December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

Written Comments from Copermittees and Interested Parties

A. San Diego Copermittees' Collective Comments

(submitted by County of San Diego)

B. City / County Management Association (submitted by City of Imperial Beach)

C. Associated General Contractors of America

D. Best Best & Krieger LLP

E. California Building Industry Association

F. City of Carlsbad

G. City of Chula Vista

H. City of San Diego

I. Industrial Environmental Association

J. Foley & Lardner LLP (dated October 3, 2006) (CCWHE, BIA)

K. Foley & Lardner LLP (dated October 30, 2006)

(CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD)

L. Natural Resources Defense Council

M. Nossaman, Guthner, Knox & Elliott, LLP

(CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD)

N. San Diego Unified Port District

O. Joe Purohit - Sparkers, Inc.

December 13, 2006 Regional Board Meeting
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A. San Diego Copermittees' Collective Comments (submitted by County of San Diego)

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County of San Diego

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October 27, 2006

John Minan
Chair
California Regional Water Quality Control Board
San Diego Region 9
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Dear Chairman Minan:

Thank you for the opportunity to comment on the revised August 30, 2006 draft of Tentative Order No. R9-2006-0011 ("Tentative Order"). In its capacity as lead Copermittee, the County of San Diego respectfully submits the attached comments on behalf of all Copermittees of the Regional Municipal Stormwater Permit.

As you are aware, the Copermittees submitted extensive comments on the previous release of the Tentative Order dated March 10, 2006. While we still have some remaining concerns about the final content of the Order, we very much appreciate the effort of RWQCB staff in considering and incorporating many of our comments, and believe the current Tentative Order to be much improved over the last version. Because of this, the Copermittees have been able to focus our comments on a much shorter list of issues and concerns.

In terms of technical issues, we have very few. You will find that the suggestions center on adjusting certain timelines and the monitoring and reporting program.

Similarly, we believe efforts were made to address the legal concerns. However, two important issues remain: unfunded state mandates and compliance with the California Environmental Quality Act. In an effort to more clearly explain our position, legal counsel for the Copermittees have compared the requirements in the draft permit with the specific mandates under the Clean Water Act. We believe the chart included with Attachment A will facilitate the discussion regarding this issue. The second, and new comment, relates to the very recent Court of Appeals decision requiring the Regional Board to conduct environmental review before adopting the Tentative Order.

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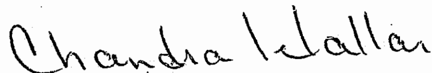
As with our previous submittal, Copermittee comments are divided into two parts. Attachment A to this letter contains a discussion of outstanding legal issues associated with adoption of the Tentative Order, and Attachment B discusses the Copermittees' remaining technical concerns. Where possible, each of our comments includes specific suggested changes and an accompanying rationale.

Finally, we respectfully request that the Board take public testimony at its December 13 Board meeting, but adopt the Order at a subsequent meeting. To enable the Board to make an informed decision, this interim step will give the board the necessary opportunity to fully consider all the information presented by the Copermittees, members of the public and your staff.

Again, thank you for considering our previous comments and we look forward to discussing our suggestions in greater detail at your December 13 Board meeting.

Please do not hesitate to call Kathleen Flannery of my staff at 619-685-2441 with any questions you have regarding this submittal.

Sincerely,



CHANDRA L. WALLAR
Deputy Chief Administrative Officer
Land Use and environment Group

Attachments

cc: Eric Anderson, Board Member
Alan Barrett, Board Member
Daniel Johnson, Board Member
Jennifer Kraus, Vice Chair
Susan Ritschel, Board Member
Richard Wright, Board Member
John Robertus, Executive Officer

CLW:ewm

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ATTACHMENT "A"

LEGAL COMMENTS ON THE BOARD'S RESPONSES TO COMMENTS DATED AUGUST 30, 2006 ON TENTATIVE ORDER NO. R9-2006-0011

I. INTRODUCTION

These comments are provided as a response to the Board's responses to comments issued on August 30, 2006 regarding Tentative Order No. R9-2006-0011 ("Permit" or "Draft Permit"). These comments were prepared by a sub-committee of legal counsel for the San Diego copermittees and were reviewed by the members of the City Attorneys Association of San Diego County. The comments focus on three issues: (1) unfunded state mandates; (2) compliance with the California Environmental Quality Act in light of new legal authority; and (3) vague and ambiguous permit terms.

II. THE BOARD'S ACTION CONSTITUTES AN UNFUNDED STATE MANDATE

The Board's response to the copermittees' comment regarding unfunded state mandates neither accurately characterizes the comment nor responds to it. It is not, and never has been, the copermittees' position that the Board lacks the legal authority to impose mandates which "exceed" or are "more explicit" than the mandates or specific requirements of federal law. Rather, when the Board elects to use its discretion to impose mandates that are "more explicit" than or "exceed" the requirements of federal law, it is electing to impose a state mandate within the meaning of California Constitution, Art. XIII B, Section 6. The Board may impose such state mandates; once imposed, however, the California Constitution requires that they must be funded by the State. The copermittees ask the Board to acknowledge that, as it has done in the past and as is implicit in draft Finding E.9, portions of the permit "are more explicit" than or "exceed" the specific requirements of federal law.

A. THE UNFUNDED STATE MANDATE PROVISIONS AND PROCESS

1. Unfunded State Mandate Provisions

Article XIII B, Section 6 of the California Constitution provides that "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service . . ." except in certain specific circumstances. Through Proposition 1A, approved by the voters in 2004, Section 6 was amended to further provide that "for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the state pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law." The concern that prompted the voters to include Section 6 in the California Constitution "was the perceived attempt by the state to enact

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legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to these agencies the fiscal responsibility for providing services that the state believed should be extended to the public." (Long Beach Unified School District v. State of California (1990) 225 Cal.App. 3d 155, 174.)

Nothing in constitutional or statutory law allows the state to shift costs to local agencies without reimbursement merely because those costs were imposed upon the state by the federal government. Hayes v. Commission on State Mandates, 11 Cal. App. 4th 1564, 1593 (1992). A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. City of Sacramento v. State of California, 50 Cal. 3d 51, 68 (1990). The courts have concluded that a state mandate exists where the state has a choice in the manner of implementation of the federal mandate. County of Los Angeles v. Commission on State Mandates, 32 Cal. App. 4th 805, 816 (1995). The focus is not simply that the obligation arises out of a federal mandate. A determination of whether certain obligations (and therefore costs) were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and *how* those costs came to be imposed upon that agency. Hayes v. Commission on State Mandates, 11 Cal. App. 4th at 1594. If the state freely chooses 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 of whether the costs were imposed upon the state by the federal government. *Id.* As shown in the attached chart, and supported by the December 2000 chart prepared by this Board, various provisions of the currently drafted permit reveal an exercise of choice by this Board in the manner of implementing federal law. Therefore, the requirements under this Draft Permit that are not express federal mandates constitute mandates by the state subject to the subvention requirements.

A "new program" within the meaning of Section 6 is a program that carries out the governmental function of providing services to the public, or a law that, to implement state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. Commission On State Mandates (1995) 32 Cal.App. 4th 805, 816.) A reimbursable "higher level of service" concerning an existing "program" exists when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided." (San Diego Unified School District v. Commission On State Mandates (2004) 33 Cal.4th 859, 877.) Both Section 6 and state law establish certain exceptions to the state mandate provisions, three of which have some potential application to the Draft Permit. First, as a threshold matter, Government Code section 17516 currently purports to exempt orders of the Regional Board from the state mandate provisions. The copermittees contend that Government Code section 17516 is unconstitutional, and Judge Victoria E. Chaney of the Los Angeles County Superior Court, has, in fact, declared Section 17516 to be unconstitutional in County of Los Angeles, et al v. State of California, et al, Consolidated Case Nos. B5087969 and B5089785. Judge Chaney's decision has been appealed by the State to the Court of Appeal, Second Appellate District, as Civil Case No. B183981. The matter has been fully briefed, but as of the date of this comment, no date for oral argument has yet been scheduled. It is the copermittees position that Government Code section 17516 is not a valid bar to their unfunded state mandate claim.

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Second, Government Code section 17556(c) provides that a statute or executive order shall not be considered to be a state mandate if the "statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation." The copermittees acknowledge that much of the Draft Permit imposes requirements mandated by a federal law or regulation. However, the copermittees contend that many of the requirements of the Draft Permit exceed the mandates in the federal law and regulations. The copermittees have attempted to set forth in detail in Section B.2 below the portions of the Draft Permit which they believe exceed the federal mandates. The copermittees also contend that draft Finding E.9 and the Board's own documents establish that a large percentage (up to 40%) of the requirements of the Draft Permit exceed the federal mandates.

Third, Government Code section 17556(d) provides that a state mandate will not be considered to be "unfunded" if the local agency "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The copermittees' previous comment explained why this provision is not a bar to an unfunded state mandates claim. The requirements of Proposition 218, as interpreted by cases such as Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351, severely limit the ability of the copermittees to fund the mandates of the Draft Permit. Certainly, the copermittees authority, whatever it may be, is not "sufficient to pay for the mandated program or increased level of service." It is for this reason that the copermittees raise the unfunded state mandate issue – to find a funding source for this state mandated program or increased level of service.

2. State Mandates Process

The Legislature has established an administrative process for seeking a determination that a mandate is an unfunded state mandate within the meaning of Section 6. (Gov. Code §§ 17500 et. seq.) These procedures are the sole and exclusive procedure by which a local agency may claim reimbursement for state-mandated costs. (Gov. Code § 17552.) The procedures require the commencement of a test claim before the Commission on State Mandates, with judicial review only being available after a final determination by the Commission. (Gov. Code § 17553, 17559.)

Traditional concepts of exhaustion of administrative remedies apply to an unfunded state mandate claim. (Tri-County Special Education Local Plan Area v. County of Tuolumne (2004) 123 Cal.App.4th 563, 572.) For this reason, the copermittees would need to pursue a petition to the State Board and then process a test claim with the Commission if the Regional Board does not agree that portions of the Draft Permit "mandate costs which exceed the mandate in the federal law."

B. THE DRAFT PERMIT IMPOSES UNFUNDED STATE MANDATES UPON THE COPERMITTEES

1. Permit Language and Previous Board Statements.

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The copermittees contend that the language of the Draft Permit and previous Board statements demonstrate that portions of the Draft Permit constitute unfunded state mandates. First, Finding E.9 states that:

> Requirements in this order that are more explicit than 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.

In its response to the copermittees' comment on this Finding E.9, the Board dismisses the copermittees' comment as a misrepresentation of Finding E.9. (See Responses to Comments, p. 59). While there may be a legitimate difference of opinion concerning the meaning of Finding E.9, the copermittees did not misrepresent the Finding in their comment. It is the copermittees' view that when the Board elects to be "more explicit than the federal storm water regulations" it is imposing state, rather than federal, mandates. While the Board's imposition of such "more explicit" mandates may be based upon its belief that such additional mandates are needed to meet the MEP standard, that cannot convert those additional mandates into mandates required by federal law or regulations. Such an elastic view of federal law would mean that the federal mandates are different in San Diego County than in Riverside County, in Texas than in New Jersey. This is inconsistent with basic concepts of federal law.

The copermittees further contend that their reading of Finding E.9 is consistent with prior official documents of the Board. For example, in Attachment 4 to Agenda Item 5 of the Board's December 13, 2000 meeting, Conclusion 14 provides that:

> Approximately 60% of the requirements in Tentative Order 2001-02 are based solely on the 1990 federal NPDES Storm Water Regulations. The remaining 40% of the requirements in the Tentative Order "exceed the federal regulations." Requirements that "exceed the federal regulations" are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.

At least one legal commentator has cited to Conclusion 14 to help explain the federal/state law structure of the NPDES process and has noted that in certain circumstances, such as CEQA, "this feature of going beyond the federal requirements is legally significant." (Minan, Municipal Storm Water Permitting in California, (2003) 40 San Diego L. Rev. 245, 251 and fn. 30.)

Again, the copermittees do not refer to this statement to show that the Board has exceeded its legal authority. The copermittees understand that the Board believes that the portions of the Draft Permit that "are more explicit" or, as the Board phrased the issue in 2000, which "exceed the federal regulations," are needed to meet the MEP standard and are consistent with the Board's authority. The copermittees simply disagree with the proposition that anything the Board does in an attempt to achieve the MEP standard constitutes a federal mandate, and ask the Board to acknowledge, as it did in 2000, that portions of the Draft Permit are not mandated by federal law.

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2. Specific State Mandates.

Legal counsel for the copermittees have compared the mandates of the Draft Permit with the specific requirements of federal law and regulations, as the Board did in December 2000. A chart comparing the Draft Permit with the federal mandates is attached. As the chart demonstrates, and as the Board's staff found in 2000, significant portions of the Draft Permit "exceed the federal regulations."

C. THE COPERMITTEE'S ASSERTION IS MISCONTRUED

It is the copermittees' position that the Board did not respond to the actual comment made by the copermittees regarding unfunded state mandates. To the extent the Board responded to the actual comment made, the copermittees understand the Board's response to be: (1) all the mandates of the Draft Permit are necessary to satisfy the MEP standard and, therefore, are federal mandates; and (2) the mandates of the Draft Permit merely expand upon or elaborate on Order No. 2001-01's pre-existing requirements. (See Responses to Comments, p. 59 and 65.) The copermittees contend that both of these responses are inconsistent with the unfunded state mandate provisions.

First, as noted above, it cannot legally or logically be the case that anything the Board mandates in an NPDES permit is by definition a federal mandate simply because all NPDES permits must strive to achieve the MEP standard. Such an approach would mean that the requirements of federal law and the federal regulations vary widely from region to region, state to state.

Rather, the logical approach, used by the Board in 2000, is to compare the express requirements of federal law and regulations (i.e., what must be in every NPDES permit) with the requirements of each individual permit to determine those areas in which the Board has elected to use its discretion to impose requirements that "exceed" or are "more explicit" than the federal mandates. In short, not everything imposed under the umbrella of federal law is a federal mandate.

Second, the additional requirements of the Draft Permit constitute a "higher level of service" concerning an existing "program." The courts have interpreted the phrase "higher level of service" in a manner that forecloses the Board's "elaboration" response. By definition, the iterative process mandated by the State Board is designed to increase the level or quality of the storm water program, and the Draft Permit attempts to do just that. Since the Board's "elaborations" are intended to increase the actual level or quality of the copermittees' storm water program, they constitute a "higher level of service" within the meaning of Section 6.

In both instances, the Board has exercised a choice in the manner in which it has imposed many of the requirements under this permit. As such, those requirements shown in the state mandate category of the attached chart shall be reimbursable.

III. FAILURE TO COMPLY WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The policy of the state is to ensure that action is taken to provide the people of this state

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with not just clean water but also clean air, quality aesthetics, and natural, scenic, and historic environmental qualities. Public Resources Code section 21001(b). In accordance with the requirements of the California Environmental Quality Act (CEQA), the Board has failed to consider the physical effects on the environment from the permit. (See Public Resources Code section 21080.) Environmental analysis should occur as "early as feasible in the planning process to enable environmental consideration to influence project program and design and yet late enough to provide meaningful information for environmental assessment." (CEQA Guidelines section 15004.)

In County of Los Angeles v. California State Water Resources Control Board, 2006 DJDAR 13567 the Court squarely addressed this issue. In County of Los Angeles, the California State Water Resources Control Board (State Board) argued that issuance of a National Pollutant Discharge Elimination Systems permit is exempt from CEQA under Water Code section 13389. The Court disagreed in large part with the State Board. The Court opined that Water Code section 13389 merely exempts the application of chapter 3 of CEQA. Nothing in state or federal law exempts the wholesale application of CEQA to the National Pollutant Discharge Elimination Systems permit. Therefore, the Board must engage in specified environmental assessments in accordance with chapters 1 and 2.6 of CEQA. Id. at 13574-13575.

In the present instance, Section E.11 of the permit states that the permit is exempt from CEQA in accordance with Water Code section 13389. As such, *no* environmental analysis has been prepared to enable the copermittees or members of the public to assess the potential environmental impacts of the permit.

Under the holding in County of Los Angeles v. California State Water Resources Control Board, specified environmental assessment must occur before this permit is approved. Not only must the potential environmental effects of the permit be assessed, but the results of an environmental assessment may influence how the permit is drafted or implemented. Therefore, to comport with the requirements of CEQA and the recent County of Los Angeles decision, the permit's potential environmental effects should be assessed and made publicly available for comment, prior to this Board's action on the Draft Permit itself.

IV. THE DRAFT PERMIT'S TERMS ARE INHERENTLY VAGUE AND AMBIGUOUS

The Copermittees reassert their claim that the permit contains many provisions that are inherently vague or ambiguous. Consequently, the Copermittees cannot discern how to comply with the permit's terms, nor can the Board enforce its vague provisions. In certain circumstances, the copermittees will not know whether their conduct is necessarily proscribed. In other instances, the terms of the permit fail to provide an ascertainable standard of conduct. Given the vagueness of certain provisions, Ccopermittees could be subject to arbitrary enforcement for failing to comply with provisions that lack sufficient specificity to permit reasonable compliance.

For example, Sections A and B set forth the general prohibitions under state or federal law pertaining to discharges. However, subsequent sections, such as Sections D (page 15), D.1 (page 15-16), D.2 (page 26), D.3 (page 29), D.4 (page 38), E.2 (page 43) and F (page 46) still contain paraphrases of the prohibitions in various forms. Given the inconsistencies between the prohibitions in Sections A and B and the differing versions throughout the permit, the

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copermittees cannot determine if the terms in Sections D through F were intended to prohibit the same conduct as in Sections A and B or expand on those prohibitions. If intended to prohibit the same conduct, there is no reason or benefit in restating the prohibitions. More importantly, restating the prohibitions using different language creates ambiguity. On the other hand, if Sections D through F are intended to prohibit different conduct, no state or federal authorization has been specified. See discussion in Section II above.

V. CONCLUSION

The Copermittees' unfunded state mandate comment is not intended to be an attack on the Board's legal authority. The copermittees merely ask that the Board acknowledge, as the copermittees believe the Board has done in the past, that some of the mandates in the Draft Permit go beyond what the federal law requires. The Copermittees understand and acknowledge that the Board is free to go beyond federal law and that very good reasons may exist to do so. However, when the Board imposes mandates not required by federal law it triggers the state's unfunded state mandates provisions. It is the Copermittees desire that, through the unfunded state mandates process, they may obtain the funding needed to pay for these mandates.

The Copermittees further request that the Board perform the necessary environmental analysis as required under the California Environmental Quality Act. While the stated goals of the Clean Water Act and the Porter-Cologne Act are to improve and protect our waters, the Legislature has declared that it is also their policy to take all action necessary to advance the goals of clean air, enjoyment of aesthetic, natural, scenic and historic environmental qualities. As such, this permit must be evaluated under the requirements of CEQA to ensure that all policies of the state are considered when this Board takes its action.

Finally, it is the Copermittess' request that the Board promptly eliminate and/or otherwise clarify the inherently vague and ambiguous language found in the Draft Permit so as to allow the Copermittees to implement its provisions, once funding has been found, in a clear and expeditious manner. The Board's failure to do so will only result in further delays due to the Copermittees' inability to resolve those inconsistencies found in the language of the Draft Permit as described above.

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
Prohibition and Receiving Water Limitations (Section A of Tentative Order No. 2006-0011)	A.1. – Prohibition of discharges into and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance.	**X**[1]	--
	A.2 – Prohibition of discharges from pollutants which have not been reduced to the maximum extent practicable	**X**[2]	--
	A.3. – Prohibits discharges that cause or contribute to the violation of water quality standards	**X**[3]	--
	A.3.a.(1) – Requirement that MS4 operator include a description of BMPs that will be implemented to remedy the violating of water quality standards	**X**[4]	--
	A.3.a.(2) – Submit any modifications to the annual report required by the Regional Board within 30 days of notification	--[5]	**X**
	A.3.a.(3) – Revise JURMP to implement approved BMPs as well as any additional monitoring	--	**X**
	A.3.a.(4) – Implement the revised JURMP and monitoring program in accordance with the approved schedule	--	**X**
	A.3.b. – Discharges from MS4s are subject to all Basin Plan prohibitions	--	**X**
Non-Storm Water Discharges (Section B of	B.1. – Requires Co-permittee to prohibit all types of non-storm water discharges	**X**[6]	--

[1] 33 U.S.C. §1342(p)(3)(B).

[2] 33 U.S.C. §1342(p)(3)(B).

[3] 40 C.F.R. § 122.44(d).

[4] 61 F.R. 43761.

[5] Not specifically required by annual reporting requirements of 40 C.F.R. §122.42(c.)

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
Tentative Order No. 2006-0011)	into its MS4 unless the discharge is authorized by an NPDES permit		
	B.3. – Requires co-permittees to develop and implement a program to reduce pollutants from non-emergency firefighting flows where such flows have been identified as a significant source of pollutants.	X[7]	--
	B.4. – Requires co-permittees to examine dry-weather field screening results to identify water quality problems that might be the result of a non-prohibited non-storm water discharge	X[8]	--
Legal Authority (Section C of Tentative Order No. 2006-0011)	C.1.- Requires each co-permittee to establish maintain and enforce adequate legal authority to control pollutant discharges into and through its MS4	X[9]	--
	C.1.a. – Requires legal authority to control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to the MS4	X[10]	--
	C.1.a. – Requires co-permittee to implement legal authority to control the quality of runoff from industrial and construction sites	X[11]	--
	C.1.a. – Requires Co-permittee to change grading ordinances to prevent discharges of runoff associated with industrial and	--	X

[6] 40 C.F.R. § 122.26(b)(1) (definition of illicit discharge); and § 122.26(d)(2)(iv)(b).

[7] 40 C.F.R. § 122.26(d)(2)(iv)(B)(1).

[8] 40 C.F.R. § 122.26(d)(2)(iii).

[9] 40 C.F.R. § 122.26(d)(2)(i).

[10] 40 C.F.R. § 122.26(d)(2)(i)(A).

[11] 40 C.F.R. § 122.26(d)(2)(A)(i).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	construction activity to the MS4		
	C.1.b. - Requires legal authority to prohibit all identified illicit discharges not otherwise permitted in the permit	X[12]	--
	C.1.c. - Requires legal authority to prohibit and eliminate illicit connections to the MS4	X[13]	--
	C.1.d. – Requires legal authority to control the discharge of spills, dumping, or disposal of materials other than storm water to the MS4	X[14]	--
	C.1.e. – Requires legal authority to require compliance with co-permittee's storm water ordinances, contracts, permits, or work orders	X[15]	--
	C.1.f. – Requires the legal authority to utilize enforcement mechanisms to require compliance with co-permittee's storm water ordinances, contracts, permits, or work orders	--[16]	X
	C.1.g. – Requires the legal authority to control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Co-permittees	X[17]	--

[12] 40 C.F.R. § 122.26(d)(2)(i)(B).

[13] 40 C.F.R. § 122.26(d)(2)(i)(B).

[14] 40 C.F.R. § § 122.26(d)(2)(i)(C).

[15] 40 C.F.R. § 122.26(d)(2)(i)(E).

[16] Not specifically required by 40 C.F.R. § 122.26(d)(2)(i)(A)-(F).

[17] 40 C.F.R. § § 122.26(d)(2)(i)(D); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 3-1.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	C.1.h. – Requires the legal authority to carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance	X[18]	--
	C.1.h. – Requires the legal authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites	--[19]	X
	C.1.i. – Requires the legal authority to require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s to the MEP	X[20]	--
	C.1.j. – Requires the legal authority to require documentation on the effectiveness of BMPs implemented to reduce the discharge of pollutants to the MS4 to the MEP	--	X
	C.2. – Each co-permittee shall include as part of its JURMP a statement certified by its chief legal counsel that the Co-permittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 CFR § 122.26(d)(2)(i)(A-F) and this Order.	--	X
	C.2.a. – The statement shall include identification of all departments within the jurisdiction that conduct urban runoff related activities, and their roles and responsibilities under this Order. Include	--	X

[18] 40 C.F.R. § 122.26(d)(2)(i)(F).

[19] Recommended but not required by EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 3-3.

[20] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 3-1.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	an up to date organizational chart specifying these departments and key personnel		
	C.2.b. – The statement shall include Citation of urban runoff related ordinances and the reasons they are enforceable	--	X
	C.2.c. – The statement shall include identification of the local administrative and legal procedures available to mandate compliance with urban runoff related ordinances and therefore with the conditions of this Order	--	X
	C.2.e. - The statement shall include a description of how urban runoff related ordinances are implemented and appealed	--	X
	C.2.f. – The statement shall include a description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions	--	X
Jurisdictional Urban Runoff Management Program (Section D of Tentative Order No. 2006-0011)	D. – Each Co-permittee shall implement all requirements of section D of this Order no later than 365 days after adoption of the Order, unless otherwise specified in this Order.	--	X
	D. – Prior to 365 days after adoption of the Order, each Co-permittee shall at a minimum implement its Jurisdictional URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01.	--	X
	D. – Each Co-permittee shall develop and implement an updated Jurisdictional Urban Runoff Management Program for its jurisdiction.	X[21]	--

[21] 40 C.F.R. § 122.26(d)(2)(iv).

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D. – Each updated Jurisdictional Urban Runoff Management Program shall meet the requirements of section D of this Order.	--[22]	X
	D. – Each updated Jurisdictional Urban Runoff Management Program shall reduce the discharge of pollutants from the MS4 to the MEP and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards	X[23]	--
Development Planning (Section D.1. of Tentative Order No. 2006-0011)	D.1. – Each Co-permittee shall implement a program which meets the requirements of this section	--[24]	X
	D.1. – Each Co-permittee shall implement a program which reduces Development Project discharges of pollutants from the MS4 to the MEP	X[25]	--
	D.1. – Each Co-permittee shall implement a program which prevents Development Project discharges from the MS4 from causing or contributing to a violation of water quality standards	X[26]	--
	D.1. – Each Co-permittee shall implement a program which manages	--[27]	X

[22] Section D contains requirements that go beyond the EPA's requirements for an MS4 permit. Consequently, the requirement that the permittee comply with all requirements in Section D is a state mandate.

[23] 33 U.S.C. § 1342(p)(3)(B); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-10; 40 C.F.R. § 122.44(d)(1).

[24] Section D.1 contains requirements that go beyond federal requirements for an MS4 permit. Consequently, the requirement that the permittee comply with all requirements in Section D.1 is a state mandate.

[25] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-10.

[26] 40 C.F.R. § 122.44(d).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force		
	D.1.a. – Each Co-permittee shall revise as needed its General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) for the purpose of providing effective water quality and watershed protection principles and policies that direct land-use decisions and require implementation of consistent water quality protection measures for Development Projects.	--[28]	X
	D.1.b. – Each Co-permittee shall revise as needed their current environmental review processes to accurately evaluate water quality impacts and cumulative impacts and identify appropriate measures to avoid, minimize and mitigate those impacts for all Development Projects.	--[29]	X
Approval Process and Criteria for all Development Projects	D.1.c. – For all proposed Development Projects, each Co-permittee during the planning process and prior to project approval and issuance of local permits	X[30]	--

[27] Although federal regulations require the proposed management plan to address sediment and erosion controls for construction sites, Section D.1. of the permit is too specific and therefore goes beyond this requirement. EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-13

[28] 40 C.F.R. § 122.26(d)(2)(iv)(A)(2).

[29] 40 C.F.R. § 122.26(d)(2)(iv)(A)(2).

[30] 40 C.F.R. § 122.26(d)(2)(iv)(D); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-11.

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
(Section D.1.c. of Tentative Order No. 2006-0011)	shall prescribe the necessary requirements so that the Development Project discharges of pollutants from the MS4 will be reduced to the MEP		
	D.1.c. – For all proposed Development Projects, each Co-permittee during the planning process and prior to project approval and issuance of local permits shall prescribe the necessary requirements so that the Development Project discharges of pollutants from the MS4 will not cause or contribute to a violation of water quality standards	--	X
	D.1.c. – For all proposed Development Projects, each Co-permittee during the planning process and prior to project approval and issuance of local permits shall prescribe the necessary requirements so that the Development Project discharges of pollutants from the MS4 will comply with Co-permittee's ordinances, permits, plans, and requirements, and with this Order.	--	X
	D.1.c.(2) – Each Co-permittee during the planning process and prior to project approval and issuance of local permits shall prescribe Source Control BMPs that reduce storm water pollutants of concern in urban runoff, including storm drain system stenciling and signage, properly designed outdoor material storage areas, properly designed trash storage areas, and implementation of efficient irrigation systems	--	X
	D.1.c.(3) – Each Co-permittee during the planning process and prior to project approval and issuance of local permits shall prescribe Site Design BMPs where feasible which maximize infiltration,	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	provide retention, slow runoff, minimize impervious footprint, direct runoff from impervious areas into landscaping, and construct impervious surfaces to minimum widths necessary		
	D.1.c.(4) – Each Co-permittee during the planning process and prior to project approval and issuance of local permits shall prescribe buffer zones for natural water bodies, where feasible. Where buffer zones are infeasible, require project proponent to implement other buffers such as trees, access restrictions, etc., where feasible	--	X
	D.1.c.(5) – Each Co-permittee during the planning process and prior to project approval and issuance of local permits shall prescribe measures necessary so that grading or other construction activities meet the provisions specified in section D.2 of this Order	--	X
	D.1.c.(6) – Each Co-permittee during the planning process and prior to project approval and issuance of local permits shall prescribe submittal of proof of a mechanism under which will ensure ongoing long-term maintenance of all structural post-construction BMPs will be conducted.	X[31]	--
SUSMPs – Approval Process and Criteria for All Priority Development Projects (Section D.1.d. of Tentative Order No. 2006-	D.1.d. – Each Co-permittee shall implement an updated local SUSMP which meets the requirements of section D.1.d of this Order and reduces the Priority Development Project discharges of pollutants from the MS4 to the MEP	--	X

[31] 40 C.F.R. § 122.26(d)(2)(iv)(A)(1); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-29.

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
0011)	D.1.d. – Each Co-permittee shall implement an updated local SUSMP which prevents Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards	--	X
	D.1.d. – Each Co-permittee shall implement an updated local SUSMP which manages increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force	--	X
	D.1.d.(3) – Each Co-permittee shall develop and implement a procedure for pollutants of concern to be identified for each Priority Development Project. The procedure shall address, at a minimum: (1) Receiving water quality (including pollutants for which receiving waters are listed as impaired under CWA section 303(d)); (2) Land use type of the Development Project and pollutants associated with that land use type; and (3) Pollutants expected to be present on site.	--	X
	D.1.d.(4) – Requires Co-permittee to implement specific site design BMPs	--	X
	D.1.d.(5) – Requires Co-permittee to implement specific Source Control BMPs	--	X
	D.1.d.(6) – Places specific parameters on the types of Treatment Control BMPs the Co-permittee may implement	--	X
	D.1.d.(7) – Site design BMP substitution program permits Co-permittees to substitute certain site design BMPs for	--	X

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	treatment control BMPs under specific conditions		
	D.1.d.(8) – Co-permittees shall develop and require Priority Development Projects to implement siting, design, and maintenance criteria for each site design and treatment control BMP listed in its local SUSMP	--	X
	D.1.d.(9) – Each Co-permittee shall implement a process to verify compliance with SUSMP requirements. The process shall identify at what point in the planning process Priority Development Projects will be required to meet SUSMP requirements. The process shall also include identification of the roles and responsibilities of various municipal departments in implementing the SUSMP requirements, as well as any other measures necessary for the implementation of SUSMP requirements.	--	X
	D.1.d.(10) – As part of its local SUSMP, each Co-permittee shall develop and apply criteria to Priority Development Projects so that runoff discharge rates, durations, and velocities from Priority Development Projects are controlled to maintain or reduce downstream erosion conditions and protect stream habitat.	--	X
	D.1.d.(11) – A Co-permittee may provide for a project to be waived from the requirement of implementing treatment BMPs (section D.1.d.(6)) if infeasibility can be established.	--	X
	D.1.d.(12) – To protect groundwater quality, each Co-permittee shall apply restrictions to the use of treatment control BMPs that are designed to primarily	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	function as infiltration devices		
Treatment Control BMP Maintenance Tracking (Section D.1.e. of Tentative Order No. 2006-0011)	D.1.e.(1) – Each Co-permittee shall develop and utilize a watershed-based database to track and inventory approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction.	--[32]	X
	D.1.e.(1) - At a minimum, the database shall include information on treatment control BMP type, location, watershed, date of construction, party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions.	--	X
	D.1.e.(2) – Each Co-permittee shall develop and implement a program to verify that approved treatment control BMPs are operating effectively and have been adequately maintained.	X[33]	--
	D.1.e.(2) – Places specific requirements on verification plan	--	X
	D.1.e.(3) – Operation and maintenance verifications shall be required prior to each rainy season.	--	X
	D.1.e.(4) – Inspections of high priority treatment control BMPs shall be conducted prior to each rainy season.	--	X
BMP Verification (Section D.1.f. of Tentative Order No. 2006-0011)	D.1.f. – Prior to occupancy of each Priority Development Project subject to SUSMP requirements, each Co-permittee shall inspect the constructed site design, source control, and treatment control	--	X

[32] 40 C.F.R. §§ 122.26(d)(1)(iii) & (d)(2)(ii) only require the inventory to be organized by watershed.

[33] 40 C.F.R. § 122.41(e); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-29.

A

Requirement Category	**Permit Requirement**	**Federal Mandate?**	**State Mandate?**
	BMPs to verify that they have been constructed in compliance with all specifications, plans, permits, ordinances, and this Order.		
Hydromodification Management Plans (HMP) (Section D.1.g. of Tentative Order No. 2006-0011)	D.1.g. – Each Co-permittee shall collaborate with the other Co-permittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.	--	X
	D.1.g.(4) – The Co-permittees shall collaborate to report on HMP development as required in section J.2.a. of this Order.	--	X
	D.1.g.(5) – 180 days after approval of the HMP by the Regional Board, each Co-permittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Co-permittees.	--	X
	D.1.g.(6) – Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More	--	X
Enforcement of Development Sites	D.1.h. – Each Co-permittee shall enforce its storm water ordinance for all	X[34]	--

[34] 40 C.F.R. § 122.41(a); 40 C.F.R. § 122.26(d)(2)(iv).

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
(Section D.1.h. of Tentative Order No. 2006-0011)	Development Projects and at all development sites as necessary to maintain compliance with this Order. Co-permittee ordinances or other regulatory mechanisms shall include appropriate and effective sanctions to achieve compliance.		
	D.1.h. - Sanctions shall include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit or occupancy denials for non-compliance.	--	X
Construction (Section D.2. of Tentative Order No. 2006-0011)	D.2. – Each Co-permittee shall implement a construction program which meets the requirements of this section.	--[35]	X
	D.2. – Each Co-permittee shall implement a construction program reduces construction site discharges of pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards	X[36]	--
Ordinance Update and Approval (Section D.2.a. of Tentative Order No. 2006-0011)	D.2.a.(1) – Within 365 days of adoption of this Order, each Co-permittee shall review and update its grading ordinances	--	X
	D.2.a.(1) – Within 365 days of adoption of this Order, each Co-permittee shall review and update its other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures.	--	X

[35] Section D.2 contains requirements that go beyond federal requirements for an MS4 permit. Consequently, the requirement that the permittee comply with all requirements in Section D.2 requires the permittee to do more than what the federal government would otherwise require, making this requirement a state mandate.

[36] 33 U.S.C. § 1342(p)(3)(B); 40 C.F.R. § 122.44(d)(1).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.2.a.(2) – Prior to approval and issuance of local construction and grading permits, each Co-permittee shall require specific assurances from the construction operator	--	X
Source Identification (Section D.2.b. of Tentative Order No. 2006-0011)	D.2.b. – Each Co-permittee shall maintain and update monthly a watershed based inventory of all construction sites within its jurisdiction.	--[37]	X
BMP Implementation (Section D.2.c. of Tentative Order No. 2006-0011)	D.2.c.(1) – Requires Co-permittee to require construction site operators to implement specific BMPs	--[38]	X
	D.2.c.(2) – Each Co-permittee shall require implementation of advanced treatment for sediment at construction sites that are determined by the Co-permittee to be an exceptional threat to water quality.	--	X
	D.2.c.(2) – In evaluating the threat to water quality the Co-permittee must consider Soil erosion potential or soil type	X[39]	--
	D.2.c.(2) – In evaluating the threat to water quality the Co-permittee must consider the site's slopes	X[40]	--
	D.2.c.(2) – In evaluating the threat to water quality the Co-permittee must consider project size and type	X[41]	--
	D.2.c.(2) – In evaluating the threat to water quality the Co-permittee must	X[42]	--

[37] 40 C.F.R. § 122.26 does not require a monthly inventory of *all* construction sites in the permittee's jurisdiction.

[38] 40 C.F.R. § 122.26(d)(2)(iv)(D) does not list specific BMPs that a construction site must implement.

[39] 40 C.F.R. § 122.26(d)(2)(iv)(D)(3).

[40] 40 C.F.R. § 122.26(d)(2)(iv)(D)(3).

[41] 40 C.F.R. § 122.26(d)(2)(iv)(D)(3).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	consider sensitivity of receiving water bodies		
	D.2.c.(2) – In evaluating the threat to water quality the Co-permittee must consider proximity to receiving water bodies	--	X
	D.2.c.(2) – In evaluating the threat to water quality the Co-permittee must consider non-storm water discharges	X[43]	--
	D.2.c.(2) – In evaluating the threat to water quality the Co-permittee must consider ineffectiveness of other BMPs	--	X
	D.2.c.(2) – In evaluating the threat to water quality the Co-permittee must consider any other relevant factors	--	X
	D.2.c.(3) – Each Co-permittee shall implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round.	--	X
	D.2.c.(4) – Each Co-permittee shall implement, or require implementation of, additional controls for construction sites tributary to CWA section 303(d) water body segments impaired for sediment as necessary to comply with this Order.	X[44]	--
Inspection of Construction Sites	D.2.c_2. – Each Co-permittee shall conduct construction site inspections for	X[45]	--

[42] 40 C.F.R. § 122.26(d)(2)(iv)(D)(3).

[43] 40 C.F.R. § 122.26(d)(2)(iv)(B).

[44] 40 C.F.R. § 122.44(d).

[45] 55 F.R. 48058; EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-15.

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
(Section D.2.c_2. of Tentative Order No. 2006-0011)	compliance with its local ordinances (grading, storm water, etc.), permits (construction, grading, etc.).		
	D.2.c_2. – Each Co-permittee shall conduct construction site inspections for compliance with this Order.	--[46]	X
	D.2.c_2.(1) – Requires inspections every two weeks during the wet season for construction sites meeting certain criteria	--	X
	D.2.c_2.(2) – Requires inspections monthly during the wet season for construction sites meeting certain criteria	--	X
	D.2.c_2.(3) – Requires inspections as needed for construction sites less than 1 acre in size	--	X
	D.2.c_2.(4) – Requires inspections as needed for all construction sites during the dry season	--	X
	D.2.c_2.(5) – Based upon site inspection findings, each Co-permittee shall implement all follow-up actions (i.e., reinspection, enforcement) necessary to comply with this Order.	X[47]	--
	D.2.c_2.(6) – Specifies requirements for construction site inspections	--	X
	D.2.c_2.(7) – The Co-permittees shall track the number of inspections for the inventoried construction sites throughout the reporting period to verify that the sites are inspected at the minimum frequencies required.	--	X

[46] The proposed permit contains requirements that go beyond federal requirements for an MS4 permit. Consequently, the requirement that the permittee inspect for compliance with all requirements in the proposed permit requires the permittee to do more than what the federal government would otherwise require, making the requirement a state mandate.

[47] 40 C.F.R. § 122.26(d)(2)(iv)(B)(3); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-34.

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
Enforcement of Construction Sites (Section D.2.d. of Tentative Order No. 2006-0011)	D.2.d. – Each Co-permittee shall develop and implement an escalating enforcement process that achieves prompt corrective actions at construction sites for violations of the Co-permittee's water quality protection permit requirements and ordinances. This enforcement process shall include authorizing the Co-permittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process shall include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.	--[48]	X
Reporting of Non-compliant Sites (Section D.2.e. of Tentative Order No. 2006-0011)	D.2.e. – In addition to the notification requirements in section 5(e) of Attachment B, each Co-permittee shall notify the Regional Board when the Co-permittee issues a stop work order or other high level enforcement to a construction site in their jurisdiction as a result of storm water violations.	X[49]	--
Existing Municipal Development (Section D.3.a. of Tentative Order No. 2006-0011)	D.3.a. – Each Co-permittee shall implement a municipal program which meets the requirements of this section, reduces municipal discharges of pollutants from the MS4 to the MEP, and prevents municipal discharges from the MS4 from causing or contributing to a	X[50]	--

[48] Although the EPA requires a permittee to implement a penalty system, EPA does not specify how that penalty system should operate. *See* 55 F.R. 48058; EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-15.

[49] 40 C.F.R. § 122.42(c)(6).

[50] 33 U.S.C. § 1342(p)(3)(B); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-10; 40 C.F.R. § 122.44(d)(1).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	violation of water quality standards.		
	D.3.a.(1) – Each Co-permittee shall annually update a watershed based inventory of municipal areas and activities. The inventory shall include the name, address (if applicable), and a description of the area/activity, which pollutants are potentially generated by the area/activity, and identification of whether the area/activity is tributary to a CWA section 303(d) water body segment and generates pollutants for which the water body segment is impaired.	--	X
	D.3.a.(2)(a) – Each Co-permittee shall implement effective pollution prevention methods in its municipal program and shall require their use by appropriate municipal departments and personnel, where appropriate.	--	X
	D.3.a.(2)(b) – Each Co-permittee shall designate a minimum set of BMPs for all municipal areas and activities. The designated minimum BMPs for municipal areas and activities shall be area or activity specific as appropriate.	--[51]	X
	D.3.a.(2)(c) – Each Co-permittee shall implement, or require the implementation of the designated minimum BMPs and any additional measures necessary to comply with this Order for each municipal area or activity within its jurisdiction	--	X
	D.3.a.(2)(d) – Each Co-permittee shall evaluate the feasibility of retrofitting	X[52]	--

[51] 40 C.F.R. § 122.26(d)(2)(iv) requires permittees to implement BMPs, but it does require permittees to implement a set minimum.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	existing structural flood control devices and retrofit where needed.		
	D.3.a.(2)(e) – Each Co-permittee shall implement, or require implementation of, any additional controls for municipal areas and activities tributary to CWA section 303(d) impaired water body segments as necessary to comply with this Order.	X[53]	--
	D.3.a.(2)(e) – Each Co-permittee shall implement, or require implementation of, additional controls for municipal areas and activities within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas	--	X
	D.3.a.(2)(f) – Each Co-permittee shall implement, or require implementation of, additional controls for special events within their jurisdiction that are expected to generate significant trash and litter.	--	X
	D.3.a.(2)(f) – Requires Co-permittee to use specific BMPs to control litter from special events	--	X
	D.3.a.(3)(a) – Each Co-permittee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.	X[54]	--

[52] 40 C.F.R. § 122.26(d)(2)(iv)(A)(4); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-8.

[53] 40 C.F.R. § 122.44(d).

[54] 40 C.F.R. § 122.26(d)(2)(iv)(A)(1); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-29.

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.3.a.(3)(b) – Each Co-permittee shall implement a schedule of maintenance activities for the MS4	X[55]	--
	D.3.a.(3)(b)(i) – The maintenance activities shall include inspections once a year between May 1 and September 30	--	X
	D.3.a.(3)(b)(ii) – Permit inspections as needed after two years of inspections and cleaning for any MS4 facility that requires inspection and cleaning less than annually, but not less that every other year.	--	X
	D.3.a.(3)(b)(iii) – Requires cleaning of any storm drain or catch basin that is 33% full of accumulated trash and debris	--	X
	D.3.a.(3)(b)(iv) – Requires record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.	--	X
	D.3.a.(3)(b)(v) – Requires proper disposal of waste removed pursuant to applicable laws.	--	X
	D.3.a.(3)(b)(vi) – Requires measures to eliminate waste discharges during MS4 maintenance and cleaning activities	--	X
	D.3.a.(4) – The Co-permittees shall implement BMPs to reduce the contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from municipal areas and activities to MS4s.	X[56]	--

[55] 40 C.F.R. § 122.26(d)(2)(iv)(A)(1); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-29.

[56] 40 C.F.R. § 122.26(d)(2)(iv)(A)(6); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-10.

A

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.3.a.(4) – Requires specific BMPs to reduce pesticides and herbicides	--	X
	D.3.a.(5) – Each Co-permittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities.	--[57]	X
	D.3.a.(6) – Each Co-permittee shall implement controls and measures to prevent and eliminate infiltration of seepage from municipal sanitary sewers to MS4s.	X[58]	--
	D.3.a.(7)(a) – Requires inspection of specific areas annually	--	X
	D.3.a.(7)(b) – Requires other municipal areas to be inspected as needed	X[59]	--
	D.3.a.(7)(c) – Based on site inspection findings, requires implementation of all follow up actions necessary to comply with the permit	X[60]	--
	D.3.a.(8) – Requires enforcement of storm water ordinances as necessary to comply with the permit	X[61]	--
Existing Industrial and Commercial Development	D.3.b. – Each Co-permittee shall implement an industrial and commercial	--[62]	X

[57] Street sweeping is not specifically required by the federal permitting scheme. 40 C.F.R. § 122.26(d)(2)(iv)(A)(3); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-6.

[58] 40 C.F.R. § 122.26(d)(2)(iv)(B)(7); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-38.

[59] 40 C.F.R. § 122.26(d)(2)(iv)(A)(5); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-9.

[60] 40 C.F.R. § 122.41(a).

