> Data and Proposed Management Programs]. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions in the use of such funds.

40 CFR 122.26(d)(2)(vi). Regional Board staff cite to no other specific legal authority in support of the business plan requirements.

Nothing in this fiscal analysis requirement remotely resembles the prescriptive requirement in the Revised Tentative Order to prepare and submit a business plan that "identifies a long-term funding strategy for program evolution and funding decisions" and that identifies "planned funding methods and mechanisms for municipal storm water management." If the Regional Board has the authority to impose such requirements, it does not derive from federal law. Such a requirement exceeds federal law.

Similarly, many of the requirements in the Revised Tentative Order to prohibit and/or control discharges *into* the MS4 exceed federal law. Under federal law, Phase I MS4 Copermittees do have some obligations regarding discharges into the MS4. For example, they must demonstrate in Part 2 of the MS4 permit that they have adequate legal authority to control discharges from industrial sites into the MS4. See 40 CFR 122.26(d)(2)(i)(A). They also must demonstrate legal authority to prohibit illicit discharges into the MS4 and to control the discharge into the MS4 of spills, dumping, or disposal of materials other than storm water. *Id.* at 122.26(d)(2)(i)(B) and (C). The County commented generally on the scope of Copermittees' obligations vis-à-vis discharges into the MS4 in its initial comments. *See* Initial Comments, Attachment A, Section IV, pp. 10-14.

There is a significant difference, however, between an obligation to have legal authority to control certain third party discharges into the MS4 and a requirement to prohibit and/or control discharges from all third parties into the MS4. *See* Revised Fact Sheet, Discussion of Finding D.3.d. *See also* Revised Fact Sheet, Finding D.3.e. ("[P]ollutant discharges into the MS4s must be reduced.") The requirement to prohibit and/or control all third-party discharges into the MS4 exceeds federal law.[4]

Because the Revised Tentative Order would impose obligations on Copermittees that exceed federal law, state law requires that it include an analysis of the costs of such obligations. *See City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005); Initial Comments, Attachment A, Section III.C., pp. 8-9. Because the Revised Tentative Order does not include such an analysis, the business plan requirement must be deleted. Similarly, all requirements that would impose obligations vis-à-vis third-party discharges into the MS4 that exceed federal law must be deleted.[5]

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[4] As noted in the County's Initial Comments, Regional Board staff's reliance on Phase II storm water regulations and guidance to support imposing requirements in the Revised Tentative Order not required by the Phase I regulations is misplaced. *See* Initial Comments, Attachment A, Section IV.A.1., p. 11. Even if Phase II regulations and/or guidance are relevant to a Phase I permit, the Phase II regulations require only that small MS4 Copermittees develop and implement ordinances to require erosion and sediment controls at construction sites. *See* 40 CFR Section 122.34(b)(4)(ii)(A). They do not impose absolute obligations on Copermittees to prohibit or control all discharges into the MS4.

[5] It also is worth noting that, to the extent the Revised Tentative Order imposes federal requirements on Copermittees requiring them to regulate third parties, it runs afoul of the Tenth Amendment of the United States Constitution. *See, e.g., Environmental Defense Center, Inc. v. United States Environmental Protection Agency*, 344 F.3d 832, 847 (9th Cir. 2003).

B. Orders Issued by the Regional Board Must Comply With the State Constitution's Ban on Unfunded Mandates.

Even if the Regional Board did consider the required state-law economic analysis with respect to the requirements that exceed federal law, unless the state is going to fund the requirements, they would run afoul of the constitutional ban on unfunded state mandates. *See* Initial Comments, Attachment A, Section III.D., pp. 9-10 In its Response to Comments, Regional Board staff dismiss the County's unfunded state mandate claim, claiming that the State Regional Board has heard and repeatedly denied similar claims and that since the State Regional Board last decided the issue, "nothing has occurred that would change how unfunded state mandates are determined." *See* Response to Comments, No. 5, pp. 14-15. In fact, there recently has been a significant development in how unfunded state mandates are determined.