[61] 40 C.F.R. § 122.26(d)(2)(iv)(B).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
(Section D.3.b. of Tentative Order No. 2006-0011)	program which meets the requirements of this section.		
	D.3.b. – Each Co-permittee shall implement an industrial and commercial program which reduces industrial and commercial discharges of pollutants from the MS4 to the MEP, and prevents industrial and commercial discharges from the MS4 from causing or contributing to a violation of water quality standards.	X[63]	--
	D.3.b.(1) – Each Co-permittee shall annually update a watershed-based inventory of all industrial and commercial sites/sources within its jurisdiction that could contribute a significant pollutant load to the MS4.	X[64]	--
	D.3.b.(1) – The inventory shall include the following minimum information for each industrial and commercial site/source: name; address; pollutants potentially generated by the site/source (and identification of whether the site/source is tributary to a Clean Water Act section 303(d) water body segment and generates pollutants for which the water body segment is impaired); and a narrative description including SIC codes which best reflects the principal products	--[65]	X

[62] Section D.1 contains requirements that go beyond the EPA's requirements for an MS4 permit. Consequently, the requirement that the permittee comply with all requirements in Section D.1 is a state mandate.

[63] 40 C.F.R. § 122.26(d)(2)(iv)(C); 40 C.F.R. § 122.44(d).

[64] 40 C.F.R. § 122.26(d)(2)(ii); 40 C.F.R. § 122.42(c)(4); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 4-1.

[65] Federal requirements for MS4 permits do not specifically require this information.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	or services provided by each facility.		
	D.3.b.(1)(a) – Lists specific sites to be inventoried	--[66]	X
	D.3.b.(1)(b) – Inventory shall include all industrial Facilities, as defined at 40 CFR § 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit; operating and closed landfills; facilities subject to SARA Title III; and hazardous waste treatment, disposal, storage and recovery facilities.	X[67]	--
	D.3.b.(1)(c) – All other commercial or industrial sites/sources tributary to a CWA Section 303(d) impaired water body segment, where the site/source generates pollutants for which the water body segment is impaired.	X[68]	--
	D.3.b.(1)(c) – All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas	--	X
	D.3.b.(1)(d) – All other commercial or industrial sites/sources that the Co-permittee determines may contribute a significant pollutant load to the MS4.	X[69]	--

[66] Federal requirements for MS4 permits do not specifically require permittees to inventory these sources.

[67] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 4-2, 6-18.

[68] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 4-1.

[69] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 4-1.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.3.b.(2)(a) – Each Co-permittee shall require the use of pollution prevention methods by industrial and commercial sites/sources, where appropriate.	--	X
	D.3.b.(2)(b) – Each Co-permittee shall designate a minimum set of BMPs for all industrial and commercial sites/sources. The designated minimum BMPs shall be specific to facility types and pollutant generating activities, as appropriate.	--[70]	X
	D.3.b.(2)(c) – Within the first three years of implementation of the updated Jurisdictional Urban Runoff Management Program, each Co-permittee shall notify the owner/operator of each inventoried industrial and commercial site/source of the BMP requirements applicable to the site/source.	--	X
	D.3.b.(2)(d) – Each Co-permittee shall implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each industrial and commercial site/source within its jurisdiction.	--[71]	X
	D.3.b.(2)(e) – Each Co-permittee shall implement, or require implementation of, additional controls for industrial and commercial sites/sources tributary to CWA section 303(d) impaired water body segments (where a site/source generates pollutants for which the water body segment is impaired) as necessary to	X[72]	--

[70] 40 C.F.R. § 122.26(d)(2)(iv) requires permittees to implement BMPs, but it does require permittees to implement a set minimum.

[71] 40 C.F.R. § 122.26(d)(2)(iv) requires permittees to implement BMPs, but it does require permittees to implement a set minimum.

[72] 40 C.F.R. § 122.44(d).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	comply with this Order.		
	D.3.b.(2)(e) – Each Co-permittee shall implement, or require implementation of, additional controls for industrial and commercial sites/sources within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order) as necessary to comply with this Order	--	X
	D.3.b.(3) – Each Co-permittee shall conduct industrial and commercial site inspections for compliance with its ordinances, permits, and this Order.	X[73]	--
	D.3.b.(3)(a)(i) – Inspections shall include review of BMP implementation plans, if the site uses or is required to use such a plan	--	X
	D.3.b.(3)(a)(ii) – Inspections shall include review of facility monitoring data, if the site monitors its runoff.	--	X
	D.3.b.(3)(a)(iii) – Inspections shall include checking for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification No.), if applicable	--	X
	D.3.b.(3)(a)(iv) – Inspections shall include assessment of compliance with Co-permittee ordinances and permits related to urban runoff	--	X
	D.3.b.(3)(a)(v) – Inspections shall include assessment of BMP implementation, maintenance and effectiveness	--	X

[73] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-11.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.3.b.(3)(a)(vi) – Inspections shall include visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff	--	X
	D.3.b.(3)(a)(vii) – Inspections shall include education and training on storm water pollution prevention, as conditions warrant.	--	X
	D.3.b.(3)(b) – At a minimum, 50% of all sites (excluding mobile sources) determined to pose a high threat to water quality shall be inspected in the first year of implementation of the updated Jurisdictional Urban Runoff Management Program	--	X
	D.3.b.(3)(c) – Requires 20% of the sites inventoried to be inspected in the first year of implementation of the updated Jurisdictional Urban Runoff Management Program.	--	X
	D.3.b.(3)(d) – Describes discretionary third party inspection program	--	X
	D.3.b.(3)(e) – Based upon site inspection findings, each Co-permittee shall implement all follow-up actions and enforcement necessary to comply with this Order.	X[74]	--
	D.3.b.(3)(g) – The Co-permittees shall track the number of inspections for the inventoried industrial and commercial sites/sources throughout the reporting period to verify that the sites/sources are inspected at the minimum frequencies listed in sections D.3.b.(3)(b) and	--	X

[74] 40 C.F.R. § 122.26(d)(2)(iv)(B)(3); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-34.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.3.b.(3)(c).		
	D.3.b.(4)(a) – Each Co-permittee shall develop and implement a program to reduce the discharge of pollutants from mobile businesses to the MEP.	--	X
	D.3.b.(4)(a) – Each Co-permittee shall keep as part of their inventory (section D.3.b.(1) above), a listing of mobile businesses known to operate within its jurisdiction.	--	X
	D.3.b.(4)(a)(i) – Requires development and implementation of minimum standards and BMPs to be required for each of the various types of mobile businesses.	--	X
	D.3.b.(4)(a)(ii) – Requires development and implementation of an enforcement strategy which specifically addresses the unique characteristics of mobile businesses.	--	X
	D.3.b.(4)(a)(iii) – Requires notification of those mobile businesses known to operate within the Co-permittee's jurisdiction of the minimum standards and BMP requirements and local ordinances.	--	X
	D.3.b.(4)(a)(iv) – Requires development and implementation of an outreach and education strategy.	--	X
	D.3.b.(4)(a)(v) – Requires inspection of mobile businesses as needed.	--	X
	D.3.b.(4)(b) – Permits Co-permittees to share in developing and implementing their programs for mobile businesses	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.3.b.(5) – Each Co-permittee shall enforce its storm water ordinance for all industrial and commercial sites/sources as necessary to maintain compliance with this Order.	--[75]	X
	D.3.b.(5) – Co-permittee ordinances or other regulatory mechanisms shall include appropriate sanctions to achieve compliance. Sanctions shall include the following or their equivalent: Non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.	--[76]	X
	D.3.b.(6) – As part of each Annual Report, each Co-permittee shall report a list of industrial sites, including the name, address, and SIC code, that may require coverage under the General Industrial Permit for which a NOI has not been filed.	--[77]	X
Existing Residential Development (Section D.3.c. of Tentative Order No. 2006-0011)	D.3.c. – Each Co-permittee shall implement a residential program which meets the requirements of this section, reduces the residential discharges of pollutants from the MS4 to the MEP, and prevents residential discharges from the MS4 from causing or contributing to a violation of water quality standards.	X[78]	--

[75] The proposed permit contains requirements that go beyond the EPA's requirements for an MS4 permit. Consequently, the requirement that the permittee enforce its storm water ordinance to implement the entire proposed permit goes beyond what the federal government would require and represents a state mandate.

76 Federal requirements for MS4 permits do not require permittees to implement specific sanctions.

77 Federal reporting requirements do not mandate this information be in the annual report. 40 C.F.R. § 122.42(c).

78 40 C.F.R. § 122.26(d)(2)(iv)(A); 40 C.F.R. § 122.44(d).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.3.c.(1) – Each Co-permittee shall identify high threat to water quality residential areas and activities.	--	X
	D.3.c.(2)(a) – Each Co-permittee shall designate minimum BMPs for high threat to water quality residential areas and activities. The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific.	--[79]	X
	D.3.c.(2)(b) – Each Co-permittee shall encourage the use of pollution prevention methods by residents, where appropriate.	--	X
	D.3.c.(2)(c) – Each Co-permittee shall facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation shall include educational activities, public information activities, and establishment of collection sites operated by the Co-permittee or a private entity.	X[80]	--
	D.3.c.(2)(d) – Each Co-permittee shall implement, or require implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order for high threat to water quality residential areas and activities.	--	X
	D.3.c.(2)(e) – Each Co-permittee shall implement, or require implementation of,	X[81]	--

79 40 C.F.R. § 122.26(d)(2)(iv)(A) requires permittees to implement source controls, which are arguably an allegory for BMPs, but it does require permittees to implement a set minimum.

80 40 C.F.R. § 122.26(d)(2)(iv)(B)(6); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-37.

81 40 C.F.R. § 122.26(d)(2)(iv)(A).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	BMPs for residential areas and activities that have not been designated a high threat to water quality, as necessary.		
	D.3.c.(2)(e) – Each Co-permittee shall implement, or require implementation of, any additional controls for residential areas and activities tributary to CWA section 303(d) impaired water body segments (where a residential area or activity generates pollutants for which the water body segment is impaired) as necessary to comply with this Order.	X[82]	--
	D.3.c.(2)(e) – Each Co-permittee shall implement, or require implementation of, additional controls for residential areas within or directly adjacent to or discharging directly to coastal lagoons or other receiving waters within environmentally sensitive areas (as defined in section Attachment C of this Order) as necessary to comply with this Order.	--	X
	D.3.c.(3) – Each Co-permittee shall enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.	--[83]	X
	D.3.c.(4) – The Co-permittees are encouraged to individually or collectively evaluate their methods used for oversight of residential areas and activities, including assessment of inspections of residential areas and activities.	--	X

82 40 C.F.R. § 122.44(d).

83 The proposed permit contains requirements that go beyond the EPA's requirements for an MS4 permit. Consequently, the requirement that the permittee enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with the proposed permit is a state mandate.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.3.c.(5) – Each Co-permittee shall collaborate with the other Co-permittees to develop and implement the Regional Residential Education Program required in section F.17 of this Order.	--	X
Illicit Discharge Detection and Elimination (Section D.4. of Tentative Order No. 2006-0011)	D.4. – Each Co-permittee shall implement an Illicit Discharge Detection and Elimination program which meets the requirements of this section.	--[84]	X
	D.4. – Each Co-permittee shall implement an Illicit Discharge Detection and Elimination program which actively seeks and eliminates illicit discharges and connections.	X[85]	--
	D.4.a – Each Co-permittee shall implement a program to actively seek and eliminate illicit discharges and connections into its MS4.	X[86]	--
	D.4.a. – The program shall include utilization of appropriate municipal personnel to assist in identifying illicit discharges and connections during their daily activities.	--	X
	D.4.a. – The program shall address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Co-permittee in accordance with section B of this Order.	X[87]	--

84 Section D.4. of the proposed permit contains requirements that go beyond the EPA's requirements for an MS4 permit. Consequently, the requirement that the permittee implement an Illicit Discharge Detection and Elimination program which meets the requirements of Section D.4. goes beyond what the federal government would require, making the requirement a state mandate.

85 40 C.F.R. § 122.26(d)(2)(iv)(B).

86 40 C.F.R. § 122.26(d)(2)(iv)(B).

87 40 C.F.R. § 122.26(d)(2)(iv)(B).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.4.b. – Each Co-permittee shall develop and/or update its labeled map of its entire MS4 and the corresponding drainage areas within its jurisdiction.	X[88]	--
	D.4.b – The accuracy of the MS4 map shall be confirmed during dry weather field screening and analytical monitoring and shall be updated at least annually.	--	X
	D.4.c. – Each Co-permittee shall conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections	--	X
	D.4.d.(1) – Each Co-permittee shall investigate and inspect any portion of the MS4 that, based on visual observations, dry weather field screening and analytical monitoring results, or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water	X[89]	--
	D.4.d.(1) – Each Co-permittee shall develop/update and utilize numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed.	--	X
	D.4.d.(2) – Within two business days of receiving dry weather field screening results that exceed action levels, the Co-permittees shall either conduct an investigation to identify the source of the	--	X

[88] 40 C.F.R. § 122.26(d)(1)(iii)(B); 40 C.F.R. § 122.42(c).

[89] 40 C.F.R. § 122.26(d)(2)(iv)(B)(3); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-34.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	discharge or provide the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.		
	D.4.d.(2) – Within two business days, where applicable, of receiving analytical laboratory results that exceed action levels, the Co-permittees shall either conduct an investigation to identify the source of the discharge or provide the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.	--	X
	D.4.d.(2) – Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) shall be investigated immediately.	--[90]	X
	D.4.e. – Each Co-permittee shall take immediate action to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections as soon as possible after detection.	--[91]	X
	D.4.e. – Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment.	--	X
	D.4.e. – Illicit discharges that pose a serious threat to the public's health or the	--[92]	X

[90] Federal MS4 permit requirements do not specifically require an investigation be immediate. *See* 40 C.F.R. § 122.26(d)(2)(iv)(B)(3); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-34.

[91] Federal MS4 permit requirements do not specifically require immediate action to eliminate all detected illicit discharges. *See* 40 C.F.R. § 122.26(d)(2)(iv)(B)(3); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-34.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	environment must be eliminated immediately		
	D.4.f. – Each Co-permittee shall implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4. Each Co-permittee shall also implement and enforce its ordinance, orders, or other legal authority to eliminate detected illicit discharges and connections to it MS4.	X[93]	--
	D.4.g. – Each Co-permittee shall prevent, respond to, contain and clean up all sewage and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems).	X[94]	--
	D.4.g. – Spill response teams shall prevent entry of spills into the MS4 and contamination of surface water, ground water and soil to the maximum extent practicable.	--	X
	D.4.g. – Each Co-permittee shall coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times.	X[95]	--

[92] Federal MS4 permit requirements do not specifically require immediate elimination of illicit discharges that pose a serious threat to public health. *See* 40 C.F.R. § 122.26(d)(2)(iv)(B)(3); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-34.

[93] 40 C.F.R. § 122.26(d)(2)(iv)(B).

[94] 40 C.F.R. § 122.26(d)(2)(iv)(B)(4); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-35.

[95] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-35.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	D.4.g. – Each Co-permittee shall develop and implement a mechanism whereby it is notified of all sewage spills from private laterals and failing septic systems into its MS4. Each Co-permittee shall prevent, respond to, contain and clean up sewage from any such notification.	--	X
	D.4.h. – Each Co-permittee shall promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s	X[96]	--
	D.4.h. – Each Co-permittee shall facilitate public reporting through development and operation of a public hotline. Public hotlines can be Co-permittee-specific or shared by Co-permittees. All storm water hotlines shall be capable of receiving reports in both English and Spanish 24 hours per day / seven days per week. Co-permittees shall respond to and resolve each reported incident in a timely manner. All reported incidents, and how each was resolved, shall be summarized in each Co-permittee's individual JURMP Annual Report.	--[97]	X
Education (Section D.5. of Tentative Order No. 2006-0011)	D.5. – Each Co-permittee shall implement an education program using all media as appropriate to measurably increase the knowledge of the target	X[98]	--

[96] 40 C.F.R. § 122.26(d)(2)(iv)(B)(5); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-37.

[97] A hotline is recommended by the EPA, but not required. EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-37.

[98] 40 C.F.R. §§ 122.26(d)(2)(iv)(B)(6); (d)(2)(iv)(D)(4).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience.		
	D.5. – Each Co-permittee shall implement an education program to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment.	--	X
	D.5. – Requires education program to be targeted at specific communities	--	X
	D.5.a.(1) – defines specific topics that education program must address	--	X
	D.5.a.(2) – Co-permittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.	--	X
	D.5.b.(1)(a) – Each Co-permittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of: (i) federal, state, and local water quality laws and regulations applicable to Development Projects; (ii) the connection between land use decisions and short and long-term water quality impacts; and (iii) methods of minimizing impacts to receiving water quality resulting from development	--[99]	X
	D.5.b.(1)(b) – Each Co-permittee shall implement an education program that	--	X

[99] Federal permit requirements do not place specific curricular requirements on the education programs. *See* 40 C.F.R. § 122.26(d)(2)(iv)(D)(4).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	includes annual training prior to the rainy season		
	D.5.b.(1)(c) – Each Co-permittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year.	--	X
	D.5.b.(1)(d) – Each Co-permittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.	--[100]	X
	D.5.b.(2) – As early in the planning and development process as possible and all through the permitting and construction process, each Co-permittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties.	X[101]	--
	D.5.b.(2) – The education program shall provide an understanding of the topics listed in Section D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs though formal or	--[102]	X

[100] Federal permit requirements do not place specific curricular requirements on the education programs. *See* 40 C.F.R. § 122.26(d)(2)(iv)(D)(4).

[101] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-16.

[102] Federal permit requirements do not place specific curricular requirements on the education programs. *See* 40 C.F.R. § 122.26(d)(2)(iv)(D)(4).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	informal training.		
	D.5.b.(3) – Each Co-permittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities.	--	X
	D.5.b.(3) – The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.	--	X
Public Participation (Section D.6. of Tentative Order No. 2006-0011)	D.6. – Each Co-permittee shall incorporate a mechanism for public participation in the updating, development, and implementation of the Jurisdictional Urban Runoff Management Program.	X[103]	--
Watershed Urban Runoff Management Program (Section E of Tentative Order No. 2006-0011)	E.1. – Each Co-permittee shall implement all requirements of section E of this Order no later than 365 days after adoption of this Order, unless otherwise specified in this Order. Prior to 365 days after adoption of this Order, each Co-permittee shall collaborate with the other Co-permittees within its Watershed Management Area(s) (WMA) to at a minimum implement its Watershed URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01.	--[104]	X

[103] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-1.

[104] Federal permit requirements only require permittees to inventory industrial sites on a watershed basis, and do not require Co-permittees to collaborate to produce one watershed document. *See* 40 C.F.R. § 122.26(d)(2)(i)(E).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	E.2. – Each Co-permittee shall collaborate with other Co-permittees within its WMA(s) to develop and implement an updated Watershed Urban Runoff Management Program for each watershed.	--	X
	E.2. – Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.	--	X
	E.2.a. – Each Watershed Urban Runoff Management Program shall include a lead watershed permittee	--	X
	E.2.b. – Watershed Co-permittees shall develop and periodically update a map of the WMA to facilitate planning, assessment, and collaborative decision-making. As determined appropriate, the map shall include features such as receiving waters (including the Pacific Ocean); Clean Water Act section 303(d) impaired receiving waters; land uses, MS4s; major highways; jurisdictional boundaries; and inventoried commercial, industrial, and municipal sites.	--[105]	X
	E.2.c. – Watershed Co-permittees shall annually assess the water quality of	--[106]	X

[105] Although federal regulations impose an annual reporting requirement, they does not specifically require an annual assessment of all waters in the permittee's watershed, rather, they require the permittee to identify water quality improvements or degradation in water bodies under the permittee's jurisdiction. 40 C.F.R. § 122.42(c)(7).

[106] Although federal regulations impose an annual reporting requirement, they does not specifically require an annual assessment of all waters in the permittee's watershed, rather, they require the permittee to identify water quality improvements or degradation in water bodies under the permittee's jurisdiction. 40 C.F.R. § 122.42(c)(7).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	receiving waters in their WMA.		
	E.2.c. – The assessment and analysis shall annually identify the WMA's water quality problems that are partially or fully attributable to MS4 discharges.	--	X
	E.2.d. – The Watershed Co-permittees shall develop, implement, and modify, as necessary, a program for encouraging collaborative, watershed-based, land use planning in their jurisdictional planning departments.	--	X
	E.2.e. – Watershed Co-permittees shall develop and implement a collective watershed strategy to abate the sources and reduce the discharge of pollutants causing the high priority water quality problems of the WMA.	--	X
	E.2.e. – The strategy shall guide Watershed Co-permittee selection and implementation of Watershed Activities, so that the Watershed Activities selected and implemented are appropriate for each Watershed Co-permittee's contribution to the WMA's high priority water quality problems.	--	X
	E.2.f.(1) – The Watershed Co-permittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Activities shall include both Watershed Water Quality Activities and Watershed Education Activities.	--	X
	E.2.f.(2) – A Watershed Activities List shall be submitted with each updated WURMP and updated annually thereafter.	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	E.2.f.(2) – The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.	--	X
	E.2.f.(3) – Requires each activity on the Watershed Activities List to include specific information	--	X
	E.2.f.(4) – Each Watershed Co-permittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase.	--	X
	E.2.g. – Watershed Co-permittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Co-permittee collaboration shall include frequent regularly scheduled meetings.	--	X
	E.2.h. – Watershed Co-permittees shall implement a watershed-specific public participation mechanism within each watershed. The mechanism shall encourage participation from other organizations within the watershed (such as the Department of Defense, Caltrans, lagoon foundations, etc.)	--	X
	E.2.j. – Each WURMP shall be reviewed annually to identify needed modifications and improvements.	--	X

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Requirement Category	**Permit Requirement**	**Federal Mandate?**	**State Mandate?**
	E.2.j. – Watershed Co-permittees shall develop and implement a plan and schedule to address the identified modifications and improvements. All updates to the WURMP shall be documented in the Watershed Urban Runoff Management Program Annual Reports.	--	X
	E.2.j. – Individual Watershed Co-permittees shall also review and modify their jurisdictional activities and JURMPs as necessary so that they are consistent with the requirements of the WURMP.	--	X
Regional Urban Runoff Management Program (Section F of Tentative Order No. 2006-0011)	F. – The Co-permittees shall implement all requirements of section F of this Order no later than 365 days after adoption of this Order, unless otherwise specified in this Order.	--	X
	F. – The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.	--	X
	F.1. – The Regional Urban Runoff Management Program shall Develop and implement a Regional Residential Education Program.	--	X
	F.1.a. – The regional Residential Education Program shall include pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash.	--	X
	F.1.b. – The regional Residential Education Program shall include education efforts focused on bacteria, nutrients, sediment, pesticides, and trash.	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	F.2. – The Regional Urban Runoff Management Program shall develop the standardized fiscal analysis method required in section G of this Order.	--	X
	F.3. – The Regional Urban Runoff Management Program shall facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.	--	X
Fiscal Analysis (Section G of Tentative Order No. 2006-0011)	G.1. – Each Co-permittee shall secure the resources necessary to meet all requirements of this Order.	X[107]	--
	G.2. – As part of the Regional Urban Runoff Management Program, the Co-permittees shall collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities).	--	X
	G.3. – Each Co-permittee shall conduct an annual fiscal analysis	X[108]	--
	G.3. – Starting January 31, 2010, the annual fiscal analysis shall be conducted consistent with the standardized fiscal analysis method included in the January 31, 2009 Regional Urban Runoff Management Program Annual Report.	--	X
	G.3. – The annual fiscal analysis shall be conducted and reported on as part of each Co-permittee's Jurisdictional Urban Runoff Management Program Annual Reports. For convenience, the fiscal	--	X

[107] 40 C.F.R. § 122.26(d)(2)(vi).

[108] 40 C.F.R. § 122.26(d)(2)(vi).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	analysis included in the Jurisdictional Urban Runoff Management Program Annual Reports shall address the Co-permittee's urban runoff management programs in their entirety, including jurisdictional, watershed, and regional activities.		
	G.3. – The fiscal analysis shall provide the Co-permittee's urban runoff management program budget for the current reporting period. The fiscal analysis shall include a description of the source(s) of the funds that are proposed to be used to meet the necessary expenditures, including legal restrictions on the use of such funds.	**X**[109]	--
Total Maximum Daily Loads (Section H of Tentative Order No. 2006-0011)	H.1.a. – The Co-permittees in the Chollas Creek watershed shall implement BMPs capable of achieving the interim and final diazinon Waste Load Allocation (WLA) concentration in the storm water discharge in Chollas Creek	**X**[110]	--
	H.1.b. – The Co-permittees in the Chollas Creek watershed shall not cause or contribute to the violation of the Interim TMDL Numeric Targets in Chollas Creek.	**X**[111]	--
	H.1.b. – If the Interim TMDL Numeric Target is violated in Chollas Creek in more than one sample in any three consecutive years, the Co-permittees shall submit a report that either 1) documents	--[112]	**X**

[109] 40 C.F.R. § 122.26(d)(2)(vi).

[110] 40 C.F.R. § 122.44(d)(1).

[111] 40 C.F.R. § 122.44(d)(1).

[112] Not specifically required by 40 C.F.R. § 122.44(d)(1) or any other EPA Guidance. *See* 61 F.R. 43761.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	compliance with the WLA through additional sampling of the urban runoff discharge or 2) demonstrates, using modeling or other technical or scientific basis, the effectiveness of additional BMPs that will be implemented to achieve the WLA.		
	H.1.b. – The report may be incorporated into the Watershed Urban Runoff Management Program Annual Report unless the Regional Board directs an earlier submittal. The report shall include an implementation schedule.	--	X
	H.1.c. - The Co-permittees in the Chollas Creek watershed shall implement the Diazinon Toxicity Control Plan and Diazinon Public Outreach/Education Program as described in the report titled, "Technical Report for Total Maximum Daily Load for Diazinon in Chollas Creek Watershed, San Diego County, August 14, 2002," including subsequent modifications, in order to achieve the WLA	--[113]	X
	H.2.a. – The Co-permittees in the Shelter Island Yacht Basin watershed shall implement BMPs to maintain a total annual copper discharge load of less than or equal to 30 kg copper/ year.	X[114]	--
	H.2.b. – The Co-permittees in the Shelter Island Yacht Basin watershed shall implement, at a minimum, the BMPs included in the Co-permittees' Jurisdictional Urban Runoff Management Plan, including subsequent modifications,	--	X

[113] Not specifically required by 40 C.F.R. § 122.44(d)(1) or any other EPA Guidance. *See* 61 F.R. 43761.

[114] 40 C.F.R. § 122.44 (d)(1).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	which address the discharge of copper to achieve the annual copper load		
Jurisdictional Program Effectiveness Assessment (Section I.1. of Tentative Order No. 2006-0011)	I.1.a. – As part of its Jurisdictional Urban Runoff Management Program, each Co-permittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation.	X[115]	--
	I.1.a.(1)-(5) – Requires specific criteria for assessment	--	X
	I.1.b. – Based on the results of the effectiveness assessment, each Co-permittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.	--	X
	I.1.b. – The Co-permittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities /BMPs that are ineffective or less effective than other comparable jurisdictional activities /BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities /BMPs.	--	X
	I.1.b. - Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality	--	X

[115] 40 C.F.R. § 122.42(c); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 7-2.

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	problems shall be modified and improved to correct the water quality problems.		
	I.1.c. – As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Co-permittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b	X[116]	--
Watershed Program Effectiveness Assessment (Section I.2. of Tentative Order No. 2006-0011)	I.2.a. – As part of its Watershed Urban Runoff Management Program, each watershed group of Co-permittees shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation.	--	X
	I.2.a.(1) – The annual effectiveness assessment shall specifically assess the effectiveness of each Watershed Water Quality Activity implemented; each Watershed Education Activity implemented; and implementation of the Watershed Urban Runoff Management Program as a whole.	--	X
	I.2.a.(2) – The annual effectiveness assessment shall identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.	--	X
	I.2.a.(3) – The annual effectiveness assessment shall Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections	--	X

[116] 40 C.F.R. § 122.26(d)(2)(v); 40 C.F.R. § 122.42(c); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 7-1, 7-2.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.		
	I.2.a.(4) – The annual effectiveness assessment shall utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.	--	X
	I.2.a.(5) – The annual effectiveness assessment shall utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.	--	X
	I.2.a.(6) – The annual effectiveness assessment shall utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.	--	X
	I.2.a.(7) – The annual effectiveness assessment shall utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.	--	X
	I.2.b. – Based on the results of the effectiveness assessment, the watershed Co-permittees shall annually review their	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness.		
	I.2.b. – The Co-permittees shall develop and implement a plan and schedule to address the identified modifications and improvements.	--	X
	I.2.b. – Watershed Water Quality Activities /Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities /Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities /Watershed Education Activities.	--	X
	I.2.b. – Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall to be modified and improved on at least an annual basis to correct the water quality problems.	--	X
	I.2.c. – As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Co-permittees shall report on its Watershed Urban Runoff Management Program	X[117]	--

[117] 40 C.F.R. § 122.26(d)(2)(v); 40 C.F.R. § 122.42(c); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 7-1, 7-2.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b		
Regional Program Effectiveness Assessment (Section I.3. of Tentative Order No. 2006-0011)	I.3.a. – As part of the Regional Urban Runoff Management Program, the Co-permittees shall annually assess the effectiveness of Regional Urban Runoff Management Program implementation.	X[118]	--
	I.3.a.(1) – The annual effectiveness assessment shall specifically assess the effectiveness of each regional activity/BMP or type of regional activity/BMP implemented, including regional residential education activities; and the Regional Urban Runoff Management Program as a whole.	--	X
	I.3.a.(2) – The annual effectiveness assessment shall identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.3.a.(1) above.	--	X
	I.3.a.(3) – The annual effectiveness assessment shall utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.3.a.(1) above, where applicable and feasible.	--	X
	I.3.a.(4) – The annual effectiveness assessment shall utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.3.a.(1) above, where applicable and feasible.	--	X

[118] 40 C.F.R. § 122.26(d)(2)(v); 40 C.F.R. § 122.42(c); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 7-1, 7-2.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	I.3.a.(5) – The annual effectiveness assessment shall utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.	--	X
	I.3.a.(6) – The annual effectiveness assessment shall include evaluation of whether the Co-permittees' jurisdictional, watershed, and regional effectiveness assessments are meeting specific stated objectives	--	X
	I.3.b. – Based on the results of the effectiveness assessment, the Co-permittees shall annually review their regional activities and other aspects of the Regional Urban Runoff Management Program to identify modifications and improvements needed to maximize the Regional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.	--	X
	I.3.b. – The Co-permittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Regional activities that are ineffective or less effective than other comparable regional activities shall be replaced or improved upon by implementation of more effective regional activities.	--	X
	I.3.b. – Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, regional activities applicable to the water quality problems shall be modified and improved to correct the	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	water quality problems		
	I.3.c. – Based on the results of the Co-permittees' evaluation of their effectiveness assessments, the Co-permittees shall modify their effectiveness assessment methods to improve their ability to accurately assess the effectiveness of their urban runoff management programs.	--	**X**
	I.3.d. – As part of its Regional Urban Runoff Management Program Annual Reports, the Co-permittees shall report on its Regional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.3.a, I.3.b, and I.3.c	**X**[119]	--
TMDL BMP Implementation Plan Program Effectiveness Assessment (Section I.4. of Tentative Order No. 2006-0011)	I.4.a. – For each TMDL in a watershed, the Co-permittees subject to the TMDL within the watershed shall annually assess the effectiveness of its TMDL BMP Implementation Plan or equivalent plan.	**X**[120]	--
	I.4.a.(1) – The annual effectiveness assessment shall specifically assess the effectiveness of each activity/BMP or type of activity/BMP implemented; and implementation of the TMDL BMP Implementation Plan or equivalent plan as a whole.	--	**X**

[119] 40 C.F.R. § 122.26(d)(2)(v); 40 C.F.R. § 122.42(c); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 7-1, 7-2.

[120] 40 C.F.R. § 122.42(c); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 7-2.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	I.4.a.(2) – The annual effectiveness assessment shall identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in sections I.4.a.(1) above.	--	X
	I.4.a.(3) – The annual effectiveness assessment shall utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in section (I.4.a.(1)(a) above, where applicable and feasible.	--	X
	I.4.a.(4) – The annual effectiveness assessment shall utilize outcome levels 1-4 to assess the effectiveness of implementation of the TMDL BMP Implementation Plan or equivalent plan as a whole, where applicable and feasible.	--	X
	I.4.a.(5) – The annual effectiveness assessment shall utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of the TMDL BMP Implementation Plan or equivalent plan as a whole. These assessments shall attempt to exhibit the effects of the TMDL BMP Implementation Plan or equivalent plan on the impairment that is targeted.	--	X
	I.4.b. – Based on the results of the effectiveness assessment, the watershed Co-permittees subject to the TMDL shall modify their BMPs and other aspects of the TMDL BMP Implementation Plan or equivalent plan in order to maximize TMDL BMP Implementation Plan or equivalent plan effectiveness.	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	I.4.b. – BMPs that are ineffective or less effective than other comparable BMPs shall be replaced or improved upon by implementation of more effective BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.	--	X
	I.4.c. – As part of its Watershed Urban Runoff Management Program Annual Reports, each group of Co-permittees subject to a TMDL shall report on any TMDL BMP Implementation Plan or equivalent plan effectiveness assessments as implemented under each of the requirements of sections I.4.a and I.4.b	X[121]	--
Long Term Effectiveness Assessment (Section I.5. of Tentative Order No. 2006-0011)	I.5.a. – Each Co-permittee shall collaborate with the other Co-permittees to develop a Long-term Effectiveness Assessment (LTEA), which shall build on the results of the Co-permittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later 210 days in advance of the expiration of this Order	--	X
	I.5.b. – The LTEA shall be designed to address each of the objectives listed in section I.3.a. of this Order, and to serve as a basis for the Co-permittees' Report of Waste Discharge for the next permit cycle.	--	X
	I.5.c. – The LTEA shall address outcome levels 1-6, and shall specifically include	--	X

[121] 40 C.F.R. § 122.42(c); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 7-2.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	an evaluation of program implementation to changes in water quality		
	I.5.d. – The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions.	--	X
	I.5.e. – The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.	--	X
JURMP Reporting (Section J.1.a of Tentative Order No. 2006-0011)	J.1.a.(1) – Each Co-permittee shall revise and update its JURMP so that it describes all activities the Co-permittee will undertake to implement the requirements of each component of Jurisdictional Urban Runoff Management Program in section D of this Order.	X[122]	--
	J.1.a.(1) – Each Co-permittee shall submit its updated and revised JURMP to the Principal Permittee by the date specified by the Principal Permittee.	--	X
	J.1.a.(2) – The Principal Permittee shall be responsible for collecting and assembling the individual JURMPs which cover the activities conducted by each individual Co-permittee. The Principal Permittee shall submit the JURMPs to the Regional Board 365 days after adoption of this Order	--	X
	J.1.a.(3)(a)(i) – Each Co-permittee's updated and revised JURMP shall contain identification of non-storm water discharge categories identified as a source of pollutants to waters of the U.S.	--	X

[122] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-1.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.1.a.(3)(a)(ii) – Each Co-permittee's updated and revised JURMP shall contain a description of whether non-storm water discharge categories identified under section (a)(i) above will be prohibited or required to implement appropriate control measures to reduce the discharge of pollutants to the MEP.	X[123]	--
	J.1.a.(3)(a)(iii) – Each Co-permittee's updated and revised JURMP shall contain identification of any control measures to be required and implemented for non-storm water discharge categories identified under section (a)(i)	X[124]	--
	J.1.a.(3)(a)(iii) – Each Co-permittee's updated and revised JURMP shall contain a description of a program to reduce pollutants from non-emergency fire fighting flows identified by the Co-permittee to be significant sources of pollutants.	X[125]	--
	J.1.a.(3)(b)(i) – Each Co-permittee's updated and revised JURMP shall contain a certified statement by the chief legal counsel that the Co-permittee has adequate legal authority to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order.	--	X
	J.1.a.(3)(b)(ii) – Each Co-permittee's updated and revised JURMP shall contain identification of all departments within the jurisdiction that conduct urban runoff	--	X

[123] 40 C.F.R. § 122.26(d)(2)(iv)(A).

[124] 40 C.F.R. § 122.26(d)(2)(iv)(A).

[125] 40 C.F.R. § 122.26(b)(2).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	related activities, and their roles and responsibilities under the Order. Include an up-to-date organizational chart specifying these departments and key personnel.		
	J.1.a.(3)(b)(iii) – Each Co-permittee's updated and revised JURMP shall contain updated urban runoff related ordinances, with explanations of how they are enforceable.	X[126]	--
	J.1.a.(3)(b)(iv) – Each Co-permittee's updated and revised JURMP shall contain identification of the local administrative and legal procedures available to mandate compliance with urban runoff related ordinances and therefore with the conditions of the Order.	X[127]	--
	J.1.a.(3)(b)(v) – Each Co-permittee's updated and revised JURMP shall contain a description of how urban runoff related ordinances are implemented and appealed.	--	X
	J.1.a.(3)(b)(vi) – Each Co-permittee's updated and revised JURMP shall contain a description of whether the municipality can issue administrative orders and injunctions or if it must go through the court system for enforcement actions	--	X
	J.1.a.(3)(c)(i) – Each Co-permittee's updated and revised JURMP shall contain a description of the water quality and watershed protection principles that have been or will be included in the Co-permittee's General Plan, and a time schedule for when modifications are	--	X

[126] 40 C.F.R. § 122.26(d)(2)(i)(A).

[127] 40 C.F.R. § 122.26(d)(2)(i)(A).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	planned, if applicable.		
	J.1.a.(3)(c)(ii) – Each Co-permittee's updated and revised JURMP shall contain a description of the Co-permittee's current environmental review process and how it addresses impacts to water quality and appropriate mitigation measures. If the Co-permittee plans to modify the process during the permit term, a time schedule for modifications shall be included.	X[128]	--
	J.1.a.(3)(c)(iii) – Each Co-permittee's updated and revised JURMP shall contain a description of the development project approval process and requirements.	X[129]	--
	J.1.a.(3)(c)(iv) – Each Co-permittee's updated and revised JURMP shall contain an updated SUSMP document that meets the requirements specified in sections D.1.d and D.1.g(6). The updated SUSMP may be submitted under separate cover as an attachment to the JURMP.	--	X
	J.1.a.(3)(c)(v) – Each Co-permittee's updated and revised JURMP shall contain a description of the database to be used to track and inventory approved treatment control BMPs and treatment control BMP maintenance.	--	X
	J.1.a.(3)(c)(vi) – Each Co-permittee's updated and revised JURMP shall contain a completed watershed-based inventory of approved treatment control BMPs.	--	X

[128] 40 C.F.R. § 122.26(d)(1)(v).

[129] 40 C.F.R. § 122.26(d)(1)(v).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.1.a.(3)(c)(vii) – Each Co-permittee's updated and revised JURMP shall contain a description of the program to be implemented to verify approved treatment control BMPs are operating effectively and have been adequately maintained.	X[130]	--
	J.1.a.(3)(c)(viii) – Each Co-permittee's updated and revised JURMP shall contain A description of inspections that will be conducted to verify BMPs have been constructed according to requirements.	X[131]	--
	J.1.a.(3)(c)(ix) – Each Co-permittee's updated and revised JURMP shall contain A description of collaboration efforts to be conducted to develop the HMP.	--	X
	J.1.a.(3)(c)(x) – Each Co-permittee's updated and revised JURMP shall contain a description of enforcement mechanisms and how they will be used.	X[132]	--
	J.1.a.(3)(d)(i) – Each Co-permittee's updated and revised JURMP shall contain updated grading and other applicable ordinances.	--	X
	J.1.a.(3)(d)(ii) – Each Co-permittee's updated and revised JURMP shall contain a description of the construction and grading approval processes.	X[133]	--
	J.1.a.(3)(d)(iii) – Each Co-permittee's updated and revised JURMP shall be updated and revised to contain updated	--	X

[130] 40 C.F.R. § 122.26(d)(2)(iv)(A)(1).

[131] 55 F.R. 48058; EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-15.

[132] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-15.

[133] 40 C.F.R. § 122.26(d)(2)(iv)(D)(1).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	construction and grading project requirements.		
	J.1.a.(3)(d)(iv) – Each Co-permittee's updated and revised JURMP shall be updated and revised to contain a completed watershed-based inventory of all construction sites.	--	X
	J.1.a.(3)(d)(v) – Each Co-permittee's updated and revised JURMP shall be updated and revised to contain a description of steps that will be taken to maintain and update monthly a watershed-based inventory of all construction sites.	--	X
	J.1.a.(3)(d)(vi) – Each Co-permittee's updated and revised JURMP shall contain A list and description of the minimum BMPs that will be implemented, or required to be implemented, including pollution prevention.	X[134]	--
	J.1.a.(3)(d)(vii) – Each Co-permittee's updated and revised JURMP shall contain a description of the maximum disturbed area allowed for grading before either temporary or permanent erosion controls are implemented.	--	X
	J.1.a.(3)(d)(viii) – Each Co-permittee's updated and revised JURMP shall contain A description of construction site conditions where advanced treatment will be required.	--	X
	J.1.a.(3)(d)(ix) – Each Co-permittee's updated and revised JURMP shall contain a description of the steps that will be	X[135]	--

[134] 40 C.F.R. § 122.26(d)(2)(iv)(D).

[135] 40 C.F.R. § 122.26(d)(2)(iv)(D).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	taken to require and verify the implementation of the designated BMPs at all construction sites.		
	J.1.a.(3)(d)(x) – Each Co-permittee's updated and revised JURMP shall contain a description of planned inspection frequencies	--	X
	J.1.a.(3)(d)(xi) – Each Co-permittee's updated and revised JURMP shall contain a description of inspection procedures.	X[136]	--
	J.1.a.(3)(d)(xii) – Each Co-permittee's updated and revised JURMP shall contain A description of steps that will be taken to track construction site inspections to verify that all construction sites are inspected at the minimum frequencies required.	--	X
	J.1.a.(3)(d)(xiii) – Each Co-permittee's updated and revised JURMP shall contain a description of available enforcement mechanisms, under what conditions each will be used, and how they will escalate.	--[137]	X
	J.1.a.(3)(d)(xiv) – Each Co-permittee's updated and revised JURMP shall contain a description of notification procedures for non-compliant sites.	--	X
	J.1.a.(3)(e)(i) – Each Co-permittee's updated and revised JURMP shall contain a completed inventory of all municipal facilities and activities.	--	X
	J.1.a.(3)(e)(ii) – Each Co-permittee's updated and revised JURMP shall contain a description of which BMPs will be	--	X

[136] 55 F.R. 48058; EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-15.

[137] Although 40 C.F.R. § 122.26(d)(2)(iv)(B) requires a description of available enforcement mechanisms, it does not require a description of under what circumstances each will be used, and how they will escalate.

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	implemented, or required to be implemented, for municipal facilities and activities, including pollution prevention.		
	J.1.a.(3)(e)(iii) – Each Co-permittee's updated and revised JURMP shall contain a description of which BMPs will be implemented, or required to be implemented, for special events.	--	X
	J.1.a.(3)(e)(iv) – Each Co-permittee's updated and revised JURMP shall contain a description of steps that will be taken to require and verify the implementation of designated BMPs at municipal facilities and activities.	--	X
	J.1.a.(3)(e)(v) – Each Co-permittee's updated and revised JURMP shall contain a description of MS4 and MS4 facility inspection and maintenance activities and schedules.	X[138]	--
	J.1.a.(3)(e)(vi) – Each Co-permittee's updated and revised JURMP shall contain a description of the management strategy and BMPs to be implemented for pesticides, herbicides, and fertilizer use.	X[139]	--
	J.1.a.(3)(e)(vii) – Each Co-permittee's updated and revised JURMP shall contain a description of street and parking facility sweeping activities and schedules.	--	X
	J.1.a.(3)(e)(viii) – Each Co-permittee's updated and revised JURMP shall contain a description of controls and measures to	X[140]	--

[138] 40 C.F.R. § 122.26(d)(2)(iv)(A)(1); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-29.

[139] 40 C.F.R. § 122.26(d)(2)(iv)(A)(3).

[140] 40 C.F.R. § 122.26(d)(2)(iv)(B)(7); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-38.

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	be implemented to prevent and eliminate infiltration of seepage from sanitary sewers to MS4s.		
	J.1.a.(3)(e)(ix) – Each Co-permittee's updated and revised JURMP shall contain a description of inspection frequencies and procedures.	X[141]	--
	J.1.a.(3)(e)(x) – Each Co-permittee's updated and revised JURMP shall contain a description of enforcement mechanisms and how they will be used.	X[142]	--
	J.1.a.(3)(f)(i) – Each Co-permittee's updated and revised JURMP shall contain a completed and prioritized inventory of all industrial and commercial sites/sources that could contribute a significant pollutant load to the MS4.	X[143]	--
	J.1.a.(3)(f)(ii) – Each Co-permittee's updated and revised JURMP shall contain a list of minimum BMPs that will be implemented, or required to be implemented, for each facility type or pollutant-generating activity, including pollution prevention.	X[144]	--
	J.1.a.(3)(f)(iii) – Each Co-permittee's updated and revised JURMP shall contain a description of the steps that will be taken to require and verify the implementation of designated BMPs,	X[145]	--

[141] 40 C.F.R. § 122.26(d)(2)(iv)(B).

[142] Although 40 C.F.R. § 122.26(d)(2)(iv)(B) requires a description of available enforcement mechanisms, it does not require a description of under what circumstances each will be used.

[143] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-17.

[144] 40 C.F.R. § 122.26(d)(2)(iv)(C).

[145] 40 C.F.R. § 122.26(d)(2)(iv)(C).

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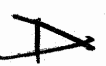
Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	including notification efforts.		
	J.1.a.(3)(f)(iv) – Each Co-permittee's updated and revised JURMP shall contain identification of high priority sites/sources and sites/sources to be inspected during the first year of implementation.	--	X
	J.1.a.(3)(f)(v) – Each Co-permittee's updated and revised JURMP shall contain a description of the steps taken to identify sites/sources to be inspected during the first year of implementation, including rationale for their selection.	--	X
	J.1.a.(3)(f)(vi) – Each Co-permittee's updated and revised JURMP shall contain a description of steps that will be taken to identify sites/sources to be inspected in subsequent years.	--	X
	J.1.a.(3)(f)(vii) – Each Co-permittee's updated and revised JURMP shall contain a description of inspection procedures.	X[146]	--
	J.1.a.(3)(f)(viii) – Each Co-permittee's updated and revised JURMP shall contain a description of any third party inspection program to be implemented	--	X
	J.1.a.(3)(f)(ix) – Each Co-permittee's updated and revised JURMP shall contain A description of the program to be implemented to regulate mobile businesses, including notification of BMP requirements and local ordinances.	--	X
	J.1.a.(3)(f)(x) – Each Co-permittee's updated and revised JURMP shall contain a description of enforcement mechanisms and how they will be used.	--	X

[146] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-18.



Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.1.a.(3)(f)(xi) – Each Co-permittee's updated and revised JURMP shall contain a description of steps that will be taken to identify non-filers and notify the Regional Board of non-filers.	--	X
	J.1.a.(3)(g)(i) – Each Co-permittee's updated and revised JURMP shall contain a list of residential areas and activities that have been identified as high priority.	--	X
	J.1.a.(3)(g)(ii) – Each Co-permittee's updated and revised JURMP shall contain a list of minimum BMPs that will be implemented, or required to be implemented, for high priority residential activities.	--[147]	X
	J.1.a.(3)(g)(iii) – Each Co-permittee's updated and revised JURMP shall contain a description of which pollution prevention methods will be encouraged for implementation, and the steps that will be taken to encourage implementation.	X[148]	--
	J.1.a.(3)(g)(iv) – Each Co-permittee's updated and revised JURMP shall contain a description of the steps that will be taken to require and verify the implementation of prescribed BMPs for high priority residential activities.	--	X
	J.1.a.(3)(g)(v) – Each Co-permittee's updated and revised JURMP shall contain	X[149]	--

[147] Although federal regulations impose an annual reporting requirement, they does not specifically require an annual assessment of all waters in the permittee's watershed, rather, they require the permittee to identify water quality improvements or degradation in water bodies under the permittee's jurisdiction. 40 C.F.R. § 122.42(c)(7).

[148] 40 C.F.R. § 122.26(d)(2)(iv)(A).

[149] 40 C.F.R. § 122.26(d)(2)(iv)(B)(6); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-37.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	a description of efforts to facilitate proper disposal of used oil and other toxic materials.		
	J.1.a.(3)(g)(vi) – Each Co-permittee's updated and revised JURMP shall contain a description of efforts to evaluate methods used for oversight of residential areas and activities.	--	X
	J.1.a.(3)(g)(vii) – Each Co-permittee's updated and revised JURMP shall contain a description of enforcement mechanisms.	X[150]	--
	J.1.a.(3)(g)(vii) – Each Co-permittee's updated and revised JURMP shall contain a description of how enforcement mechanisms will be used	--[151]	X
	J.1.a.(3)(h)(i) – Each Co-permittee's updated and revised JURMP shall contain a description of the program to actively seek and eliminate illicit discharges and illicit connections.	X[152]	--
	J.1.a.(3)(h)(ii) – Each Co-permittee's updated and revised JURMP shall contain an updated MS4 map, including locations of the MS4, dry weather field screening and analytical monitoring sites, and watersheds.	X[153]	--
	J.1.a.(3)(h)(iii) – Each Co-permittee's updated and revised JURMP shall contain	--[154]	X

[150] Although 40 C.F.R. § 122.26(d)(2)(iv)(B).

[151] Although 40 C.F.R. § 122.26(d)(2)(iv)(B) requires a description of available enforcement mechanisms, it does not require a description of under what circumstances each will be used.

[152] 33 U.S.C. 1342(p)(3)(B)(ii); 40 C.F.R. § 122.26(d)(2)(iv)(B); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-32.

[153] 40 C.F.R. § 122.26(d)(1)(iii)(A).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	A description of dry weather field screening and analytical monitoring to be conducted (including procedures) which addresses all requirements included in sections B.1-4 of Receiving Waters Monitoring and Reporting Program No. R9-2006-0011.		
	J.1.a.(3)(h)(iv) – Each Co-permittee's updated and revised JURMP shall contain a description of investigation and inspection procedures to follow up on dry weather monitoring results or other information which indicate potential for illicit discharges and illicit connections.	**X**[155]	--
	J.1.a.(3)(h)(v) – Each Co-permittee's updated and revised JURMP shall contain a description of procedures to eliminate detected illicit discharges and illicit connections.	**X**[156]	--
	J.1.a.(3)(h)(vi) – Each Co-permittee's updated and revised JURMP shall contain a description of enforcement mechanisms.	**X**[157]	--
	Each Co-permittee's updated and revised JURMP shall contain a description of how enforcement mechanisms will be used.	--[158]	**X**

[154] Discretionary under 40 C.F.R. §122.26(d)(2)(iii)(A)(4), and EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 5-10.

[155] 40 C.F.R. § 122.26(d)(2)(iv)(B)(3); EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-34.

[156] 40 C.F.R. § 122.26(d)(2)(iv)(B).

[157] 40 C.F.R. § 122.26(d)(2)(iv)(B).

[158] Although 40 C.F.R. § 122.26(d)(2)(iv)(B) requires a description of available enforcement mechanisms, it does not require a description of under what circumstances each will be used.

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.1.a.(3)(h)(vii) – Each Co-permittee's updated and revised JURMP shall contain a description of the mechanism to receive notification of spills.	--	X
	J.1.a.(3)(h)(viii) – Each Co-permittee's updated and revised JURMP shall contain a description of measures to prevent, respond to, contain, and clean up all sewage and other spills.	X[159]	--
	J.1.a.(3)(h)(ix) – Each Co-permittee's updated and revised JURMP shall contain a description of efforts to facilitate public reporting of illicit discharges and connections, including a public hotline.	--[160]	X
	J.1.a.(3)(i)(i) – Each Co-permittee's updated and revised JURMP shall contain a description of the content, form, and frequency of education efforts for each target community.	--	X
	J.1.a.(3)(i)(ii) – Each Co-permittee's updated and revised JURMP shall contain a description of steps to be taken to educate underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.	--	X
	J.1.a.(3)(i)(iii) – Each Co-permittee's updated and revised JURMP shall contain a description of the content, form, and frequency of education efforts targeting municipal staff working on development	X[161]	--

[159] 40 C.F.R. § 122.26(d)(2)(iv)(B)(4).

[160] A hotline is recommended by the EPA, but not required. EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-37.

[161] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-16.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	planning, construction, municipal, industrial/commercial, and other aspects of the Jurisdictional Urban Runoff Management Program.		
	J.1.a.(3)(i)(iv) – Each Co-permittee's updated and revised JURMP shall contain a description of the content, form, and frequency of education efforts targeting new development and construction target communities.	X[162]	--
	J.1.a.(3)(i)(v) – Each Co-permittee's updated and revised JURMP shall contain a description of the content, form, and frequency of jurisdictional education efforts for the residential, general public, and school children target communities.	--	X
	J.1.a.(3)(j)(i) – Each Co-permittee's updated and revised JURMP shall contain a description of the steps that will be taken to include public participation in the development and implementation of each Co-permittee's Jurisdictional Urban Runoff Management Program.	--	X
	J.1.a.(3)(k)(i) – Each Co-permittee's updated and revised JURMP shall contain a description of the fiscal analysis to be conducted annually, as required by section G of this Order	X[163]	--
	J.1.a.(3)(l)(i) – Each Co-permittee's updated and revised JURMP shall contain a description of steps that will be taken to annually conduct program effectiveness assessments in compliance with section I.1 of the Order.	--	X

[162] EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems 6-16.

[163] 40 C.F.R. § 122.26(d)(2)(vi).

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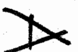

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.1.a.(3)(l)(ii) – Each Co-permittee's updated and revised JURMP shall contain an identification of measurable targeted outcomes, assessment measures, and assessment methods to be used to assess the effectiveness of: (1) Each significant jurisdictional activity or BMP to be implemented; (2) Implementation of each major component of the Jurisdictional Urban Runoff Management Program; and (3) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.	--	X
	J.1.a.(3)(l)(iii) – Each Co-permittee's updated and revised JURMP shall identify which of the outcome levels 1-6 will be utilized to assess the effectiveness of each of the items listed in sections J.1.a.(3)(l)(ii)(1-3). Where an outcome level is determined to not be applicable or feasible for an item listed in sections J.1.a.(3)(l)(ii)(1-3), the Co-permittee shall provide a discussion exhibiting inapplicability or infeasibility.	--	X
	J.1.a.(3)(l)(iv) – Each Co-permittee's updated and revised JURMP shall contain a description of the steps that will be taken to utilize monitoring data to assess the effectiveness of each of the items listed in sections J.1.a.(3)(l)(ii)(1-3)	--	X
	J.1.a.(3)(l)(v) – Each Co-permittee's updated and revised JURMP shall contain a description of the steps that will be taken to improve the Co-permittee's ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6. Include a time schedule for when improvement	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	will occur.		
	J.1.a.(3)(l)(vi) – Each Co-permittee's updated and revised JURMP shall contain a description of the steps that will be taken to identify aspects of the Co-permittee's Jurisdictional Urban Runoff Management Program that will be changed, based on the results of the effectiveness assessment.	--	X
	J.1.a.(3)(m)(i) – Each Co-permittee's updated and revised JURMP shall contain an identification of the location in the JURMP of any changes made to the JURMP in order to meet the requirements of Order No. R9-2006-0011.	--	X
WURMP Reporting (Section J.1.b. of Tentative Order No. 2006-0011)	J.1.b.(1) – The Co-permittees within each watershed shall be responsible for updating and revising each WURMP. Each WURMP shall be updated and revised to describe all activities the watershed Co-permittees will undertake to implement the Watershed Urban Runoff Management Program requirements of section E of this Order.	--	X
	J.1.b.(2) – Each Lead Watershed Permittee shall be responsible for producing its respective WURMP, as well as for coordination and meetings amongst all member watershed Co-permittees. Each Lead Watershed Permittee is further responsible for the submittal of the WURMP to the Principal Permittee by the date specified by the Principal Permittee.	--	X
	J.1.b.(3) – The Principal Permittee shall assemble and submit the WURMPs to the Regional Board 365 days after adoption	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	of this Order		
	J.1.b.(4)(a) – Each updated and revised WURMP shall include an identification of the Lead Watershed Permittee for the watershed.	--	X
	J.1.b.(4)(b) – Each updated and revised WURMP shall include an updated watershed map.	--	X
	J.1.b.(4)(c) – Each updated and revised WURMP shall include an identification and description of all pertinent applicable water quality data, reports, analyses, and other information to be used to assess receiving water quality.	X[164]	--
	J.1.b.(4)(d) – Each updated and revised WURMP shall include an assessment and analysis of the watershed's water quality data, reports, analyses, and other information, including identification and prioritization of the watershed's water quality problems. Water quality problems and high priority water quality problems shall be identified.	X[165]	--
	J.1.b.(4)(e) – Each updated and revised WURMP shall include identification of the likely sources, pollutant discharges, and/or other factors causing the high priority water quality problems within the watershed.	--	X
	J.1.b.(4)(f) – Each updated and revised WURMP shall include a description of the program to be implemented to encourage collaborative, watershed-	--	X

[164] 40 C.F.R. § 122.26(d)(2)(iii).

[165] 40 C.F.R. § 122.26(d)(2)(iii).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	based, land-use planning.		
	J.1.b.(4)(g) – Each updated and revised WURMP shall include a description of the strategy to be used to guide Co-permittee implementation of Watershed Water Quality Activities and Watershed Education Activities, including criteria for evaluating and identifying effective activities.	--	X
	J.1.b.(4)(h) – Each updated and revised WURMP shall include a list of potential Watershed Water Quality Activities, including a description of each activity, and its location.	--	X
	J.1.b.(4)(i) – Each updated and revised WURMP shall include an identification and description of the Watershed Water Quality Activities to be implemented by each Co-permittee for the first year of implementation.	--	X
	J.1.b.(4)(j) – Each updated and revised WURMP shall include a list of potential Watershed Education Activities	--	X
	J.1.b.(4)(k) – Each updated and revised WURMP shall include an identification and description of the Watershed Education Activities to be implemented by each Co-permittee for the first year of implementation.	--	X
	J.1.b.(4)(l) – Each updated and revised WURMP shall include a description of the public participation mechanisms to be used and the parties anticipated to be involved.	--	X
	J.1.b.(4)(m) – Each updated and revised WURMP shall include a description of Co-permittee collaboration to occur,	--	X

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	including a schedule for WURMP meetings		
	J.1.b.(4)(n) – Each updated and revised WURMP shall include a description of any TMDL BMP Implementation Plan or equivalent plan to be implemented under section H of this Order.	--	X
	J.1.b.(4)(o) – Each WURMP shall include A detailed description of the effectiveness assessment to be conducted for the WURMP, including a description how each of the requirements in section I.2 of this Order will be met.	--	X
RURMP Reporting (Section J.1.c. of Tentative Order No. 2006-0011)	J.1.c.(1) – Each Co-permittee shall collaborate with the other Co-permittees to develop the RURMP. The RURMP shall describe all activities the Co-permittees will undertake to implement the requirements of each component of Regional Urban Runoff Management Program section F of this Order.	--	X
	J.1.c.(1)(a) – The RURMP shall contain a common activities section that describes the urban runoff management activities to be implemented on a regional level.	--	X
	J.1.c.(1)(b) – The RURMP shall contain a description of steps that will be taken to facilitate assessment of the effectiveness of jurisdictional, watershed, and regional programs.	--	X
	J.1.c.(1)(c) – The RURMP shall contain a description of the regional residential education program to be implemented.	--	X
	J.1.c.(1)(d) – The RURMP shall contain A description of the strategy for development of the standardized fiscal	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	analysis method		
	J.1.c.(1)(e) – The RURMP shall contain A detailed description of the effectiveness assessment to be conducted for the Regional Urban Runoff Management Program	--	X
	J.1.c.(2) – The Principal Permittee shall be responsible for creating and submitting the RURMP. The Principal Permittee shall submit the RURMP to the Regional Board 365 days after adoption of this Order	--	X
Other Required Reports and Plans (Section J.2. of Tentative Order No. 2006-0011)	J.2.a.(1) – Each Co-permittee shall collaborate with the other Co-permittees to develop the HMP. The HMP shall be submitted for approval by the Regional Board.	--	X
	J.2.a.(2) – The Principal Permittee shall be responsible for producing and submitting each document according to the schedule	--	X
	J.2.b. – the Principal Permittee shall submit the LTEA to the Regional Board no later 210 days in advance of the expiration of this Order	--	X
	J.2.c. – The Principal Permittee shall submit to the Regional Board, no later than 210 days in advance of the expiration date of this Order, a Report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements.	--	X
	J.2.c. – the ROWD shall include the following: (1) Proposed changes to the Co-permittees' urban runoff management programs; (2) Proposed changes to monitoring programs; (3) Justification for	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	proposed changes; (4) Name and mailing addresses of the Co-permittees; (5) Names and titles of primary contacts of the Co-permittees; and (6) Any other information necessary for the reissuance of this Order.		
JURMP Annual Reporting Requirements (Section J.3. of Tentative Order No. 2006-0011)	J.3.a. – Each Jurisdictional Urban Runoff Management Program Annual Report shall contain a comprehensive description of all activities conducted by the Co-permittee to meet all requirements of section D. The reporting period for these annual reports shall be the previous fiscal year.	--	X
	J.3.a.(1) – Each Co-permittee shall generate individual Jurisdictional Urban Runoff Management Program Annual Reports which cover implementation of its jurisdictional activities during the past annual reporting period.	--	X
	J.3.a.(1) – Each Co-permittee shall submit to the Principal Permittee its individual Jurisdictional Urban Runoff Management Program Annual Report by the date specified by the Principal Permittee.	--	X
	J.3.a.(2) – The Principal Permittee shall submit Unified Jurisdictional Urban Runoff Management Program Annual Reports to the Regional Board by September 30 of each year, beginning on September 30, 2008.	--	X
	J.3.a.(3)(a)(i) – Each Urban Runoff Management Program Annual Report shall contain a description of any amendments to the General Plan, the	X[166]	--

[166] 40 C.F.R. § 122.42(c).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	environmental review process, development project approval processes, or development project requirements.		
	J.3.a.(3)(a)(ii) – Each Urban Runoff Management Program Annual Report shall contain confirmation that all development projects were required to undergo the Co-permittee's urban runoff approval process and meet the applicable project requirements, including a description of how this information was tracked.	--	X
	J.3.a.(3)(a)(iii) – Each Urban Runoff Management Program Annual Report shall contain a listing of the development projects to which SUSMP requirements were applied.	--	X
	J.3.a.(3)(a)(iv) – Each Urban Runoff Management Program Annual Report shall contain confirmation that all applicable SUSMP BMP requirements were applied to all priority development projects, including a description of how this information was tracked.	--	X
	J.3.a.(3)(a)(v) – Each Urban Runoff Management Program Annual Report shall contain at least one example of a priority development project that was conditioned to meet SUSMP requirements and a description of the required BMPs.	--	X
	J.3.a.(3)(a)(vi) – Each Urban Runoff Management Program Annual Report shall contain a listing of the priority development projects which were allowed to implement treatment control BMPs with low removal efficiency rankings, including the feasibility analyses which were conducted to exhibit	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	that more effective BMPs were infeasible.		
	J.3.a.(3)(a)(vii) – Each Urban Runoff Management Program Annual Report shall contain a listing of priority development projects which implemented the site design BMP substitution program, including a description of the site design BMPs utilized for each of the development projects.	--	X
	J.3.a.(3)(a)(viii) – Each Urban Runoff Management Program Annual Report shall contain an updated treatment control BMP inventory.	--	X
	J.3.a.(3)(a)(ix) – Each Urban Runoff Management Program Annual Report shall contain the number of treatment control BMPs inspected, including a summary of inspection results and findings.	X[167]	--
	J.3.a.(3)(a)(x) – Each Urban Runoff Management Program Annual Report shall contain A description of the annual verification of operation and maintenance of treatment control BMPs, including a summary of verification results and findings.	--	X
	J.3.a.(3)(a)(xi) – Each Urban Runoff Management Program Annual Report shall contain confirmation that BMP verification was conducted for all priority development projects prior to occupancy, including a description of how this information was tracked.	--	X

[167] 40 C.F.R. § 122.42(c)(4).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.a.(3)(a)(xii) – Each Urban Runoff Management Program Annual Report shall contain a listing of any projects which received a SUSMP waiver.	--	X
	J.3.a.(3)(a)(xiii) – Each Urban Runoff Management Program Annual Report shall contain a description of implementation of any SUSMP waiver mitigation program.	--	X
	J.3.a.(3)(a)(xiv) – Each Urban Runoff Management Program Annual Report shall contain a description of Hydromodification Management Plan (HMP) development collaboration and participation.	--	X
	J.3.a.(3)(a)(xv) – Each Urban Runoff Management Program Annual Report shall contain a listing of development projects required to meet HMP requirements, including a description of hydrologic control measures implemented.	--	X
	J.3.a.(3)(a)(xvi) – Each Urban Runoff Management Program Annual Report shall contain a listing of priority development projects not required to meet HMP requirements, including a description of why the projects were found to be exempt from the requirements.	--	X
	J.3.a.(3)(a)(xvii) – Each Urban Runoff Management Program Annual Report shall contain A listing of development projects disturbing 50 acres or more, including information on whether Interim Hydromodification Criteria were met by each of the projects, together with a description of hydrologic control measures implemented for each	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	applicable project.		
	J.3.a.(3)(a)(xviii) – Each Urban Runoff Management Program Annual Report shall contain The number of violations and enforcement actions (including types) taken for development projects, including information on any necessary follow-up actions taken.	X[168]	X
	J.3.a.(3)(a)(xix) – Each Urban Runoff Management Program Annual Report shall contain a description of notable activities conducted to manage urban runoff from development projects.	--	X
	J.3.a.(3)(b)(i) – Each Urban Runoff Management Program Annual Report shall contain confirmation that all construction sites were required to undergo the Co-permittee's construction urban runoff approval process and meet the applicable construction requirements, including a description of how this information was tracked.	--	X
	J.3.a.(3)(b)(ii) – Each Urban Runoff Management Program Annual Report shall contain confirmation that a regularly updated construction site inventory was maintained, including a description of how the inventory was managed.	--	X
	J.3.a.(3)(b)(iii) – Each Urban Runoff Management Program Annual Report shall contain a description of modifications made to the construction and grading ordinances and approval	X[169]	--

[168] 40 C.F.R. § 122.42(c)(6).

[169] 40 C.F.R. § 122.42(c)(2).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	processes.		
	J.3.a.(3)(b)(iv) – Each Urban Runoff Management Program Annual Report shall contain confirmation that the designated BMPs were implemented, or required to be implemented, for all construction sites.	--	X
	J.3.a.(3)(b)(v) – Each Urban Runoff Management Program Annual Report shall contain confirmation that a maximum disturbed area for grading was applied to all applicable construction sites.	--	X
	J.3.a.(3)(b)(vi) – Each Urban Runoff Management Program Annual Report shall contain a listing of all construction sites with conditions requiring advanced treatment, together with confirmation that advanced treatment was required at such construction sites.	--	X
	J.3.a.(3)(b)(vii) – Each Urban Runoff Management Program Annual Report shall contain for each construction site within each priority category (high, medium, and low), identification of the period of time (weeks) the site was active within the rainy season, the number of inspections conducted during the rainy season, and the number of inspections conducted during the dry season, and the total number of inspections conducted for all sites.	X[170]	--
	J.3.a.(3)(b)(viii) – Each Urban Runoff Management Program Annual Report shall contain a description of the general	--	X

[170] 40 C.F.R. § 122.42(c)(6).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	results of the inspections.		
	J.3.a.(3)(b)(ix) – Each Urban Runoff Management Program Annual Report shall contain confirmation that the inspections conducted addressed all the required inspection steps to determine full compliance.	--	X
	J.3.a.(3)(b)(x) – Each Urban Runoff Management Program Annual Report shall contain The number of violations and enforcement actions (including types) taken for construction sites, including information on any necessary follow-up actions taken.	X[171]	--
	J.3.a.(3)(b)(xi) – Each Urban Runoff Management Program Annual Report shall contain a description of notable activities conducted to manage urban runoff from construction sites.	--	X
	J.3.a.(3)(c)(i) – Each Urban Runoff Management Program Annual Report shall contain any updates to the municipal inventory and prioritization.	--	X
	J.3.a.(3)(c)(ii) – Each Urban Runoff Management Program Annual Report shall contain confirmation that the designated BMPs were implemented, or required to be implemented, for municipal areas and activities, as well as special events.	--	X
	J.3.a.(3)(c)(iii) – Each Urban Runoff Management Program Annual Report shall contain a description of inspections	X[172]	--

[171] 40 C.F.R. § 122.42(c)(6).

[172] 40 C.F.R. § 122.42(c)(6).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	conducted for municipal treatment controls.		
	J.3.a.(3)(c)(iii) – Each Urban Runoff Management Program Annual Report shall contain a description of maintenance conducted for municipal treatment controls.	--	X
	J.3.a.(3)(c)(iv) – Each Urban Runoff Management Program Annual Report shall contain identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.	--	X
	J.3.a.(3)(c)(v) – Each Urban Runoff Management Program Annual Report shall contain identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.	--	X
	J.3.a.(3)(c)(vi) – Each Urban Runoff Management Program Annual Report shall contain identification of the total distance (miles) of open channels, the distance of open channels inspected, the distance of open channels found with anthropogenic litter, and the distance of open channels cleaned.	--	X
	J.3.a.(3)(c)(vii) – Each Urban Runoff Management Program Annual Report shall contain Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.a.(3)(c)(viii) – Each Urban Runoff Management Program Annual Report shall contain identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.	--	X
	J.3.a.(3)(c)(ix) – Each Urban Runoff Management Program Annual Report shall contain confirmation that the designated BMPs for pesticides, herbicides, and fertilizers were implemented, or required to be implemented, for municipal areas and activities.	--	X
	J.3.a.(3)(c)(x) – Each Urban Runoff Management Program Annual Report shall contain identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.	--	X
	J.3.a.(3)(c)(xi) – Each Urban Runoff Management Program Annual Report shall contain identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.	--	X
	J.3.a.(3)(c)(xii) – Each Urban Runoff Management Program Annual Report shall contain identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of	--	X

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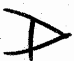
Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.		
	J.3.a.(3)(c)(xiii) – Each Urban Runoff Management Program Annual Report shall contain identification of the total distance of curb-miles swept	--	X
	J.3.a.(3)(c)(xiv) – Each Urban Runoff Management Program Annual Report shall contain identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.	--	X
	J.3.a.(3)(c)(xv) – Each Urban Runoff Management Program Annual Report shall contain amount of material (tons) collected from street and parking lot sweeping.	--	X
	J.3.a.(3)(c)(xvi) – Each Urban Runoff Management Program Annual Report shall contain a description of efforts implemented to limit prevent and eliminate infiltration from the sanitary sewer to the MS4	--	X
	J.3.a.(3)(c)(xvii) – Each Urban Runoff Management Program Annual Report shall contain identification of the number of sites requiring inspections, the number of sites inspected, and the frequency of the inspections.	X[173]	--
	J.3.a.(3)(c)(xviii) – Each Urban Runoff Management Program Annual Report shall contain a description of the general results of the inspections.	--	X
	J.3.a.(3)(c)(xix) – Each Urban Runoff Management Program Annual Report	--	X

[173] 40 C.F.R. § 122.26(c)(6).



Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	shall contain confirmation that the inspections conducted addressed all the required inspection steps to determine full compliance.		
	J.3.a.(3)(c)(xx) – Each Urban Runoff Management Program Annual Report shall contain the number of violations and enforcement actions (including types) taken for municipal areas and activities, including information on any necessary follow-up actions taken.	X[174]	--
	J.3.a.(3)(c)(xxi) – Each Urban Runoff Management Program Annual Report shall contain a description of notable activities conducted to manage urban runoff from municipal areas and activities.	--	X
	J.3.a.(3)(d)(i) – Each Urban Runoff Management Program Annual Report shall contain any updates to the industrial and commercial inventory.	--	X
	J.3.a.(3)(d)(ii) – Each Urban Runoff Management Program Annual Report shall contain confirmation that the designated BMPs were implemented, or required to be implemented, for industrial and commercial sites/sources.	--	X
	J.3.a.(3)(d)(iii) – Each Urban Runoff Management Program Annual Report shall contain a description of efforts taken to notify owners/operators of industrial and commercial sites/sources of BMP requirements, including mobile businesses.	X[175]	--

[174] 40 C.F.R. § 122.42(c)(6).

[175] 40 C.F.R. § 122.42(c)(6).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.a.(3)(d)(iv) – Each Urban Runoff Management Program Annual Report shall contain identification of the total number of industrial and commercial sites/sources inventoried and the total number inspected.	X[176]	--
	J.3.a.(3)(d)(v) – Each Urban Runoff Management Program Annual Report shall contain justification and rationale for why the industrial and commercial sites/sources inspected were chosen for inspection.	X[177]	--
	J.3.a.(3)(d)(vi) – Each Urban Runoff Management Program Annual Report shall contain confirmation that all inspections conducted addressed all the required inspection steps to determine full compliance.	--	X
	J.3.a.(3)(d)(vii) – Each Urban Runoff Management Program Annual Report shall contain identification of the number of third party inspections conducted.	X[178]	--
	J.3.a.(3)(d)(viii) – Each Urban Runoff Management Program Annual Report shall contain identification of efforts conducted to verify third party inspection effectiveness.	--	X
	J.3.a.(3)(d)(ix) – Each Urban Runoff Management Program Annual Report shall contain a description of efforts implemented to address mobile businesses.	--	X

[176] 40 C.F.R. § 122.42(c)(6).

[177] 40 C.F.R. § 122.42(c)(6).

[178] 40 C.F.R. § 122.42(c)(6).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.a.(3)(d)(x) – Each Urban Runoff Management Program Annual Report shall contain the number of violations and enforcement actions (including types) taken for industrial and commercial sites/sources, including information on any necessary follow-up actions taken.	X[179]	--
	J.3.a.(3)(d)(xi) – Each Urban Runoff Management Program Annual Report shall contain a description of steps taken to identify non-filers and a list of non-filers (under the General Industrial Permit) identified by the Co-permittees.	--	X
	J.3.a.(3)(d)(xii) – Each Urban Runoff Management Program Annual Report shall contain a description of notable activities conducted to manage urban runoff from industrial and commercial sites/sources.	--	X
	J.3.a.(3)(e)(i) – Each Urban Runoff Management Program Annual Report shall contain identification of the high threat to water quality residential areas and activities that were focused on.	--	X
	J.3.a.(3)(e)(ii) – Each Urban Runoff Management Program Annual Report shall contain confirmation that the designated BMPs were implemented, or required to be implemented, for residential areas and activities.	--	X
	J.3.a.(3)(e)(iii) – Each Urban Runoff Management Program Annual Report shall contain a description of efforts implemented to facilitate proper management and disposal of used oil and other household hazardous materials.	--	X

[179] 40 C.F.R. § 122.42(c)(6).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.a.(3)(e)(iv) – Each Urban Runoff Management Program Annual Report shall contain types and amounts of household hazardous wastes collected, if applicable.	--	X
	J.3.a.(3)(e)(v) – Each Urban Runoff Management Program Annual Report shall contain a description of any evaluation of methods used for oversight of residential areas and activities, as well as any findings of the evaluation.	--	X
	J.3.a.(3)(e)(vi) – Each Urban Runoff Management Program Annual Report shall contain the number of violations and enforcement actions (including types) taken for residential areas and activities, including information on any necessary follow-up actions taken.	X[180]	--
	J.3.a.(3)(e)(vii) – Each Urban Runoff Management Program Annual Report shall contain a description of collaboration efforts taken to develop and implement the Regional Residential Education Program.	X[181]	--
	J.3.a.(3)(e)(viii) – Each Urban Runoff Management Program Annual Report shall contain a description of notable activities conducted to manage urban runoff from residential areas and activities.	--	X
	J.3.a.(3)(f)(i) – Each Urban Runoff Management Program Annual Report shall contain correction of any inaccuracies in either the MS4 map or the Dry Weather Field Screening and	--	X

[180] 40 C.F.R. § 122.42(c)(6).

[181] 40 C.F.R. § 122.42(c)(6).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	Analytical Stations Map.		
	J.3.a.(3)(f)(ii) – Each Urban Runoff Management Program Annual Report shall contain reporting of all dry weather field screening and analytical monitoring results.	X[182]	--
	J.3.a.(3)(f)(ii) – Each Urban Runoff Management Program Annual Report shall contain The reporting shall include station locations, all dry weather field screening and analytical monitoring results, identification of sites where results exceeded action levels, follow-up and elimination activities for potential illicit discharges and connections, the rationale for why follow-up investigations were not conducted at sites where action levels were exceeded, any Co-permittee or consultant program recommendations/changes resulting from the monitoring, and documentation that these recommendations/changes have been implemented	X[183]	--
	J.3.a.(3)(f)(iii) – Each Urban Runoff Management Program Annual Report shall contain any dry weather field screening and analytical monitoring consultant reports generated, to be provided as an attachment to the annual report.	X[184]	--

[182] 40 C.F.R. § 122.42(c)(4).

[183] 40 C.F.R. § 122.42(c)(4).

[184] 40 C.F.R. § 122.42(c)(2).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.a.(3)(f)(iv) – Each Urban Runoff Management Program Annual Report shall contain a brief description of any other investigations and follow-up activities for illicit discharges and connections.	X[185]	--
	J.3.a.(3)(f)(v) – Each Urban Runoff Management Program Annual Report shall contain the number and brief description of illicit discharges and connections identified.	--	X
	J.3.a.(3)(f)(vi) – Each Urban Runoff Management Program Annual Report shall contain the number of illicit discharges and connections eliminated.	X[186]	--
	J.3.a.(3)(f)(vii) – Each Urban Runoff Management Program Annual Report shall contain identification and description of all spills to the MS4 and response to the spills.	--	X
	J.3.a.(3)(f)(viii) – Each Urban Runoff Management Program Annual Report shall contain a description of activities implemented to prevent sewage and other spills from entering the MS4.	--	X
	J.3.a.(3)(f)(ix) – Each Urban Runoff Management Program Annual Report shall contain a description of the mechanism whereby notification of sewage spills from private laterals and septic systems is received.	--	X
	J.3.a.(3)(f)(x) – Each Urban Runoff Management Program Annual Report shall contain number of times the hotline was called, as compared to previous	--	X

[185] 40 C.F.R. § 122.42(c)(4).

[186] 40 C.F.R. § 122.42(c)(6).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	reporting periods, and a summary of the calls.		
	J.3.a.(3)(f)(xi) – Each Urban Runoff Management Program Annual Report shall contain a description of efforts to publicize and facilitate public reporting of illicit discharges.	--	X
	J.3.a.(3)(f)(xii) – Each Urban Runoff Management Program Annual Report shall contain the number of violations and enforcement actions (including types) taken for illicit discharges and connections, including information on any necessary follow-up actions taken.	X[187]	--
	J.3.a.(3)(f)(xii) – Each Urban Runoff Management Program Annual Report shall contain a description of notable activities conducted to manage illicit discharges and connections.	--	X
	J.3.a.(3)(g)(i) – Each Urban Runoff Management Program Annual Report shall contain a description of education efforts conducted for each target community.	X[188]	--
	J.3.a.(3)(g)(ii) – Each Urban Runoff Management Program Annual Report shall contain a description of how education efforts targeted underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges.	X[189]	--
	J.3.a.(3)(g)(iii) – Each Urban Runoff Management Program Annual Report	X[190]	--

[187] 40 C.F.R. § 122.42(c)(6).

[188] 40 C.F.R. § 122.42(c)(6).

[189] 40 C.F.R. § 122.42(c)(6).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	shall contain a description of education efforts conducted for municipal departments and personnel.		
	J.3.a.(3)(g)(iv) – Each Urban Runoff Management Program Annual Report shall contain a description of education efforts conducted for the new development and construction communities.	X[191]	--
	J.3.a.(3)(g)(v) – Each Urban Runoff Management Program Annual Report shall contain a description of jurisdictional education efforts conducted for residents, the general public, and school children.	X[192]	--
	J.3.a.(3)(h)(i) – Each Urban Runoff Management Program Annual Report shall contain a description of public participation efforts conducted.	--	X
	J.3.a.(3)(i)(i) – Each Urban Runoff Management Program Annual Report shall contain an assessment of the effectiveness of the Jurisdictional Urban Runoff Management Program which meets all requirements of section I.1 of this Order.	--	X
	J.3.a.(3)(j)(i) – Each Urban Runoff Management Program Annual Report shall contain a fiscal analysis of the Co-permittee's urban runoff management programs which meets all requirements of section G of this Order.	--	X

[190] 40 C.F.R. § 122.42(c)(6).

[191] 40 C.F.R. § 122.42(c)(6).

[192] 40 C.F.R. § 122.42(c)(6).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.a.(3)(k)(i) – Each Urban Runoff Management Program Annual Report shall contain a description of any special investigations conducted.	X[193]	-
	J.3.a.(3)(l)(i) – Each Urban Runoff Management Program Annual Report shall contain a description of any efforts conducted to reduce pollutant discharges from non-emergency fire fighting flows.	--	X
	J.3.a.(3)(m)(i) – Each Urban Runoff Management Program Annual Report shall contain a description of any proposed revisions to the JURMP.	X[194]	--
WURMP Annual Reporting Requirements (Section J.3.b. of Tentative Order No. 2006-0011)	J.3.b.(1) – Each Lead Watershed Permittee shall generate watershed specific Watershed Urban Runoff Management Program Annual Reports for their respective watershed(s). Co-permittees within each watershed shall collaborate with the Lead Watershed Permittee to generate the Watershed Urban Runoff Management Program Annual Reports.	--	X
	J.3.b.(2) – Each Watershed Urban Runoff Management Program Annual Report shall be a comprehensive documentation of all activities conducted by the watershed Co-permittees during the previous annual reporting period to meet all requirements of section E. Each Watershed Urban Runoff Management Program Annual Report shall also serve as an update to the WURMP	--	X

[193] 40 C.F.R. § 122.42(c)(6).

[194] 40 C.F.R. § 122.42(c)(2).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.b.(2)(a) – Each WURMP Annual Report shall contain a comprehensive description of all activities conducted by the watershed Co-permittees to meet all requirements of section E	--	X
	J.3.b.(2)(b) – Each WURMP Annual Report shall contain any updates to the watershed map.	--	X
	J.3.b.(2)(c) – Each WURMP Annual Report shall contain an updated assessment and analysis of the watershed's current and past applicable water quality data, reports, analyses, and other information, including identification of the watershed's water quality problems and high priority water quality problem(s) during the reporting period.	X[195]	--
	J.3.b.(2)(d) – Each WURMP Annual Report shall contain identification of the likely sources, pollutant discharges, and/or other factors causing the high priority water quality problems within the watershed. The annual report shall clearly describe any changes to the identified sources, pollutant discharges, and/or other factors that have occurred since the previous reporting period, and provide justification for the changes.	--	X
	J.3.b.(2)(e) – Each WURMP Annual Report shall contain An updated list of potential Watershed Water Quality Activities. the annual report shall clearly describe any changes to the list of Watershed Water Quality Activities that have occurred since the previous	--	X

[195] 40 C.F.R. § 122.42(c)(7).

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	reporting period, and provide justification for the changes.		
	J.3.b.(2)(f) – Each WURMP Annual Report shall contain identification and description of the Watershed Water Quality Activities implemented by each Co-permittee during the reporting period, and justification for any changes that have occurred since the previous reporting period	--	X
	J.3.b.(2)(g) – Each WURMP Annual Report shall contain an updated list of potential Watershed Education Activities.	X[196]	--
	J.3.b.(2)(h) – Each WURMP Annual Report shall contain identification and description of the Watershed Education. Activities implemented by each Co-permittee for the reporting period, including information exhibiting that the activities directly targeted the sources and discharges of pollutants causing the watershed's high priority water quality problems, and that activities in active implementation phase changed target audience attitudes, knowledge, awareness, or behavior.	X[197]	--
	J.3.b.(2)(i) – Each WURMP Annual Report shall contain a description of the public participation mechanisms used during the reporting period and the parties that were involved	--	X
	J.3.b.(2)(j) – Each WURMP Annual Report shall contain a description of Co-permittee collaboration efforts,	--	X

[196] 40 C.F.R. § 122.42(c)(6).

[197] 40 C.F.R. § 122.42(c)(6).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.b.(2)(k) – Each WURMP Annual Report shall contain a description of efforts implemented to encourage collaborative, watershed based, land-use planning.	--	X
	J.3.b.(2)(l) – Each WURMP Annual Report shall contain a description of all TMDL activities implemented (including BMP Implementation Plan or equivalent plan activities) for each approved TMDL in the watershed.	--	X
	J.3.b.(2)(m) – Each WURMP Annual Report shall contain an assessment of the effectiveness of the WURMP, which meets the requirements of section I.2	--	X
	J.3.b.(3) – Each Lead Watershed Co-permittee shall submit to the Principal Permittee a Watershed Urban Runoff Management Program Annual Report by the date specified by the Principal Permittee. The Principal Permittee shall assemble and submit the Unified Watershed Urban Runoff Management Program Annual Report to the Regional Board by January 31, 2009 and every January 31 thereafter.	--	X
RURMP Annual Reporting Requirements (Section J.3.c. of Tentative Order No. 2006-0011)	J.3.c. – The Principal Permittee shall generate the Regional Urban Runoff Management Program (RURMP) Annual Reports. All Co-permittees shall collaborate with the Principal Permittee to generate the RURMP Annual Reports. The Principal Permittee shall submit the Regional Urban Runoff Management Program Annual Report to the Regional Board by January 31, 2009 and every January 31 thereafter.	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	J.3.c.(a) – Each RURMP Annual Report shall contain a common activities section that describes description of the urban runoff management activities or BMPs implemented on a regional level	--	X
	J.3.c.(b) – Each RURMP Annual Report shall contain a description of steps taken to facilitate assessment of the effectiveness of jurisdictional, watershed, and regional programs.	--	X
	J.3.c.(c) – Each RURMP Annual Report shall contain a description of the regional residential education activities implemented as part of the regional residential education program.	X[198]	--
	J.3.c.(d) – Each RURMP Annual Report shall contain a description of steps taken to develop and implement the standardized fiscal analysis method.	--	X
	J.3.c.(e) – Each RURMP Annual Report shall contain an assessment of the effectiveness of the Regional Urban Runoff Management Program which meets the requirements of section I.3	--	X
Interim Reporting Requirements (Section J.4. of Tentative Order No. 2006-0011)	J.4. – For the July 2006–June 2007 reporting periods, Jurisdictional URMP and Watershed URMP Annual Reports shall be submitted on January 31, 2008	--	X
Annual Reporting Integration (Section J.5. of Tentative Order No. 2006-0011)	J.5.a. – The Co-permittees are encouraged to submit, for Regional Board review and approval, an annual reporting format which integrates the information submitted in the JURMP, WURMP, and RURMP Annual Reports and Monitoring	--	X

[198] 40 C.F.R. § 122.42(c)(6).

Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	Reports.		
	J.5.a.(1)-(10) – Discretionary requirements of the integrated report	--	X
	J.5.b. – Upon approval of the Integrated Annual Report Format by the Regional Board, an Integrated Annual Report shall be submitted annually, which may substitute for the JURMP Annual Reports, WURMP Annual Reports, RURMP Annual Report, and/or Monitoring Reports, as approved by the Regional Board.	--	X
Universal Reporting Requirements (Section J.6. of Tentative Order No. 2006-0011)	J.6. – All submittals shall include an executive summary, introduction, conclusion, recommendations, and signed certified statement.	--	X
Modification Programs (Section K of Tentative Order No. 2006-0011)	K. – Modifications of Jurisdictional Urban Runoff Management Programs, Watershed Urban Runoff Management Programs, and/or the Regional Urban Runoff Management Program may be initiated by the Executive Officer or by the Co-permittees. Requests by Co-permittees shall be made to the Executive Officer, and shall be submitted during the annual review process. Requests for modifications should be incorporated, as appropriate, into the Annual Reports or other deliverables required or allowed under this Order.	--	X
	K.1. – Minor modifications to Jurisdictional Urban Runoff Management Programs, Watershed Urban Runoff Management Programs, and/or the Regional Urban Runoff Management	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	Program may be accepted by the Executive Officer where the Executive Officer finds the proposed modification complies with all discharge prohibitions, receiving water limitations, and other requirements of this Order.		
	K.2. – Modifications Requiring an Amendment to this Order – Proposed modifications that are not minor shall require amendment of this Order in accordance with this Order's rules, policies, and procedures.	--	X
All Co-permittee Collaboration (Section L of Tentative Order No. 2006-0011)	L.1. – All Co-permittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that delegates responsibilities among co-permittees	--[199]	X
Principle Permittee Responsibilities (Section M of Tentative Order No. 2006-0011)	M. – Within 180 days of adoption of this Order, the Co-permittees shall designate the Principal Permittee and notify the Regional Board of the name of the Principal Permittee.	--	X
	M.1. – The Principal Permittee shall Serve as liaison between the Co-permittees and the Regional Board on general permit issues, and when necessary and appropriate, represent the Co-permittees before the Regional Board.	--	X
	M.2. – The Principal Permittee shall Coordinate permit activities among the Co-permittees and facilitate collaboration on the development and implementation	--	X

[199] 40 C.F.R. § 122.26(d)(2)(i)(D) only requires the legal authority to enter into agreements with Co-permittees. The federal MS4 permit requirements do not specifically require Co-permittee agreements.

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
	of programs required under this Order.		
	M.3. – The Principal Permittee shall Integrate individual Co-permittee documents and reports into single unified documents and reports for submittal to the Regional Board as required under this Order.	--	X
	M.4. – The Principal Permittee shall Produce and submit documents and reports as required by section J of this Order and Receiving Waters Monitoring and Reporting Program No. 2006-11.	--	X
	M.5. – The Principal Permittee shall Submit to the Regional Board, within 180 days of adoption of this Order, a formal agreement between the Co-permittees which provides a management structure for meeting the requirements of this Order	--	X
	M.6. – The Principal Permittee shall Coordinate joint development by all of the Co-permittees of standardized format(s) for all documents and reports required under this Order. The Principal Permittee shall submit the standardized format(s) to the Regional Board for review no later than 180 days after adoption of this Order.	--	X
	M.6. – The standardized reporting format(s) shall be used by all Co-permittees.	--	X
Receiving Waters Monitoring and Reporting Program (Section N of Tentative	N. – Pursuant to CWC section 13267, the Co-permittees shall comply with all the requirements contained in Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2006-0011.	--	X

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Requirement Category	Permit Requirement	Federal Mandate?	State Mandate?
Order No. 2006-0011)			
Standard Provisions, Reporting Requirements and Notifications (Section N of Tentative Order No. 2006-0011)	O.1. – Each Co-permittee shall comply with Standard Provisions, Reporting Requirements, and Notifications contained in Attachment B of this Order. This includes 24 hour/5day reporting requirements for any instance of non-compliance with this Order as described in section 5.e of Attachment B.	--	X
	O.2. – All plans, reports and subsequent amendments submitted in compliance with this Order shall be implemented immediately (or as otherwise specified). All submittals by Co-permittees must be adequate to implement the requirements of this Order.	--	X

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San Diego Municipal Stormwater Copermittee Final Comments
October 30, 2006
Attachment B. Technical Comments

INTRODUCTION

This attachment provides Copermittee technical comments on Tentative Order No. R9-2006-011 (Tentative Order). Comments are presented according to the following organization:

- A. Comments specific to compliance timelines
- B. Comments on Tentative Receiving Waters and Urban Runoff Monitoring and Reporting Program (Monitoring and Reporting Program) No. R9-2006-0011

A. Comments specific to compliance timelines

1. Scheduled submittal of JURMP Annual Reports (Section J.3.a.(2))

Tentative Order section J.3.a.(2) requires that Copermittees submit Unified JURMP Annual Reports by September 30 of each year beginning in 2008. The Copermittees request that this timeframe be extended to October 31 of each year beginning in 2008.

Under Order No. 2001-01, Copermittees have until January 31 of each year to submit a Unified JURMP Annual Report for the previous fiscal year. A September 30 reporting deadline would compress that time from seven to three months. While the Copermittees support moving this deadline forward as a means of separating the Unified JURMP and WURMP Annual Reports, we believe an additional month is needed to complete the Unified JURMP Annual Reports. This would provide a more realistic timeframe for receiving and consolidating reporting data and information, and would still provide three full months separation between the two reports.