In *County of Los Angeles v. Commission on State Mandates*, 150 Cal.App.4th 898 (2007), the Court of Appeals held that Government Code Section 17516 is unconstitutional to the extent that it exempts Regional Regional Boards from the constitutional state mandate subvention requirement.[6] Government Code 17516 defines "executive order" which is a prerequisite for asserting an unfunded state mandate claim. It excludes from the definition any order or requirement issued by the State Regional Board or a Regional Regional Board. With the holding that the statutory exemption is unconstitutional, there no longer is a statutory basis for excluding orders issued by Regional Boards from state unfunded mandate claims. Accordingly, the Regional Board must adhere to the constitutional requirement to fund state mandates.

C. Copermittees Must Be Allowed to Comply With the MEP Standard in Any Manner They Choose.

Finally, regarding the proposed obligations on discharges into the MS4, even if Regional Board staff believe that the best way for Copermittees to meet the MEP standard for discharges from the MS4 is by controlling discharges into the MS4, as noted previously, Water Code Section 13360 prohibits the Regional Board from specifying the manner in which Copermittees are to comply with the MEP standard.

IV. Without Justification, Inconsistencies Between the Revised Tentative Order and Other MS4 Permits Adopted by the Regional Board are Arbitrary.

As discussed above, the requirement in the Revised Tentative Order to develop and submit a Business Plan exceeds federal law. This requirement also exceeds the requirements set forth in other Phase I MS4 permits adopted by the Regional Board. For example, on January 24, 2007, the Regional Board renewed the MS4 permit for San Diego County (Order No. R9-2007-0001). Notwithstanding, however, that the Regional Board largely has developed the permitting programs for San Diego and Orange Counties in tandem, the Regional Board chose not to adopt a Business Plan requirement in the new San Diego permit. If Regional Board staff believe a Business Plan is necessary for Orange County Copermittees, why was such a requirement not necessary just eight months ago for San Diego County Copermittees? The Revised Fact Sheet and Tentative Order provide no explanation. Without justification for why the requirement is proposed in the Revised Tentative Order but was not proposed in R9-2007-

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[6] "Subvention" generally means a grant of financial aid or assistance, or a subsidy. *See County of Los Angeles v. Commission on State Mandates, supra*, at 906.

0001, the Business Plan requirement appears to be arbitrarily imposed only on Orange County Copermittees.

Another example of an unjustified inconsistency between the two permits is the use of "violation" versus "exceedance." As noted in the County's initial comments, the Tentative Order inappropriately used the term "violation" in several instances instead of "exceedance." For example, in Finding C.7., the Tentative Order provided that data submitted by Copermittees documents "persistent violations" of Basin Plan water quality objectives. This is not accurate. The data may have shown *exceedances* of water quality objectives, but they do not show *violations* of water quality objectives. In its Response to Comments, Regional Board staff stated that the word "violation" was appropriately used in Finding C.7. However, in a nearly identical finding in the San Diego County permit (Order R9-2007-0001), staff correctly used "exceedance" rather than "violation." *See* Order R9-2007, 0001, Finding C.7 ("... data submitted to date documents persistent *exceedances* of Basin Plan water quality objectives.") (Emphasis added.) If "exceedance" was correct in R9-2007-0001 why is it not correct now?

The County appreciates that the two permits need not be the same in all respects. There are differences between the two counties' storm water programs that may warrant differences in their respective permits. However, where, as here, there appears to be no basis for imposing different requirements (*e.g.*, the Business Plan requirement) or for using different terms (*e.g.*, "violation" instead of "exceedance"), the inconsistencies between the two permits are arbitrary and should be resolved.

V. The Drainage Area Management Plan (DAMP) is an Effective and Integral Part of the Orange County Storm Water Program; Without It, the Revised Tentative Order Becomes Unnecessarily Prescriptive.

As noted above and described in detail in the County's Initial Comments, the Revised Tentative Order dismisses the DAMP as mere "procedural correspondence." The County strongly disagrees with any attempt to undermine the significance and importance of the DAMP. The DAMP is the principal policy, programmatic guidance and planning document for the Orange County Storm Water Program. The main objectives of the DAMP are to fulfill the commitment of the Copermittees to present a plan that satisfies federal storm water permitting requirements (*i.e.*, NPDES requirements) and to evaluate the impacts of urban storm water discharges on receiving waters.