Although this change was not specifically requested in the Copermittees' June 7, 2006 comments, it is consistent with our August 2005 Report of Waste Discharge (Section D.10.3, p. 107), which recommended a September or October submittal, and the November 1, 2005 draft permit language submitted by the County (Section G.3.a, p. 42), which recommended an October 31 date. The Copermittees' previous comments were additionally drafted under a working assumption that we would pursue the option allowed in Tentative Order Section J.5 to develop an "Integrated Annual Report Format." If approved by RWQCB staff, this report would be due on January 31 of each subsequent year, which would obviate the need to separately submit Unified JURMP Annual Reports. While the Copermittees remain interested in pursuing this streamlined reporting alternative, neither its completion nor RWQCB approval can be assumed prior to adoption of the final Order.

2. Submittal of a description of "various monitoring program components" (Attachment D)

Tentative Order Attachment D requires that Copermittees submit a description of the "various monitoring program components" described in Tentative Receiving Waters and Urban Runoff Monitoring and Reporting Program ("Monitoring and Reporting Program") Section III.A.3 by

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July 1, 2007. The Copermittees request that this date be modified to "365 days after adoption of the Order."

Comment 2 of the Copermittees' previous submittal requested that compliance timelines for one-time deliverables be specified as the time elapsed from adoption of the Order rather than as firm dates to prevent a need for further modification if the projected adoption date is not met. Most deliverable dates in the revised Tentative Order were modified accordingly, but the due date for this monitoring program submittal remains fixed at July 1, 2007.

Assuming the earliest possible Order adoption date of December 13, 2006, the Copermittees would have a maximum of 6 1/2 months to develop and submit a comprehensive package of monitoring programs that includes the following new elements: trash monitoring, pyrethroids monitoring, MS4 outfall monitoring, and source identification monitoring. The Copermittees do not consider this to be sufficient time to develop and implement these new programs. First, the general requirements of the adopted Order must be translated to a more detailed program design. As indicated by the RWQCB staff response on page 245 of the August 30, 2006 Responses to Comments letter "[t]he Source Identification Studies requirements are quite general and provide Copermittees with ample discretion to develop the Source Identification Studies as they see fit including integrating monitoring activities that meet different objectives, focusing on the constituent of concern, integrating studies among and between watersheds, and complementing similar, but broader, source identification requirements in the WURMP section of this Tentative Order." While this flexibility is appreciated, it places a significant responsibility on the Copermittees to develop detailed, implementable work plans in a short period of time that could be further compressed if the Order is not adopted in December 2006. The final Order should allow the time needed to consider all relevant factors and to produce useful, well thought-out programs.

Second, regional and watershed level coordination are both needed in the development of the programs. Once an overall study design and technical standards and guidelines are developed regionally, numerous details must then be fleshed out and implemented out at the watershed scale. For example, dry weather monitoring and coastal outfall sampling points will need to be reviewed and updated by each Copermittee individually, and then reviewed collectively by each of the nine WURMP workgroups to ensure that watershed-specific and regional objectives are met. These updates should ideally reflect additional review of results of the Copermittees' Long Term Effectiveness Assessment, the soon to be updated 303(d) list, and updated WURMP priorities.

While the Tentative Order provides considerable flexibility in the content of new programs, the compression of timelines needed to complete this work may undermine that process by necessitating that they be put together hastily. Extending that timeline to 365 days after adoption would provide needed time for program development, as well as for Copermittees to integrate these new programs with other modifications to their dry weather programs which are due 365 days after adoption of the Order.

3. Implementation of trash monitoring at mass loading stations and temporary watershed assessment stations, pyrethroids monitoring, MS4 outfall monitoring and source identification monitoring (Monitoring and Reporting Program Sections II.A.k, II.A.7, II.B.1, and II.B.2)

The Monitoring and Reporting Program Section of the Tentative Order requires that Copermittees initiate four new monitoring programs no later than the 2007-2008 monitoring year. These are:

- A monitoring program to assess the presence of trash in receiving waters (Section II.A.k);
- A monitoring program to assess the presence of pyrethroids in receiving waters (Section II.A.7);
- A monitoring program to characterize pollutant discharges from MS4 outfalls in each watershed during wet and dry weather (Section II.B.1); and
- A source monitoring program to identify sources of discharges of pollutants causing priority water quality problems within each watershed (Section II.B.2).

The requirement to implement these programs in the 2007-2008 monitoring year was initially established in the March 10, 2006 draft of the Tentative Order, but the anticipated adoption date of the August 30, 2006 draft has since slipped at least five months, quite possibly longer. To provide a realistic timeframe for program development and implementation to occur, these schedules should be modified accordingly. The Copermittees therefore request that the effective date for the first three of these provisions be modified to the 2008-2009 monitoring year, and for the last provision to the 2009-2010 monitoring year.

As described in Comment 2 above, additional time is needed to complete the development of these new monitoring elements. This will consequently require that their implementation dates also be amended. Extension of this timeline will provide time needed to develop monitoring protocols, and to coordinate implementation amongst individual Copermittees and watershed groups. An additional year (i.e., the 2009-2010 monitoring year) is also requested to implement the source monitoring requirements because the development and implementation of this element will require data input from the new MS4 outfall monitoring programs.

B. Comments on Tentative Receiving Waters and Urban Runoff Monitoring and Reporting Program (Monitoring and Reporting Program) No. R9-2006-0011

The remaining Copermittee technical comments address concerns with specific aspects of the Monitoring and Reporting Program. The Copermittees recognize and appreciate the considerable flexibility shown by RWQCB staff in incorporating comments previously received, most notably the re-organization of this entire section. Given the magnitude of those changes, our remaining comments are comparatively minor, and generally address clarification and fine-tuning of the program as a whole.

4. Re-sampling criteria for paired storm drain and receiving water samples (Monitoring and Reporting Program Sections II.A.6.b.(3) and (4))

Monitoring and Reporting Program Sections II.A.6.b.(3) and (4) prescribe conditions for conducting re-sampling and conducting source investigations in response to coastal storm drain monitoring results. Section II.A.6.b, establishes general conditions under which coastal storm drain discharge and coastal waters must be conducted.

As drafted Monitoring and Reporting Program Section II.A.6.b.(4) is overly complex and may lead to confusion during implementation. The Copermittees recommend that it be modified as follows:

> "(4) If re-sampling ~~conducted under section (3) above~~ exhibits continued exceedances ~~of a AB 411 or basin Plan standards in either the storm drains or receiving water~~, investigations of sources of bacterial contamination shall commence within one business day of receipt of analytical results."

This simplification of language would make it much easier to understand the Copermittees' obligations to conduct investigations. It should also be noted that removing the reference to Monitoring and Reporting Program Section II.A.6.b.(3) above would not change the requirements for re-sampling, or their relationship to investigations. This would also be consistent with the requirements of the current Coastal Storm Drain Monitoring Program.

5. Selection of dry weather field screening and analytical monitoring stations (Monitoring and Reporting Program Section II.B.3.a)

Monitoring and Reporting Program Section II.B.3.a provides criteria by which Copermittees must select dry weather field screening and analytical monitoring stations. As drafted, it appears that these criteria are applicable in all instances. However, this is inconsistent with RWQCB staff's August 30, 2006 response to Copermittees comments (see p. 249), which indicated that "Under the Tentative Order Dry Weather Field Screening and Analytical Monitoring, the Copermittees have the discretion to locate sample stations using the methods of their choice. The Tentative Order provides each Copermittee with discretion to randomly select stations that are either major outfalls or other outfall points or to select stations non-randomly using a method of choice that meets, exceeds, or provides equivalent coverage to the requirements for station selection." This flexibility is initially provided in Monitoring and Reporting Program Section II.B.3.a, but the last sentence of that paragraph and the list that follows it create an inconsistency by establishing more restrictive guidelines and criteria to be followed in establishing stations. This text should either be removed or the last sentence of the paragraph amended as follows:

> "The dry weather analytical and field screening monitoring stations ~~shall~~ may be established using the following guidelines and criteria."

6. Field screening analysis of dissolved copper (Monitoring and Reporting Program Section II.B.3.c.(4))

Monitoring and Reporting Program Section II.B.3.c.(4) requires that field screening at dry weather monitoring stations include analysis for dissolved copper. This reflects a modification that was made in response to a recommendation in the Copermittees' Report of Waste Discharge that dissolved copper be analyzed using field test kits instead of analytical procedures. At the request of the City of San Diego, this recommendation has been re-evaluated by the Copermittees. Review of available test kits indicates that a visual test kit using the bathocuproine method could reach a method detection limit of 0.05 ppm. However, the reporting limit will be higher than the method detection limit and therefore, not appropriate to meet a dry weather action level ranging from 0.038 to 0.05 ppm, depending on the hardness of the water (300 ppm to 400 ppm and higher). Based on this re-assessment, the Copermittees request that dissolved copper be removed from the list of required field screening analytes and added back to those required for laboratory analysis (Monitoring and Reporting Program Section II.B.3.c.(3)).

7. Consistency of requirements for trash assessment (Monitoring and Reporting Program Sections II.B.3.c.(7) and I.I. A. 1. k)

Monitoring and Reporting Program Section II.A.1.k requires that Copermittees:

> "shall collaborate to develop and implement a program to assess the presence of trash (anthropogenic litter) in receiving waters. The program shall collect and evaluate trash data in conjunction with collection and evaluation of analytical data."

Monitoring and Reporting Program Section II.B.3.c.(7) requires that Copermittees:

> "assess the presence of trash in receiving waters and urban runoff at each dry weather screening or analytical monitoring station."

It additionally requires that:

> "Assessments of trash shall provide information on the spatial extent and amount of trash present, as well as the nature of the types of trash present."

The trash assessment language is inconsistent in these two sections. Copermittees recommend that the wording used in II.A.1.k be modified as follows and used in II.B.3.c.(7):

> "The Copermittees shall collaborate to develop and implement a program to assess the presence of trash (anthropogenic litter) in urban runoff. The program shall collect and evaluate trash data in conjunction with collection and evaluation of analytical data."

8. Requiring draft data and interpretations prior to the due date of January 31st (Monitoring and Reporting Program Section III.A.6)

Monitoring and Reporting Program Section III.A.6 requires that, following completion of an annual cycle of monitoring, Copermittees make monitoring data and results available to the Regional Board upon request. While the Copermittees agree that there may be instances where RWQCB staff accessibility to data is needed prior to the scheduled submittal of monitoring reports, such requests should be subject to reasonable limitations. First, quality assurance / quality control should be completed in accordance with applicable requirements of the Order prior to the required submission of data. Second, only raw data and results should be required, i.e., analysis (trends, box plots, etc.) should be included only in the scheduled submittals. Meeting a January 31 monitoring report submittal deadline is already challenging. This should not be complicated by requirements to conduct additional analysis on intermediate timeframes.

The Copermittees recommend that this language be modified as follows:

> "Following completion of an annual cycle of monitoring in October, the Copermittees shall after thorough quality assurance/quality control, make the monitoring data and results available to the Regional Board at the Regional Board's request. ~~This shall include trend analyses, box plots, and other similar statistical analyses if requested.~~"

December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

B. City/County Management Association (submitted by City of Imperial Beach)

B

CCMA City/County Management Association

October 26, 2006

Mr. John Robertus
SDRWQCB
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Via Fax: 858-571-6972 and US Mail

RE: Draft Tentative Order #R9-2006-0011 (San Diego County Municipal Stormwater Permit)

Dear Mr. Robertus:

As representatives of the City/County Management Association in San Diego County, we wish to comment on the Draft Tentative Order #R9-2006-0011 San Diego County Municipal Stormwater Permit issued by your office.

First, we wish to thank you and your staff for its efforts in responding to comments made by copermittees. The changes reflect your sincere willingness to listen carefully and search for solutions that strike a delicate balance among the many stakeholders and general public welfare for which you're responsible.

There are a few remaining concerns mentioned in comments submitted by the copermittees technical group, and we ask that you carefully consider their viewpoints on subjects such as, but not limited to, the deadline for submitting JURMP Annual Reports, clarification of language to avoid ambiguity or misinterpretations, and the time needed to complete detailed work plans for new monitoring programs.

In contrast to RWQCB staff's thoughtful responses to technical comments, it appears that the question of unfunded state mandates is unaddressed or treated with summary dispatch. During the previous comment period copermittee attorneys questioned the presence of potentially unfunded mandates within the proposed permit. The attorneys have clarified their questions pertaining to both federal and state law and prepared a lengthy analysis on the topic for your review. We ask that you review their analysis with the same care shown to the technical comments because the outcome presents significant fiscal and constitutional implications for all stakeholders including the RWQCB.

The attorneys also raise legal questions about environmental review of the proposed permit under California law. It appears that a recent Los Angeles published court decision may require permits to undergo a thorough environmental review including analysis of impacts, mitigating steps and alternatives plus a thorough public discussion of the environmental review. Given that the court's ruling is so new, we simply request that your attorneys review this matter to see how it applies to the current process.

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Mr. John Robertus
October 26, 2006
Page Two

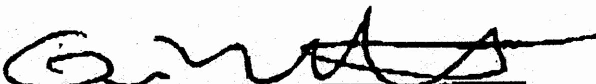
Finally, it's our understanding that adoption of the permit will be recommended for the December 13th meeting. We respectfully ask that adoption be postponed to allow careful deliberation of the yet-to-be-heard comments at the hearing as well as the written comments received by the end of October.

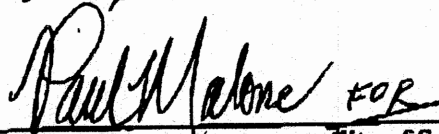
Again, thank you for the many technical revisions you've already made. We hope the focus will shift to the question of unfunded mandates raised by our attorneys and the few remaining technical questions.

Sincerely,

Phil Cotton, City Manager, City of Encinitas

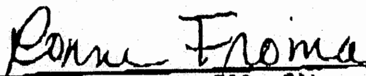
Gary Brown, City Manager, City of Imperial Beach


Graham Mitchell, City Manager, City of Lemon Grove


Rick Gittings, City Manager, City of San Marcos

David Ott, City Manager, City of Solana Beach

Rita Geldert, City Manager, City of Vista


Ronne, Froman, COO, City of San Diego

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SKILL - INTEGRITY - RESPONSIBILITY

October 30, 2006

Mr. John Minan
Chair, San Diego Region
California Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Dear Chairman Minan:

On behalf of the 1,300 members of the Associated General Contractors of America (AGC), San Diego Chapter, I would like to request that the Regional Water Quality Control Board reconsider some of the proposed changes to the Municipal Storm Water Permit.

AGC represents most of the contractors who build the region's commercial, industrial, institutional, engineering, and heavy highway construction projects. Our members work closely with the public agencies affected by the storm water regulations, and we are concerned these agencies will be forced to comply with new regulations that will have dramatic impacts on their budgets.

Current storm water regulations have resulted in increased costs for public agencies. These new proposals will further increase the cost for construction by making it more difficult for developers/contractors to comply with the hydromodification and advance treatment requirements and for agencies to comply with the increased inspection requirements.

Water quality improvements are important to the construction industry and the business community, and we look forward to participating in your decision making process. If you need additional information, please contact me at 858-558-7444 or at bbarnum@agcsd.org.

Sincerely,

Bradford E. Barnum
Vice President Government Relations

December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

D. Best Best & Krieger LLP

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October 9, 2006

2006 OCT 11 P 2:45
WATER QUALITY CONTROL BOARD

VIA FACSIMILE AND MAIL (858) 571-6972

John Robertus, Executive Officer
Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Comment Letter – Revised San Diego County Municipal Storm Water Permit (Tentative Order No. R9-2006-0011)

Dear Mr. Robertus:

Best Best & Krieger LLP represents over seventy (70) public entities throughout California as to all aspects of storm water, urban runoff, and waste discharge issues, including compliance with all applicable National Pollutant Discharge Elimination System ("NPDES") permits. Further, Best Best & Krieger represents many public entities, many of which are schools, in the San Diego Region which may be, or currently are, subject to the storm water permitting programs and other regulations overseen by the Regional Water Quality Control Board for the San Diego Region ("Regional Board").

Currently, the Regional Board has proposed revisions to the San Diego County Municipal Storm Water Permit (Tentative Order No. R9-2006-0011) (the "Revised Permit"). The Regional Board's Notice of Availability for the Revised Permit states that the Regional Board accepted comments on the Revised Permit through June 21, 2006, but that additional comments are now being accepted to address any changes made as a result of that initial round of comments.

The changes to the Revised Permit, like the original Revised Permit itself, raise several concerns for Best Best & Krieger's public entity clients. Foremost is that the Revised Permit, including the changes most recently incorporated by the Regional Board, suggests that the Large Municipal Separate Storm Sewer System ("MS4") permittees appear ultimately responsible for storm water flows from upstream dischargers – including Small MS4 permittees – such that certain administration and storm water management activities appear unnecessarily duplicative

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between the Large and Small MS4 permitting programs. With this overview, Best Best & Krieger submits the following comments on our clients' behalf.

COMMENTS

As the Regional Board's staff is aware, many public entities in the San Diego region are subject to the Small MS4 Permit, which is overseen by the Regional Board. Among those public entities, are a number of schools and other special district entities which have not yet been designated pursuant to the Small MS4 Permit. (See Attachment 3 to Small MS4 Permit [Water Quality Order No. 2003 – 0005 – DWQ; NPDES General Permit No. CAS000004].) In anticipation of eventual designation, these entities have voluntarily prepared Storm Water Management Plans ("SWMP") consistent with the Small MS4 Permit. In fact, these plans, in draft, have been reviewed by Regional Board staff who have provided comments.

A primary impetus for yet-to-be designated Small MS4s to voluntarily prepare SWMPs is that most school districts and the North County Transit District ("NCTD") have facilities in more than one large MS4 jurisdiction. As we raised in our letter to the SWRQB dated November 4, 2002:

> "Permittees whose boundaries straddle more than one large MS4 jurisdiction will have a particularly hard time efficiently ensuring that they are in compliance with the large MS4 jurisdictional requirements and the Small MS4 permit for substantially the same reason. The inefficiencies and potential for inadvertent violation markedly increases for these types of Permittees."

The concern voiced in our letter of November 4, 2002 exists today, especially in light of the revised Permit language which basically places these Small MS4 Permittees under the jurisdictional 'thumb' of larger MS4s.

"A "Small MS4" is an MS4 that is <u>not permitted under the municipal Phase I regulations</u>." (Small MS4 Permit Fact Sheet, supra, at p. 1 [emphasis added].) This is so because the Small MS4 Permit program was implemented subsequent to, and independent of, the Phase I, or Large MS4 Permit, program. (See discussion in Small MS4 Permit Fact Sheet, supra, at pp. 1-2.) As such, the Small MS4 Permit is a stand-alone program.[1]

In recognizing that the Small MS4 Permit is distinct from the Large MS4 Permit, the Small MS4 permittees, once designated, are required to develop and implement extensive water quality monitoring, public outreach and other requirements. Among these requirements is the

[1] Although the Small MS4 Permit allows "[n]on-traditional Small MS4s that discharge into medium and large MS4 [to] integrate public education and outreach program with the existing MS4 public education and outreach programs," this does not change the fundamentally independent nature of the Large and Small and MS4 Permits and the independent obligations on permittees to implement those permits. (See Small MS4 Permit, supra, at p. 9.)

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costly and time-consuming process of developing a Storm Water Management Plan ("SWMP") and implementing that plan following public comment and revision. (See Small MS4 Permit Fact Sheet, supra, at pp. 3-4.) For schools and other public agencies like NCTD – for whom limited budgets are exacerbated by rapidly growing populations – the implementation of a SWMP and the other measures required to ensure compliance with the Small MS4 Permit have come at a great cost. Many of our clients have already incurred these costs and are voluntarily implementing their SWMPs.

Despite the development of the Small MS4 Permit, its stand-alone nature, and the extensive investment which Small MS4 permittees continue to make into their SWMPs, the Revised Permit suggests that it is Large MS4s, and not their upstream Small MS4 counterparts, which will ultimately remain responsible for the impacts of storm water discharges on receiving water quality in the San Diego region. For example, the recent changes to the Revised Permit state that the Large MS4 Permittees are required to work towards and implement a "watershed-based urban runoff management" plan. (Revised Permit at p. 9.) In addition, the changes to the Revised Permit provide that Large MS4 permittees must develop and implement a Jurisdictional Urban Runoff Management Program to "prevent urban runoff discharges from the MS4 causing or contributing to a violation of water quality standards." (*Id.* at p. 16.) Notably, neither the watershed-based management plan nor the Jurisdictional Urban Runoff Management Plan distinguish between storm water discharges which originate from the Large MS4 and those which originate from Small MS4s which discharge into the Large MS4 storm sewer systems. In fact, the Revised Permit makes clear that, despite the relatively recent implementation of the Small MS4 Permit program, the Large MS4 permittees will remain responsible for discharges from any "Small MS4 that is 'interrelated' to a medium of large MS4." (*Id.* at p. 2.)

Many, if not the majority, of Small MS4s discharge their storm water runoff into the storm sewer system of a Large MS4s. Accordingly, it would seem that these Small MS4s are "interrelated" to the Large MS4 permittee. Under the Revised Permit, then, it is the Large MS4 permittee which appears ultimately responsible for ensuring that storm water discharges "do not caus[e] or contribut[e] to the violation of any applicable water quality standard."

Because the Revised Permit has such an extensive scope, the obligations of Large MS4s and those of Small MS4s seem unnecessarily duplicative. Both Large and Small MS4 permittees are required to develop and implement water quality plans, storm water monitoring, and other measures under supposedly <u>separate</u> permitting programs. Yet, both Large and Small MS4 storm water discharges enter the Large MS4 storm sewer system, and that is the system upon which the Regional Board has placed primarily responsible for receiving water quality. As such, the administrative costs, time, and other burdens associated with the implementation of Large and Small MS4 permits appear duplicative and unnecessary. Accordingly, Best Best & Krieger's public agency clients believe that the Regional Board needs to take a deeper look at the relationship between the Large and Small MS4 permits, eliminate the unnecessary duplication of effort and costs among the two sets of permittees.

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CONCLUSION

In conclusion, the Revised Permit places primary responsibility for receiving water quality on the Large MS4 permittees, yet it does not relieve any of the storm water monitoring, testing, or other financial costs which currently burden Small MS4 permittees. For many Small MS4s, the costs of storm water management must be balanced against the demands of the community and the provision of educational facilities and public and transportation services. As such, the Revised Permit appears to impose unnecessarily duplicative costs on Large and Small MS4s to perform what are essentially the same storm water management functions. The Small MS4s that have voluntarily prepared and now implement their SWMPs know best their facilities and the requisite BMPs to effectively manage storm water runoff.

Our public agency clients trust that the Regional Board will carefully consider these comments and address the questions and concerns raised herein before reissuing the San Diego County Large MS4 Permit. I will contact you shortly to schedule a meeting to discuss our concerns.

Please feel free to contact me should you require any clarification or expansion on our letter.

Sincerely,

Marguerite S. Strand
of BEST BEST & KRIEGER LLP

MSS:djg

cc: Bob Nicholson
Tom Lichterman
Cliff Moriyama

December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

E. California Building Industry Association

PH

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California Building Industry Association

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SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

2006 OCT 31 P 2:14

October 30, 2006

<u>**VIA OVERNIGHT MAIL & EMAIL**</u>

John Minan
Chairman
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: **Public Comments Regarding Revised Tentative Order No. R9-2006-0011, NPDES No. CAS0108758 ("Revised Tentative Order")**

Dear Chairman Minan:

We appreciate the opportunity to provide the California Regional Water Quality Control Board, San Diego Region ("Regional Board") with comments on the Revised Tentative Order. These comments are submitted on behalf of the California Building Industry Association ("CBIA"). In addition to these comments, CBIA hereby adopts the written comments submitted by Nossaman Guthner Knox & Elliott, LLP on behalf of the Construction Industry Coalition on Water Quality ("CICWQ"), the Building Industry Association of Southern California ("BIASC"), the Building Industry Association of San Diego County ("BIASD"), the Coalition for Clean Water and a Healthy Economy ("Coalition") and the Consulting Engineers and Land Surveyors of California ("CELSOC") dated October 30, 2006 (the "Nossaman Comment Letter"). The comments set forth herein supplement the comments set forth in the Nossaman Comment Letter, and CBIA respectfully requests the consideration of the comments in both this letter and the Nossaman Comment letter by the Regional Board, as well as Regional Board staff.

I. THE RESPONSES TO COMMENTS FAIL TO ADEQUATELY ADDRESS AGENCY REVIEW AND PUBLIC PARTICIPATION REQUIREMENTS REGARDING THE URBAN RUNOFF MANAGEMENT PLANS AND THE INTERIM HYDROMODIFICATION CRITERIA.

A. The Urban Runoff Management Plans must be subject to agency review and public participation.

The Revised Tentative Order, like the previous tentative order, requires the Copermittees to revise and update their Jurisdictional Urban Runoff Management Plans ("JURMPs") and Watershed Urban Runoff Management Plans ("WURMPs"), as well as develop a Regional Urban Runoff Management Plan ("RURMP"). (See Revised Tentative Order section J.1.) Under the Ninth Circuit Court of Appeals' opinion in *Environmental Defense Center, Inc. v. United States Environmental Protection Agency*

(9th Cir. 2003) 344 F.3d 832, 856 (hereafter referred to as "*EDC*"), these plans must be subject to meaningful review by the appropriate agency to ensure that each program reduces the discharge of pollutants to the maximum extent practicable ("MEP"). These plans must also be subject to public participation requirements including public availability and the opportunity for a hearing. (See *id.* at pp. 857-858.)

As we have previously commented, the Copermittees have been given significant flexibility in developing, revising and updating these plans. (See Coalition's Comment Letter dated June 20, 2006, attached hereto as Exhibit A.) This is analogous to the regulatory scheme under the Phase II Rule which was considered by the Ninth Circuit in *EDC*. Under the Phase II Rule, when a discharger opted to file a notice of intent ("NOI") to comply with a general permit, the NOI had to contain information on an individualized pollution control program that addressed six general criteria. (See *EDC, supra*, at p. 854.) There, as here, the regulated parties were required to design aspects of their own storm water management programs. (See *id.* at p. 856.) For this reason, the agency review and public participation requirements applied to the Phase II NOIs by the Ninth Circuit must also be applied to the urban runoff management plans in the Revised Tentative Order. The Revised Tentative Order fails to provide the procedure to fulfill these requirements. This legal analysis is supported by all stakeholders. (See Responses to Comments, pp. 27-32 & 33-42.)

Regional Board staff attempted to distinguish *EDC* in the Responses to Comments by stating, "[t]he Tentative Order is not a general Phase II NPDES permit, it is an individual Phase I NPDES permit." (Responses to Comments, p. 29.) Regional Board staff further stated that the judicial ruling has not been extended to permits such as the tentative order. (See *id.*) This is a distinction without a difference. The agency review and public participation requirements mandated by the Clean Water Act apply to the Revised Tentative Order regardless of whether it is Phase I or Phase II. No authority has been cited for treating Phase I and Phase II permits differently in this regard.[1]

Therefore, not only are the Regional Board's responses inconsistent as explained previously at p. 5 of our letter dated October 3, 2006 and attached hereto as Exhibit B, but they are inadequate and incomplete. In particular, the statement in the responses to our comments that, "[a]dditional information in response to this comment may be developed" suggests that Regional Board staff has not fully analyzed this important legal issue. (See Responses to Comments, pp. 29-33.) As a matter of prudent public policy, Regional Board staff's analysis on this issue should be fully developed prior to consideration of adoption of the Revised Tentative Order.

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[1] Assuming, *arguendo*, that the Ninth Circuit's holding applies only to Phase II permits, Regional Board staff has conceded the Revised Tentative Order is a Phase II permit by attempting to support the Revised Tentative Order's requirements by citing Code of Federal Regulations Phase II regulations and Environmental Protection Agency Phase II guidance.

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We have previously recommended that the procedural methodology included in the Regional Board's Order No. 2001-01 with regard to the model Standard Urban Stormwater Management Plan ("SUSMP") may be used to address these agency review and public participation requirements. Regional Board staff responded to our recommendation by stating that while the SUSMP requirement necessitated the development of totally new programs, the urban runoff management programs required by the tentative order are not totally new. (See Responses to Comments, p. 33.) Regional Board staff further stated that any new requirements in the tentative order are essentially extensions or enhancements of already existing requirements. (See *id.*) Even assuming, *arguendo*, that this true with regard to JURMPs and WURMPs, the mandatory Clean Water Act requirements for agency review and public participation apply because the revised and updated JURMPs and WURMPs are substantive components of the proposed permit. A provision in a proposed permit is not "shielded" from agency review and public participation requirements simply because it is included in the existing permit, and Regional Board staff cite no authority to the contrary. Further, there is no RURMP requirement under the existing permit. We respectfully request that the Regional Board staff reconsider their analysis of this recommendation.

B. Interim Hydromodification Criteria must be subject to agency review and public participation.

The Revised Tentative Order requires the Copermittees to collectively identify an interim range of runoff flow rates for which Priority Development Project ("PDP") post-project runoff flow rates and durations shall not exceed pre-project flow rates and durations ("Interim Hydromodification Criteria"), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. (See Revised Tentative Order section D.1.g.(6).) Starting 365 days after adoption of the Revised Tentative Order and until the final HMP standard and criteria are implemented, each Copermittee must require PDPs disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. (See *id.*)

The Revised Tentative Order does not require that the Interim Hydromodification Criteria be reviewed by the Regional Board, and it does not provide for public availability and a public hearing. The Copermittees are required to design this substantive component of the Revised Tentative Order, and under the Ninth Circuit's holding in *EDC*, the mandatory agency review and public participation requirements under the Clean Water Act must be satisfied. (See *EDC, supra*, 344 F.3d at p. 856.) Thus, assuming it is appropriate to include Interim Hydromodification Critera (which we do not believe to be the case as explained in section 8.a below), the Revised Tentative Order must be further revised to provide for agency review and public participation regarding the Interim Hydromodification Criteria.

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II. THE REVISED TENTATIVE ORDER IS REPLETE WITH UNFUNDED STATE MANDATES.

A. The Revised Tentative Order Contains Many New Programs and Higher Levels of Service.

The California Constitution provides that the state government may not mandate a new program or higher level of service on a local government without reimbursing that local government for the costs of that program. (See Cal. Const., art. XIII B, § 6(a).) The California Supreme Court explained that the purpose of article XIII B, section 6 is "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735 (quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.)

In order for a state mandate to constitute a "new program" or "higher level of service" within the meaning of article XIII B, section 6, it must be either a program that carries out the governmental function of providing services to the public, or it must be a law that imposes a requirement that is unique to local government. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.) The provisions of the Revised Tentative Order satisfy this requirement. The Revised Tentative Order imposes requirements on the municipal separate storm sewer systems ("MS4s") operated by the County of San Diego, the incorporated cities of San Diego County, the San Diego Unified Port District and the San Diego County Regional Airport Authority. The operation of these MS4s carry out the Copermittees' governmental function of providing services to the public, and the Revised Tentative Order imposes requirements unique to local government such as inspecting residential post-construction BMPs and industrial and commercial facilities.

The Revised Tentative Permit contains many examples of new programs and requirements for higher levels of service. For example, as mentioned previously, the Revised Tentative Order imposes new inspection requirements regarding residential post-construction BMPs. It also mandates inspections of new classes of industrial and commercial facilities, and it imposes increased requirements regarding MS4 cleaning. Additionally, it requires the creation of a RURMP, an HMP, and the development and implementation of Watershed Water Quality Activities and Watershed Education Activities, none of which are mandated by the Clean Water Act. These are just a few of the new programs or higher levels of service required by the Revised Tentative Order.

Unless these new programs and higher levels of service are required pursuant to a federal mandate, the Copermittees are entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. (See *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859.) As explained below, these new programs and higher levels of service are not required pursuant to a federal

mandate, and thus they constitute unfunded state mandates for which the Copermittees are entitled to reimbursement.

B. The New Programs and Higher Levels of Service Are Not Required Pursuant to a Federal Mandate.

Section 402(p) of the Clean Water Act requires 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).) The Regional Board may impose standards stricter than the federal MEP standard. (See *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880-891; see also *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167.) However, new programs and higher levels of service adopted pursuant to the Regional Board's discretionary authority to impose standards stricter than the MEP are not required pursuant to a federal mandate. Thus, Regional Board staff's citation to federal authority that may allow, but does not require, a certain provision of the Revised Tentative Order does not demonstrate a federal mandate.[2] (See *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613.)

The existing MS4 permit issued by this Regional Board exceeds the requirements of federal law. (See Minan, *Municipal Storm Water Permitting in California* (2003) 40 San Diego L.Rev. 245, 251.)[3] The Revised Tentative Order

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[2] An example of mandatory language is found at Clean Water Act Section 402(q), 33 U.S.C. section 1342(q). This subsection provides,

> Each permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy.")

The inclusion of requirements necessary to conform to the CSO control policy in a NPDES permit for a municipal combined storm and sanitary sewer would be done pursuant to a federal mandate.

[3] Minan, *Municipal Storm Water Permitting in California* (2003) 40 San Diego Law Review 245, 251 fn. 30 provides,

> *See* San Diego Regional Water Quality Control Board, Comparison Between the Requirements of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Storm Water Permit, agenda item 5, attach. 4, at 2-3 (Dec. 13, 2000) (on file with author). The comparison states:
>
> > Approximately 60% of the requirements in Tentative Order 2001-01 are based solely on the 1990 federal NPDES Storm Water Regulations. The remaining 40% of the requirements in the Tentative Order "exceed the federal regulations." Requirements that "exceed the federal regulations" are either more numerous, more specific/detailed,

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requires new programs and higher levels of service compared to the existing MS4 permit.[4] While these new programs and higher levels of service may be authorized by federal law, they are not *required* by federal law.[5] Thus, there is no federal mandate.

Regional Board staff has cited federal statutes and sections of the Code of Federal Regulations in an attempt to demonstrate the specific legal authority for many provisions of the Revised Tentative Order. While the cited federal authority may authorize the provisions, in many instances the new programs or higher levels of service are not required by the language of that authority. Regional Board staff was asked to identify the legal authority relied on for various programs, especially in light of the unfunded mandates issue. (See Uncertified Rough Draft of Regional Water Quality Control Board Meeting – June 21, 2006, p. 183, lines 13-23, attached hereto as Exhibit C.) In order to inform the analysis of the unfunded mandates issue, Regional Board staff must do more than cite federal regulations that give the Regional Board the discretion to impose new programs or higher levels of service. Where the new programs and higher levels of service are not specifically required by the federal regulations, Regional Board staff must show that they are necessary to meet the MEP standard. Neither the Revised Tentative Order nor the Responses to Comments provides this explanation.

As an example, the Revised Tentative Order requires the Copermittees to develop and implement a Hydromodification Management Plan ("HMP"). (See Revised Tentative Order D.1.g.) Regional Board staff stated in response to comments from the Copermittees that limits have been placed on urban runoff flows under certain circumstances to protect the beneficial uses of waters as required by federal law. (See Responses to Comments, pp. 60-61.) As an initial matter, Regional Board staff identified no studies or factual data supporting their claim that any specific water bodies' beneficial uses have been impaired as a result of hydromodification impacts. Moreover, no federal authority requires the development and implementation of an

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> or more stringent than the requirements in the regulations.

Id. at 2. The comparison goes on to discuss the provisions that exceed the federal regulations. "The 40% of the requirements in Tentative Order 2001-01 which 'exceed the federal regulations' are based almost exclusively on (1) guidance documents developed by USEPA; and (2) the SWRCB's orders describing statewide precedent setting decisions on MS4 permits." *Id.* at 2-3.

[4] If there are no new programs or higher levels of service, it is unclear why it would be necessary to change the existing MS4 permit.

[5] The Findings in the Revised Tentative Order provide, "[r]equirements in this Order that are more explicit than 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." (Revised Tentative Order Finding E.9.) This statement alone is insufficient to show that the new programs and higher levels of service in the Revised Tentative Order are in fact necessary to fulfill mandatory requirements under the federal regulations or to comply with the MEP standard.

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HMP to protect beneficial uses. Further, it has not been shown that the development and implementation of an HMP, and particularly a ban on hardened improvements, is the only strategy available to the Regional Board in order to satisfy its obligation to protect the beneficial uses of the waters at issue here. Thus, there is no federal mandate that the Regional Board require the development and implementation of an HMP in the Revised Tentative Order. The HMP requirements apply to, among others, flood control capital improvement and maintenance projects. Therefore, costs associated with the development and implementation of the HMP requirements, including those associated with flood control capital improvement and maintenance projects, are incurred pursuant to an unfunded state mandate.

As a second example, the Revised Tentative Order requires each Copermittee to implement a schedule of maintenance activities for the MS4 and MS4 facilities that must include inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris and at least annual inspection of all other MS4 facilities. (See Revised Tentative Order section D.3.a.(3)(b).) Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed but not less than every other year. (See *id.*) This constitutes a higher level of service compared to the existing permit. (See Order No. 2001-01 section F.3.a.(5).) As specific legal authority for the annual inspection and cleaning of MS4s, Regional Board staff relies on 40 Code of Federal Regulations section 122.26(d)(2)(iv)(A)(1, 3 and 4). (See Responses to Comments, p. 62.) The cited subdivisions of this section do not require the annual inspection and cleaning of MS4s. Assuming, *arguendo,* that the Regional Board is authorized by this section to impose annual inspection and cleaning of MS4s, it is not *required* to do so. Further, it has not been shown that annual inspection and cleaning of MS4s is necessary to meet the federal MEP standard. Therefore, this higher level of service in the Revised Tentative Order is not required pursuant to a federal mandate. Instead, it is an unfunded state mandate.

As a third example, the Revised Tentative Order places additional requirements on the Copermittees with regard to the descriptions and analysis of Watershed Activities, and it requires no less than two Watershed Water Quality Activities and two Watershed Education Activities be in an active implementation phase in each permit year. (See Revised Tentative Order section E.2.) The new requirements regarding the WURMPs constitute a higher level of service compared to the existing permit. Regional Board staff cite 40 Code of Federal Regulations section 122.26(a)(3)(ii), 40 Code of Federal Regulations section 122.26(a)(3)(v), 40 Code of Federal Regulations section 122.26(a)(5) and 40 Code of Federal Regulations section 122.26(d)(2)(iv) as specific legal authority for this requirement. (See Responses to Comments, pp. 63-64.) While this regulation may provide such authority, it does not mandate the imposition of a watershed program, nor does it require the new levels of service in the Revised Tentative Order. Thus, the new levels of service required with regard to the WURMPs constitute unfunded state mandates.

These are just three examples of new programs or higher levels of service imposed by the Revised Tentative Order and subject to reimbursement as unfunded

state mandates. It is essential to identify in the Revised Tentative Order what is required of Copermittees that is above and beyond that mandated, not permitted, by federal law. Without clear identification of the requirements that exceed federal mandates, it is impossible for the Regional Board to identify the extent to which it is requiring Copermittees to develop new programs or higher levels of service under Porter-Cologne, rather than the Clean Water Act, and thus, risks running afoul of the prohibition on unfunded state mandates.

C. The Copermittees Are Entitled To Challenge The Unfunded State Mandates Through A "Test Claim."

-It is apparent that the Copermittees are ill-equipped to assume the enormous cost to provide the higher level of service mandated by the Revised Tentative Order. The Copermittees have identified some of the problems that local governments face will face in their attempts to raise funding for this purpose. (See Copermittee Letter dated June 7, 2006, Attachment "A.") During the public hearing on June 21, 2006, the Copermittees testified not only with regard to the estimated cost of the higher level of service, but also their need to satisfy other mandates, such as providing adequate emergency services and roads, with limited funds.

The Copermittees may challenge the unfunded state mandates in the Revised Tentative Order by filing a "test claim" with the Commission on State Mandates. (See *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.) The Commission will hear and decide whether there are in fact costs mandated by the state. (See Gov. Code § 17551.) Once the Commission has determined that there are in fact costs mandated by the state, the Legislature must, for any amount owed to local governments determined in the previous year, either pay the balance or suspend the operation of the mandate for the following fiscal year. (See Cal. Const. art. XIII B, § 6(b)(1).)

Regional Board staff's reliance on federal statutes and regulations for the authority to adopt many of the new programs and higher levels of service in the Revised Tentative Order does not demonstrate that those new programs and higher levels of service are required by a federal mandate. Thus, if challenged, it seems likely that the Commission would determine the costs for these new programs and higher levels of service are mandated by the state and thus the Copermittees would be entitled to reimbursement.

III. THE REGIONAL BOARD MUST CONSIDER THE FACTORS IDENTIFIED IN WATER CODE SECTION 13241 AND RELEVANT CASE LAW SINCE THE REVISED TENTATIVE ORDER EXCEEDS THE FEDERAL MEP STANDARD.

The California Supreme Court has concluded that a regional board must take into account the factors listed in Water Code section 13241 and relevant case law when adopting standards that are more stringent than federally imposed standards. (*City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613.) As discussed above, the Revised Tentative Order contains a number of instances where the Regional

Board has gone beyond the standards imposed by the Clean Water Act, and thus additional analysis under Water Code section 13241 is required for adoption of such standards and conditions. In addition to the examples discussed above, the Revised Tentative Order requires the control of runoff from *all* construction and industrial sites, imposes additional inspection and MS4 cleaning requirements, mandates advanced treatment and incorporates numeric effluent limits – none of which is mandated by the Clean Water Act. (See sections 3.a. and 3.b., above, for additional requirements under the Revised Tentative Order that exceed federal mandates.)

Further, the Court of Appeal in the previous litigation over the San Diego County MS4 Permit concluded that MEP was the standard applicable to MS4 Permits and that the Regional Board has discretion to exceed the MEP standard only if expertise and factual information determined that the heightened standard was a necessary and workable enforcement mechanism necessary to achieve the goals of the Clean Water Act. (*Building Industry Assn. of San Diego County, supra,* 124 Cal.App.4th at p. 884.) Nowhere in the Revised Tentative Order or accompanying supporting documentation and information has the Regional Board sufficiently shown that the requirements exceeding the MEP standard, some of which are cited above, are necessary and a workable enforcement mechanism to achieve the water quality goals of the Clean Water Act.

IV. INCLUSION OF TMDL WASTE LOAD ALLOCATIONS AS NUMERIC EFFLUENT LIMITS FOR THE MS4 PERMIT IS INAPPROPRIATE.

The Revised Tentative Order includes Chollas Creek Diazinon Total Maximum Daily Load ("TMDL") Water Quality Based Effluent Limits ("WQBELs") and Shelter Island Yacht Basin WQBELs. (See Revised Tentative Order section H.) It is inappropriate to adopt TMDL waste load allocations as numeric WQBELs without conducting an evaluation under Water Code section 13241. Such provisions are properly adopted in water quality control plans under Water Code section 13240, et seq. In establishing water quality objectives in water quality control plans, the regional boards must consider factors including: (a) past, present and probable future beneficial uses of water; (b) environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (c) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (d) economic considerations; (e) the need for developing housing within the region; and (f) the need to develop and use recycled water. (See Water Code § 13241.) This analysis may not be avoided by adopting the Chollas Creek Diazinon TMDL WQBELs and Shelter Island Yacht Basin WQBELs in the Revised Tentative Order, rather than as amendments to the Water Quality Control Plan for the San Diego Basin.

It is inappropriate for the Regional Board to incorporate numeric effluent limits and other standards that go beyond the Clean Water Act mandated MEP standard into the Revised Tentative Order without undertaking the statutorily required analysis. Thus the Regional Board should eliminate all references to numeric effluent limits in the

Revised Tentative Order and incorporate a finding that provides that an iterative approach, including implementation of BMPs, will achieve the applicable waste load allocation compliance schedules. An iterative approach to achieving waste load allocations is consistent with the following statement of the court in *Building Industry Assn. of San Diego County, supra,* 124 Cal.App.4th at p. 890 (emphasis added): "the Water Boards have made clear in this litigation that they *envision the ongoing iterative approach as the centerpiece to achieving water quality standards.*" Such an approach to storm water regulation is also consistent with prior decisions of the State Board. (*See* Order WQ2001-15.)

The incorporation of numeric WQBELs as discharge limits for MS4 permits in the Revised Tentative Order is also contrary to the *Storm Water Panel Recommendations to the California State Water Resources Control Board on The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* (June 19, 2006) ("Blue Ribbon Panel Recommendations") in which the Storm Water Blue Ribbon Panel ("Blue Ribbon Panel") concluded that the incorporation of numeric limits into storm water permits is not feasible. (See Blue Ribbon Panel Recommendations, p. 8, attached hereto as Exhibit D and discussion below in section 7.)

In addition, the Regional Board, through the incorporation of WQBELs and additional inspection and enforcement requirements, has improperly attempted to begin implementation of a detection based approach to storm water regulation, which not only goes beyond the requirements of the Clean Water Act so as to warrant analysis under Water Code section 13241, but is also inconsistent with the Clean Water Act's approach to municipal storm water regulation.[6]

V. THE REVISED TENTATIVE ORDER IMPERMISSIBLY ATTEMPTS TO DELEGATE REGIONAL BOARD OBLIGATIONS TO THE COPERMITTEES AND TO SHIFT RESPONSIBILITY FOR ILLEGAL AND ILLICIT DISCHARGES OF POLLUTANTS TO COPERMITTEES.

At the outset, as a matter of law, the regulation of discharges "into" the MS4 versus regulation of discharges "into" receiving waters requires clarification throughout the Revised Tentative Order in order to comply with the Clean Water Act and other State Water Resources Control Board precedent. (Order WQ2001-0015.) In addition, the Revised Tentative Order needs to be revised so that it no longer shifts liability from

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[6] Clean Water Act section 402(p)(3)(B)(III) requires that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable...and other such provisions as the EPA Administrator determines appropriate for the control of such pollutants." Thus, the Clean Water Act mandates a technology based approach to storm water regulation, which is contrary to the position being taken by the Regional Board with respect to incorporation of numeric WQBELs as discharge limits in the Revised Tentative Order.

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polluters to Copermittees or delegates enforcement responsibilities properly assumed by the Regional Board to Copermittees.

A. By Attempting to Regulate Discharges Into the MS4, the Revised Tentative Order Holds Copermittees Liable For Third Party Illegal and Illicit Discharges.

Clean Water Act section 402(p)(3)(B), the basis for municipal storm water regulation, authorizes the issuance of permits for discharges "*from* municipal storm sewers." Contrary to this, the Revised Tentative Order attempts to regulate discharges "into" the MS4 system which is inappropriate and inconsistent with the regulatory scheme for municipal storm water discharges established by the Clean Water Act, State Water Resources Control Board orders and related court decisions. In Order WQ2001-0015, the State Water Resources Control Board determined that the Regional Board cannot prohibit discharges "into" the MS4 system and that permit provisions that attempted to regulate all discharges into the MS4 system were too broad in light of the statutory framework of municipal storm water regulation under the Clean Water Act. In that order the State Board stated, "the 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 WQ2001-0015.) Indeed, a footnote in that order provides, "Discharge Prohibition A.1. also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occur in 'waters of the state.' Therefore, it is interpreted to *apply only to discharges to receiving waters*." (*Id. (emphasis added)*.)

In addition, in its discussion of the MS4 regulatory scheme the Court in *Building Industry Assn. of San Diego County*, *supra*, 124 Cal.App.4th at p. 871 stated, "municipalities and other public entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be *discharged from these storm sewer systems*." Thus, both the courts and the State Water Resources Control Board have made clear that the Clean Water Act regulates discharges "into" receiving waters – not discharges "into" the MS4. Regulating discharges "into" the MS4 system shifts the legal burden of compliance from the discharger to the Copermittees without adequate statutory authorization to do so and in violation of the statutory scheme set up for municipal storm water regulation in the Clean Water Act.

In the Responses to Comments, Regional Board staff state, "[s]ince the Copermittees own and operate their MS4s, they cannot passively receive discharges from third parties." (Responses to Comments, p. 26.) In support of this statement, they cite [64] Fed.Reg. 68766. On this page, the Environmental Protection Agency ("EPA"), in describing its final Phase II Rule, states, "the operators of regulated small MS4s cannot passively receive and discharge pollutants from third parties." However, the issue of whether a small MS4 could be required to regulate third parties discharging into their system was not a settled matter. In fact, the EPA went on to explain that the individual permit option is an alternative for municipal system operators who seek to avoid third party regulation according to all or some of the minimum measures required

under the general permit. Thus, the citation to 64 Fed.Reg. 68766 does not clearly demonstrate federal authority to require MS4 operators to regulate discharges by third parties into their systems.

Further, from a water quality perspective, regulating discharges "into" the MS4 system unduly constrains regional water quality solutions that will benefit water quality, particularly in the context of the watershed management plans in the Revised Tentative Order. The internal conflict in the Revised Tentative Order between mandating regional solutions, and making those legally difficult if not impossible to implement by requiring treatment before discharge into the MS4 system should be eliminated. For all of these reasons, the Revised Tentative Order should be revised to eliminate all requirements and implications that Copermittees are responsible for non-compliant and illicit dischargers.

B. Copermittees Cannot Be Charged With Enforcement Responsibilities That Are Properly Within the Regional Board's Authority.

The Revised Tentative Order improperly attempts to shift enforcement obligations from the Regional Board to the Copermittees and requires the Copermittees to undertake enforcement action against dischargers, without the legal authority to do so. For example, the Revised Tentative Order requires inspection by the Copermittees of industrial and commercial sites to determine if such sites have obtained coverage under the applicable NPDES permit, to assess compliance with ordinances and permit requirements, and to perform visual inspections for illicit discharges. These are all activities that are properly handled by the Regional Board and not the Copermittees who have no legal authority to undertake enforcement action to respond to such violations.

The Revised Tentative Order, like the previous tentative order, also requires the Copermittees to adopt and apply ordinances to prohibit or otherwise regulate discharges into and from MS4s caused by third parties, including private residents, other local agencies, and non-traditional MS4s. (See, e.g., Revised Tentative Order Section D.3.) These third parties include non-traditional MS4s, such as universities, community colleges and public schools, that have not been designated under the State Board's General Permit for Storm Water Discharges from Small MS4s (Water Quality Order No. 2003-0005-DWQ, NPDES No. CAS00000X) ("Small MS4 Permit"). In support of its Small MS4 Permit, the State Board stated that the regional boards may designate non-traditional MS4s at any time subsequent to the adoption of the Small MS4 Permit. (See State Board's Findings In Support of Small MS4 Permit, No. 12.) Instead of designating non-traditional MS4s, the Regional Board impermissibly attempts to shift its obligation to regulate these Phase II jurisdictions to the Copermittees through the Revised Tentative Order.

These types of provisions requiring enforcement by the Copermittees are inappropriate and raise serious issues about Copermittee compliance under the Revised Tentative Order: Instead of enforcing against the dischargers responsible for

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exceedances of water quality standards, the Regional Board is improperly attempting to shift their enforcement obligations under Porter-Cologne, which delegates enforcement authority to determine violations of the Clean Water Act to the Regional Boards, not to the local jurisdictions regulated under MS4 Permit. (Water Code § 13300 et seq.; Water Code § 13329.25 et seq.) This issue is extremely problematic in light of the recent enforcement action against the City of San Diego (*See* Notice of Violation R9-2006-0111, September 27, 2006.) These provisions raise serious compliance issues for the Copermittees because it is unclear if failure to issue a Notice of Violation to a discharger will result in a Copermittee violation of the MS4 Permit, even though the Copermittee has no legal authority to take any enforcement action against the discharger.

Not only is this attempt impermissible, but the Revised Tentative Order requires the Copermittees to regulate local agency third parties in a manner that is outside of their authority under California law. The Revised Tentative Order, like the previous tentative order, makes no meaningful legal distinction between private third parties and local government agency third parties. California law provides that cities and the County are prohibited from applying building, zoning or related land use controls to the location or construction of facilities for the production, generation, storage, treatment, or transmission of water or waste water by a local agency. (See Gov. Code § 53091, subds. (d) & (e).) The term "local agency" is broadly defined in Government Code section 53090, and it includes agencies such as school districts, redevelopment agencies, joint powers authorities, water districts, and any other agency that locally performs a "government or proprietary function within limit boundaries." Thus, the Revised Tentative Order requires the Copermittees exercise authority they simply do not have under California law.

Regional Board staff responded to our comments on this issue by stating that since the Copermittees own and operate their MS4s, they cannot passively receive discharges from third parties. Even assuming, *arguendo*, that this is a valid interpretation, it does not address the issue that the Copermittees lack the legal authority (legal authority that the Regional Board expressly has) to adopt and apply ordinances that prohibit or otherwise regulate discharges into and from the MS4s caused by local agency third parties. Regional Board staff states, "[t]he MEP standard can be met through the implementation of coordination efforts and agreements with the third parties outside of the Copermittees' jurisdictions." (Responses to Comments, p. 26.) While such efforts and agreements are possible, the Copermittees' options to enforce against the local agency third parties remain limited. Copermittees may find themselves in the untenable position of filing a citizen suit enforcement action under Section 505 of the Clean Water Act against a local agency in order to meet the requirements of the Revised Tentative Order. Not only is this a questionable approach from a public policy standpoint, but it would also be an inefficient use of judicial and Copermittee resources.

Regional Board staff further responded that the Revised Tentative Order does not require the Copermittees to apply building, zoning, or related land use controls on parties outside of the Copermittees' jurisdictions. (See Responses to Comments, p. 26.) This response is unclear as to whether and to what extent the Copermittees would be

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required to regulate other local agencies, especially in light of the Regional Board's further statement that "where the Government Code provides the Copermittees with jurisdiction to apply treatment control BMPs to local agency projects, the Copermittees must mandate treatment control BMPs as required by section D.1.d." (Responses to Comments, p. 27.) Regional Board staff cites no authority in support of their interpretation. The language of Government Code sections 53091 specifically applies to building and zoning ordinances for the storage, treatment or transmission of water. (See Gov. Code § 53091(d) & (e).) Ordinances requiring treatment control BMPs on local agency projects deal with the "storage, treatment, or transmission of water," and they are within the scope of limitations set forth in Government Code section 53091.

As we previously suggested, the issue with respect to such Phase II Jurisdictions may be resolved in one of two ways. The Regional Board can direct staff to amend the Revised Tentative Order to absolve the Copermittees of responsibility for local agencies and regulate those local agencies by designating them under the Small MS4 Permit. Alternatively, the Regional Board can direct staff to include those local agencies as Copermittees under the Revised Tentative Order. Under either of these two options, the Regional Board must eliminate the requirement to enforce against other dischargers that the Copermittees have no authority over.

VI. THE REVISED TENTATIVE ORDER ATTEMPTS TO PREEMPT THE INTENT OF THE STATE WATER RESOURCES CONTROL BOARD TO LEAD STATE HYDROMODIFICATION POLICY BY IMPOSING HYDROMODIFICATION MANAGEMENT PLANS, ADVANCED TREATMENT AND NUMERIC EFFLUENT LIMITS AND IT DIRECTLY CONTRAVENES THE EXPLICIT RECOMMENDATIONS OF THE BLUE RIBBON PANEL.

Under the Revised Tentative Order, the Copermittees must require the implementation of advanced treatment at construction sites, and they must develop and implement a HMP. The Copermittees must require implementation of advanced treatment at construction sites that are determined by the Copermittees to be an "exceptional threat to water quality." (Revised Tentative Order section D.2.c.(2).) Each Copermittee is to consider eight identified factors in evaluating the threat to water quality. (See *id.*) The Copermittees must also collaborate with other Copermittees to develop and implement a HMP. (Revised Tentative Order Section D.1.g.) That plan must, among other things, require PDPs to, under certain circumstances, implement certain hydrologic control measures.[7]

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[7] Revised Tentative Order, Section D.1.g.(1)(c) provides that the HMP shall,

> Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse

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Hydromodification policy should to be developed in a coordinated manner across the state.[8] Indeed, the State Board is considering the degree to which hydromodification needs to be regulated to protect water quality and has already acted to undertake regulation of hydromodification. (Order No. 2004-0004-DWQ.) To inform its policy decisions about hydromodification policy, the State Board convened the Blue Ribbon Panel to evaluate, *inter alia*, advanced treatment, HMPs and Numeric Effluent Limits in its recommendations to the State Board.

The Blue Ribbon Panel observed that active treatment technologies involving the use of polymers with large storage systems now exist that can provide much more consistent and very low discharge turbidity." (Blue Panel Recommendations, p. 15.) It also observed that "toxicity has been observed at some locations" and "[t]here is always the potential for an accidental large release of such chemicals with their use." (See *id.*) The Blue Ribbon Panel stated, "[i]n considering widespread use of active treatment systems, full consideration must be given to whether issues related to toxicity or other environmental effects of the use of chemicals has been fully answered." Further, "[c]onsideration should be given to longer-term effects of chemical use, including operational and equipment failures or other accidental excess releases." (See *id.* at p. 17.)

The Blue Ribbon Panel also considered runoff volume and peak flow in its findings on the feasibility of numeric effluent limits applicable to municipal activities. The Blue Ribbon Panel looked at data charting exceedance frequencies for detention basins in Fort Collins, Colorado, and it noted that "[t]the peak flow frequency curve can be adjusted back to its predevelopment character by the proper application of runoff controls." (Blue Ribbon Panel Recommendations, p. 13.) It went on to state, "[b]ut while these controls restore the peak flow frequency to its natural regime, the duration of flows at the low end (but still channel "working") of the flow frequency curve is greatly increased, which raises potential for channel scour in stream channels with erosive soils." (See *id.*) The Blue Ribbon Panel's observations identify concerns associated with hydromodification.

As a matter of prudent public policy, the State Board should have the opportunity to review the Blue Ribbon Panel's recommendations and develop a state-

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impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

[8] The importance of a statewide approach to regulating hydromodification is underscored in a letter from (former) Secretary Tamminen to the State Board in which Secretary Tamminen calls for the State Board to "adopt a detailed program to be used by the regional boards to provide consistent protection for the remaining state waters no longer subject to federal jurisdiction." (Letter from T. Tamminen, California EPA Secretary, to A. Baggett, Chair, State Water Resources Control Board, August 27, 2004, p. 1.)

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wide policy or approach prior to the inclusion of advanced treatment and HMP in this proposed permit. If the Regional Board includes advanced treatment and HMP in the permit it ultimately adopts, it may be inconsistent with a State-wide approach or policy. Further, it does not appear that Regional Board staff has addressed the Blue Ribbon Panel's concerns and recommendations regarding hydromodification and advanced treatment in its Responses to Comments.

With respect to numeric effluent limits, the subject of the Blue Ribbon Panel's recommendations, the Blue Ribbon Panel concluded that incorporation of such limits in municipal storm water permits was not feasible. (Blue Ribbon Panel Recommendations, p. 8.) However, the Regional Board has seemingly disregarded the Blue Ribbon Panel's recommendations in its incorporation of WQBELs into the Revised Tentative Order. The State Board, who convened the Blue Ribbon Panel, should have the opportunity to review the Blue Ribbon Panel Recommendations and determine how those recommendations should be developed into a state-wide policy prior to incorporation of numeric effluent limits into MS4 permits.

Additionally, especially in light of the Blue Ribbon Panel's recommendations, the Revised Tentative Order may be inconsistent with the requirements of the General Construction Storm Water Permit when it is reissued by the State Board. Inconsistencies between these two permits would impose an economic and administrative burden on both the Copermittees and developers. From a policy perspective, it is important for the statewide General Construction Storm Water Permit and the statewide General Industrial Storm Water Permit to govern discharges from those types of facilities to the standards applicable in those permits (BAT/BCT) without unnecessary and confusing interference by the Regional Board through the MS4 Permit. It should also be noted that the General Construction Storm Water Permit (Order No. 99-08-DWQ) and the General Industrial Storm Water Permit (Order No. 9703-DWQ) provide sufficient regulation to protect water quality and have stricter standards for protection of water quality, and the proposed regulation of construction and industrial sites under the Revised Tentative Order creates unnecessary, duplicative regulation and requires additional water quality control in accordance with a different water quality standard (MEP v. BAT/BCT) which will be confusing to the regulated community without providing any real water quality benefit.

Chairman Minan expressed his opinion at the June 21, 2006 public hearing that the standards in the General Construction Storm Water Permit and the MS4 permit ought to be the same, and that he favors the view that if a developer meets the General Construction Storm Water Permit standards, that ought to satisfy the MS4 requirements. (See Uncertified Rough Draft of Regional Water Quality Control Board Meeting – June 21, 2006, p. 183, lines 4-8.) Regional Board staff appears to have failed to address this issue in the Responses to Comments.

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VII. THE REVISED TENTATIVE ORDER'S STANDARDS FOR ADOPTION OF INTERIM AND LONG-TERM HYDROMODIFICATION CRITERIA ARE INAPPROPRIATE.

A. Adoption of Interim Hydromodification Criteria is Not Feasible.

The Interim Hydromodification Criteria do not differ substantively from final HMP standard. The presumably unintended consequence of the duplicative nature of the Interim Criteria is that the Copermittees are required to develop--in a shortened timeframe--what the Regional Board itself has acknowledged will require additional study, analysis, resources and time to develop.

Regional Board staff acknowledges that it will take at approximately three years to develop an adequate HMP for the region. (See Revised Tentative Order section J.2.a.) However, within 365 of the adoption of the Revised Tentative Order, the Copermittees must identify Interim Hydromodification Criteria and require PDPs disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flows and durations as required by the Interim Hydromodification Criteria. (See *id.* at section D.1.g.(6).) The 365 day time-frame is not feasible because the same technical analysis required to develop a regional plan will also be required to develop the Interim Hydromodification Criteria for PDPs.

Further, the development and implementation of Interim Hydromodification Criteria for PDPs disturbing 50 acres or more is not appropriate. The Blue Ribbon Panel has recommended that an effective storm water strategy include control of energy discharges for channel forming events completed under a watershed management plan and not site-by-site. (See Blue Ribbon Panel Recommendations, p. 14.) The Interim Hydromodification Criteria would apply this type of controls on a site-by-site basis, rather than under a watershed management plan. Further, a jurisdiction-by-jurisdiction approach to development of hydromodification criteria will likely lead to confusion as different criteria are applied throughout the region. Given the infeasibility of developing Interim Hydromodication Criteria for PDPs in 365 days and the Blue Ribbon Panel's recommendation that this type of control be completed under a watershed management plan, the Regional Board should put PDPs disturbing 50 acres or more on the same schedule as other entities that will be covered by the regional HMP.

B. Additional Problems With the Hydromodification Control Criteria.

The Revised Tentative Order fails to provide sufficient information to dischargers with regard to the implementation of Hydromodification Control Criteria. Because this is a new approach to hydromodification control, the Regional Board needs to clarify a number of issues in the Revised Tentative Order before dischargers can be expected to comply with the Revised Tentative Order's putative requirements.

- The Revised Tentative Order does not make clear that Hydromodification Control Criteria will only be necessary to protect against increased erosion of channel beds, etc. due to erosive force, but rather the Revised Tentative Order seems to suggest that hydromodification control will always be required. This type of requirement fails to take into account situations where hydromodification control is not necessary to protect against hydromodification impacts (e.g., trapezoidal reinforced channels).

- The Revised Tentative Order requires flow duration control of project discharges and does not specifically allow for increase in project runoff discharge rates and durations if instream control measures are utilized to accomplish hydromodification control, and to protect stream habitat and any beneficial uses. This requirement directly contradicts the Southern California Coastal Water Research Project report, which specifically recommends that a suite of management measures be made available so as to adequately protect public safety, provide for flood control, control erosion and deposition, and provide for channel stability. (See Managing Runoff to Protect Natural Streams: The Latest Developments on Investigation and Management of Hydromodification in California (SCCWRP 2006).)

- The Revised Tentative Order should be revised to specifically allow for instream hydromodification control measures to be used if the provisions of D.1.g.(2) are met. Further, the Revised Tentative Order seems to allow for instream hydromodification control, although it does not do so specifically. The Revised Tentative Order prohibits the use of non-naturally occurring hardscape materials, such as concrete, rip rap, etc.. These materials, if used judiciously are an important component to instream hydromodification control measures such as grade control structures. In some circumstances, such as to provide for public health and safety, flood control, erosion and deposition controls, and channel stability, hardened materials are necessary. As noted above, this menu of management options must be available to allow for sufficient flexibility to accommodate the variety of circumstances. (SCCWRP 2006.)

- The Revised Tentative Order should be clarified to state that the conditions to protect groundwater quality applicable to hydromodification control BMPs apply only to infiltration facilities that are serving as water quality treatment control BMPs (treatment BMPs) and not to those that are functioning as volume reduction hydromodification control BMPs (volume control BMPs). Infiltration for volume control, after the flows up to the water quality treatment design event have received treatment in a treatment control BMP that addresses pollutants of concern for groundwater, should be allowed to be infiltrated without further water quality control restrictions. Such restrictions are not necessary to protect groundwater quality because the water infiltrated for volume control is fully treated urban runoff. Indeed, the imposition of restrictions might actually impede performance of infiltration facilities designed for hydromodification control.

- Provisions requiring groundwater protection for infiltration facilities in the Revised Tentative Order should also be revised to allow for infiltration to treat bacteria because infiltration is one of most effective ways of treating bacteria; when such infiltration is accomplished bacteria does not affect ground water quality because infiltration treats the pollutant before it gets to groundwater.

- The Revised Tentative Order should be revised to allow for dry weather flows that have received treatment to reduce pollutants to be discharged to treatment control infiltration facilities.

VIII. COPERMITTEES SHOULD BE GIVEN FLEXIBILITY TO DETERMINE WHETHER ADVANCED TREATMENT IS APPROPRIATE EVEN IN CIRCUMSTANCES WHERE THE CONSTRUCTION SITE MAY POSE AN "EXCEPTIONAL THREAT TO WATER QUALITY."

Assuming that advanced treatment is a safe and effective BMP, which we do not believe it is, the requirements of the Revised Tentative Order are so vague and ambiguous as to make compliance impossible. The Revised Tentative Order requires implementation of advanced treatment for sediment at construction sites that are determined by the Copermittees to be an "exceptional threat to water quality." (See Revised Tentative Order section D.2.a.(2).) However, the Revised Tentative Order does so without sufficient technical information, without an adequate regulatory framework, and without providing the regulated community sufficient explanation as to what is required in order to comply with the advanced treatment provisions of the Revised Tentative Order.

While the Copermittees must consider eight factors in making the determination, the Revised Tentative Order provides no further definition of "exceptional threat to water quality." (See *id.*) The Blue Ribbon Panel has recognized that technical practicalities and cost-effectiveness may make active treatment technologies less feasible for smaller construction sites, including small drainages within a larger site. (See Blue Ribbon Panel Recommendations, p. 15.) The Blue Ribbon Panel also recognized that there is also the potential for an accidental large release of chemicals involved in active treatment technologies. (See *id.*) The provisions in the Revised Tentative Order regarding advanced treatment do not address these concerns.

While the Copermittees are given some flexibility in determining whether a construction site poses an "exceptional threat to water quality," the Revised Tentative Order does not give the Copermittees flexibility to decide whether advanced treatment should be applied even in cases where there is an "exceptional threat to water quality." The Copermittees should be given flexibility to determine whether advanced treatment is appropriate even in circumstances where the construction site may pose an "exceptional threat to water quality" given the feasibility and safety concerns regarding this type of treatment.

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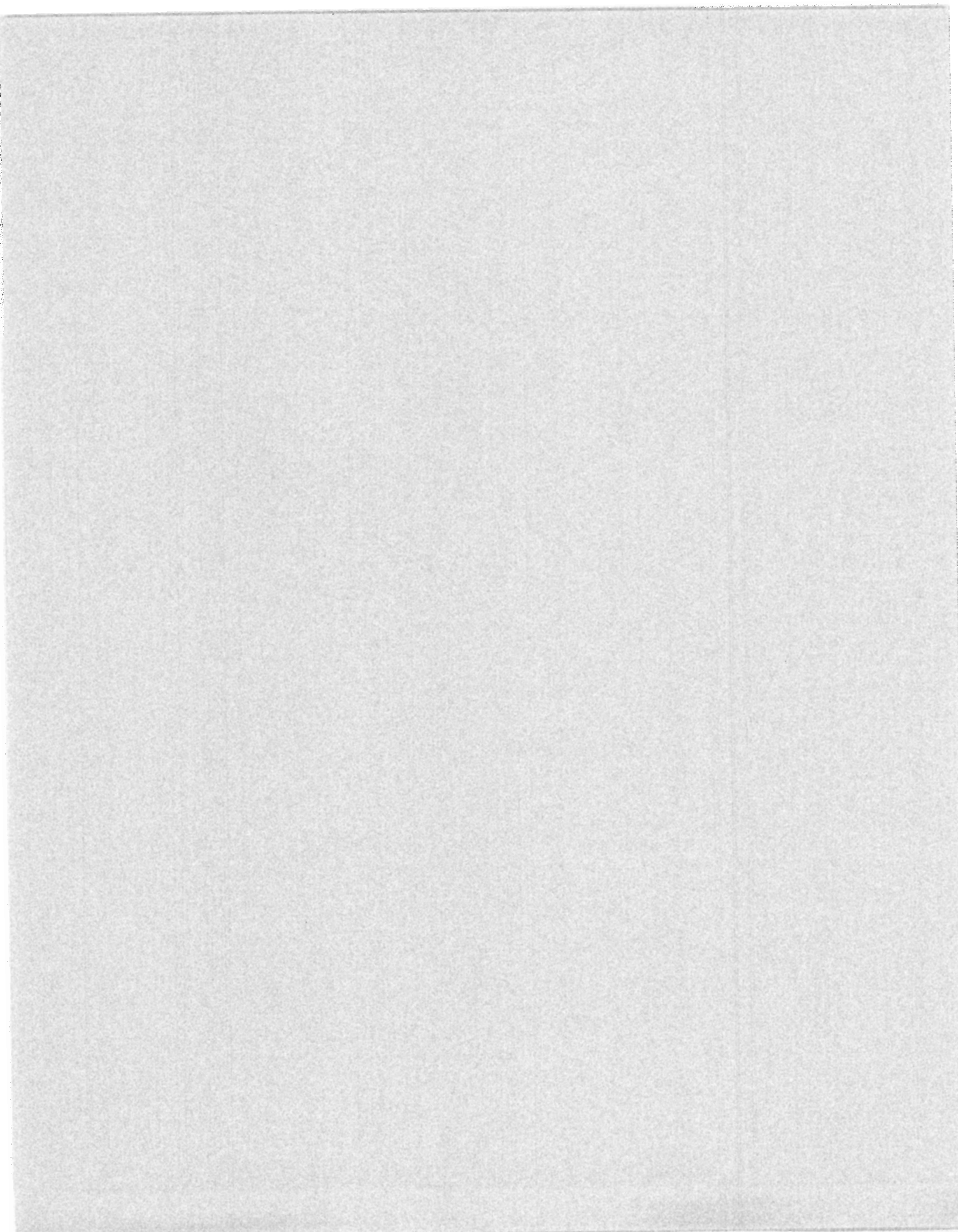
As an additional matter of concern, the Revised Tentative Order fails to address whether a report of waste discharge must be filed pursuant to Water Code sections 13260(a)(1) and 13264 prior to the use of any advanced treatment at construction sites. The Revised Tentative Order should be amended to clarify whether such the waste discharge requirements apply to discharges from advanced treatment at construction sites. If the waste discharge requirements are applicable, the Revised Tentative Order should provide a procedure for obtaining the necessary permits. The Regional Board should not move forward with requiring advanced treatment at certain construction sites without providing an adequate regulatory framework to deal with the consequences of its regulation.

Further, as we have previously commented, it appears that the only flocculent demonstrated to be safe, effective and feasible for advanced treatment of sediment at construction sites is a patented product called Chitosan. Regional Board staff has not provided any other examples of advanced treatment BMPs that are proved to be safe, effective and feasible. Thus, this requirement appears to be a facial violation of Water Code section 13360 which prohibits the issuance of waste discharge requirements which specify the design, location, type of construction or particular manner in which compliance may be had with those requirements. For this additional reason, the Copermittees should be given flexibility to determine whether advanced treatment is appropriate even in circumstances where the construction site may pose an "exceptional threat to water quality." Where advanced treatment is not feasible or safe, the Copermittees should be allowed to impose alternate BMPs.

Again, thank you for the opportunity to provide you with these comments. We look forward to working with you and your staff to make the necessary revisions to the Revised Tentative Order.

Very truly yours,

Nick Cammarota
General Counsel, California Building
Industry Association



December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

F. City of Carlsbad

F

City of Carlsbad

ENVIRONMENTAL PROGRAMS

October 30, 2006

Mr. John Robertus
Executive Officer, San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Via email sent to JRobertus@waterboards.ca.gov and PHammer@waterboards.ca.gov

Re: Comments on Revised Tentative Order No. R9-2006-011

Dear Mr. John Robertus:

On behalf of the City of Carlsbad (City), please accept the information contained in this letter as formal comment to Revised Tentative Order No. R9-2006-011.

The City of Carlsbad appreciates the comment review already conducted by Regional Board staff, and acknowledges the changes to the Revised Tentative Order. The City would like to take this opportunity to thank the Regional Board staff for writing a more clear and effective Revised Tentative Order.

The City supports comments submitted by the Copermittees and their legal counsels in their letter dated October 30, 2006, and supports comments submitted by the City County Managers Association in their letter dated October 26, 2006.

Thank you for the opportunity to comment on this draft document. We appreciate the amount of work that your agency is doing to help protect water quality in our region. If you have any questions or need further clarification, please do not hesitate to contact me at 760-602-2730.

Regards,

GLENN T. PRUIM, P.E.
Public Works Director

2006 NOV -2 P 2:5

CC: Mr. Ray Patchett, City Manager, City of Carlsbad
Mr. Ronald Ball, City Attorney, City of Carlsbad
Ms. Linda Kermott, Public Works Manager, City of Carlsbad
Ms. Elaine Lukey, Storm Water Program Manager, City of Carlsbad

G. City of Chula Vista

DEPARTMENT OF PUBLIC WORKS OPERATIONS

2006 OCT 31 A 11:09

October 30, 2006
File # 0780-85-KY181

Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
Attention: Mr. John Robertus, Executive Officer

SUBJECT: COMMENTS ON THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) TENTATIVE ORDER NO. R9-2006-0011, REVISED AUGUST 30, 2006
RWQCB REFERENCE: WPS:10-5000.02:HAMMP

The City of Chula Vista appreciates this opportunity to provide comments on the Revised Tentative Order No. R9-2006-0011. The majority of our technical comments included in our comment letter dated June 7, 2006, have been addressed in the Revised Tentative Order and the accompanying documents (Responses to Comments and Fact Sheet/Technical Report). However, the City of Chula Vista has identified specific areas within the Revised Tentative Order as presented in the attachment to this letter titled "City of Chula Vista's Comments" for which we request your consideration.

On behalf of the San Diego Copermittees, the County of San Diego, as the Principal Copermittee, will also submit comments to the Regional Board that are regional in nature and have been discussed at the regional level. The City of Chula Vista generally endorses those regional comments.

We trust that the Regional Board will give full consideration to the regional and individual comments and recommendations in order to facilitate continued compliance by the Copermittees and to improve effectiveness of the Municipal Permit program.

Should you have any questions or if you need further information, please call Kirk Ammerman, Principal Civil Engineer, at (619) 397-6121. Thank you.

Sincerely,

DAVE BYERS
DIRECTOR OF PUBLIC WORKS OPERATIONS

1800 Maxwell Rd.
Chula Vista, CA 91911
Phone (619) 397-6000

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G

Attachment

C: Jim Thomson, Interim City Manager
Dana Smith, Assistant City Manager
Sharon Marshall, Senior Assistant City Attorney
Rick Hopkins, Assistant Director of Public Works Operations
Kirk Ammerman, Principal Civil Engineer

K:\Public Works Operations\NPDES\New Permit\DRAFT_Revised Tentative Order Comments.doc

G

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
TENTATIVE ORDER NO. R9-2006-0011
SAN DIEGO COUNTY MUNICIPAL STORM WATER PERMIT RE-ISSUANCE

CITY OF CHULA VISTA'S COMMENTS
October 30, 2006

The City of Chula Vista provides the following comments to the San Diego Regional Water Quality Control Board as part of the public review and comment process for the re-issuance of the San Diego County NPDES Municipal Storm Water Permit:

1. **Section D.1.b – General Plan**

   Since a General Plan is not, nor intended to be, an enforceable document, it is not a mechanism to *"require implementation of consistent water quality protection measures for Development Projects."* Therefore, prescriptive language to revise this plan to effectively *"require implementation of..."* is not warranted, and should not set the criterion for Copermittees' compliance with the Municipal Permit. Additionally, City of Chula Vista's General Plan Update adopted in December 2005, includes several watershed protection and water quality policies, which provide adequate basis for subsequent enforceable development planning documents.

2. **Section D.1.d(4) – Site Design BMP Requirements**

   a. While *"conservation of natural areas, including existing trees, other vegetation, and soils"* has been included in List 2 as a Site Design BMP requirement for individual development projects, it should be considered that the conservation of natural areas might be addressed at much larger scales through planned Open Space and MSCP planning areas. Similar in concept to area-wide or shared treatment control BMPs, provision for site design credit through such jurisdictional programs, requirements, and planning measures should be included with this permit language.

   b. List 2 also includes *"minimize soil compaction"* as a site design BMP. This language may be deleted from the permit, as soil compaction under paved, building areas, and slopes cannot be compromised, and soil compaction in unimproved or landscaped areas typically does not occur. Therefore, the minimization of soil compaction as a Site Design BMP appears to be redundant.

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3. Section D.1.g(2) - Hydromodification & Planning Measures

This Section of the Tentative Order precludes the use of, and vaguely defines *non-naturally occurring structures* and provides examples such as riprap and gabions. It should be considered that ripraps and gabions generally blend in with the environment and do not prevent the growth of vegetation. Such structures provide necessary and valuable mitigation measures to lower effective slope and velocities, maintain proper bed loading, and minimize erosion. Further, such structures may be utilized in concert with naturalized measures to achieve a more durable and functional system supporting both water quality management and habitat creation. Notably, the City of Chula Vista has implemented similar measures in Telegraph Canyon and Poggi Canyon Channel segments with remarkable success in maintaining stream stability and function as well as supporting habitat. While the intent of the permit language is clear, it would be more prudent to provide some flexibility to Copermittees in considering such structures where alternative measures are not feasible.

December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

H. City of San Diego

H

THE CITY OF SAN DIEGO

October 30, 2006

Hand Delivery

2006 OCT 30 P 5:33
SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

John H. Robertus
Executive Officer
Attn: Phil Hammer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123

Subject: Comments on the Draft Municipal Storm Water Permit (Tentative Order No. R9-2006-0011)

Dear Mr. Robertus:

The City of San Diego is grateful for the revisions made to the permit thus far and is pleased to provide the Regional Water Quality Control Board with the following two (2) comments on the subject permit and monitoring program.

<u>Coastal Storm Drain Monitoring.</u> This section requires copermittees to re-sample and conduct investigations in the storm drain system where samples exceed the AB 411 or Basin Plan REC1 water quality standards during routine monitoring. The City does not believe it is appropriate to apply receiving water standards within storm drains or apply REC1 standards to storm water in storm drains prior to storm water reaching receiving waters. Investigations should not be required if only the storm drain exhibits an exceedence of AB 411 or Basin Plan standards.

<u>MS4 Outfall Monitoring.</u> This section requires copermittees to sample MS4 outfalls during dry and wet weather in order to determine contribution of pollutant loading from urban runoff to receiving waters. The requirement states that its intent is to characterize pollutant discharges from MS4 in each watershed and, although the language "outfalls to be monitored shall be representative of the outfalls in each watershed", was stricken, the City remains concerned that the number of outfalls that will need to be monitored exceeds the numbers of samples that can be logistically collected during the region's limited wet weather days (the City has approximately 6,000 storm drain outfalls). The City suggests that the Regional Board establish a cap on the

Storm Water Pollution Prevention Program
1970 B Street, MS 27A • San Diego, CA 92102
Hotline (619) 235-1000 Fax (619) 525-8641

number of storm drain outfalls to be monitored during wet weather based on the level of characterization desired.

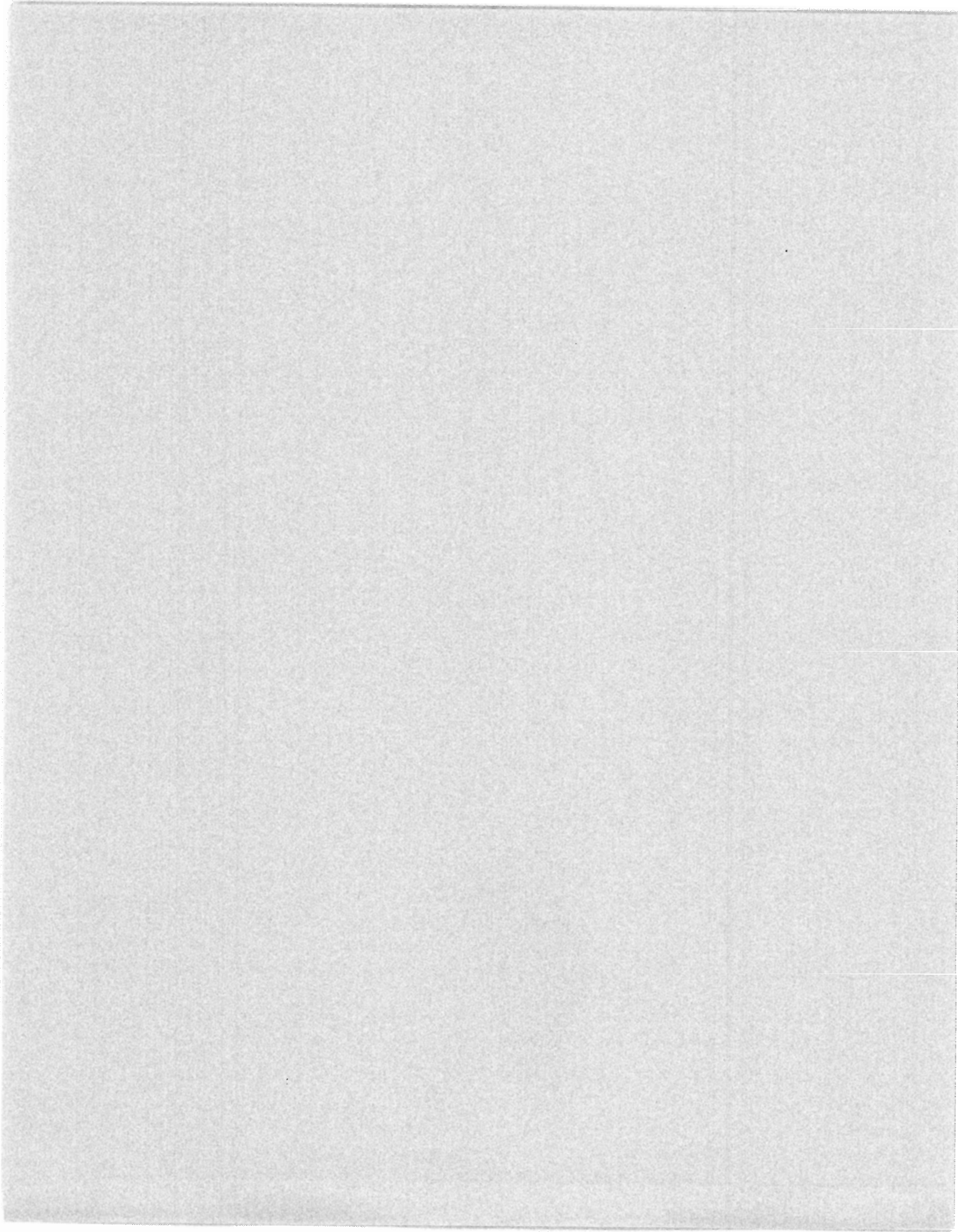
If you have any questions or require more information, please contact Storm Water Specialist Ruth Kolb at (619) 525-8636.

Sincerely,

Chris Zirkle
Deputy Director

CZ\rk

cc: Scott Tulloch, Director, Metropolitan Wastewater Department
Bob Ferrier, Assistant Director, Metropolitan Wastewater Department
Andrew Kleis, Storm Water Specialist
Ruth Kolb, Storm Water Specialist
File



December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

I. Industrial Environmental Association

I

October 30, 2006

Mr. John Minan, Chairman
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: Draft Tentative Order No. R9-2006-0011
Municipal Stormwater Permit

Dear Chairman Minan:

Thank you for the opportunity to provide comment on the San Diego Regional Water Quality Control revised tentative order for the municipal stormwater permit.

Specially, our comments are directed toward the Industrial and Commercial section of the proposed order, pages 35-40.

Page 35, (b) Industrial and Commercial: We support the underlined changes.

Page 36 (1) Source Identification and Page 37(c): We support the addition of the word "segment."

Page 37 (2) BMP Implementation: We support the deletion of the word "effective."

Page 38(b): We would recommend changes:

ii: "Materials 'exposed' at the facility"

iii: " 'Exposed' wastes generated."

iv: "Pollutant discharge potential and spill 'history' "

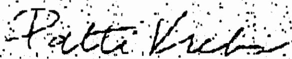
Xv: Add new bullet point to read "Base ranking on past inspections."

Page 39: Third party inspections: Third party inspections need more definition to address whether the inspector is working on behalf of the Copermittee or whether an industrial facility can contract for a third party inspection. We support minimum standards for inspectors, an approved curriculum and certification. In addition, audits should verify quality of inspections and not solely rely on the number of inspections performed.

Page 39 (f): We would suggest that the language read "To the extent that the Regional Board, the State Water Quality Control Board or the U.S. Environmental Agency has conducted an inspection of an industrial site during a particular year, the requirement for the responsible Copermittee to inspect this facility during the same year will be satisfied."

We look forward to working with the Regional Board and the Copermittees in the implementation of the revised order.

Sincerely,



Patti Krebs
Executive Director

December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

J. Foley and Lardner (dated October 3, 2006)
(CCWHE, BIA)

J

FOLEY

FOLEY & LARDNER LLP

ATTORNEYS AT LAW

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SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

VIA E-MAIL
VIA HAND DELIVERY

John Minan
Chairman
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: **Public Comments Regarding Procedural Infirmities of Revised Tentative Order No. R9-2006-0011, NPDES No. CAS0108758 ("Revised Tentative Order")**

Dear Chairman Minan:

Foley & Lardner LLP submits comments on behalf of the Coalition for Clean Water and a Healthy Economy ("Coalition") and the San Diego Building Industry Association ("BIA") addressing the mandatory requirement for a public hearing on the Revised Tentative Order as well as the adequacy of responses dated August 30, 2006 by the San Diego Regional Water Quality Control Board ("Regional Board") to comments. The members of the Coalition include the San Diego Regional Chamber of Commerce, the Carlsbad Chamber of Commerce, the San Diego Economic Development Corporation, and the San Diego North Economic Development Council. The BIA is a non-profit trade association that represents legislative and business interests of 1,450 member companies, and their 165,000 employees, who are active in the San Diego regional building industry.

As described in further detail below, we write today to express our concerns over the lack of procedural due process that has been accorded the stakeholders and to demand that an additional public hearing be afforded to the public prior to consideration of the adoption of the Revised Tentative Order. We note that the California legislature and the Governor have recently expressed similar concerns.[1] The opportunity for such a hearing is mandated by both federal and state law. Further, public policy demands that when the Regional Board proposes to take an action that will effect every business, homeowner and citizen in the County of San Diego ("County"), the citizens of the County must have an opportunity to be heard. While the Regional Board provided some opportunity for public comment on the previous draft tentative order, the

[1] On September 22, 2006 the Governor approved SB 1733, by which the legislature found and declared that "the California regional water quality control boards should afford all parties to an adjudicative proceeding, . . . fair and adequate adjudication procedures."

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Revised Tentative Order contains approximately over 250 significant changes supported by more than 250 pages of responses to comments. The Regional Board staff admits are many of those responses are incomplete. Both the law and public policy demand that the public have an opportunity to address these changes at a public hearing before the Regional Board.

1. Federal and State Laws Require the Opportunity for a Public Hearing Prior to Adoption of the Revised Tentative Order.

The Regional Board's Notice dated August 30, 2006 states that the Revised Tentative Order is "tentatively scheduled to be considered by the Regional Board for adoption during the December 13, 2006 Regional Board Meeting" without any mention of first holding a public hearing. The Revised Tentative Order contains over 250 significant changes, and there are over 250 pages of responses to comments. This "revised" draft permit is essentially a brand new draft NPDES permit. As such, it is subject to certain procedural requirements including the opportunity for a public hearing prior to adoption. If the Regional Board moves to adopt the Revised Tentative Order without first providing the opportunity for a public hearing, then it is acting contrary to both federal and state laws.

a. The federal regulations require a public hearing prior to adoption of a "substantially modified" draft permit.

The Regional Board administers the federal NPDES system locally under the state's agreement with the Environmental Protection Agency ("EPA"). As such, under the Clean Water Act ("CWA") implementing regulations, the Regional Board is considered a local NPDES permitting authority that is subject to the same NPDES program requirements as the EPA. See 40 C.F.R. § 123.25. Under these regulations, the Regional Board must prepare a new draft NPDES permit when it determines that conditions exist for the revocation and reissue of the preexisting NPDES permit. Id. § 124.5(c)(1).

Such conditions arise when the Regional Board "receive[s] new information that cumulative effects [of water pollutants or storm water runoff] on the environment are unacceptable," which triggers a NPDES permit revocation and reissue proceeding. Id. § 122.62(a)(2). This revocation and reissue proceeding moves forward upon the "agreement" of permittees to the proceedings. This "agreement" is evidenced by the submission of a new application by the Copermittees.

The Copermittees submitted a Report of Waste Discharge ("RWD"), which is the functional equivalent of a new NPDES permit application, to the Regional Board. Thus, the act of submitting the RWD provides the necessary "agreement" for the revocation and reissue proceeding, which then "reopens the entire permit[,] subject to revision, and [a modified permit] is reissued for a new term." Id. § 122.62. The preexisting NPDES permit remains in force because the Copermittees must "comply with all conditions of the existing permit until a new final permit is issued." Id. § 124.5(c)(2).

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When required to revoke and reissue the NPDES permit, the Regional Board must issue a draft permit in accordance with the procedures set forth in Title 40, Part 124 of the Code of Federal Regulations. See 40 C.F.R. § 122.62. These procedures require that a draft permit be accompanied by a "fact sheet, . . . based on the administrative record, publicly noticed[,] [] made available for public comment, [and provide] an *opportunity for a public hearing*." Id. § 124.6(e) (emphasis added). Thus, a draft permit pending for adoption before the Regional Board must be subject to public comment. Additionally, the Regional Board must provide an opportunity for a public hearing.

Since the existing NPDES permit remains in force, any revised draft permit that is a "substantial modification" of the existing permit is considered a new "draft permit," which again triggers the public participation requirements mandated by the CWA implementing regulations. The Revised Tentative Order contains over 250 significant modifications of the original draft tentative order. It constitutes a "substantial modification" of both the original tentative order and the existing permit. Thus, the Regional Board is required by federal regulations to afford an opportunity for a public hearing before voting on adoption of the Revised Tentative Order.

b. The CWA and related case law mandate that notice, comment, and the opportunity for a public hearing must precede approval of an NPDES permit.

The CWA requires that a permitting authority provide for public participation before issuing a decision on whether to adopt an NPDES permit. 33 U.S.C. § 1342(a)(1), (b)(3) (2005). The United States Supreme Court interpreted this statutory directive to require that the NPDES Administrator provide an *opportunity* for a public hearing, if the NPDES Administrator finds that "sufficient public interest" in the permit decision exists. Costle v. Pac. Legal Found., 445 U.S. 198, 216 (1980).

If it appears that "significant public interest" exists in a permitting decision (as it does here), then the NPDES Administrator is bound to hold a public hearing on the matter. In that instance, interested parties may "open substantive consideration of [the conditions of a new permit] through hearing requests" when those hearing requests "purport to affect those conditions." Id. Given the large number of participants, the large volume of comments, and the high level of attendance at the prior hearing on the original tentative order, and the significant public interest in conditions that would be imposed under the Revised Tentative Order (as demonstrated by this communication), the standard for "significant public interest" has been met. There is no justification for refusing to hold a public hearing on the Revised Tentative Order.