By dismissing the DAMP while incorporating some of the DAMP's provisions directly into the permit, the Revised Tentative Order unnecessarily limits the required flexibility of the Orange County Storm Water Program. With programmatic elements memorialized in the permit rather than the living DAMP, the iterative nature of effective storm water management is lost. For all of the above reasons, and as discussed in detail in the Initial Comments, the County respectfully requests that Revised Tentative Permit be fully revised as described in Attachment B of the Initial Comments. *See* Initial Comments, Attachment B, pp. 2-30.

* * * *

Thank you for your attention to the County's concerns with the Revised Tentative Order. We appreciate the effort you and your staff have devoted to the development of the fourth-term MS4 permit for the Orange County Program. While we believe the Revised Tentative Order is deficient in several significant respects, as discussed above and in our Initial Comments, we believe it should be fairly simple to significantly improve the permit. With respect to the "FETD"

issue, because these new requirements only were added to the proposed permit in the Revised Tentative Order, we believe it would be appropriate to allow for additional time for public comment on this issue before the Regional Board convenes to adopt the order.

We look forward to discussing the Revised Tentative Order with you and with Regional Board members at the public hearing on September 12, 2007. Please feel free to contact me if you have any questions. For technical questions, please contact Chris Crompton at (714) 834-6662 or Richard Boon at (714) 973-3168.

Sincerely,

Mary Anne Skorpanich, Acting Director
Watershed & Coastal Resources Division

Attachment: Initial Comments

cc: Regional Board Members
Technical Advisory Committee
Copermittees

Bryan Speegle, Director

COUNTY OF ORANGE

RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

Environmental Resources
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April 25, 2007

By E-mail and U.S. Mail

Jeremy Haas
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. Haas:

Please find attached additional comments regarding the Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002.

Please contact me directly if you have any questions. For technical questions, please contact Richard Boon at (714)973-3168.

Sincerely,

Chris Crompton, Manager
RDMD/Environmental Resources

Attachment A: Additional Comments

cc: Permittees

Attachment 1
Comments on Fact Sheet/Technical Report For Tentative Order R9-2007-0002

Economic Issues (p.11)

The Fact Sheet's discussion of Economic Issues considers the costs and benefits of water quality protection and management. This discussion is prefaced with a reference to the work of Ribaudo and Hellerstein (2002). These authors note that that a "knowledge of benefits and costs to water users is required in any complete assessment of policies to create incentives for water quality improving changes in agricultural practices." The paraphrasing of this work in the Fact Sheet unfortunately omits consideration of the context and scope of this work. Since their work is advocating cost-benefit analysis to initially inform policy development rather than subsequently validate its implementation, Ribaudo and Hellerstein's target audience are clearly the policy writers (or permit writers) and not the practioners of agricultural production. This key point is missed by the Fact Sheet author.

The scope and limitations of environmental cost-benefit analysis also have to be recognized. Indeed, the beach closure studies noted in the Fact Sheet quite possibly represent the limits of meaningful cost-benefit analysis as it can be applied to water quality protection and management in Orange County. In environmental cost-benefit analysis there are no markets for environmental quality and no prices with which to completely measure environmental value. Consequently, such analyses have to determine economic effects through the measurement of observed changes in the behavior of water users (e.g. a reduction in beach use) and the determination of direct use values. However, direct use values such as those identified by Lew et. al. (2001) only capture a portion of the total economic value of an environmental asset. For example, NOAA observes that indirect use values (e.g. biological support, climate regulation etc.), non-use values (e.g. potential future use), and intrinsic values (biota has a value irrespective of usefulness to humanity) also have to be considered in the evaluation of an environmental resource