Additionally, the Ninth Circuit Court of Appeals has held that an NPDES permitting authority "shall provide an opportunity for a hearing before [any] permit application is approved." Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency, 344 F.3d 832, 857 (9th Cir. 2003) (citing 33 U.S.C. § 1342(a)(1) (2005)). While the Ninth Circuit applied this principle

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specifically to Notices of Intent under a Phase II general permitting scheme, these public participation requirements mandated by the CWA apply to all NPDES permit applications.

Finally, when, as here, a permitting authority is presented with arguments that proposed changes to a NPDES permit affect the rights of interested parties, the CWA requires that those parties be afforded an opportunity for a public hearing in which they may present their arguments. Trustees for Alaska v. U.S. Envtl. Prot. Agency, 749 F.2d 549, 557 (9th Cir. 1984). The Coalition and the BIA, both "interested parties," assert that their rights will be affected by the conditions that would be imposed by the Revised Tentative Order if adopted. Under the CWA's public participation requirements, the Regional Board must afford them a public hearing to present their comments regarding the Revised Tentative Order.

c. The California Water Code requires the Regional Board to hold a public hearing prior to adoption of a "Water Quality Control Plan."

The Regional Board is also subject to the governing statutes contained in the California Water Code. The Water Code requires regional water quality control boards to "formulate and adopt water quality control plans for all areas within the region." CAL. WATER CODE § 13240. The Revised Tentative Order fulfills this mandate by developing directives for administration of management programs by the Copermittees. For example, in Section H of the Revised Tentative Order, the Regional Board proposes to set Total Maximum Daily Loads ("TMDLs") for "Water Quality Based Effluent Limits" by Copermittes in the areas of Chollas Creek and the Shelter Island Yacht Basin. This directive specifies limits in order to establish a standard of "water quality" for storm water in those areas. This represents a standard for "water quality control." As such, the Revised Tentative Order qualifies as a "water quality control plan."

The Water Code mandates that "[t]he regional boards shall not adopt any water quality control plan unless a public hearing is first held." Id. § 13244. The Revised Tentative Order constitutes a sufficiently distinct version of a "water quality control plan" such that a new public hearing is required because, for example, in Section H alone there are multiple substantive changes that affect the Copermittees differently than the terms proposed under the original tentative order.

The Regional Board has stated its tentative plans to vote on adoption of the Revised Tentative Order without mention of a public hearing. This contradicts the express provisions of Water Code § 13244. Despite the fact that a public hearing was held on the original tentative order, the issuance of the Revised Tentative Order precipitates the need for an entirely new public hearing. See id. A new public hearing is required pursuant to Water Code § 13244 because the Regional Board is considering *adoption* of a "water quality control plan" as part of the Revised Tentative Order.

Additionally, the Water Code empowers the Regional Board, "as authorized or required by the Federal [Clean Water Act]," to "issue waste discharge requirements ... which apply and

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ensure compliance with all applicable provisions of the [Clean Water Act]." Id. § 13377. The Regional Board may only adopt these requirements "after *notice and any necessary hearing*." CAL. WATER CODE § 13378 (emphasis added). A move to adopt the Revised Tentative Order, which contains approximately over 250 significant modifications of the original draft tentative order, should clearly precipitate the need for the public to comment on these changes in an open hearing before the Regional Board. Thus, in moving to vote on adoption of the Revised Tentative Order without first holding such a hearing, the Regional Board is acting in violation of Water Code § 13378.

2. The Responses to Comments are Insufficient, Inconsistent, and Incomplete.

a. The responses fail to fully address legal issues raised by the comments.

The Regional Board staff's responses to comments fail to fully address many legal issues raised by those comments. In particular, the Coalition commented on the failure of the original tentative order to provide for meaningful review and public participation with respect to the urban runoff management plans that must be developed, revised and updated by the Copermittees. See Response to Comments, pp. 27-33. These plans are substantive components of the regulatory regime. While regulated parties may design aspects of their own storm water programs, those programs "must, in every instance, be subject to meaningful review by an appropriate entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable." Envtl. Def. Ctr., Inc., 344 F.3d at 856. Additionally, like the Phase II NOIs considered by the Ninth Circuit, these plans are subject to public participation requirements including public availability and the opportunity for a hearing. See id. at pp. 857-858.

The Regional Board staff's attempt to distinguish the Ninth Circuit's holding by stating that "the judicial ruling has not been extended to permits such as the Tentative Order" is unconvincing. Response to Comments, p. 29. Whether the permit is a Phase I NPDES permit or a Phase II NPDES permit, the minimum procedural requirements under the CWA must be satisfied. The Revised Tentative Order, if adopted, will be issued to multiple Copermittees who will be required to develop, revise and update their own storm water programs and describe those programs in detailed plans. The programs (and the plans describing them) are substantive components of the regulatory regime. Thus, the Ninth Circuit's analysis is squarely on point. The Regional Board staff's attempt to further distinguish the Ninth Circuit's opinion based on the role of the plans is inconsistent with the Revised Tentative Order itself as well as with other responses to comments.

b. The responses are inconsistent with regard to the role of the urban runoff management plans.

The Regional Board staff's statement that, "the plans only serve as descriptions of the programs, to be used by the Copermittees to guide their implementation," is inconsistent with the

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Revised Tentative Order itself. Responses to Comments, pp. 29, 30, 31. The Copermittees are required to revise and update their Jurisdictional Urban Runoff Management Plans (JURMPs) and Watershed Urban Runoff Management Plans (WURMPs), as well as develop a Regional Urban Runoff Plan (RURMP). See Revised Tentative Order § (J)(1). These plans are intended to provide a detailed, written account of the overall programs. See id. They must be submitted to the Regional Board for review. See Revised Tentative Order §§ (J)(1)(a)(2); (J)(1)(b)(3); (J)(1)(c)(2). The Copermittees must also submit annual reports on each of the programs. See Revised Tentative Order § (J)(3). Modifications of the programs may be initiated by the Executive Officer, or the Copermittees may submit requests for modification to the Executive Officer. See Revised Tentative Order § (K). Thus, the plans are an important and necessary part of the regulatory regime. They inform the Regional Board regarding the details of each of the programs, and they are essential to the Regional Board's ability to monitor and enforce those programs. The Regional Board staff's characterization calls into question the Regional Board's ability to enforce the contents of these plans.

The Coast Law Group raised similar concerns regarding public participation with respect to the plans. See Responses to Comments, pp. 42-43. The Regional Board staff responded, in part, by stating,

> Additional public participation processes are not necessary for the urban runoff management plans required in the Tentative Order. The Tentative Order itself contains sufficient detailed requirements to ensure that compliance with discharge prohibitions, receiving water limits, and the narrative standard of MEP are achieved, without formal approval of the plans by the Regional Board. This is achieved by requiring the Copermittees to implement programs that meet specific requirements, rather than requiring the Copermittees to develop plans. Therefore, the extensive formal process followed by the Regional Board for adoption of the Tentative Order is sufficient. Responses to Comments, p. 43.

This response initially states the plans are required, and then in the third sentence it appears to suggest that the Copermittees are not required to develop plans. This is in further contrast to the response to the Coalition's comments, in which the Regional Board staff appears to say that Copermittees are required to implement a program which meets specific requirements, and the plans only serve as descriptions of the programs to be used by the Copermittees to guide their implementation. See Responses to Comments, p. 29. Thus the role of the plans is unclear. Additionally, if the plans are not necessary to ensure compliance with discharge prohibitions, receiving water limits, and the narrative standard of MEP are achieved, it is unclear why the Copermittees should be required to spend public funds to develop, revise and update them.

It is rare that both environmental groups (as demonstrated by comments submitted by the Coast Law Group) and business interests (as demonstrated by comments submitted on behalf of

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the Coalition and the BIA) agree on an issue. Here, all stakeholders agree that additional public participation processes are necessary with regard to the plans. This rare agreement emphasizes the need for the Regional Board to fully and consistently respond to this issue.

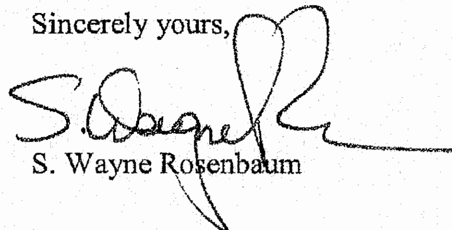
c. The responses to significant legal issues raised by the comments should be fully developed prior to consideration of the Revised Tentative Order by the Regional Board.

The Regional Board staff qualified many of their responses (including the responses identified above) with the statement that, "[a]dditional information in response to this comment may be developed." See Responses to Comments, pp. 29-67. Federal regulations require certain procedural requirements to be adopted by States in order to gain EPA approval to operate NPDES permit programs, including requirements regarding response to comments. See 40 C.F.R. § 124.1(e); 40 C.F.R. § 123.25(a)(31). The Regional Board must respond to all significant comments on the draft permit prior to, or contemporaneously with, issuance of the final permit. See 40 C.F.R. § 124.17(a). To the extent the Regional Board staff may be suggesting that they may further respond to comments after the issuance of the final permit, such an attempt would violate the minimum procedural requirements mandated by the federal regulations.

The Regional Board staff included this statement in their responses to many comments raising significant legal questions regarding the Revised Tentative Order. While the statement itself may not be legally improper, it does raise substantial public policy concerns. The reissuance of the San Diego County Municipal Stormwater Permit is an extremely important matter to the San Diego region, and as demonstrated at the June 21, 2006 public hearing, it has generated keen community interest. Therefore, it is vitally important to the public participation process that the Regional Board staff develop its legal arguments in support of its rejection of many proposed improvements and fully respond to comments prior to consideration of the Revised Tentative Order by the Regional Board.

In summary, both the law and public policy require that the Regional Board postpone any consideration of the adoption of the Revised Tentative Order until all public comments are fully responded to, and the public is given a chance to participate in a formal public hearing before the Regional Board. We appreciate the opportunity to comment on the Revised Tentative Order, and we look forward to working with you and your staff on this matter of great importance to our region.

Sincerely yours,



S. Wayne Rosenbaum

cc: John Robertus

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December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

K. Foley and Lardner LLP (dated October 30, 2006) (CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD)

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October 30, 2006

VIA HAND DELIVERY AND U.S. MAIL

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2006 OCT 30 P 3:0
SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

Re: **Public Comments Regarding Revised Tentative Order No. R9-2006-0011, NPDES No. CAS0108758 ("Revised Tentative Order")**

Dear Chairman Minan:

We appreciate the opportunity to provide the California Regional Water Quality Control Board, San Diego Region ("Regional Board") with comments on the Revised Tentative Order. These comments are submitted on behalf of the following parties:

- The Coalition for Clean Water and a Healthy Economy ("Coalition"). The Coalition includes the following members: the San Diego Regional Chamber of Commerce, the Carlsbad Chamber of Commerce, the San Diego Economic Development Corporation and the San Diego North Economic Development Council.

- The Building Industry Association of San Diego County ("BIA"). The BIA is a non-profit trade association that represents legislative and business interests of 1,450 member companies, and their 165,000 employees, who are active in the San Diego regional building industry.

- The Consulting Engineers and Land Surveyors of California ("CELSOC"). CELSOC is a 50-year-old, nonprofit association of private consulting engineering and land surveying firms. CELSOC members provide services for all phases of planning, designing and constructing projects. Member services include civil, structural, geotechnical, electrical and mechanical engineering and land surveying for all types of public works, residential, commercial and industrial projects.

- The Building Industry Association of Southern California ("BIASC").

- The Construction Industry Coalition on Water Quality ("CICWQ").

- The Building Industry Legal Defense Foundation ("BILD").

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1. The Regional Board Has Failed To Comply With The California Environmental Quality Act ("CEQA").

On October 5, 2006, the Second District Court of Appeal filed its opinion in *County of Los Angeles v. California State Water Resources Control Board* (October 5, 2006, B184034) ____ Cal.App.4th ____ (hereafter referred to as "*County of Los Angeles*"). In *County of Los Angeles*, the plaintiffs challenged the legality of the regional board's issuance of a Phase I municipal storm water permit[1] on grounds including the failure to comply with the CEQA. The Court of Appeal agreed with the plaintiffs in that regard, and it ordered that the regional board be directed to set aside its permit and conduct review under chapters 1 and 2.6 of the CEQA.

The Court of Appeal found, "[t]he Legislature has clearly indicated in Water Code section 13389 that only chapter 3 of the [CEQA] does not apply to [NPDES] permits." (*County of Los Angeles, supra*, at [p. 24].) Insofar as certain California Code of Regulations sections are inconsistent with Water Code section 13389, they are unenforceable. (See *id.* at [p. 24].) Further, the Court held that none of the applicable forms of federal preemption apply to Water Code section 13389. It stated, "[t]he manner in which [NPDES] permits are issued by state agencies such as the regional board is not a field occupied exclusively by the federal government--it is a partnership between federal and state governments." (*Id.* (citations omitted).) The Court also concluded that there is nothing in the National Environmental Policy Act ("NEPA") that requires the permit be excluded from CEQA review. Accordingly, the Court ordered the trial court to direct the regional board to prepare a certification pursuant to Public Resources Code section 21080.5. (*Id.* at [p. 23].)

The *County of Los Angeles* opinion determining the regional board's CEQA obligations with regard to the issuance of a Phase I municipal storm water permit is squarely on point with the circumstances presented here. Thus, the Regional Board must conduct review under chapters 1 and 2.6 of the CEQA, including a certification pursuant to Public Resources Code section 21080.5, prior to adopting the Revised Tentative Order.

Even though an EIR is not required, an agency preparing an environmental certification under CEQA, Public Resources Code section 21080.5, must comply with all of CEQA's other requirements. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105.) One court explained these requirements by stating,

> Documents prepared by certified programs [under § 21080.5] are considered the functional equivalent of documents CEQA would otherwise require. An agency seeking certification must adopt regulations requiring that final action on the proposed activity include

[1] At issue was Order No. 01-182 adopting the National Pollutant Discharge Elimination System ("NPDES") Permit No. CAS004001, entitled, "Municipal Storm Water And Urban Runoff Discharges Within The County Of Los Angeles, And The Incorporated Cities Therein, Except The City of Long Beach."

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> written responses to significant environmental points raised during the decision-making process. The agency must also implement guidelines for evaluating the proposed activity consistently with the environmental protection purposes of the regulatory program. The document generated pursuant to the agency's regulatory program must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects, and be made available for review by other public agencies and the public. (*City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1422.)

The Court of Appeal in *City of Arcadia* went on to explain that although the CEQA Guidelines do not apply directly to a certified regulatory program that,

> when conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA. In a certified program, an environmental document used as a substitute for an environmental impact report must include alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment... (*Id.*)

Thus, the Regional Board is required to conduct an environmental assessment (see comments below for examples of potentially significant environmental impacts); consider cumulative impacts; provide public notice and allow public review; respond to comments on the draft environmental document; and provide for monitoring and mitigation measures in its functional equivalent/substitute environmental document. (*See Joy Road Area Forest and Watershed Assn. v. Cal. Department of Forestry and Fire Protection* (2006) __ Cal.App.4th __; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105; *see also, e.g.,* State Water Resources Control Board CEQA Scoping Meeting Informational Document: Development of Sediment Quality Objectives for Enclosed Bays and Estuaries (Aug 17, 2006), pp. 1-2 (noting changes in planning document title from Functional Equivalent Document ("FED") to Substitute Environmental Document ("SED").) And it must prepare a certification pursuant to Public Resources Code section 21080.5 prior to adoption of the Revised Tentative Order. If the Regional Board fails to do so, a court may issue a writ of administrative mandate directing it to set aside the permit and conduct the required environmental review.

There are a number of requirements in the Revised Tentative Order that could result in potentially significant environmental impacts which must be addressed by a functionally equivalent assessment under CEQA. (Pub. Res. Code § 21080.5.) For example, the environmental impacts associated with depriving alluvial drainage systems of southern California of sediment needed to support beneficial uses and channel stability as a result of mandated Advanced Treatment Control

need to be adequately addressed pursuant to a functionally equivalent CEQA analysis. Significant environmental effects associated with the prohibition on hardened improvements on flood control projects designed to protect public health and safety and channel stability must also be evaluated. As must the potentially significant land use impacts associated with adopted general plans specifying land use designations amenable to infill and redevelopment that occur as a result of requiring all development projects to implement site design best management practices ("BMPs").

The Regional Board has failed to comply with the requirements of Public Resources Code section 21080.5 and relevant case law. The Regional Board has failed to prepare an adequate certification and has failed to identify and adequately analyze the potential significant environmental impacts associated with adoption and implementation of the Revised Tentative Order. In order to comply with the CEQA, the Regional Board must prepare an adequate certification pursuant to Public Resources Code section 21080.5 prior to adoption of the Revised Tentative Order.

2. The Responses To Comments Fail To Adequately Address Agency Review And Public Participation Requirements Regarding The Urban Runoff Management Plans And The Interim Hydromodification Criteria.

a. The Urban Runoff Management Plans must be subject to agency review and public participation.

The Revised Tentative Order, like the previous tentative order, requires the Copermittees to revise and update their Jurisdictional Urban Runoff Management Plans ("JURMPs") and Watershed Urban Runoff Management Plans ("WURMPs"), as well as develop a Regional Urban Runoff Management Plan ("RURMP"). (See Revised Tentative Order section J.1.) Under the Ninth Circuit Court of Appeals' opinion in *Environmental Defense Center, Inc. v. United States Environmental Protection Agency* (9th Cir. 2003) 344 F.3d 832, 856 (hereafter referred to as "*EDC*"), these plans must be subject to meaningful review by the appropriate agency to ensure that each program reduces the discharge of pollutants to the maximum extent practicable ("MEP"). These plans must also be subject to public participation requirements including public availability and the opportunity for a hearing. (See *id.* at pp. 857-858.)

As we have previously commented, the Copermittees have been given significant flexibility in developing, revising and updating these plans. (See Coalition's Comment Letter dated June 20, 2006, attached hereto as Exhibit A.) This is analogous to the regulatory scheme under the Phase II Rule which was considered by the Ninth Circuit in *EDC*. Under the Phase II Rule, when a discharger opted to file a notice of intent ("NOI") to comply with a general permit, the NOI had to contain information on an individualized pollution control program that addressed six general criteria. (See *EDC, supra*, at p. 854.) There, as here, the regulated parties were required to design aspects of their own storm water management programs. (See *id.* at p. 856.) For this reason, the agency review and public participation requirements applied to the Phase II NOIs by the Ninth Circuit must also be applied to the urban runoff management plans in the Revised Tentative Order.

The Revised Tentative Order fails to provide the procedure to fulfill these requirements. This legal analysis is supported by all stakeholders. (See Responses to Comments, pp. 27-32 & 33-42.)

Regional Board staff attempted to distinguish *EDC* in the Responses to Comments by stating, "[t]he Tentative Order is not a general Phase II NPDES permit, it is an individual Phase I NPDES permit." (Responses to Comments, p. 29.) Regional Board staff further stated that the judicial ruling has not been extended to permits such as the tentative order. (See *id.*) This is a distinction without a difference. The agency review and public participation requirements mandated by the Clean Water Act apply to the Revised Tentative Order regardless of whether it is Phase I or Phase II. No authority has been cited for treating Phase I and Phase II permits differently in this regard.[2]

Therefore, not only are the Regional Board's responses inconsistent as explained previously at p. 5 of our letter dated October 3, 2006 and attached hereto as Exhibit B, but they are inadequate and incomplete. In particular, the statement in the responses to our comments that, "[a]dditional information in response to this comment may be developed" suggests that Regional Board staff has not fully analyzed this important legal issue. (See Responses to Comments, pp. 29-33.) As a matter of prudent public policy, Regional Board staff's analysis on this issue should be fully developed prior to consideration of adoption of the Revised Tentative Order.

We have previously recommended that the procedural methodology included in the Regional Board's Order No. 2001-01 with regard to the model Standard Urban Stormwater Management Plan ("SUSMP") may be used to address these agency review and public participation requirements. Regional Board staff responded to our recommendation by stating that while the SUSMP requirement necessitated the development of totally new programs, the urban runoff management programs required by the tentative order are not totally new. (See Responses to Comments, p. 33.) Regional Board staff further stated that any new requirements in the tentative order are essentially extensions or enhancements of already existing requirements. (See *id.*) Even assuming, *arguendo*, that this true with regard to JURMPs and WURMPs, the mandatory Clean Water Act requirements for agency review and public participation apply because the revised and updated JURMPs and WURMPs are substantive components of the proposed permit. A provision in a proposed permit is not "shielded" from agency review and public participation requirements simply because it is included in the existing permit, and Regional Board staff cite no authority to the contrary. Further, there is no RURMP requirement under the existing permit. We respectfully request that the Regional Board staff reconsider their analysis of this recommendation.

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[2] Assuming, *arguendo*, that the Ninth Circuit's holding applies only to Phase II permits, Regional Board staff has conceded the Revised Tentative Order is a Phase II permit by attempting to support the Revised Tentative Order's requirements by citing Code of Federal Regulations Phase II regulations and Environmental Protection Agency Phase II guidance.

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b. Interim Hydromodification Criteria must be subject to agency review and public participation.

The Revised Tentative Order requires the Copermittees to collectively identify an interim range of runoff flow rates for which Priority Development Project ("PDP") post-project runoff flow rates and durations shall not exceed pre-project flow rates and durations ("Interim Hydromodification Criteria"), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. (See Revised Tentative Order section D.1.g.(6).) Starting 365 days after adoption of the Revised Tentative Order and until the final HMP standard and criteria are implemented, each Copermittee must require PDPs disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. (See *id.*)

The Revised Tentative Order does not require that the Interim Hydromodification Criteria be reviewed by the Regional Board, and it does not provide for public availability and a public hearing. The Copermittees are required to design this substantive component of the Revised Tentative Order, and under the Ninth Circuit's holding in *EDC*, the mandatory agency review and public participation requirements under the Clean Water Act must be satisfied. (See *EDC, supra*, 344 F.3d at p. 856.) Thus, assuming it is appropriate to include Interim Hydromodification Criteria (which we do not believe to be the case as explained in section 8.a below), the Revised Tentative Order must be further revised to provide for agency review and public participation regarding the Interim Hydromodification Criteria.

3. The Revised Tentative Order Is Replete With Unfunded State Mandates.

a. The Revised Tentative Order Contains Many New Programs and Higher Levels of Service.

The California Constitution provides that the state government may not mandate a new program or higher level of service on a local government without reimbursing that local government for the costs of that program. (See Cal. Const., art. XIII B, § 6(a).) The California Supreme Court explained that the purpose of article XIII B, section 6 is "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735 (quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.)

In order for a state mandate to constitute a "new program" or "higher level of service" within the meaning of article XIII B, section 6, it must be either a program that carries out the governmental function of providing services to the public, or it must be a law that imposes a requirement that is unique to local government. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46,

56.) The provisions of the Revised Tentative Order satisfy this requirement. The Revised Tentative Order imposes requirements on the municipal separate storm sewer systems ("MS4s") operated by the County of San Diego, the incorporated cities of San Diego County, the San Diego Unified Port District and the San Diego County Regional Airport Authority. The operation of these MS4s carry out the Copermittees' governmental function of providing services to the public, and the Revised Tentative Order imposes requirements unique to local government such as inspecting residential post-construction BMPs and industrial and commercial facilities.

The Revised Tentative Permit contains many examples of new programs and requirements for higher levels of service. For example, as mentioned previously, the Revised Tentative Order imposes new inspection requirements regarding residential post-construction BMPs. It also mandates inspections of new classes of industrial and commercial facilities, and it imposes increased requirements regarding MS4 cleaning. Additionally, it requires the creation of a RURMP, an HMP, and the development and implementation of Watershed Water Quality Activities and Watershed Education Activities, none of which are mandated by the Clean Water Act. These are just a few of the new programs or higher levels of service required by the Revised Tentative Order.

Unless these new programs and higher levels of service are required pursuant to a federal mandate, the Copermittees are entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. (See *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859.) As explained below, these new programs and higher levels of service are not required pursuant to a federal mandate, and thus they constitute unfunded state mandates for which the Copermittees are entitled to reimbursement.

b. <u>The New Programs and Higher Levels of Service Are Not Required Pursuant to a Federal Mandate.</u>

Section 402(p) of the Clean Water Act requires 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).) The Regional Board may impose standards stricter than the federal MEP standard. (See *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880-891; see also *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167.) However, new programs and higher levels of service adopted pursuant to the Regional Board's discretionary authority to impose standards stricter than the MEP are not required pursuant to a federal mandate. Thus, Regional Board staff's citation to federal authority that may allow, but does not require, a certain provision of the Revised Tentative Order does not demonstrate a federal mandate.[3] (See *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613.)

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[3] An example of mandatory language is found at Clean Water Act Section 402(q), 33 U.S.C. section 1342(q). This subsection provides,

The existing MS4 permit issued by this Regional Board exceeds the requirements of federal law. (See Minan, *Municipal Storm Water Permitting in California* (2003) 40 San Diego L.Rev. 245, 251.)[4] The Revised Tentative Order requires new programs and higher levels of service compared to the existing MS4 permit.[5] While these new programs and higher levels of service may be authorized by federal law, they are not *required* by federal law.[6] Thus, there is no federal mandate.

> Each permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy.")

The inclusion of requirements necessary to conform to the CSO control policy in a NPDES permit for a municipal combined storm and sanitary sewer would be done pursuant to a federal mandate.

[4] Minan, *Municipal Storm Water Permitting in California* (2003) 40 San Diego Law Review 245, 251 fn. 30 provides,

> *See* San Diego Regional Water Quality Control Board, Comparison Between the Requirements of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Storm Water Permit, agenda item 5, attach. 4, at 2-3 (Dec. 13, 2000) (on file with author). The comparison states:
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> > Approximately 60% of the requirements in Tentative Order 2001-01 are based solely on the 1990 federal NPDES Storm Water Regulations. The remaining 40% of the requirements in the Tentative Order "exceed the federal regulations." Requirements that "exceed the federal regulations" are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.
>
> *Id.* at 2. The comparison goes on to discuss the provisions that exceed the federal regulations. "The 40% of the requirements in Tentative Order 2001-01 which 'exceed the federal regulations' are based almost exclusively on (1) guidance documents developed by USEPA; and (2) the SWRCB's orders describing statewide precedent setting decisions on MS4 permits." *Id.* at 2-3.

[5] If there are no new programs or higher levels of service, it is unclear why it would be necessary to change the existing MS4 permit.

[6] The Findings in the Revised Tentative Order provide, "[r]equirements in this Order that are more explicit than 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." (Revised Tentative Order Finding E.9.) This statement alone is insufficient to show that the new programs and higher levels of service in the Revised Tentative Order are in fact necessary to fulfill mandatory requirements under the federal regulations or to comply with the MEP standard.

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Regional Board staff has cited federal statutes and sections of the Code of Federal Regulations in an attempt to demonstrate the specific legal authority for many provisions of the Revised Tentative Order. While the cited federal authority may authorize the provisions, in many instances the new programs or higher levels of service are not required by the language of that authority. Regional Board staff was asked to identify the legal authority relied on for various programs, especially in light of the unfunded mandates issue. (See Uncertified Rough Draft of Regional Water Quality Control Board Meeting – June 21, 2006, p. 183, lines 13-23, attached hereto as Exhibit C.) In order to inform the analysis of the unfunded mandates issue, Regional Board staff must do more than cite federal regulations that give the Regional Board the discretion to impose new programs or higher levels of service. Where the new programs and higher levels of service are not specifically required by the federal regulations, Regional Board staff must show that they are necessary to meet the MEP standard. Neither the Revised Tentative Order nor the Responses to Comments provides this explanation.

As an example, the Revised Tentative Order requires the Copermittees to develop and implement a Hydromodification Management Plan ("HMP"). (See Revised Tentative Order D.1.g.) Regional Board staff stated in response to comments from the Copermittees that limits have been placed on urban runoff flows under certain circumstances to protect the beneficial uses of waters as required by federal law. (See Responses to Comments, pp. 60-61.) As an initial matter, Regional Board staff identified no studies or factual data supporting their claim that any specific water bodies' beneficial uses have been impaired as a result of hydromodification impacts. Moreover, no federal authority requires the development and implementation of an HMP to protect beneficial uses. Further, it has not been shown that the development and implementation of an HMP, and particularly a ban on hardened improvements, is the only strategy available to the Regional Board in order to satisfy its obligation to protect the beneficial uses of the waters at issue here. Thus, there is no federal mandate that the Regional Board require the development and implementation of an HMP in the Revised Tentative Order. The HMP requirements apply to, among others, flood control capital improvement and maintenance projects. Therefore, costs associated with the development and implementation of the HMP requirements, including those associated with flood control capital improvement and maintenance projects, are incurred pursuant to an unfunded state mandate.

As a second example, the Revised Tentative Order requires each Copermittee to implement a schedule of maintenance activities for the MS4 and MS4 facilities that must include inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris and at least annual inspection of all other MS4 facilities. (See Revised Tentative Order section D.3.a.(3)(b).) Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed but not less than every other year. (See *id.*) This constitutes a higher level of service compared to the existing permit. (See Order No. 2001-01 section F.3.a.(5).) As specific legal authority for the annual inspection and cleaning of MS4s, Regional Board staff relies on 40 Code of Federal Regulations section 122.26(d)(2)(iv)(A)(1, 3 and 4). (See Responses to Comments, p. 62.) The cited subdivisions of this section do not require the annual inspection and cleaning of MS4s.

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Assuming, *arguendo,* that the Regional Board is authorized by this section to impose annual inspection and cleaning of MS4s, it is not *required* to do so. Further, it has not been shown that annual inspection and cleaning of MS4s is necessary to meet the federal MEP standard. Therefore, this higher level of service in the Revised Tentative Order is not required pursuant to a federal mandate. Instead, it is an unfunded state mandate.

As a third example, the Revised Tentative Order places additional requirements on the Copermittees with regard to the descriptions and analysis of Watershed Activities, and it requires no less than two Watershed Water Quality Activities and two Watershed Education Activities be in an active implementation phase in each permit year. (See Revised Tentative Order section E.2.) The new requirements regarding the WURMPs constitute a higher level of service compared to the existing permit. Regional Board staff cite 40 Code of Federal Regulations section 122.26(a)(3)(ii), 40 Code of Federal Regulations section 122.26(a)(3)(v), 40 Code of Federal Regulations section 122.26(a)(5) and 40 Code of Federal Regulations section 122.26(d)(2)(iv) as specific legal authority for this requirement. (See Responses to Comments, pp. 63-64.) While this regulation may provide such authority, it does not mandate the imposition of a watershed program, nor does it require the new levels of service in the Revised Tentative Order. Thus, the new levels of service required with regard to the WURMPs constitute unfunded state mandates.

These are just three examples of new programs or higher levels of service imposed by the Revised Tentative Order and subject to reimbursement as unfunded state mandates. It is essential to identify in the Revised Tentative Order what is required of Copermittees that is above and beyond that mandated, not permitted, by federal law. Without clear identification of the requirements that exceed federal mandates, it is impossible for the Regional Board to identify the extent to which it is requiring Copermittees to develop new programs or higher levels of service under Porter-Cologne, rather than the Clean Water Act, and thus, risks running afoul of the prohibition on unfunded state mandates.

c. The Copermittees Are Entitled To Challenge The Unfunded State Mandates Through A "Test Claim."

It is apparent that the Copermittees are ill-equipped to assume the enormous cost to provide the higher level of service mandated by the Revised Tentative Order. The Copermittees have identified some of the problems that local governments face will face in their attempts to raise funding for this purpose. (See Copermittee Letter dated June 7, 2006, Attachment "A.") During the public hearing on June 21, 2006, the Copermittees testified not only with regard to the estimated cost of the higher level of service, but also their need to satisfy other mandates, such as providing adequate emergency services and roads, with limited funds.

The Copermittees may challenge the unfunded state mandates in the Revised Tentative Order by filing a "test claim" with the Commission on State Mandates. (See *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.) The Commission will hear and decide whether there are in fact costs mandated by the state. (See Gov. Code § 17551.) Once the Commission has determined that there

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are in fact costs mandated by the state, the Legislature must, for any amount owed to local governments determined in the previous year, either pay the balance or suspend the operation of the mandate for the following fiscal year. (See Cal. Const. art. XIII B, § 6(b)(1).)

Regional Board staff's reliance on federal statutes and regulations for the authority to adopt many of the new programs and higher levels of service in the Revised Tentative Order does not demonstrate that those new programs and higher levels of service are required by a federal mandate. Thus, if challenged, it seems likely that the Commission would determine the costs for these new programs and higher levels of service are mandated by the state and thus the Copermittees would be entitled to reimbursement.

4. The Regional Board Must Consider The Factors Identified In Water Code Section 13241 And Relevant Case Law Since The Revised Tentative Order Exceeds The Federal MEP Standard.

The California Supreme Court has concluded that a regional board must take into account the factors listed in Water Code section 13241 and relevant case law when adopting standards that are more stringent than federally imposed standards. (*City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613.) As discussed above, the Revised Tentative Order contains a number of instances where the Regional Board has gone beyond the standards imposed by the Clean Water Act, and thus additional analysis under Water Code section 13241 is required for adoption of such standards and conditions. In addition to the examples discussed above, the Revised Tentative Order requires the control of runoff from *all* construction and industrial sites, imposes additional inspection and MS4 cleaning requirements, mandates advanced treatment and incorporates numeric effluent limits – none of which is mandated by the Clean Water Act. (See sections 3.a. and 3.b., above, for additional requirements under the Revised Tentative Order that exceed federal mandates.)

Further, the Court of Appeal in the previous litigation over the San Diego County MS4 Permit concluded that MEP was the standard applicable to MS4 Permits and that the Regional Board has discretion to exceed the MEP standard only if expertise and factual information determined that the heightened standard was a necessary and workable enforcement mechanism necessary to achieve the goals of the Clean Water Act. (*Building Industry Assn. of San Diego County, supra,* 124 Cal.App.4th at p. 884.) Nowhere in the Revised Tentative Order or accompanying supporting documentation and information has the Regional Board sufficiently shown that the requirements exceeding the MEP standard, some of which are cited above, are necessary and a workable enforcement mechanism to achieve the water quality goals of the Clean Water Act.

5. Inclusion Of TMDL Waste Load Allocations As Numeric Effluent Limits For The MS4 Permit Is Inappropriate.

The Revised Tentative Order includes Chollas Creek Diazinon Total Maximum Daily Load ("TMDL") Water Quality Based Effluent Limits ("WQBELs") and Shelter Island Yacht Basin WQBELs. (See Revised Tentative Order section H.) It is inappropriate to adopt TMDL waste load

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allocations as numeric WQBELs without conducting an evaluation under Water Code section 13241. Such provisions are properly adopted in water quality control plans under Water Code section 13240, et seq. In establishing water quality objectives in water quality control plans, the regional boards must consider factors including: (a) past, present and probable future beneficial uses of water; (b) environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (c) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (d) economic considerations; (e) the need for developing housing within the region; and (f) the need to develop and use recycled water. (See Water Code § 13241.) This analysis may not be avoided by adopting the Chollas Creek Diazinon TMDL WQBELs and Shelter Island Yacht Basin WQBELs in the Revised Tentative Order, rather than as amendments to the Water Quality Control Plan for the San Diego Basin.

It is inappropriate for the Regional Board to incorporate numeric effluent limits and other standards that go beyond the Clean Water Act mandated MEP standard into the Revised Tentative Order without undertaking the statutorily required analysis. Thus the Regional Board should eliminate all references to numeric effluent limits in the Revised Tentative Order and incorporate a finding that provides that an iterative approach, including implementation of BMPs, will achieve the applicable waste load allocation compliance schedules. An iterative approach to achieving waste load allocations is consistent with the following statement of the court in *Building Industry Assn. of San Diego County, supra,* 124 Cal.App.4th at p. 890 (emphasis added): "the Water Boards have made clear in this litigation that they *envision the ongoing iterative approach as the centerpiece to achieving water quality standards."* Such an approach to storm water regulation is also consistent with prior decisions of the State Board. (*See* Order WQ2001-15.)

The incorporation of numeric WQBELs as discharge limits for MS4 permits in the Revised Tentative Order is also contrary to the S*torm Water Panel Recommendations to the California State Water Resources Control Board on The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* (June 19, 2006) ("Blue Ribbon Panel Recommendations") in which the Storm Water Blue Ribbon Panel ("Blue Ribbon Panel") concluded that the incorporation of numeric limits into storm water permits is not feasible. (See Blue Ribbon Panel Recommendations, p. 8, attached hereto as Exhibit D and discussion below in section 7.)

In addition, the Regional Board, through the incorporation of WQBELs and additional inspection and enforcement requirements, has improperly attempted to begin implementation of a detection based approach to storm water regulation, which not only goes beyond the requirements of

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the Clean Water Act so as to warrant analysis under Water Code section 13241, but is also inconsistent with the Clean Water Act's approach to municipal storm water regulation.[7]

6. The Revised Tentative Order Impermissibly Attempts To Delegate Regional Board Obligations To The Copermittees And To Shift Responsibility For Illegal And Illicit Discharges Of Pollutants To Copermittees.

At the outset, as a matter of law, the regulation of discharges "into" the MS4 versus regulation of discharges "into" receiving waters requires clarification throughout the Revised Tentative Order in order to comply with the Clean Water Act and other State Water Resources Control Board precedent. (Order WQ2001-0015.) In addition, the Revised Tentative Order needs to be revised so that it no longer shifts liability from polluters to Copermittees or delegates enforcement responsibilities properly assumed by the Regional Board to Copermittees.

a. By Attempting to Regulate Discharges Into the MS4, the Revised Tentative Order Holds Copermittees Liable For Third Party Illegal and Illicit Discharges.

Clean Water Act section 402(p)(3)(B), the basis for municipal storm water regulation, authorizes the issuance of permits for discharges "*from* municipal storm sewers." Contrary to this, the Revised Tentative Order attempts to regulate discharges "into" the MS4 system which is inappropriate and inconsistent with the regulatory scheme for municipal storm water discharges established by the Clean Water Act, State Water Resources Control Board orders and related court decisions. In Order WQ2001-0015, the State Water Resources Control Board determined that the Regional Board cannot prohibit discharges "into" the MS4 system and that permit provisions that attempted to regulate all discharges into the MS4 system were too broad in light of the statutory framework of municipal storm water regulation under the Clean Water Act. In that order the State Board stated, "the 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 WQ2001-0015.) Indeed, a footnote in that order provides, "Discharge Prohibition A.1. also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occur in 'waters of the state.' Therefore, it is interpreted to *apply only to discharges to receiving waters*." (*Id. (emphasis added)*.)

In addition, in its discussion of the MS4 regulatory scheme the Court in *Building Industry Assn. of San Diego County*, *supra*, 124 Cal.App.4th at p. 871 stated, "municipalities and other public

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[7] Clean Water Act section 402(p)(3)(B)(III) requires that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable...and other such provisions as the EPA Administrator determines appropriate for the control of such pollutants." Thus, the Clean Water Act mandates a technology based approach to storm water regulation, which is contrary to the position being taken by the Regional Board with respect to incorporation of numeric WQBELs as discharge limits in the Revised Tentative Order.

entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be *discharged from these storm sewer systems.*" Thus, both the courts and the State Water Resources Control Board have made clear that the Clean Water Act regulates discharges "into" receiving waters – not discharges "into" the MS4. Regulating discharges "into" the MS4 system shifts the legal burden of compliance from the discharger to the Copermittees without adequate statutory authorization to do so and in violation of the statutory scheme set up for municipal storm water regulation in the Clean Water Act.

In the Responses to Comments, Regional Board staff state, "[s]ince the Copermittees own and operate their MS4s, they cannot passively receive discharges from third parties." (Responses to Comments, p. 26.) In support of this statement, they cite [64] Fed.Reg. 68766. On this page, the Environmental Protection Agency ("EPA"), in describing its final Phase II Rule, states, "the operators of regulated small MS4s cannot passively receive and discharge pollutants from third parties." However, the issue of whether a small MS4 could be required to regulate third parties discharging into their system was not a settled matter. In fact, the EPA went on to explain that the individual permit option is an alternative for municipal system operators who seek to avoid third party regulation according to all or some of the minimum measures required under the general permit. Thus, the citation to 64 Fed.Reg. 68766 does not clearly demonstrate federal authority to require MS4 operators to regulate discharges by third parties into their systems.

Further, from a water quality perspective, regulating discharges "into" the MS4 system unduly constrains regional water quality solutions that will benefit water quality, particularly in the context of the watershed management plans in the Revised Tentative Order. The internal conflict in the Revised Tentative Order between mandating regional solutions, and making those legally difficult if not impossible to implement by requiring treatment before discharge into the MS4 system should be eliminated. For all of these reasons, the Revised Tentative Order should be revised to eliminate all requirements and implications that Copermittees are responsible for non-compliant and illicit dischargers.

b. Copermittees Cannot Be Charged With Enforcement Responsibilities That Are Properly Within the Regional Board's Authority.

The Revised Tentative Order improperly attempts to shift enforcement obligations from the Regional Board to the Copermittees and requires the Copermittees to undertake enforcement action against dischargers, without the legal authority to do so. For example, the Revised Tentative Order requires inspection by the Copermittees of industrial and commercial sites to determine if such sites have obtained coverage under the applicable NPDES permit, to assess compliance with ordinances and permit requirements, and to perform visual inspections for illicit discharges. These are all activities that are properly handled by the Regional Board and not the Copermittees who have no legal authority to undertake enforcement action to respond to such violations.

The Revised Tentative Order, like the previous tentative order, also requires the Copermittees to adopt and apply ordinances to prohibit or otherwise regulate discharges into and from MS4s

caused by third parties, including private residents, other local agencies, and non-traditional MS4s. (See, e.g., Revised Tentative Order Section D.3.) These third parties include non-traditional MS4s, such as universities, community colleges and public schools, that have not been designated under the State Board's General Permit for Storm Water Discharges from Small MS4s (Water Quality Order No. 2003-0005-DWQ, NPDES No. CAS00000X) ("Small MS4 Permit"). In support of its Small MS4 Permit, the State Board stated that the regional boards may designate non-traditional MS4s at any time subsequent to the adoption of the Small MS4 Permit. (See State Board's Findings In Support of Small MS4 Permit, No. 12.) Instead of designating non-traditional MS4s, the Regional Board impermissibly attempts to shift its obligation to regulate these Phase II jurisdictions to the Copermittees through the Revised Tentative Order.

These types of provisions requiring enforcement by the Copermittees are inappropriate and raise serious issues about Copermittee compliance under the Revised Tentative Order: Instead of enforcing against the dischargers responsible for exceedances of water quality standards, the Regional Board is improperly attempting to shift their enforcement obligations under Porter-Cologne, which delegates enforcement authority to determine violations of the Clean Water Act to the Regional Boards, not to the local jurisdictions regulated under MS4 Permit. (Water Code § 13300 et seq.; Water Code § 13329.25 et seq.) This issue is extremely problematic in light of the recent enforcement action against the City of San Diego (*See* Notice of Violation R9-2006-0111, September 27, 2006.) These provisions raise serious compliance issues for the Copermittees because it is unclear if failure to issue a Notice of Violation to a discharger will result in a Copermittee violation of the MS4 Permit, even though the Copermittee has no legal authority to take any enforcement action against the discharger.

Not only is this attempt impermissible, but the Revised Tentative Order requires the Copermittees to regulate local agency third parties in a manner that is outside of their authority under California law. The Revised Tentative Order, like the previous tentative order, makes no meaningful legal distinction between private third parties and local government agency third parties. California law provides that cities and the County are prohibited from applying building, zoning or related land use controls to the location or construction of facilities for the production, generation, storage, treatment, or transmission of water or waste water by a local agency. (See Gov. Code § 53091, subds. (d) & (e).) The term "local agency" is broadly defined in Government Code section 53090, and it includes agencies such as school districts, redevelopment agencies, joint powers authorities, water districts, and any other agency that locally performs a "government or proprietary function within limit boundaries." Thus, the Revised Tentative Order requires the Copermittees exercise authority they simply do not have under California law.

Regional Board staff responded to our comments on this issue by stating that since the Copermittees own and operate their MS4s, they cannot passively receive discharges from third parties. Even assuming, *arguendo*, that this is a valid interpretation, it does not address the issue that the Copermittees lack the legal authority (legal authority that the Regional Board expressly has) to adopt and apply ordinances that prohibit or otherwise regulate discharges into and from the MS4s

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caused by local agency third parties. Regional Board staff states, "[t]he MEP standard can be met through the implementation of coordination efforts and agreements with the third parties outside of the Copermittees' jurisdictions." (Responses to Comments, p. 26.) While such efforts and agreements are possible, the Copermittees' options to enforce against the local agency third parties remain limited. Copermittees may find themselves in the untenable position of filing a citizen suit enforcement action under Section 505 of the Clean Water Act against a local agency in order to meet the requirements of the Revised Tentative Order. Not only is this a questionable approach from a public policy standpoint, but it would also be an inefficient use of judicial and Copermittee resources.

Regional Board staff further responded that the Revised Tentative Order does not require the Copermittees to apply building, zoning, or related land use controls on parties outside of the Copermittees' jurisdictions. (See Responses to Comments, p. 26.) This response is unclear as to whether and to what extent the Copermittees would be required to regulate other local agencies, especially in light of the Regional Board's further statement that "where the Government Code provides the Copermittees with jurisdiction to apply treatment control BMPs to local agency projects, the Copermittees must mandate treatment control BMPs as required by section D.1.d." (Responses to Comments, p. 27.) Regional Board staff cites no authority in support of their interpretation. The language of Government Code sections 53091 specifically applies to building and zoning ordinances for the storage, treatment or transmission of water. (See Gov. Code § 53091(d) & (e).) Ordinances requiring treatment control BMPs on local agency projects deal with the "storage, treatment, or transmission of water," and they are within the scope of limitations set forth in Government Code section 53091.

As we previously suggested, the issue with respect to such Phase II Jurisdictions may be resolved in one of two ways. The Regional Board can direct staff to amend the Revised Tentative Order to absolve the Copermittees of responsibility for local agencies and regulate those local agencies by designating them under the Small MS4 Permit. Alternatively, the Regional Board can direct staff to include those local agencies as Copermittees under the Revised Tentative Order. Under either of these two options, the Regional Board must eliminate the requirement to enforce against other dischargers that the Copermittees have no authority over.

7. **The Revised Tentative Order Attempts To Preempt The Intent Of The State Water Resources Control Board To Lead State Hydromodification Policy By Imposing Hydromodification Management Plans, Advanced Treatment and Numeric Effluent Limits and It Directly Contravenes the Explicit Recommendations of The Blue Ribbon Panel.**

Under the Revised Tentative Order, the Copermittees must require the implementation of advanced treatment at construction sites, and they must develop and implement a HMP. The Copermittees must require implementation of advanced treatment at construction sites that are determined by the Copermittees to be an "exceptional threat to water quality." (Revised Tentative Order section D.2.c.(2).) Each Copermittee is to consider eight identified factors in evaluating the

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threat to water quality. (See *id.*) The Copermittees must also collaborate with other Copermittees to develop and implement a HMP. (Revised Tentative Order Section D.1.g.) That plan must, among other things, require PDPs to, under certain circumstances, implement certain hydrologic control measures.[8]

Hydromodification policy should to be developed in a coordinated manner across the state.[9] Indeed, the State Board is considering the degree to which hydromodification needs to be regulated to protect water quality and has already acted to undertake regulation of hydromodification. (Order No. 2004-0004-DWQ.) To inform its policy decisions about hydromodification policy, the State Board convened the Blue Ribbon Panel to evaluate, *inter alia*, advanced treatment, HMPs and Numeric Effluent Limits in its recommendations to the State Board.

The Blue Ribbon Panel observed that active treatment technologies involving the use of polymers with large storage systems now exist that can provide much more consistent and very low discharge turbidity." (Blue Panel Recommendations, p. 15.) It also observed that "toxicity has been observed at some locations" and "[t]here is always the potential for an accidental large release of such chemicals with their use." (See *id.*) The Blue Ribbon Panel stated, "[i]n considering widespread use of active treatment systems, full consideration must be given to whether issues related to toxicity or other environmental effects of the use of chemicals has been fully answered." Further, "[c]onsideration should be given to longer-term effects of chemical use, including operational and equipment failures or other accidental excess releases." (See *id.* at p. 17.)

The Blue Ribbon Panel also considered runoff volume and peak flow in its findings on the feasibility of numeric effluent limits applicable to municipal activities. The Blue Ribbon Panel looked at data charting exceedance frequencies for detention basins in Fort Collins, Colorado, and it noted that "[t]the peak flow frequency curve can be adjusted back to its predevelopment character by

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[8] Revised Tentative Order, Section D.1.g.(1)(c) provides that the HMP shall,

> Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

[9] The importance of a statewide approach to regulating hydromodification is underscored in a letter from (former) Secretary Tamminen to the State Board in which Secretary Tamminen calls for the State Board to "adopt a detailed program to be used by the regional boards to provide consistent protection for the remaining state waters no longer subject to federal jurisdiction." (Letter from T. Tamminen, California EPA Secretary, to A. Baggett, Chair, State Water Resources Control Board, August 27, 2004, p. 1.)

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the proper application of runoff controls." (Blue Ribbon Panel Recommendations, p. 13.) It went on to state, "[b]ut while these controls restore the peak flow frequency to its natural regime, the duration of flows at the low end (but still channel "working") of the flow frequency curve is greatly increased, which raises potential for channel scour in stream channels with erosive soils." (See *id.*) The Blue Ribbon Panel's observations identify concerns associated with hydromodification.

As a matter of prudent public policy, the State Board should have the opportunity to review the Blue Ribbon Panel's recommendations and develop a state-wide policy or approach prior to the inclusion of advanced treatment and HMP in this proposed permit. If the Regional Board includes advanced treatment and HMP in the permit it ultimately adopts, it may be inconsistent with a State-wide approach or policy. Further, it does not appear that Regional Board staff has addressed the Blue Ribbon Panel's concerns and recommendations regarding hydromodification and advanced treatment in its Responses to Comments.

With respect to numeric effluent limits, the subject of the Blue Ribbon Panel's recommendations, the Blue Ribbon Panel concluded that incorporation of such limits in municipal storm water permits was not feasible. (Blue Ribbon Panel Recommendations, p. 8.) However, the Regional Board has seemingly disregarded the Blue Ribbon Panel's recommendations in its incorporation of WQBELs into the Revised Tentative Order. The State Board, who convened the Blue Ribbon Panel, should have the opportunity to review the Blue Ribbon Panel Recommendations and determine how those recommendations should be developed into a state-wide policy prior to incorporation of numeric effluent limits into MS4 permits.

Additionally, especially in light of the Blue Ribbon Panel's recommendations, the Revised Tentative Order may be inconsistent with the requirements of the General Construction Storm Water Permit when it is reissued by the State Board. Inconsistencies between these two permits would impose an economic and administrative burden on both the Copermittees and developers. From a policy perspective, it is important for the statewide General Construction Storm Water Permit and the statewide General Industrial Storm Water Permit to govern discharges from those types of facilities to the standards applicable in those permits (BAT/BCT) without unnecessary and confusing interference by the Regional Board through the MS4 Permit. It should also be noted that the General Construction Storm Water Permit (Order No. 99-08-DWQ) and the General Industrial Storm Water Permit (Order No. 9703-DWQ) provide sufficient regulation to protect water quality and have stricter standards for protection of water quality, and the proposed regulation of construction and industrial sites under the Revised Tentative Order creates unnecessary, duplicative regulation and requires additional water quality control in accordance with a different water quality standard (MEP v. BAT/BCT) which will be confusing to the regulated community without providing any real water quality benefit.

Chairman Minan expressed his opinion at the June 21, 2006 public hearing that the standards in the General Construction Storm Water Permit and the MS4 permit ought to be the same, and that he favors the view that if a developer meets the General Construction Storm Water Permit standards, that ought to satisfy the MS4 requirements. (See Uncertified Rough Draft of Regional Water

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Quality Control Board Meeting – June 21, 2006, p. 183, lines 4-8.) Regional Board staff appears to have failed to address this issue in the Responses to Comments.

8. The Revised Tentative Order's Standards for Adoption of Interim and Long-Term Hydromodification Criteria are Inappropriate.

a. Adoption of Interim Hydromodification Criteria is Not Feasible.

The Interim Hydromodification Criteria do not differ substantively from final HMP standard. The presumably unintended consequence of the duplicative nature of the Interim Criteria is that the Copermittees are required to develop--in a shortened timeframe--what the Regional Board itself has acknowledged will require additional study, analysis, resources and time to develop.

Regional Board staff acknowledges that it will take at approximately three years to develop an adequate HMP for the region. (See Revised Tentative Order section J.2.a.) However, within 365 of the adoption of the Revised Tentative Order, the Copermittees must identify Interim Hydromodification Criteria and require PDPs disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flows and durations as required by the Interim Hydromodification Criteria. (See *id.* at section D.1.g.(6).) The 365 day time-frame is not feasible because the same technical analysis required to develop a regional plan will also be required to develop the Interim Hydromodification Criteria for PDPs.

Further, the development and implementation of Interim Hydromodification Criteria for PDPs disturbing 50 acres or more is not appropriate. The Blue Ribbon Panel has recommended that an effective storm water strategy include control of energy discharges for channel forming events completed under a watershed management plan and not site-by-site. (See Blue Ribbon Panel Recommendations, p. 14.) The Interim Hydromodification Criteria would apply this type of controls on a site-by-site basis, rather than under a watershed management plan. Further, a jurisdiction-by-jurisdiction approach to development of hydromodification criteria will likely lead to confusion as different criteria are applied throughout the region. Given the infeasibility of developing Interim Hydromodification Criteria for PDPs in 365 days and the Blue Ribbon Panel's recommendation that this type of control be completed under a watershed management plan, the Regional Board should put PDPs disturbing 50 acres or more on the same schedule as other entities that will be covered by the regional HMP.

b. Additional Problems With the Hydromodification Control Criteria.

The Revised Tentative Order fails to provide sufficient information to dischargers with regard to the implementation of Hydromodification Control Criteria. Because this is a new approach to hydromodification control, the Regional Board needs to clarify a number of issues in the Revised Tentative Order before dischargers can be expected to comply with the Revised Tentative Order's putative requirements.

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- The Revised Tentative Order does not make clear that Hydromodification Control Criteria will only be necessary to protect against increased erosion of channel beds, etc. due to erosive force, but rather the Revised Tentative Order seems to suggest that hydromodification control will always be required. This type of requirement fails to take into account situations where hydromodification control is not necessary to protect against hydromodification impacts (e.g., trapezoidal reinforced channels).

- The Revised Tentative Order requires flow duration control of project discharges and does not specifically allow for increase in project runoff discharge rates and durations if instream control measures are utilized to accomplish hydromodification control, and to protect stream habitat and any beneficial uses. This requirement directly contradicts the Southern California Coastal Water Research Project report, which specifically recommends that a suite of management measures be made available so as to adequately protect public safety, provide for flood control, control erosion and deposition, and provide for channel stability. (See Managing Runoff to Protect Natural Streams: The Latest Developments on Investigation and Management of Hydromodification in California (SCCWRP 2006).)

- The Revised Tentative Order should be revised to specifically allow for instream hydromodification control measures to be used if the provisions of D.1.g.(2) are met. Further, the Revised Tentative Order seems to allow for instream hydromodification control, although it does not do so specifically. The Revised Tentative Order prohibits the use of non-naturally occurring hardscape materials, such as concrete, rip rap, etc.. These materials, if used judiciously are an important component to instream hydromodification control measures such as grade control structures. In some circumstances, such as to provide for public health and safety, flood control, erosion and deposition controls, and channel stability, hardened materials are necessary. As noted above, this menu of management options must be available to allow for sufficient flexibility to accommodate the variety of circumstances. (SCCWRP 2006.)

- The Revised Tentative Order should be clarified to state that the conditions to protect groundwater quality applicable to hydromodification control BMPs apply only to infiltration facilities that are serving as water quality treatment control BMPs (treatment BMPs) and not to those that are functioning as volume reduction hydromodification control BMPs (volume control BMPs). Infiltration for volume control, after the flows up to the water quality treatment design event have received treatment in a treatment control BMP that addresses pollutants of concern for groundwater, should be allowed to be infiltrated without further water quality control restrictions. Such restrictions are not necessary to protect groundwater quality because the water infiltrated for volume control is fully treated urban runoff. Indeed, the imposition of restrictions might actually impede performance of infiltration facilities designed for hydromodification control.

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- Provisions requiring groundwater protection for infiltration facilities in the Revised Tentative Order should also be revised to allow for infiltration to treat bacteria because infiltration is one of most effective ways of treating bacteria; when such infiltration is accomplished bacteria does not affect ground water quality because infiltration treats the pollutant before it gets to groundwater.

- The Revised Tentative Order should be revised to allow for dry weather flows that have received treatment to reduce pollutants to be discharged to treatment control infiltration facilities.

9. Copermittees Should Be Given Flexibility To Determine Whether Advanced Treatment Is Appropriate Even In Circumstances Where The Construction Site May Pose An "Exceptional Threat To Water Quality."

Assuming that advanced treatment is a safe and effective BMP, which we do not believe it is, the requirements of the Revised Tentative Order are so vague and ambiguous as to make compliance impossible. The Revised Tentative Order requires implementation of advanced treatment for sediment at construction sites that are determined by the Copermittees to be an "exceptional threat to water quality." (See Revised Tentative Order section D.2.a.(2).) However, the Revised Tentative Order does so without sufficient technical information, without an adequate regulatory framework, and without providing the regulated community sufficient explanation as to what is required in order to comply with the advanced treatment provisions of the Revised Tentative Order.

While the Copermittees must consider eight factors in making the determination, the Revised Tentative Order provides no further definition of "exceptional threat to water quality." (See *id.*) The Blue Ribbon Panel has recognized that technical practicalities and cost-effectiveness may make active treatment technologies less feasible for smaller construction sites, including small drainages within a larger site. (See Blue Ribbon Panel Recommendations, p. 15.) The Blue Ribbon Panel also recognized that there is also the potential for an accidental large release of chemicals involved in active treatment technologies. (See *id.*) The provisions in the Revised Tentative Order regarding advanced treatment do not address these concerns.

While the Copermittees are given some flexibility in determining whether a construction site poses an "exceptional threat to water quality," the Revised Tentative Order does not give the Copermittees flexibility to decide whether advanced treatment should be applied even in cases where there is an "exceptional threat to water quality." The Copermittees should be given flexibility to determine whether advanced treatment is appropriate even in circumstances where the construction site may pose an "exceptional threat to water quality" given the feasibility and safety concerns regarding this type of treatment.

As an additional matter of concern, the Revised Tentative Order fails to address whether a report of waste discharge must be filed pursuant to Water Code sections 13260(a)(1) and 13264 prior to the use of any advanced treatment at construction sites. The Revised Tentative Order should be

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amended to clarify whether such the waste discharge requirements apply to discharges from advanced treatment at construction sites. If the waste discharge requirements are applicable, the Revised Tentative Order should provide a procedure for obtaining the necessary permits. The Regional Board should not move forward with requiring advanced treatment at certain construction sites without providing an adequate regulatory framework to deal with the consequences of its regulation.

Further, as we have previously commented, it appears that the only flocculent demonstrated to be safe, effective and feasible for advanced treatment of sediment at construction sites is a patented product called Chitosan. Regional Board staff has not provided any other examples of advanced treatment BMPs that are proved to be safe, effective and feasible. Thus, this requirement appears to be a facial violation of Water Code section 13360 which prohibits the issuance of waste discharge requirements which specify the design, location, type of construction or particular manner in which compliance may be had with those requirements. For this additional reason, the Copermittees should be given flexibility to determine whether advanced treatment is appropriate even in circumstances where the construction site may pose an "exceptional threat to water quality." Where advanced treatment is not feasible or safe, the Copermittees should be allowed to impose alternate BMPs.

Again, thank you for the opportunity to provide you with these comments. We look forward to working with you and your staff to make the necessary revisions to the Revised Tentative Order.

Very truly yours,

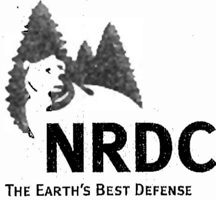
S. Wayne Rosenbaum

S. Wayne Rosenbaum

SWR:aao

cc: John Robertus

L. Natural Resources Defense Council



NATURAL RESOURCES DEFENSE COUNCIL

October 23, 2006

Via U.S. Mail

Executive Officer and Members of the Board
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: Revised Tentative Order No. R9-2006-0011

Dear Mr. Robertus and Members of the Board:

The Natural Resources Defense Council ("NRDC") is a national environmental organization with over 600,000 members, more than 100,000 of whom are California residents and approximately 8,000 of whom live in the San Diego Region. NRDC has reviewed the August 30th revisions to Tentative Order No. R9-2006-0011 (San Diego County Municipal Stormwater Permit) ("proposed permit") reflecting Board staff's responses to comments on the proposed third-term Phase I municipal storm water permit under the Clean Water Act's National Pollution Discharge Elimination System. Many of the changes in the revised document represent important improvements, and we appreciate staff's effort to strengthen the proposed permit in these respects.

We submit the following comments[1] to demonstrate that, while certain revisions strengthened it, the proposed permit nonetheless requires improvement in order to meet legal standards and achieve the goals of the Clean Water Act. As it stands, the proposed permit will not achieve water quality standards compliance, does not represent the maximum extent practicable standard ("MEP") under the Clean Water Act, is inadequate under the State Board's Low Impact Development storm water management policy, and is inconsistent with other laws. Specifically, the record contains overwhelming evidence showing that the proposed permit's current development planning framework is unlikely to remedy problems that Board staff has identified under the previous permit. In particular, despite moving toward greater use of low impact site-design best management practices, the proposed permit fails to do enough to achieve compliance with water quality standards or meet MEP. Indeed, the Board's own observations underscore the urgency of adopting a new approach: "[b]ecause the urbanization process is a direct and leading cause of water quality degradation in this Region, *fundamental changes to existing policies and practices about urban*

[1] This letter supplements NRDC's comment letter on Tentative Permit No. R9 2006-0011, and the attachments thereto, submitted on June 20, 2006 (hereinafter "June 20 letter").

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development are needed if the beneficial uses of San Diego's natural water resources are to be protected."[2] That statement accompanied the Board's adoption of the previous permit in 2001. Five years later, it is clear that more needs to be done to address storm water-related water quality impairments in the San Diego region. It is imperative that the new permit effect the solutions that were already sorely need in 2001, and are now overdue.

I. The Proposed Permit Falls Short of Fully Implementing Necessary and Practicable Solutions.

In spite of the changes Staff made to the proposed permit, the document still reflects an approach that fails to take the steps necessary to remedy the San Diego Region's storm water problems and falls short of what is legally required.

In our June 20 letter, NRDC identified targeted revisions to the proposed permit to incorporate commonplace and effective low-impact development ("LID") storm water management strategies. An overwhelming body of legal and technical evidence, as well as strong policy considerations, supports making LID measures the cornerstone of new development and re-development permit programs—and doing so with permit language that will ensure implementation on the ground. For instance, along with our letter, NRDC submitted scores of case studies, technical manuals, agency reports, industry publications, and storm water program documents from other jurisdictions that demonstrate both the need for and the effectiveness—including the cost-effectiveness—of the solutions we identified.

Indeed, one of the documents NRDC submitted is a technical study conducted for NRDC by a national storm water expert, Dr. Richard Horner. Dr. Horner's report specifically addressed the effectiveness and feasibility of various storm water management techniques in San Diego County. He documented the practicability of full-LID implementation in San Diego, given its specific development patterns. Dr. Horner's study confirms the conclusion that the surrounding evidence points to: not only would the benefits of comprehensive LID implementation be substantial in the San Diego region, but implementing LID practices is necessary to meet the MEP standard, and is further necessary to meet water quality standards.[3] Dr. Horner's report and the myriad other documents in the record show that LID strategies and tools are available, practicable, and widely used.

While the current version of the proposed permit incorporates some elements of LID in its development planning program, it nevertheless falls short of adopting a robust, effective development planning framework in the following critical respects:

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[2] RWQCB Order No. 2001-01 at pp. 4-5 (emphasis added).

[3] *See* R. Horner, Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID") for the San Diego Region (2006) (Attachment I of NRDC's June 20 letter).

1. *Under the proposed permit's "Priority Development Project" program, not enough development activity is required to meet numeric SUSMP storm water runoff treatment standards.* While we strongly support the inclusion of a new heavy industrial category and the broader coverage of commercial development reflected in the revised document, the proposed permit's failure to include a square footage-based "catch-all" provision for new development projects is a serious omission.[4] An area-based catch-all would require any kind of development project above a specified footprint to meet numeric SUSMP storm water runoff treatment standards. Such an approach is critical to the success of the entire permit in achieving water quality compliance because virtually all urban development significantly increases pollutant loading and increases storm water runoff volume and rate by increasing impervious surfaces that disrupt the natural hydrology of land.[5] Under the proposed permit's current language, development projects that do not fall within one of ten narrowly-defined categories are not required to meet numeric SUSMP runoff treatment standards, no matter how much impervious surface they create. Because storm water runoff is a primary cause of water quality impairment in the region and the region is experiencing massive growth and development representing more and more impervious land cover, it is vital that the new permit require that *any* development projects that create 5,000 square feet or greater of impervious surface meet numeric SUSMP runoff treatment standards. Five thousand square feet is an appropriate threshold because, as we discussed in our June 20 letter and describe below under heading III(A)(2)(i), it represents the maximum extent practicable standard ("MEP") required under the Clean Water Act.

2. *LID requirements under the proposed permit are insufficient and uncertain.* The weight of the evidence in the record unequivocally shows that effective development planning centers around broad implementation of site-design best management practices ("BMPs") based on LID strategies. The cornerstone of this critically-necessary approach is establishing low impact site-design BMPs as the <u>default</u> storm water management strategy for development projects by requiring that LID practices be the presumptive tool to meet the 85th percentile runoff event treatment standard.[6] The proposed permit does represent an improvement in this area over the previous permit in that it requires a minimum level of low impact site-design BMPs.[7] But by continuing to rely on a fatally vague "where feasible" approach to effectuate maximum low impact site-design BMP implementation, the proposed permit virtually guarantees the San Diego Region's continued failure to see broad utilization of site-design BMPs. Moreover, the proposed

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[4] *See* Regional Water Quality Control Board, San Diego Region, Revised Tentative Order No. 2006-0011 (Aug. 30, 2006) at p. 18 (hereinafter "Proposed Permit" or "Revised Document").

[5] *See* Proposed Permit at p. 5.

[6] *See* NRDC June 20 comment letter at p. 14.

[7] Proposed Permit at p. 19.

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permit continues to require that treatment-control BMPs, rather than site-design BMPs, be implemented to meet the 85th percentile runoff event treatment standard. This provision severely undermines the already weak language requiring low impact site-design BMPs. To achieve widespread implementation of LID practices, it is imperative that the Board adopt a permit revised to require that priority development projects meet the 85th percentile runoff standard using low impact site-design BMPs.

In short, the evidence shows that the current approach cannot reasonably be expected to remedy the persistent and in some cases worsening water quality impairment in the San Diego region. Indeed, we respectfully suggest that Regional Board staff cannot reasonably support, based on facts in the record, a contrary conclusion. On the other hand, it is clear from the record that LID is an effective, practicable storm water management strategy—and certainly falls well within the MEP standard required by law to be implemented in municipal storm water discharge permits.

II. Standard Governing this Board's Action on the Proposed Permit.

To withstand scrutiny upon appeal, the record must clearly demonstrate that the Board relied on solid evidence to support its decision, and that the action taken is consistent with applicable law. The State Water Resources Control Board exercises independent judgment to determine whether an action or order of a regional board is reasonable or constitutes an abuse of discretion.[8] Under this standard of review, abuse of discretion is established if "the [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."[9] If it is asserted that the findings are not supported by the evidence, "abuse of discretion is established . . . [where] the findings are not supported by the weight of the evidence."[10] Furthermore, the Board must make clear how it arrived at its conclusion by presenting written determinations that detail a thorough analysis of the evidence and the applicable legal factors. That is, it must present "findings to bridge the gap between the raw evidence and the ultimate decision or order."[11] The Board's written determinations must provide sufficient detail to clearly demonstrate its "analytical route."[12]

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[8] *See* SWRCB, *In the Matter of the Petition of Stinnes-Western Chem. Corp.*, WQ 86-16 (Sept. 18, 1986).

[9] Cal. Code Civ. Proc. § 1094.5 (b).

[10] Cal. Code Civ. Proc. § 1094.5 (c).

[11] *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 515 (1974).

[12] *Dep't of Corr. v. State Personnel Board*, 59 Cal.App.4th 131, 151 (1997).

III. The Regional Board Must Adopt a Revised Version of the Proposed Permit that Is Consistent with the Evidence in the Record and Applicable Law.

Proceeding with the current version of the proposed permit is not only unwise from a policy perspective, it is legally indefensible. Adoption of this proposed permit would not withstand appeal under the abuse of discretion standard of review: the proposed permit's findings are not supported by the weight of the evidence in the record; the record does not adequately describe the analysis that led to the selection or rejection of relevant proposals; and the proposed permit is inconsistent with applicable law.

A. The findings are not supported by the weight of the evidence.

Contrary to Board staff's findings, the evidence shows that (1) implementation of the regulatory framework established under the proposed permit will not achieve compliance with water quality standards; (2) the proposed permit's terms do not represent MEP; and (3) the proposed permit is insufficient in light of State Board policies.[13] The proposed permit's approach appears to ignore copious evidence in the administrative record that undermines each of these findings, while staff has failed to show what evidence supports them.

1. *It is reasonably likely that the proposed permit will not achieve compliance with water quality standards.*

The Board is poised to adopt the finding that implementation of the proposed permit "is expected to ultimately achieve compliance with water quality standards."[14] Indeed, under State Board Order WQ 2001-01, the Regional Board is obligated to require compliance with water quality standards.[15] Yet contrary to the quoted finding, and despite the legal requirement to meet water quality standards, the weight of the evidence here shows that water quality impairments persist—and in some cases are worsening—in the San Diego Region after over 15 years of storm water management under the existing regime.[16] This fact is not in dispute. The Copermittees'

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[13] *See* Proposed Permit at pp. 2, 5, 9, 11.

[14] Proposed Permit at pp. 5, 9 (stating that "[t]his Order contains . . . requirements that are necessary to . . . achieve water quality standards" and "program implementation is expected to ultimately achieve compliance with water quality standards").

[15] *See* SWRCB, *In the Matter of the Petitions of the Cities of Bellflower et al.*, WQ 2000-11 (Oct. 5, 2000) at p. 8 (quoting U.S. EPA, Interim Permitting Approach for Water Quality-Based Effluent Limits in Storm Water Permits, 61 Fed. Reg. 57,425 (1996)).

[16] As Board staff has noted, "the Copermittees have generally been implementing the jurisdictional urban runoff programs required pursuant to Order No. 2001-01 since February 21, 2002[, yet] urban runoff discharges continue to cause or contribute to violations of water quality standards." Proposed Permit at p. 5.

own monitoring data show that urban runoff remains a primary cause of water quality impairment in the San Diego region:

> Persistent exceedances of Basin Plan water quality objectives for various urban runoff-related pollutants [including] diazinon, fecal coliform bacteria, total suspended solids, turbidity, metals, etc. . . . At some monitoring stations, *statistically significant upward trends* in pollutant concentrations have been observed. . . . [U]rban runoff discharges are not only causing or contributing to water quality impairments, [but] are a *leading cause of such impairments in San Diego County*.[17]

As these comments by Board staff demonstrate, the record clearly shows not only that water quality problems remain, but that Board staff has determined that the existing urban runoff management regime has failed to prevent worsening water quality.

Absent any evidence to the contrary—and we are unable to locate any such evidence in the record—these observations lead to the ineluctable conclusion that another permit structured largely the same way as the previous permit is unlikely to produce improvements in water quality. This is especially true considering the rapid pace of development that exists and is expected to continue in the region, because "[u]rban development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. . . . . As a result, the runoff leaving the developed urban area is significantly greater in pollutant load. . . ."[18] These observations are problematic because none of the documents—neither the staff report, the responses to comments, nor the findings—actually demonstrates that the proposed permit will achieve water quality objectives in light of the previous permit's utter failure to do so.

While new or improved provisions such as hydromodification, inspections, watershed-based activities, mobile businesses, the regional urban runoff management program, and development planning render the proposed permit a stronger regulatory program than the previous permit, almost no evidence is presented to show that any of the improvements will in fact achieve water quality compliance or suffice to meet MEP. Rather, it is merely asserted, without substantiating analyses, that the proposed permit will "attain water quality objectives in the Basin Plan by limiting the contributions of pollutants conveyed by urban runoff."[19] It is the

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[17] Proposed Permit at p. 4 (emphasis added); *see also* RWQCB, Fact Sheet/Technical Report for Tentative Order No. 2006-0011 (August 30, 2006) at pp. 7-8, 15, 18-19 (hereinafter "Fact Sheet" or "Staff Report").

[18] Proposed Permit at p. 5.

[19] Fact Sheet at p. 14.

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Board's burden to show that the proposed permit will achieve compliance with water quality standards as required for post-first round municipal storm water discharge permits, but neither the staff report, nor the findings, nor the responses to comments makes such a demonstration. Rather, these documents simply assert the legal foundations of MEP and describe how, in theory, advancing a constantly-improving MEP standard will allow the permit to achieve compliance with water quality objectives.

For example, to explain the finding that the proposed permit represents MEP and will achieve water quality compliance, Board staff states that "[t]he Copermittees' continual evolution in meeting the MEP standard is expected to achieve compliance with water quality standards."[20] This statement is reflective of the approach throughout the record—merely stating the conclusion required by law without pointing to specific evidence and describing how the evidence demonstrates that the proposed permit represents an improved incarnation of MEP that will achieve water quality improvements. In fact, as noted, the facts in the record prove the findings to be false: the Copermittees are not meeting standards notwithstanding nearly fifteen years of alleged efforts.

Similarly, the staff report's section on watershed planning provides another example of the absence of reasonably detailed and adequately supported discussion of how the proposed permit's new provisions will achieve water quality standards. This section quotes EPA guidance stating that "[a] watershed-based approach to point source permitting under the NPDES program may serve as one innovative tool for achieving new efficiencies and environmental results. . . [by] lead[ing] to more environmentally effective results."[21] We fully agree that a watershed-based program should be pursued for these reasons. But such statements are vastly under-specific and consequently fail, given the failure of the previous permit to achieve water quality objectives, to show that the proposed permit will.

While the record presents virtually no evidence that the proposed permit, by virtue of its new and revised provisions, will adequately address water quality, viable solutions do exist—and were, in fact, presented along with supporting evidence in our June 20 submission. Of particularly strong relevance is the Horner study, which specifically evaluated storm water management in the San Diego region and addressed the effectiveness of low impact site design practices compared to other storm water management tools. Dr. Horner examined the effectiveness of typical conventional "treatment control" BMPs chosen from a large list provided in the previous permit, such as drain inlet inserts, continuous deflective separation units, extended detention basins, and filter strips, as well as low-impact site-design BMPs such as decreasing impervious surface area, enhancing soils, and harvesting roof runoff. The study found that across a wide variety of development types (e.g., large commercial, single-family residential, multi-family residential, restaurant, office, etc.), LID strategies are more effective

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[20] *Id.* at p. 24.

[21] *Id.* at p. 37-38.

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than conventional tools—such as the basic treatment BMPs typically deployed in new development projects under the previous permit—in reducing pollutant loading and volume of storm water runoff.[22] The take-away message from the Horner report—indeed, from the entire body of evidence in the record on storm water management practices—is that "[i]nfiltrating sufficient runoff to maintain pre-development hydrologic characteristics and prevent pollutant transport *is the most effective way to protect surface receiving waters*."[23] While Board staff recognizes as much—the staff report notes that "USEPA finds including plans for a 'natural' site design and BMP implementation during the design phase of new development and redevelopment offers *the most cost effective strategy to reduce pollutants loads to receiving waters*"[24]—the proposed permit falls short of requiring robust implementation of these strategies, as we describe further under heading III(A)(3) below.

Thus, while there is ample evidence in the record showing that LID-based solutions are the best development planning tools to achieve water quality improvements, and ample documentation of how LID solutions effect improved water quality, there is none showing how the modest additions and revisions in the proposed permit would actually accomplish this objective. Furthermore, the record also lacks any evidence or discussion supporting the decision to not include the full range of LID solutions.

2. *The record shows that the proposed permit falls short of MEP.*

The Clean Water Act requires municipal dischargers to reduce storm water pollution to the maximum extent practicable ("MEP"), a standard that continually evolves and improves as better and better technologies become available and are demonstrated to be effective.[25] In this vein, the Board proposes to find that "[t]his Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)."[26] This is not the case. Because it is significantly less stringent in key respects than similar storm water programs in place in states and municipalities around the country, and relies on standards from outdated regulations, the proposed permit fails to meet the MEP standard. Indeed, in this connection, there is no showing to the contrary in the record.

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[22] Horner (2006) at pp. 2, 8-12 ("[D]evelopments implementing traditional basins and biofilters, *and even more so low-impact post-construction BMPs*, achieve *significant reduction of pollutant loading and runoff volume* . . . compared to both developments with no BMPs and developments with basic treatment BMPs.") (emphasis added).

[23] *Id.* at p. 5 (emphasis added).

[24] Fact Sheet at p. 31 (emphasis added).

[25] 33 U.S.C. § 1342(p)(3)(B)(iii); Proposed Permit at p. 5 (describing MEP as a dynamic standard that evolves over time as storm water management knowledge improves).

[26] Proposed Permit at p. 5.

i. *The proposed permit falls short of MEP because it does not reflect the scope of storm water management practices in use across the country.*

As Board staff has recognized, MEP is at least in part defined by other municipalities' approaches, because effective implementation is an indication of the feasibility and practicability of storm water management practices.[27] Thus, it is appropriate to compare the requirements in the proposed permit to those in other municipalities' storm water management programs to evaluate whether the proposed permit's requirements actually require the maximum practicable effort to reduce municipal storm water discharges.

Here, such a comparison shows that the proposed permit's requirements come up short compared to other storm water programs around the country. For instance, as our June 20 letter described, scores of municipalities around the country include blanket, area-based thresholds for new development storm water control requirements.[28] Specifically, evidence in the record shows that a 5,000 square feet threshold represents MEP in the context of defining the scope of new development projects to which specific storm water treatment standards apply, as several states and municipalities—and even the proposed permit's redevelopment provision—currently apply a 5,000 square feet catch-all threshold. The proposed permit falls short of MEP in this respect by failing to include an area-based catch-all trigger for the application of storm water treatment standards to new development projects.

In a similar vein, numerous case studies across the country demonstrate the effectiveness and practicability of LID techniques in new development and redevelopment. These well-documented studies, many of which were included in the body of literature NRDC provided

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[27] Regional Water Quality Control Board, San Diego Region, Responses to Comments on Tentative Order No. R9-2006-0011 (August 30, 2006) at p.106 (noting with regard to the threshold for public streets, sidewalks, etc. that "[a]pplication of the 5,000 square feet threshold in other parts of the country indicates the appropriateness and feasibility of its application.") (hereinafter "Responses to Comments").

[28] *See* City of Santa Monica, Santa Monica Municipal Code Chapter 7.10.030(d)(3) (defining "new development," to which specific storm water runoff requirements apply, as "any construction project that (a) results in improvements to fifty percent or greater of the square footage of a building, (b) creates or adds at least five thousand square feet of impervious surfaces, or (c) creates or adds fifty percent or more of impervious surfaces."); Contra Costa County, Contra Costa Countywide NPDES Municipal Stormwater Permit Amendment Order No. R2-2003-0022 (applying storm water control requirements to any "new and redevelopment projects that create 10,000 square feet or more of impervious area"); State of New Jersey, New Jersey Stormwater Rules, N.J.A.C. § 7:8-1.2 (defining "major development," to which specific storm water control requirements apply, as "any development that ultimately provide for disturbing one or more acres of land or increasing impervious surface by one-quarter acre or more"); State of Washington, Phase I Municipal Stormwater NPDES General Permit (Draft Feb. 15, 2006) Appendix I at pp. 7, 8, 20 (applying numeric storm water treatment requirements to any project adding 5,000 square feet or more of new impervious surface); State of Maryland, Maryland Code, Title 26, Subtitle 17, Chapter 2 § 5B (requiring storm water management plans for any development that disturbs 5,000 square feet or greater).

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along with our June 20 letter, inform the MEP standard by establishing what storm water techniques are available, feasible, and effective—*i.e.*, what is practicable. The proposed permit thus falls short of MEP by failing to include vigorous requirements for the use of LID techniques in new development and redevelopment projects. As we describe below under heading III(A)(3), the proposed permit fails to adopt such an approach by using weak, vague language and soft standards in its provisions requiring the use of low impact site-design BMPs for new development and redevelopment projects. The documents that NRDC submitted in Attachment V of our June 20 letter, including agency reports, industry documents, scientific studies, case studies, and technical manuals demonstrate the feasibility, effectiveness, and cost-saving potential of LID strategies. Moreover, as discussed above, Dr. Horner's study specifically shows that these techniques are feasible and would be effective in the San Diego region. While this tremendous body of evidence illustrates that MEP includes comprehensive implementation of low impact site-design BMPs for new and redevelopment, the record does not show how the proposed permit's approach, which includes some LID requirements but will not lead to broad LID implementation in the urban landscape, meets MEP.

ii. The proposed permit relies on old standards, ignoring five years of advancement in storm water management knowledge in contradiction of the definition of MEP.

Second, as Board staff has noted, "MEP is a dynamic performance standard which [sic] evolves over time as urban runoff management knowledge increases, [and] . . . must be continually assessed and modified to incorporate improved programs, control measures, [BMPs], etc.."[29] In this vein, Board staff emphasized in the responses to comments that the Phase I permit, which has been effect for over 15 years, should be at least as stringent as the newer Phase II regulations that apply to small MS4 operators.[30] We agree. But the Phase II regulations have already been in place for five years, and represent a flexible approach afforded to first-time storm water permittees. Moreover, as staff has recognized in discussing the relevance of the Phase II regulations to determining MEP in this context, Phase I municipalities generally face "greater water quality concerns" than the small municipalities subject to Phase II regulations.[31] Given the evolving nature of MEP, no evidence shows that five-year old standards—the length of an entire permit term—are adequate to fulfill MEP today for the Phase I San Diego Copermittees, especially since, as discussed above, more stringent programs are currently in place across the country. Moreover, while the proposed permit is more stringent than Phase II regulations in some respects, such as setting a 5,000 square feet trigger for specific development categories, it

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[29] Proposed Permit at p. 5.

[30] *See* Responses to Comments at pp. 100, 104.

[31] Fact Sheet at p. 27.

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is actually less stringent than the Phase II regulations in that it lacks a catch-all threshold for new development projects.[32]

Similarly, the staff report and responses to comments refer to State Board Order WQ 2000-11 to support the existing development thresholds, asserting that the development categories and thresholds in the six-year old Order "reflect a reasonable interpretation of MEP."[33] Again, in light of the Board's obligation to continually improve and strengthen MEP in the permit, it is unclear why the staff continues to use as the foundation for the new San Diego municipal storm water permit today what the State Board considered MEP more than five years ago. Moreover, it is worth noting that WQ 2000-11 interpreted MEP for a 1996 permit. The Board must demonstrate that this permit meets MEP, yet neither the staff report nor responses to comments nor the findings cite evidence or provide an analysis showing that it does. An appropriate analysis of MEP would address more recent evidence documenting implementation of effective BMPs at least in the years since the previous permit was adopted. We find no such analysis in the record. If evidence in the record in fact justifies the proposed permit's reliance on five-year old standards and shows that the proposed permit does in fact represent MEP, we ask that it be pointed out for clarification.

3. *The proposed permit does not satisfy the objectives of the State Board's Low Impact Development-Sustainable Storm Water Management policy.*

The Board is poised to find that the proposed permit "is based on . . . all applicable provisions of . . . Policies adopted by the State Water Resources Control Board."[34] But by failing to include language that will ensure low impact site-design BMP implementation as the primary strategy for storm water management in priority development projects, the proposed permit in its current form does not live up to the State Board's January 2005 Low Impact Development-Sustainable Storm Water Management policy, which "adopt[s] sustainability as a *core value*" of storm water management.[35] The State Board notes that "LID has been a *proven*

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[32] The Phase II storm water control requirements apply to all "development and redevelopment projects that disturb greater than or equal to one acre." 40 C.F.R. § 122.34(b)(5).

[33] *See* Responses to Comments at pp. 99, 103 (explaining, in response to comments regarding thresholds for new development projects, that "[t]he Priority Development Project categories and their respective thresholds are based on the development project categories reviewed and approve by the SWRCB in Order WQ 2000-11"); Fact Sheet at p. 30 (citing several regional board orders in addition to SWRCB Order WQ 2000-11, all of which are dated no more recently than 2002, to support the finding that the proposed permit's SUSMP requirements meet MEP.)

[34] Proposed Permit at p. 2.

[35] State Water Resources Control Board, "Low Impact Development – Sustainable Storm Water Management" (Jan. 2005) (emphasis added), available at http://www.waterboards.ca.gov/lid/index.html (hereinafter "SWRCB LID Policy").

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approach in other parts of the country," and focuses on achieving broad implementation of LID practices as the cornerstone of its Sustainable Storm Water Management policy.[36] The policy urges regional boards to move beyond traditional storm water management practices and to use LID "in *all* future policies, guidelines, and *regulatory actions*."[37]

The proposed permit purports to be in accord with all applicable State Board policies, presumably including this one.[38] Yet the history of under-utilization of low impact site-design BMPs under the previous permit, and the similarity of the language in the proposed permit to that in the previous permit, shows that the proposed permit does not hold water with respect to the State Board's LID policy:

- The previous permit directed new development projects to utilize site-design BMPs "where feasible";[39]

- The proposed permit requires new development projects to utilize at least two site-design BMPs from a list, and directs that all the listed site-design BMPs be used "*where determined to be applicable and feasible by the Copermittees*."[40]

By continuing to take a vague and ambiguous "where feasible" approach to site-design BMP requirements, the proposed permit's current language sets the program up for failure and otherwise is untenable as a matter of administrative decision-making. Audits of several of the Copermittees' JURMP programs demonstrated that the "where feasible" approach to BMP requirements resulted in serious under-use in the previous permit cycle for BMPs generally, and particularly for site-design BMPs.[41] Even though the proposed permit improves on the previous permit by providing a list of specific site-design BMPs and requiring the use of at least some site-design BMPs, it still relies on an implementation approach that the evidence in the record shows does not work. The changes in the revised document do not cure this fundamental defect. Compare the following provisions of the proposed permit:

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[36] *Id.* (emphasis added).

[37] *Id.* (emphasis added)

[38] *See* Proposed Permit at p. 2.

[39] RWQCB Order No. 2001-01 (Feb. 21, 2001) at p. 15.

[40] Proposed Permit at p. 19.

[41] Tetra Tech, Inc., San Diego Area Stormwater Program: Cities of Encinitas, Lemon Grove, Poway, and Santee (NPDES Permit No. CAS0108758) (June 11, 2004) at p. 8; Tetra Tech, Inc., San Diego Standard Urban Storm Water Mitigation Plan (SUSMP) Evaluation (April 29, 2005) at pp. 4, 8, 10, 12, 14, 18, 21, 24, 27, 29, 30, 34, 37, 40, 47).

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- "Implement all site design BMPs . . . *where determined to be applicable and feasible by the Copermittee*";[42]
- "Each Copermittee *shall require* each Priority Development Project to implement source control BMPs";[43] and
- "Each Copermittee *shall require* each Priority Development Project to implement treatment control BMPs. . . ".[44]

By caveating the requirement for site-design BMPs, while using strict language to require implementation of source-control and treatment-control BMPs, the proposed permit takes away with one hand what it gives with the other—the *presumptive requirement* that Priority Development Projects fully employ site-design BMPs. Indeed, the new language—no doubt earnestly intended by Board staff to achieve broad low-impact site-design BMP implementation—is nearly identical, and has no discernibly different meaning, than the language in the Model SUSMP developed by the Copermittees under the previous permit, which required priority projects to "consider, and incorporate and implement [site-design BMPs] *where determined applicable and feasible*."[45] Under that language, as the 2005 JURMP audit emphasized, "many of the SUSMP plans . . . did not adequately address site design."[46] Even Board staff has emphasized the shortcomings of this approach, noting in the staff report that this "open-ended approach. . . . *has proven to be ineffective in integrating site design BMPs in project designs.*"[47]

Furthermore, the Copermittees themselves have described why the "where feasible" approach to site-design BMP implementation lacks effect: "if-feasible analys[e]s are time-consuming and contentious, and . . . soft standards are not widely accepted by the regulated community."[48]

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[42] Proposed Permit, at 19 (emphasis added).

[43] *Id.* at 20 (emphasis added).

[44] *Id.* at 20 (emphasis added).

[45] Model Standard Urban Storm Water Mitigation Plan for San Diego County, Port of San Diego, and Cities in San Diego County (2002) at pp. 21-22.

[46] San Diego SUSMP Report (2005) at p. 4.

[47] Fact Sheet at p. 55.

[48] San Diego Municipal Stormwater Copermittees, Report of Waste Discharge (Aug. 2005) at p.44.

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The bottom line is that that State Board policy calls for broad LID implementation and the proposed permit in its current form fails to deliver it. To comply with the letter and spirit of the State Board's LID policy, it is imperative that the new Phase I permit for the San Diego Copermittees require LID strategies as the presumptive tool to meet the 85th percentile runoff standard, rather than continuing to rely on partial implementation—and, at that, only when the indeterminate "where feasible" approach is satisfied.[49]

B. The Record Reflects a Failure to Proceed in the Manner Prescribed by Law.

Not only must the adopted order be supported by evidence and findings in the record—here, they are not—but the Board's findings and determinations must be clearly explained and linked to the evidence.[50] Adopting the San Diego Copermittees' new municipal stormwater permit without supporting, explaining, or otherwise providing justification for the decisions and findings that underlie the proposed permit, would be an abuse of the Board's discretion. The record does not present any articulation of the reasoning or analysis behind several key provisions of the proposed permit. Here, the staff report, the responses to comments, and the proposed order itself are fora for the presentation of such findings and analytical explanations. But in none of these documents do we find any reasonably-justified explanations for the rejection of critically-necessary, common-sense revisions or adoption of the permit in its current form.

For example, with respect to the measures that are necessary to reach MEP in the permit, the both the staff report and the responses to comments explain that the new permit, because it is a third-generation Phase I permit, should be at least as stringent as Phase II permits, which are by design less demanding and more flexible under the Clean Water Act.[51] On this basis, the proposed permit lowers the threshold for storm water requirements applicable to new commercial development projects from 100,000 square feet to one acre.[52] Yet no justification is

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[49] As described in the NRDC June 20 letter, in the event that specific site conditions render it impossible to meet the numeric SUSMP treatment standard solely using LID techniques, the proponent of such a project would submit an application, based on site-specific data, for a waiver that would allow the project to use treatment control BMPs in addition to low impact site-design BMPs to meet the standard. While Board staff's Responses to Comments approximately describes such an arrangement, the language in the proposed permit fails to reflect the presumption that LID methods be used as the primary tool to meet the numeric SUSMP treatment standard. *See* Responses to Comments at p. 114; *but cf.* Proposed Permit at pp. 19-20 (requiring site-design BMPs only "where applicable and feasible" while requiring that projects meet the 85th percentile runoff standard under section on treatment control BMPs).

[50] *See Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 525 (1974) ("[T]he agency which renders a challenged decision must set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order.").

[51] *See* Fact Sheet at p. 28; Responses to Comments at pp. 100, 104.

[52] *See* Responses to Comments at p. 100.

given for the decision to set the limit at one acre, which represents the threshold in the less-stringent, five-year old Phase II regulations, when the weight of evidence shows that 5,000 square feet is, in fact, the appropriate MEP threshold for all categories of new development.[53]

Similarly, the responses to comments repeatedly—and correctly—emphasizes the importance of establishing a permit that is at least as stringent as the regulations for Phase II permits. Board staff even quotes language from the Phase II regulations that sets an area-based catch-all threshold for development projects—yet the proposed permit does not include an analogous catch-all provision.[54] This contradiction goes unexplained.