In summary, cost-benefit analysis requires that the natural environment be translated into monetary terms. The Center for Progressive Regulation (CPR) (2007) believes that this feature is one aspect of cost-benefit analysis that "makes it a terrible way to make decisions about environmental protection, for both intrinsic and practical reasons." CPR also believes that "it is not useful to keep cost-benefit analysis around as a kind of regulatory tag-along, providing information that regulators may find useful even if not decisive. Cost-benefit analysis is exceedingly time- and resource-intensive, and its flaws are so deep and so large that this time and these resources are wasted on it." Part of this latter observation is underscored by the 1998 the state of Minnesota's scoping study on a cost-benefit model to analyze water-quality standards. Its task force estimated costs of $3.6 to $4.4 million over four years to support model development and the project was stopped at the conclusion of the scoping study. If the Fact Sheet retains a discussion of cost benefit analyses, this discussion should be revised to explicitly recognize the limited utility of the approach when applied to environmental protection.

Discharge Characteristics (p.21)

The Fact Sheet presents a chronological record of investigations into the environmental significance of dry and wet weather runoff from urban areas starting with Nationwide Urban Runoff Program (NURP). This discussion is overly selective in its sources and needs to temper some of the assertions predicated on NURP and the federal assessments of water quality with more recent research (see discussion below).

Illicit Connections/Discharges: NURP clearly identified illicit connections as an issue of concern with respect to dry weather processes. However, the NURP studies of this issue were predominantly from the older urban environments of the East Coast. For example, USEPA's investigative guidance cites studies from Washentaw County, Michigan; Toronto, Canada; and Inner Grays Harbor, Washington. While the Fact Sheet reports that NURP "found pollutant levels from illicit discharges were high enough to significantly degrade receiving water quality," and thereby connotes the potential significance of this issue in Orange County, the Permittees' extensive and repeated inspections of their storm drain infrastructure during the first and second term permits found very few illicit connections. Moreover the most recent annual report identified only 12 illegal discharges identified through the dry weather reconnaissance program. The Fact Sheet needs to recognize this significant regional disparity.

Fecal Indicator Bacteria: The Fact Sheet notes Haile et. al's (1996) epidemiological study conducted in the summer of 1996 to assess adverse impacts from swimming in ocean water receiving untreated urban runoff. The study presents adverse health effects as risk ratios, comparing the risk to swimming near storm drains with swimming varying distances (1-50, 51-100, and >400 yards) from storm drains. It also assessed risk by Fecal Indicator Bacteria (total coliform, fecal coliform, enterococcus, and E. coli), and by virus. The study found elevated risk for the majority of the disease symptoms, most notably for Highly Credible Gastro-intestinal Illness (HCGI) when swimming near the storm drain. However, the only statistically significant results were for a subset of symptoms: fever, chills, ear discharge, cough and phlegm, and significant respiratory disease. The correlation between health effect and FIB was poor. For HCGI, the relationship was strongest with the FIB enterococcus since the risk increases with concentration. However, this risk was not statistically significant.

The Fact Sheet is significantly remiss in not discussing Colford et al. (2005) who conducted an epidemiological study at Mission Bay, California during the summer of 2003. The study's goal was to evaluate health impacts in relation to traditional fecal indicator bacteria where non-point sources, non-human fecal sources are dominant. One important finding was that no significant correlation was observed between increased risk of illness and increased levels of traditional water quality indicators, including enterococcus, fecal coliform, or total coliform (see Table 15 in Colford et al., which summarizes health outcome and odds ratio). The Table shows a weak correlation, or an odds ratio greater than 1 for various symptoms, but the confidence intervals indicate the results are not statistically significant. On the other hand, significant associations were observed between the levels of male-specific coliphage and HCGI-1 (vomiting and

diarrhea, or fever; or cramps and fever), HCGI-2 (vomiting and fever), nausea, cough, and fever-but this was a rare circumstance, possibly indicative of the presence of human sewage, and not many swimmers were exposed.

The results from the epidemiological studies conducted both at Santa Monica and Mission Bay agree that fecal indicator bacteria do not adequately assess risk. However, it is anticipated that the results from a new epidemiological study being conducted by Southern California Coastal Water Research Project (SCCWRP) in association with the City of Dana Point will offer insight about the impact from fecal indicator bacteria reaching beaches. The Fact Sheet needs to be revised to correct its current oversimplification of epidemiological understanding and omission of both current and impending research in this area.