Third, the record lacks any discussion of the reasoning and analysis behind the choice to not require new development projects to meet runoff treatment standards using site-design BMPs. Abundant evidence in the record demonstrates that absent such a requirement the permit will not effect broad utilization of site-design techniques to control storm water volume, rate, and pollutant loading. None of the supporting documents justifies—or even explains—the proposed course, which does not include this requirement. The decision to exclude this important requirement therefore appears arbitrary.

Fourth, as described above under heading A(1), the record lacks sufficient analysis showing that the proposed permit's provisions will achieve compliance with water quality standards. Rather than reiterate the vast shortcomings of the record in this respect, we would like to point to the staff report's discussion of the new hydromodification provisions as an example of a thorough discussion that does support the proposed course of action with a reasonably specific analysis.[55] In contrast to the inadequate discussions offered in support of many of the proposed permit's sections, the hydromodification discussion includes an empirical analysis of the underlying problem and proposed solution, and is based on data from various identified sources. Moreover, where compromises to the stringency of the proposed requirement are made, the discussion openly explains the reasoning behind the decision to do so.[56] Such detailed analyses should accompany all of the proposed permits' key provisions, as well as provisions that do not adopt identified solutions that the evidence in the record supports.

The overall failure to describe the path taken from the evidence to the decisions that underlie the proposed permit's provisions is a fatal legal procedural error that must be corrected. Absent detailed explanations in the record of the analytical route linking the evidence in the record to the proposed course of action, adoption of this proposed permit is arbitrary. On the other hand, myriad documents in the record—including the San Diego-specific Horner study—

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[53] *See* footnote 28, *supra*.

[54] Responses to Comments at pp. 100, 104..

[55] *See* Fact Sheet at pp. 60-62.

[56] *Id.* at p. 62 (explaining relatively large threshold for interim criteria).

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support the suggested solutions by demonstrating their relevance to meeting the MEP standard and explaining both how these solutions are expected to improve water quality and to what extent.[57]

C. The Proposed Permit Is Inconsistent with Applicable Law.

Several substantive flaws in the record and in the proposed permit itself represent points of significant inconsistency with applicable laws. As a result, a decision to adopt the proposed permit in its current form would not withstand review under the abuse of discretion standard. Specifically, the Board must address the following infirmities:

1. *The proposed permit is inconsistent with the Clean Water Act's requirement that Phase I municipal dischargers to implement storm water controls to the maximum extent practicable.*[58] As described under heading III(A)(2) above, the proposed permit stops short of the level of controls demonstrated by the weight in the evidence to constitute MEP. The State Board has emphasized in the context of determining MEP that "practical solutions may not lightly be rejected" when constructing elements of a municipal storm water management program.[59] Here, it appears that practical solutions have not only been rejected—they have been altogether ignored.

2. *The proposed permit does not fulfill the State Board's Low Impact Development Sustainable Stormwater Management Policy.*[60] As described under heading III(A)(3) above, this State Board policy recognizes LID storm water management techniques as effective and available, and calls for their broad implementation in regional board regulatory actions. By proposing to implement LID under permit language that proved vastly ineffective in the previous permit term, the Board essentially flaunts the State Board LID directive.

3. *By continuing to use a regulatory framework that has proven insufficient to address persistent water quality impairment, the proposed permit is in direct conflict with State Board Order No. 2000-11.* Under WQ 2000-11, the Regional Board is obligated to design a municipal storm water discharge permit that will achieve water quality compliance.[61] But as described under heading III(A)(1) above, the weight of the

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[57] *See e.g.*, Horner (2006).

[58] *See* 33 U.S.C. § 1342(p)(3)(B)(iii).

[59] SWRCB, *In the Matter of the Petitions of the Cities of Bellflower et al.*, WQ 2000-11 (Oct. 5, 2000) at p. 10.

[60] *See* SWRCB LID Policy, available at http://www.waterboards.ca.gov/lid/index.html.

[61] *See* SWCRB, *In the Matter of the Petitions of the Cities of Bellflower et al.*, WQ 2000-11 (Oct. 5, 2000) at p. 8 ("BMPs should be used in first-round storm water permits, and 'expanded or better-tailored

evidence in the record shows that the storm water management framework under the previous permit was insufficiently protective of water quality. Although the proposed permit contains various identifiable improvements to the requirements of the permit, there is no evidence or specific discussion in the staff report, responses to comments, or findings showing what specific provisions in the proposed permit are reasonably expected to produce improvements in water quality. Rather, by stopping short of implementing what are identified in the record as necessary and practicable solutions, the Board would abuse its discretion in approving the proposed permit.

4. *The proposed permit fails to comply with the federal requirement to estimate the expected reductions in pollutant loading to be achieved by the permit's terms.* EPA regulations require that municipal storm water NPDES permits include an estimate of the reduction in pollutant loading expected to be achieved.[62] With the exception of TMDL analyses for diazinon in Chollas Creek and for dissolved copper in Shelter Island Yacht Basin, we are unable to locate in the staff report, response to comments, or findings, exactly what pollutant reductions are expected through implementation of the proposed permit's terms.[63]

5. *By leaving the required level of low impact site-design BMP implementation to Copermittees, the proposed permit creates an impermissible system of self-regulation that is inconsistent with the Clean Water Act.*[64] Under the Clean Water Act, the Phase I permit issued by the Regional Board must by its terms represent a program that will reduce municipal storm water pollution to the maximum extent practicable.[65] One of the proposed permit's explicit findings asserts that the document contains such requirements as are necessary to ensure that the Copermittees reduce the discharge of pollutants in storm water to the maximum extent practicable.[66] But in fact, the proposed permit does not outline all that is required to meet the MEP standard. Instead, it inappropriately

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BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.'")(quoting U.S. EPA, Interim Permitting Approach for Water Quality-Based Effluent Limits in Storm Water Permits, 61 Fed. Reg. 57,425 (1996)).

[62] *See* 40 C.F.R. § 122.26(2)(v).

[63] *See* Fact Sheet at pp. 87-91.

[64] *See Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 853-56 (9th Cir. 2003) (finding unlawful under 33 U.S.C. § 1342(p)(3)(B)(iii) EPA Rule that allowed NPDES permitting authorities to grant general discharge permits to small MS4s without substantive review to ensure compliance with MEP standard) (hereinafter "EDC").

[65] 33 U.S.C. § 1342(p)(3)(B)(iii).

[66] *See* Proposed Permit at p. 5.

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leaves substantive aspects of storm water management program design to the Copermittees.

The proposed permit's framework for requiring low-impact site design BMPs in development projects defers MEP determinations in a manner federal courts have found unlawful under the Clean Water Act.[67] Because site-design BMPs are a major component of the regulatory requirements governing new development and redevelopment projects, these requirements are substantive aspects of standards that must meet MEP in the permit. By leaving decisions regarding the scope—and ultimately the effectiveness—of site-design BMP implementation up to the Copermittees, the proposed permit's provision requiring implementation of these BMPs only "where determined to be applicable and feasible by the Copermittee" improperly leaves the decision of what constitutes MEP up to the regulated parties.[68] In fact, the proposed permit explicitly directs Copermittees to undertake the determination of what constitutes "applicable and feasible" under the site-design BMP requirement: "Each Copermittee shall develop and implement criteria to aid in determining Priority Development Project conditions where implementation of . . . site design BMP[s] . . . is applicable and feasible." This language openly indicates that the Copermittees—with no further direction or review from the Board—should decide for themselves what comprises MEP. This approach is not only ineffective, it constitutes a failure to regulate and is disallowed under the Clean Water Act, which requires NPDES permitting authorities to review permits "to ensure that the measures that any given operator . . . has decided to undertake will *in fact* reduce discharges to the maximum extent practicable."[69]

In another example of the proposed permit's flawed and unlawful approach to the MEP standard, among the list of acceptable site-design BMPs is construction of "a portion of walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces." We support such language, as reducing impervious cover in development projects is a core LID concept. But as one Copermittee commented, "the requirement is unclear."[70] Staff responded by indicating that "[i]t is *at the discretion of the Copermittees* to determine how much of a project's low traffic areas must be constructed with permeable surfaces. The Copermittees' determination must be based on the MEP standard."[71] This approach effectively—indeed, explicitly—leaves MEP decisions to the regulated Copermittees, reflecting a fundamental misunderstanding by

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[67] *See EDC*, 344 F.3d at 856.

[68] Proposed Permit at p. 19.

[69] *EDC*, 344 F.3d at 855 (emphasis in original); 33 U.S.C. § 1342(p)(3)(B)(iii).

[70] Responses to Comments at pp. 114-115 (City of Santee commenting).

[71] *Id.* at p. 115 (emphasis added).

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the staff of the requirement that the regulating agency determine what constitutes MEP in the permit and ensure that the Copermittees' storm water management programs meet the permit's MEP requirements.[72]

6. *By failing to include "substantive information about how the [Copermittees] will reduce discharges to the maximum extent practicable," the proposed permit is inconsistent with the Clean Water Act's public participation requirements.*[73] Public participation rights are a cornerstone of the Clean Water Act's goals.[74] We acknowledge that the Board has undertaken extensive procedures to accept and respond to public comment. But the opportunity to comment is rendered less than effective when, as described above, substantive portions of the permit's regulatory framework are missing, to be determined by the Copermittees at some later date. This failure to proceed in the manner prescribed by law will render the adoption of this permit an abuse of discretion by the Board if uncorrected.[75]

7. *The proposed permit is inconsistent with the requirement that the Board present detailed explanations to support its course of action.*[76] The record must contain clear descriptions of the "analytical route" the agency took to reach its conclusions.[77] Here, as we have described throughout this letter, the record presents insufficient explanations for several key provisions—and in some cases none at all. Absent analyses showing how the proposed permit meets MEP and how its provisions will achieve compliance with water quality standards—especially in light of copious evidence showing that more robust strategies are necessary and practicable—adoption of the permit is arbitrary and capricious, and an abuse of discretion.

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[72] *See EDC*, 344 F.3d at 856 ("[S]tormwater management programs that are designed by regulated parties must, *in every instance*, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable.") (emphasis added).

[73] *Id.* at 857.

[74] *See* 33 U.S.C. § 1251(e); *EDC*, 344 F.3d at 856-857.

[75] *See* Cal. Code Civ. Proc. § 1094.5(b).

[76] *See Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 525 (1974).

[77] *See Dep't of Corr. v. State Personnel Board*, 59 Cal.App.4th 131, 151 (1977) (citing *Topanga*, 11 Cal.3d 506 (1974)).

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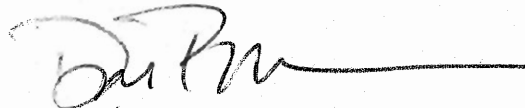
IV. Conclusion

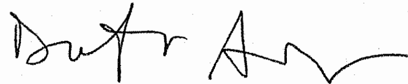
Reissuance presents an opportunity to modify the permit's structure and requirements to better achieve the central goal of municipal storm water regulations: "assuring maintenance of water quality standards."[78] But to adopt this proposed permit in its current form would be to adopt a permit knowing that it will not achieve water quality standards; to adopt a permit knowing that its terms do not represent MEP; and to adopt a permit that merely pays lip service to the State Board policy establishing LID as a core value driving storm water management in the State of California. Such an action would constitute an abuse of discretion.

The Board should ask—not only in light of the ever-evolving and improving standard of MEP, but also in light of its own position as a leader in storm water management and water quality protection—if the proposed permit truly represents five years of progress in terms of its requirements and likelihood to deliver water quality results. We believe, and the evidence overwhelmingly shows, that the proposed permit falls short in its current form despite the important improvements Board staff has made to the document. That is why NRDC has offered the Board a concrete proposal, the components of which the evidence shows meet the legal requirements of MEP, present a reasonable likelihood of achieving improved water quality, and live up to the State Board's Low Impact Development Sustainable Storm Water Management Policy. We urge the Board to adopt a revised version that incorporates our specific proposals to effect the fundamental change it has recognized is needed in storm water management practices in the San Diego region, and thank the Board for this opportunity to comment on the reissuance of the San Diego County municipal storm water permit.

Sincerely,



David Beckman, Senior Attorney



Dorothée Alsentzer, Legal Fellow

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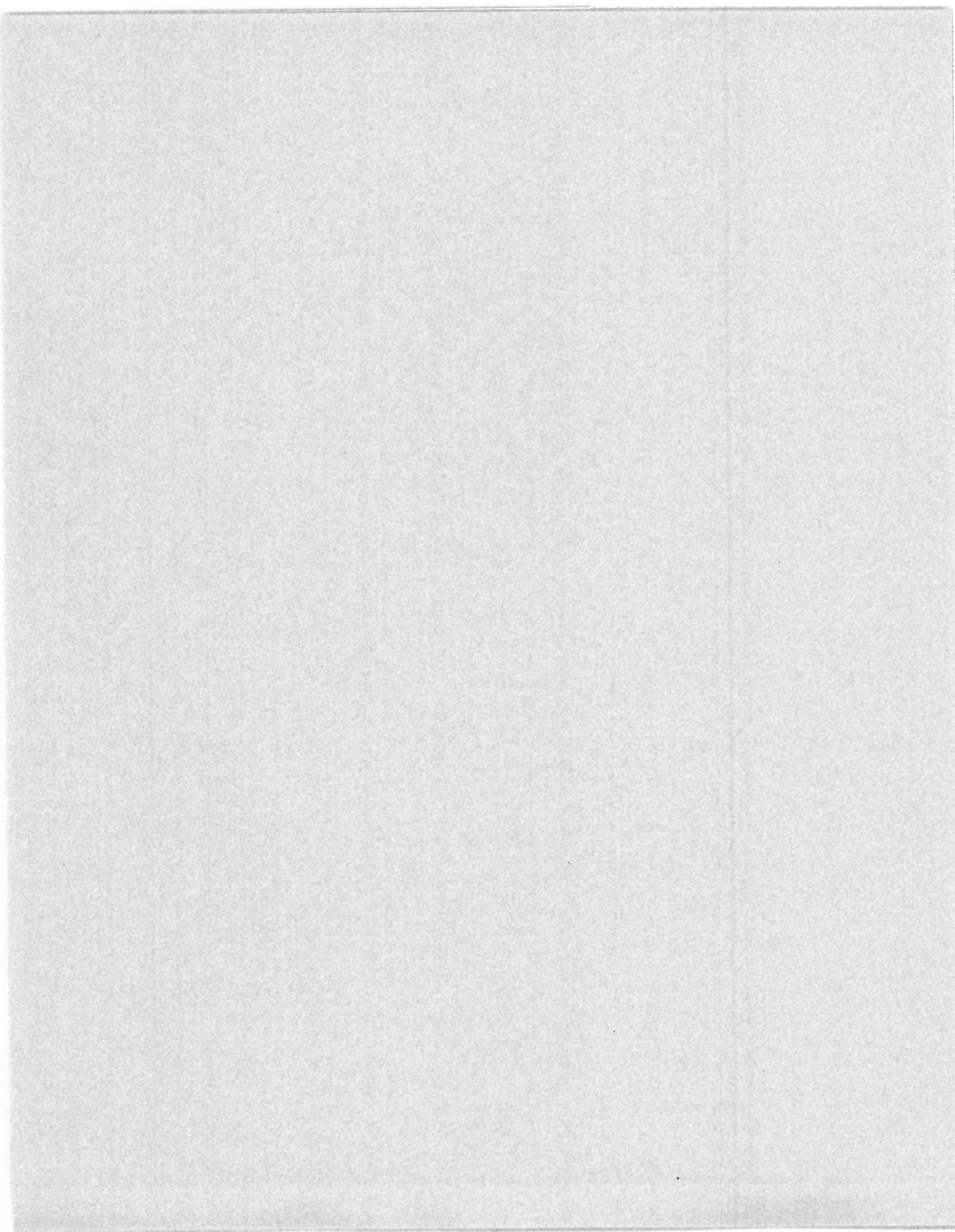
[78] *See* Fact Sheet at p. 24 (quoting U.S. EPA, 64 Fed. Reg. No. 235 (Dec. 8, 1999)).



December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

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SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD
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October 30, 2006

REFER TO FILE NUMBER
270045-0036

John Minan
Chairman
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: **Public Comments Regarding Revised Tentative Order No. R9-2006-0011, NPDES No. CAS0108758 ("Revised Tentative Order")**

Dear Chairman Minan:

We appreciate the opportunity to provide the California Regional Water Quality Control Board, San Diego Region ("Regional Board") with comments on the Revised Tentative Order No. R9-2006-0011, NPDES No. CAS0108758 ("Revised Tentative Order"). These comments are being submitted by *the Construction Industry Coalition on Water Quality (CICWQ), the Building Industry Association of Southern California (BIASC), the Building Industry Association of San Diego County, the Building Industry Legal Defense Foundation (BILD), the Coalition for Clean Water and a Healthy Economy and the Consulting Engineers and Land Surveyors of California (CELSOC).* In addition to these comments, CICWQ, BIASC, BILD and CELSOC hereby adopt the written comments submitted by Foley & Lardner LLP on behalf of the Coalition for Clean Water and a Healthy Economy (Coalition) and the Building Industry Association of San Diego County (BIASD), dated October 30, 2006 and attached hereto as Attachment "A" (the "Foley Comment Letter"). The comments set forth herein supplement the comments set forth in the Foley Comment Letter, and CICWQ, BIASC, BIASD, BILD, the Coalition, and CELSOC respectfully request the consideration of the comments in both this letter and the Foley Comment letter by the Regional Board, as well as Regional Board staff.

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1. **The Revised Tentative Order Requires Significant Clarification In Order to Avoid Violation of the Due Process Rights of Regulated Community.**

The Revised Tentative Order deprives the regulated community of due process in a number of instances because many of the terms, conditions and requirements are so vaguely stated that the Revised Tentative Order does not provide the regulated community with adequate notice of what is required to comply with the Revised Tentative Order, and, conversely, fails to provide adequate notice as to what may constitute a violation of the Revised Tentative Order once it is adopted. "Notice is fundamental to due process." 7 Witkin § 638 (10th ed. 2006). The lack of an adequate definition constitutes improper notice to the regulated community in violation of due process. Cal. Const. Art. I, §§ 7, 15; Cal. Gov. Code § 11340 et *seq*. (A "standard that has no content is no standard at all and is unreasonable." *Wheeler* v. *State Bd. of Forestry* (1983) 144 Cal.App.3d 522, 527-528).

The critical instance of insufficient notice relates to provisions of the Revised Tentative Order governing the standard of water quality control that must be attained by Copermittees under the Permit. For example, currently the Revised Tentative Order does not adequately address situations where water quality controls are implemented by Copermittees to the Maximum Extent Practicable ("MEP"), as required by federal law[1], but receiving water violations are nonetheless detected. This issue will be particularly difficult for Copermittees to address if it is not factually clear that discharges from public storm drain (MS4) systems are proximately causing or contributing to receiving water violations, and/or if no additional best management practices (BMPs) can be identified to provide additional water quality control because, in fact, BMPs meeting the MEP standard have already been implemented.

Therefore, the terms of the Revised Tentative Order must be revised to make it clear that implementation by Copermittees of water quality control measures meeting the MEP standard, which standard inherently requires review and implementation of better available BMPs if MS4 system discharges are causing or contributing to receiving water quality standard violations, constitutes compliance with the Revised Tentative Order. These clarifications to provisions of the Revised Tentative Order, including Discharge Prohibition A.3., are critical to providing adequate notice to the regulated community of activities required under the Revised Tentative Order to establish compliance and avoid enforcement actions.

Similarly, a number of other terms and provisions of the Revised Tentative Order are not adequately defined in violation of the due process rights of the regulated community. Many terms and conditions of the Revised Tentative Order are characterized by broad, vague, undefined and/or subjective language, resulting in difficulty in implementation and creating potential liability for the Copermittees. For example, terms such as "Minimum Widths Necessary" (D.1.d.(5)(a); D.1.d.(4)); "High levels of average daily traffic" (D.1.d(7)(e)); "High volumes of trash and debris" (D.3.a.(3)(b)(i)); "Highest," "Moderate," and "Low" volumes of trash and debris (D.3.a.(5)); "Environmentally Sensitive Area" D.1.d.(2)(g); and "All other ....

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[1] Clean Water Act § 402(p)(3)(B)(iii).

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tributary to a CWA Section 303(d) impaired water body segment" D.3.b.(1)(c); D.3.c.(2)(f). The terms cited above are not adequately defined in the Revised Tentative Order so as to provide the regulated community with sufficient notice of what is required in order to comply with such provisions. Thus, these terms should be clarified by the Regional Board in the Revised Tentative Order before the MS4 Permit is adopted.

In addition, certain of the provisions in the Revised Tentative Order require Copermittee actions that are undefined, which precludes compliance with those terms and conditions. For example, Provision D.3.a.(2)(c) requires Copermittees to evaluate feasibility of retrofitting existing structural flood control devices and retrofit "where necessary." However, no standard is provided as to when retrofitting would be "necessary" under this Provision. Further, there is no guidance in the Revised Tentative Order as to how such retrofitting should be accomplished in compliance with the terms of the Permit. Thus, this Provision does not provide the regulated community sufficient notice as to what is required in order to satisfy the Copermittees compliance obligations and thus raises serious due process concerns. This provision should be clarified.

Along similar lines, Provision D.3.c.(2)(f) in the Revised Tentative Order requires Copermittees to implement or require implementation of "additional controls" for residential areas and activities tributary to CWA Section 303(d) impaired water body segments and for those areas adjacent to coastal lagoons or other receiving waters within "environmentally sensitive areas." It is unclear what additional controls would be required in order to comply with this Provision and other provisions similar that are found in other sections of the Revised Tentative Order. See D.3.b.(2)(e); D.3.b(1)(c). It is also unclear whether the Copermittees must, themselves, implement additional controls for these areas in the event that there is a failure to comply with requirements adopted by the Copermittee mandating that others do so. As noted above, many of the terms in this Provision are vague and require additional clarification by the Regional Board to provide the regulated community with the notice required to satisfy due process.

Another example of this need for additional clarification and definition arises in Provision D.3.a.(3)(a)(iii), which requires that the Copermittees remove accumulated trash and debris "immediately" from any MS4 facility that is designed to be self-cleaning. It is unclear what "immediately" means in this context and how exactly a Copermittee can be expected to "immediately" discern whether a self-cleaning facility needs maintenance, as would be required to comply with this requirement as written. Further, as a practical matter, it is infeasible to identify and accomplish "immediate" removal of trash and debris within the MS4 system. While trash and debris can be identified as part of the mandated regular inspection program, and removed upon identification, immediate removal does not allow the normal operation of the storm drain inspection and maintenance process otherwise specified in the Revised Tentative Order. Therefore, this Provision should be clarified.

Thus, in order to provide the regulated community with sufficient notice of what is required to comply with the MS4 Permit and what will constitute a violation of the MS4 Permit so as to

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satisfy basic due process standards, the Revised Tentative Order should be revised to provide further clarification regarding a number of terms and conditions.

2. Program Effectiveness Provisions Need to be Revised to Clarify that Copermittees Are Only Responsible to Implement Additional Water Quality Measures to Respond to Water Quality Programs to the Extent that Those Water Quality Problems are Factually Connected to MS4 Discharges and that Additional Water Quality Measures Are Available and Feasible to Implement.

The Program Effectiveness conditions in the Revised Tentative Order seem to require that when "water quality problems" are determined to exist, then the Copermittees must "correct" those problems, regardless of whether the water quality problems at issue are factually related to MS4 discharges, regardless of whether such conditions are a result of a failure of Copermittees to implement BMPs and water quality controls to the Maximum Extent Practicable standard ("MEP"), and regardless of whether there are additional water quality controls that are available and technologically feasible to implement. Further, the provisions of the Revised Tentative Order are inconsistent and conflict as to the standards that will be used to determine compliance with the Revised Tentative Order requirements, and as to the actions that Copermittees must take to address "correction" of receiving water quality problems as mandated by the Revised Tentative Order. *See* Provisions I.1.b.; I.2.b; I.3.b.; I.4.b. Specifically, it is unclear that the Copermittees' implementation of water quality control measures addressing discharges from the MS4 system to the MEP will be sufficient to establish Copermittees' compliance with the Order in the event that receiving waters continue to exhibit exceedences. Instead, the Revised Tentative Order appears to mandate nothing less than that Copermittees implement a solution for receiving water quality, whether or not the primary source of the receiving water quality problem is a proximate result of MS4 system discharges.

The Revised Tentative Order also fails to address the situation where a Copermittee is meeting the MEP standard and there are no additional water quality controls available that are technologically feasible for implementation. It is unreasonable and impracticable to require Copermittees to "correct" every water quality problem that arises, whether or not those water quality issues are related to discharges from the MS4 system, and regardless of existing compliance with the MEP standard. The result of such a requirement is an unattainable compliance standard. Thus, these provisions of the Revised Tentative Order should be revised to require that activities be modified and improved to respond to "water quality problems" to the extent that alternative water quality controls are available, technologically capable of implementation, and necessary to address water quality conditions proximately caused or contributed to by MS4 system discharges. Without these clarifications, the Revised Tentative Order mandates actions that exceed the Clean Water Act and Porter Cologne authority, and are impracticable to implement. *See*, Clean Water Act Section 412(p)(3)(B)(iii), and California Water Code Sections 13256, 13375, and 13376, providing for regulation of *discharges of waste in* stormwater.

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3. A Number of Provisions in the Revised Tentative Order Do Not Allow For Certain Activities Which Provide Water Quality and Other Environmental Benefits and Thus Such Provisions Should be Revised to Provide Sufficient Flexibility to Provide These Water Quality Benefits.

The conditions in the Revised Tentative Order regarding implementation of BMPs do not provide sufficient flexibility to achieve maximum water quality and environmental benefits. For example, the language of Finding 2.b. broadly denouncing the water quality benefit of regional BMPs, contrary to factual evidence generated by engineering studies produced by the International Stormwater BMP Database (ASCE/EPA, 2004) combined with List 1 of Provision D.1.4 related to site design BMPs do not allow for the sufficient implementation of regional BMPs, even when those BMPs can be very useful in achieving water quality control and volume reductions.[2] In light of professional recommendations to the contrary, the provisions of the Revised Tentative Order should be revised to allow the use of regional, end-of-pipe BMPs in appropriate circumstances, particularly to supplement site specific source controls. For example, under the existing language of the Revised Tentative Order, use of infiltration facilities to reduce or eliminate increase in runoff volume at the downstream end of the MS4, prior to discharge into the receiving water would be precluded. In many situations infiltration at the downstream end of the MS4 is a better option, particularly to supplement upstream source controls, and particularly when land costs, land availability and/or water conservation needs are an issue. Although routing flows through vegetation prior to conveyance to an infiltration facility would reduce the size of the infiltration facility, it should not be mandated because in some cases infiltration at the downstream end of the MS4 is the preferable option from a water quality perspective, as well as from a land and water conservation perspective (*e.g.,* project is proposing to collect all runoff in a retention pond for storage and reuse for irrigation; in that case infiltration through vegetated areas would need to be minimized in order to maximize capture and reuse potential).

In addition, some projects (*e.g.* redevelopment projects) may not feasibly be able to use site design BMPs listed in List 2, and more regional solutions downstream of infill sites may also benefit water quality by controlling discharges from other, neighboring existing development. Language in the Revised Tentative Order, like that in the provisions cited above, discourages regional BMPs, and therefore limits water quality benefits. Therefore, such provisions should be revised to allow for regional BMPs, endorsed by professional associations and appropriate for maximizing water quality control.

In addition, the Regional Board should revise a number of conditions in the Revised Tentative Order to allow for Copermittees to collaborate with other groups and entities, including Homeowners Associations ("HOAs"), Commercial Property Owners Associations ("COAs"), and similar associations and industry groups, to maximize compliance with the Revised

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[2] The improper prohibitions in the Revised Tentative Order related to preclusion of discharges of waste "into" receiving waters, rather than precluding discharges of waste into receiving waters, as described in the Foley Comment Letter, further restrict the implementation of regional BMPs.

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Tentative Order. The Revised Tentative Order in its current form does not sufficiently encourage cooperation of Copermittees with other groups in a manner that can benefit water quality. In its responses to comments, the Regional Board staff recognized that water quality benefits can result from regional agreements and cooperation between agencies, and small and large MS4s. The same concept also applies to agreements with HOAs, COAs and similar entities, and such collaboration may allow the Copermittees to expand their water quality reach, which allows for greater water quality benefits.

For example, Copermittees should be allowed to collaborate with HOAs and COAs on methods for oversight of residential areas and on the regional residential education program requirements. *See* Provision D.3.c.2.(4)-(5). The HOAs are likely going to play an important part in implementing such programs, and thus it makes sense for the HOAs to be involved in development of such program requirements. Involvement of the HOAs during the creation of such programs will allow for more effective programs to be developed that have a greater chance of success in terms of implementation, education, and ultimately greater water quality benefits.

Other provisions in the Revised Tentative Order similarly do not allow sufficient flexibility for the Copermittees to collaborate with third parties on certain compliance responsibilities, including Provisions D.1.e.(1) and D.3.a.(3)(a) which require BMP maintenance and verification be undertaken by the Copermittees and do not allow such activities to be performed by third parties, eliminating assistance to the Copermittees that can be provided by proprietary BMP vendors, HOAs, COAs, etc.

Similarly, Provision D.3.b.(3)(d) provides that third parties may only perform 30% of BMP inspections and that the Copermittees are responsible for performing the remaining inspections required by the provision. Precluding Copermittees from entering into cooperative agreements with third parties to perform maintenance, verification and/or inspection activities deprives the Copermittees of the ability to expand their water quality reach, and therefore constitutes poor water quality policy. If allowed to cooperate with third parties, like vendors, subcontractors, HOAs and COAs, with respect to maintenance, inspection and BMP implementation obligations, Copermittees will be able to implement more effective programs, which will result in greater water quality benefits. Thus, these provisions should be revised to allow sufficient flexibility for Copermittees to engage in partnerships with third parties to more effectively implement programs and achieve greater water quality benefits.

4. The Regional Board Should Not Expand the Application of CEQA to Include Projects Not Already Subject to CEQA Review.

The current language of the Revised Tentative Order appears to impermissibly expand the application of the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 *et seq*., by mandating environmental review of projects not already subject to environmental review under CEQA. Sections D.1.b. and D.1.c. of the Revised Tentative Order apply to all development projects, as no acreage or other thresholds are applied in the current definition of "development project" found in Attachment C to the Revised Tentative Order. Attachment C defines the term as "new development or redevelopment with land disturbing activities; structural development,

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including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects or land subdivision."

However, CEQA does not apply to certain activities that would be considered "development projects" under the definition provided in the Revised Tentative Order. Instead, CEQA only applies to those projects requiring discretionary approvals from state or local agencies. Cal. Pub. Res. Code § 21080. The definition contained in the Revised Tentative Order, as cited above, would likely encompass projects that are not already subject to environmental review under CEQA (*e.g.*, nondiscretionary projects, ministerial actions, and emergency projects). The Regional Board should make clear in the Revised Tentative Order that these requirements only apply to those projects that are already subject to environmental review under CEQA.

5. The Regional Board Has Made a Number of Findings to Support the Revised Tentative Order That are Not Supported by Available Scientific Evidence And/Or that Misstate the Available Scientific Evidence.

First, Finding C.4. provides that "human illnesses have been linked to recreating near storm drains flowing to coastal waters" and that urban runoff pollutants can bioaccumulate in humans; however, the Regional Board has not cited the evidence in the record that supports this contention, and the contention is contrary to a proper and complete summary of available scientific evidence as a whole. As a result, the finding is misleading and does not constitute a comprehensive summary of available scientific evidence. By way of example, a study conducted by PBS&J in coastal watersheds near Laguna Beach in Orange County (PBS&J, 1999) found that indicator bacteria concentrations in receiving waters downstream from the developed/urban watersheds were not significantly different than concentrations in receiving waters downstream from undeveloped watersheds. Additional analysis conducted by Paulsen and List (Paulsen and List, 2005) further supported these findings. These studies conclude that the occurrence of bacteria and pathogens in surface water, and the resulting potential for illness, cannot be directly linked to urban runoff, as opposed to runoff from natural areas. Further, Paulsen and List summarize the debate over the use of bacteria monitoring for pathogenic indicators, and point out that scientific studies show no correlation between bacteria levels and pathogens and therefore bacteria may not indicate a significant potential for causing human illness (Paulsen and List, 2005). In a recent field study conducted by Schroeder et al., pathogens (in the form of viruses, bacteria, or protozoa) were found to occur in 12 of 97 samples taken, but the samples that contained pathogens did not correlate with the concentrations of indicator organisms (Schroeder et. al. 2002). These studies suggest that bacteria is not necessarily a proper indicator of pathogens and associated water quality issues. The far reaching statement in Finding C.4. suggesting that human illnesses has been directly linked to urban runoff is not supported by substantial evidence, and contradicts the available scientific evidence.

Similarly, Finding C.9. provides that runoff from urban areas is significantly greater in pollutant loads than pre-development runoff from the same area. However, available data indicate that the relationship between pollutant loads and land use is a much more complicated than Finding C.9. indicates, and Finding C.9. is, as a result, only generally true in certain

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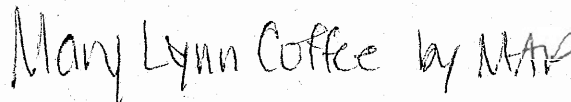
circumstances. Whether runoff from urban areas contains significantly greater pollutant loads than runoff from the same areas in the pre-development condition will depend on a number of factors, including pre-development land use, and the type of pollutant at issue. As a result, while the statement Finding C.9. may be true for some pollutants depending upon pre-urban land uses, it certainly is not true for all situations. For example, urbanized areas typically contribute far smaller loads of TSS and other sediment related pollutants in runoff than open space and agricultural uses. Similarly, urban areas generally contribute lower pesticide and nutrient loads than prior land uses associated with agriculture. This Finding should be revised to accurately reflect the complex relationship of pollutant loads for urbanized areas v. those associated with pre-development conditions. In its current form, Finding C.9. is too simplistic and, as a result is inaccurate and misleading.

Thank you for the opportunity to provide comments on the Revised Tentative Order. We look forward to working with the Regional Board and Regional Board staff on the incorporation of the necessary revisions to the Revised Tentative Order.

Sincerely,



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October 30, 2006

Via Hand Delivery

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2006 OCT 30 P 5:19
SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

Re: Comments on the Revised Tentative Order No. R9-2006-011

Dear Mr. Robertus:

The San Diego Unified Port District (Port) appreciates the opportunity to comment on the revised Tentative Order 2006-0011 - the Draft Municipal Stormwater Permit for the San Diego region (revised Draft Permit). The Port has carefully reviewed the revised Draft Permit, as well as the Responses to Comments provided by the Regional Water Quality Control Board (RWQCB). We appreciate the consideration of our previous comments and the incorporation of many of the regional Copermittee concerns into the revised Draft Permit language.

While we believe the revised Draft Permit represents an improved approach to urban stormwater management in the San Diego region, additional clarification in the Permit language is necessary to ensure that Copermittees are not liable for water quality problems caused by pollutant sources beyond their control. Therefore, we recommend modifications to two key concepts in the revised Draft Permit:

1. *Add language to the Permit clarifying that Copermittees are responsible only for MS4 discharges that cause or contribute to a violation of receiving water quality standards.* In the Responses to Comments, RWQCB staff stated that "the Tentative Order does not require that the Copermittees ensure that water quality standards in receiving waters are met; it requires that the Copermittees ensure that their discharges do not cause or contribute to a violation of water quality standards in receiving waters" (Responses to Comments pp. 13-14). While this may be the RWQCB's intent, language retained in the revised Draft Permit states that "urban runoff management program implementation is expected to ultimately achieve compliance with water quality standards" (Finding D.1.a). This statement assumes that pollutants causing exceedances of water quality standards are completely under the control of the Copermittees. Language in the Permit must clarify that Copermittees are responsible only for MS4 discharges that cause or contribute to a violation of receiving water quality standards.

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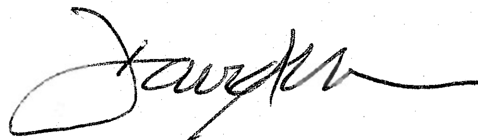
2. *Add language to the Permit clarifying that Copermittees are not responsible for major sources of pollutants that are not under their direct control.* The RWQCB stated in their Responses to Comments "the Tentative Order does not hold the Copermittees responsible for pollution originating outside their jurisdictions. Instead, the Tentative Order holds the Copermittees responsible for their contribution of pollutants to receiving waters" (Responses to Comments, pp 13-14). This concept, however, is not directly stated in the revised Draft Permit. As such, Copermittees may be liable for violations to water quality standards caused by pollutant sources beyond their control, such as aerial deposition. Language in the Permit must acknowledge that Copermittees do not have control, nor can they prevent, all pollutant sources from entering the MS4.

The Port is committed to its mission of being an environmental steward for San Diego Bay. We value clean water and enhancing natural resources and environmental health. We are proud of what we have accomplished to date; however, we recognize that more remains to be done. We emphasize the need to develop programs that are beneficial to water quality and the environment, yet remain cost effective. We encourage the Regional Board to consider the comments submitted on behalf of the Port and to make changes to the revised Draft Permit as necessary.

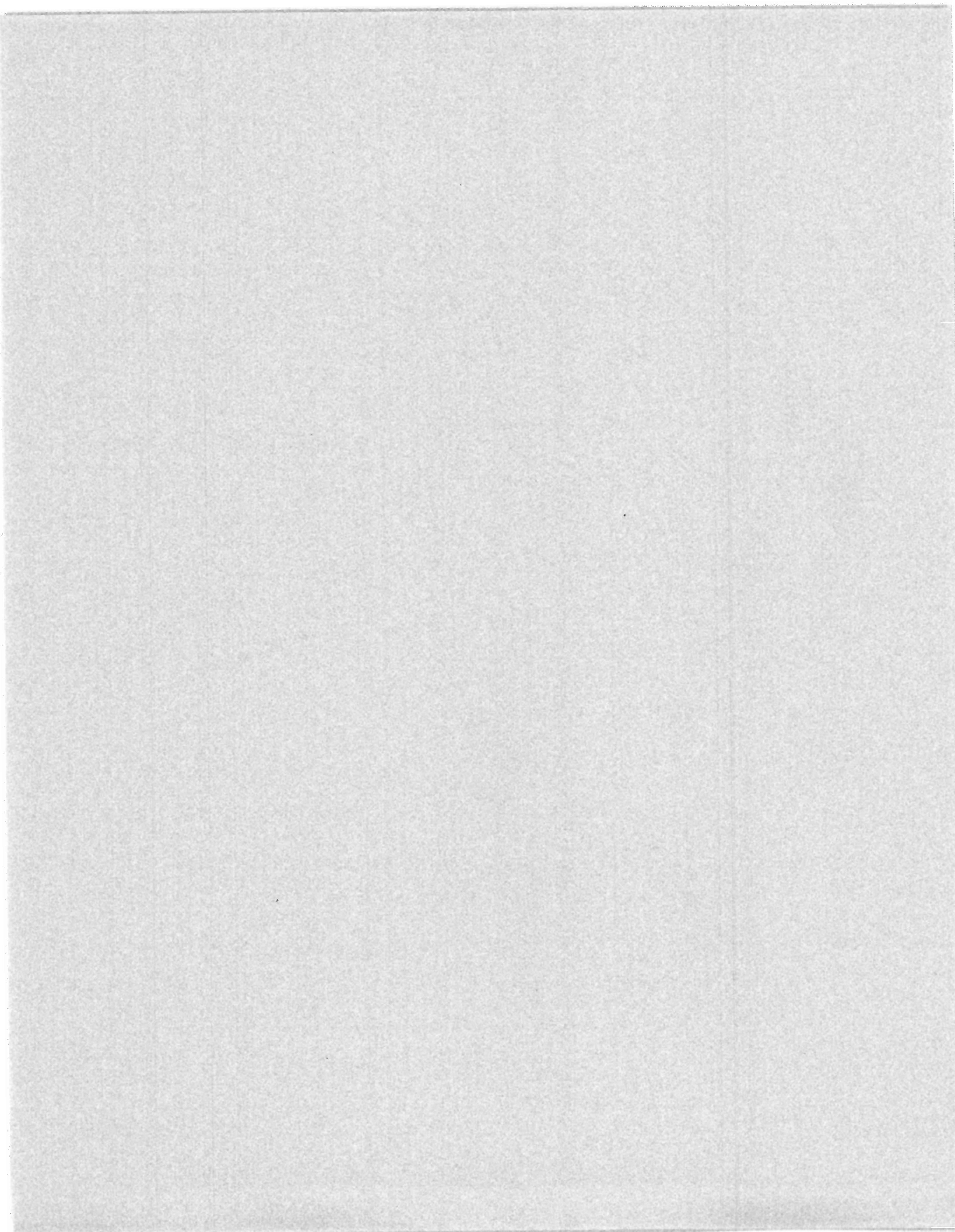
If you have any questions about the issues discussed above, please contact Michelle White at (619) 686-7297.

Sincerely,



David Merk, Director
Environmental Services

MW/rv
File: Municipal Stormwater Permit
Docs #205677v1



December 13, 2006 Regional Board Meeting
Item 10, Supporting Document # 4

O. Joe Purohit – Sparkers Inc.

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COMMENTS TO THE REVISED STORM WATER PERMIT DUE OCTOBER 30, 2006

In general, regulatory oversight must accomplish at least these two objectives, as has been the case in many industries (telecom, power):

1. Ensure that the regulated industry meets certain societal goals and/or delivers its goods or services within prescribed standards of quality and service
2. Protect, enhance and eventually maximize consumer welfare/benefits, i.e., the regulated industry must operate at least cost and highest efficiencies.

For storm water, the regulator is the SDRWQCB, the regulated industry consists primarily of the co-permittees, the storm water and related infrastructure in their franchised geographic areas, and their suppliers (e.g., environmental consultants, attorneys, monitoring companies, equipment vendors), and consumers are predominantly the local taxpayers (citizens, private companies; the ports being possible exceptions).

Overall, the revised permit addresses the first objective (water quality) very well but falls short in ensuring that co-permittees will conduct themselves in ways that maximize consumer welfare/benefits (i.e., least cost, most efficient operation).

The perception of most consumers and businesses is that improved water quality is not as primary a need as electricity, roads or telephones. Because of such perceptions, it is all the more important that consumer welfare/benefits be maximized. It must become one of the core tenets of storm water regulations. The SDRWQCB, to the extent permitted by law and its regulatory authority, is urged to include mechanisms in the new permit towards meeting this goal, in 2007 or at the earliest practical date.

SAN DIEGO REGIONAL
WATER QUALITY
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Status of Consumer Welfare/Benefits

"Findings," Sections C-7 and D-1b of the revised permit confirm that after almost five years there has been no material improvement in our region's water quality. This raises a few questions:

- What are the causes for the findings of Sec. C-7 and D-1b? Understanding these causes will help avoid the problems for the next 5-years cycle.
- The situation gets more complicated if a co-permittee incurs a substantial penalty for violation of the permit. The consumers pay to the industry participants (co-permittee, its environmental consultants, attorneys, water testing companies, etc.) for the original compliance, then again during the appeal phase and then again for the penalty. The water quality has still not improved, and there is a high likelihood that there is no change in industry participants either.
- Who then are the primary beneficiaries of the previous storm water permit?

Responses from the SDRWQCB to the above comments would be welcome. Also, what are SDRWQCB's plans to ensure these situations are not repeated in the next 5-years cycle of the permit?

Increasing Consumer Benefits

Numerous regulatory mechanisms are available to protect and enhance consumer benefits. A few that can be expediently implemented for the new storm water permit are discussed below. They have proven to be hugely successful in other industries.

Disclosure of costs: Costs of regulated activities must be fully disclosed by each co-permittee. In the short term, of particular importance are vendor payments for key

products and services (e.g., water quality testing). The benefits of such cost disclosure are:

- A better understanding of the overall cost structure which can help the the regulator and the "market" identify areas for efficiency improvements
- Increased competition among existing suppliers and new entrants
- Greater risk-taking and innovation in new technologies and processes. For example, testing water quality at substantially lower costs, or new sampling methodologies that lower total costs

Disclosure of Permit Compliance Source Data: Sufficient data must be disclosed by each co-permittee based on which independent third parties can conduct the same level of analysis as the regulated entities for permit compliance. Paper reports with pre-formatted tables in Excel or PDF are specifically inadequate for such analysis. In stead, disclosure must be of the original source data (as provided to the co-permitttee by the lab or consulting company, in SWAMP format for example) in an easily exportable form. The following data items are proposed for submission by each co-permittee, though the SDRWQCB may wish to include others:

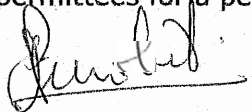
- Wet and dry weather water quality data (chemistry, pollutions, metals, etc.) at each monitoring location
- Bioassessment data
- Regulated industrial and construction sites - all important data that the co-permittee will use for its compliance with the permit

Information disclosure and dissemination must not turn into expensive propositions requiring major grants. An electronic submission of Excel spreadsheets to SDRWQCB each reporting cycle by each co-permittee is sufficient. The SDRWQCB can then set up simple methods for downloading the files.

Shift regulatory focus on individual co-permittees and jurisdictions: Various watershed-level and regional considerations may have led the SDRWQCB to issue a single permit having oversight over 22 municipalities and government agencies. A single permit approach, however, carries the risk of encouraging "group think" and behavior which may be expedient for the short-term needs of the co-permittees but in the long run will be detrimental to maximizing consumer benefits.

Technology is available today that allows each jurisdiction to measure and analyze water quality (pollutant levels) at all storm water ingress and egress points. Setting relative improvement in water quality over a certain period of time as the jurisdictional regulatory objective is more likely to result in a competitive environment that benefits the consumer. Increased competition can also be expected from suppliers of products and services, and amongst the jurisdictions as each strives to excel and differentiate itself from others based on natural and anthropomorphic characteristics native to its franchised geographic area.

If not practicable to implement for the entire region, such an approach can be readily trialed (with sufficient regulatory involvement) over an exemplar watershed or even with a few co-permittees for a period of few years.



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