Environmentally Sensitive Areas (ESAs): The Fact Sheet contends that CWA 303(d) impaired waterbodies have a much lower capacity to withstand pollutant shocks than might be acceptable in other areas. This contention appears contrary to the Permittees's bioassessment data which finds degraded habitats to be characterized by diminished biological diversity and higher numbers of a limited range of pollutant tolerant taxa. CWA 303(d) impaired waterbodies might be better characterized as pollution *insensitive* areas.

Infiltration and Groundwater Protection: The Fact Sheet notes the Tentative Order's incorporation of existing guidance regarding urban runoff infiltration and groundwater quality protection. This discussion needs to be re-considered in the context of studies that suggest that the threat to groundwater may be overstated. Nightingale (1987) examined the impact of urban runoff on water quality beneath five retention/recharge basins in Fresno as part of NURP. He concluded that "no significant contamination of percolating soil water or groundwater underlying any of the five basins has occurred for the constituents monitored in the study." More recently, the Los Angeles Basin Water Augmentation Study (2005) has specifically examined the fate and transport of urban runoff-borne pollutants by monitoring storm water quality as it infiltrates through the soil to groundwater. The data collected during this study showed no immediate impacts, and no apparent trends to indicate that storm water infiltration will negatively impact groundwater.

In Summary: Regarding urban stormwater discharges, it has been observed that:

- Impacts to water quality in terms of chemistry tend to be transient and elusive, particularly in streams;
- Impacts to habitat and aquatic life are generally more profound and are easier to see and quantify than changes in water column chemistry;
- Impacts are typically complex because urban stormwater is one of several sources of adverse impact including agricultural and non-urban area runoff, and
- Impacts are often interrelated and cumulative. For example, the condition of an urban stream system's biological resources reflects both degraded water quality and hydromodification.

Prefacing the Discharge Characterization discussion with an equivalent summary would help balance the chronological presentation of information that has the effect of perhaps overly connoting the significance of urban stream chemistry.

Urban Runoff Management Programs (p.34)

Sweeping of Municipal Areas: Street sweeping was essentially discredited as a BMP after the 1983 NURP report. However, since that time technological advances, specifically the development of vacuum assisted dry sweepers, have led to street sweeping as a practice that can potentially be effective in improving water quality. For example, RWMWD (2005) reports a number of studies that show regenerative air and vacuum sweepers capable of 70% total suspended solids (TSS) removal. Higher rates of TSS recovery are reported by Bannerman (2007).

On the specific issue of effectiveness and the relative significance of street sweeping frequency, frequency is clearly subordinate to other considerations. The Center for Watershed Protection (2002) notes that "arguably the most essential factor in using street sweeping as a pollutant removal practice is to be sure to use the most sophisticated sweepers available." The Center also notes the ability to regulate parking as another important aspect. Martinelli (2002) concludes that "...freeway sweeping with a high efficiency sweeper can be a BMP for the control of stormwater runoff pollutant..." and that his study supports the purchase and use of high efficiency sweepers. [These findings are consistent with the current and proposed 2007 DAMP.]

The significance of the technology is also a recurrent message in the extensive annotated bibliography of street sweeping studies in RWMWD (2005). RWMWD notes street sweeping effectiveness begins first with the choice of the right equipment. Other important variables include the timing of sweeping in relation to rainfall events and the speed of sweeper operation. Where frequency has been examined, the Center for Watershed Protection also observes that efficiency at greater frequencies than weekly declines because of (1) only small incremental gain and (2) higher removal could be obtained on residential streets versus heavily traveled roads. This finding contradicts CASQA's (2002) recommendation to increase frequency in high traffic areas.

It is clear from a review of the available literature there is no robust technical justification for working to try to optimize street sweeping based on traffic counts. Consequently, while street sweeping will continue to be a focus of the Permittees efforts with respect to pollutant load reduction efforts. The requirement to try to optimize frequency based upon traffic counts needs to be deleted from the Order.

Bryan Speegle, Director

COUNTY OF ORANGE

RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

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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.