Responses to Comments
on
Tentative Order No. R9-2006-0011
(San Diego County Municipal Storm Water Permit)

San Diego Regional Water Quality Control Board

August 30, 2006

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LIST OF ABBREVIATIONS AND ACRONYMS

ADT - Average Daily Traffic
BAT - Best Available Technology
BIA - Building Industry Association of San Diego County
BMP - Best Management Practice
Basin Plan - Water Quality Control Plan for the San Diego Basin
CASQA - California Stormwater Quality Association
CCC - California Coastal Commission
CDFG - California Department of Fish and Game
CEQA - California Environmental Quality Act
CFR - Code of Federal Regulations
Copermittees - County of San Diego, the 18 incorporated cities within the County of San Diego, the San Diego Unified Port District, and the San Diego County Regional Airport Authority
CWA - Clean Water Act
CWC - California Water Code
CZARA - Coastal Zone Act Reauthorization Amendments of 1990
ESAs - Environmentally Sensitive Areas
FR - Federal Register
GIS - Geographic Information System
IC/ID - Illicit Connections and Illicit Discharges
JURMP - Jurisdictional Urban Runoff Management Plan
LARWQCB - Los Angeles Regional Water Quality Control Board
MEP - Maximum Extent Practicable
MRP - Receiving Waters Monitoring and Reporting Program
MS4 - Municipal Separate Storm Sewer System
NOI - Notice of Intent
NPDES - National Pollutant Discharge Elimination System
NRDC - Natural Resources Defense Council
NURP - Nationwide Urban Runoff Program
Regional Board - San Diego Regional Water Quality Control Board
RGOs - Retail Gasoline Outlets
ROWD - San Diego County Copermittees' Report of Waste Discharge
RURMP - Regional Urban Runoff Management Plan
RWLs - Receiving Water Limitations
SANDAG - San Diego Association of Governments
SIC - Standard Industrial Classification Code
SUSMP - Standard Urban Storm Water Mitigation Plan
SWMP - Storm Water Management Plan
SWRCB - State Water Resources Control Board
SWPPP - Storm Water Pollution Prevention Plan
TAC - State Water Resources Control Board Urban Runoff Technical Advisory Committee
TIE - Toxicity Identification Evaluation
TMDL - Total Maximum Daily Load

USEPA - United States Environmental Protection Agency
WDRs - Waste Discharge Requirements
WLAs - Waste Load Allocation
WQC - Water Quality Criteria
WQBELs - Water Quality Based Effluent Limits
WSPA - Western States Petroleum Association
WURMP - Watershed Urban Runoff Management Plan

INTRODUCTION

The Regional Board received a total of approximately 530 final written comments on Tentative Order No. R9-2006-0011 from approximately 30 different organizations and individuals. Each of these final written comments is responded to in this document. Many of the comments received were equivalent to other comments received (approximately 46%); these comments were grouped with other similar comments and responded to once in order to minimize redundancy in this document.

The overall organization of this document is consistent with the organization of Tentative Order No. R9-2006-0011. Responses to "General Comments" are presented first, followed by responses to "Comments on Findings". The remainder of the document contains responses to "Comments on Specific Sections," presented in same sequence as the sections in the Tentative Order.

The Regional Board appreciates the efforts of all those who contributed by commenting on Tentative Order No. R9-2006-0011. The comments are valuable and many have resulted in proposed permit language changes. To the extent that a revision to the permit language is proposed as a result of a particular comment, that fact is noted in the response to that comment. References to permit section numbers where revisions have been made generally refer to section numbers of the original Tentative Order dated March 10, 2006. However, some sections of the Tentative Order have been reorganized, particularly regarding reporting and monitoring. References to section numbers where revisions have been made in those instances may refer to the revised Tentative Order dated August 30, 2006. In those cases, readers will be referred to section numbers in the "revised Tentative Order," as opposed to the "Tentative Order."

The revised Tentative Order and Fact Sheet (dated August 30, 2006) are available in conjunction with this Responses to Comments document at:

http://www.waterboards.ca.gov/sandiego/programs/sd_stormwater.html.

RESPONSES TO GENERAL COMMENTS

Section: General **Sub-section**:

Commenter(s): Bob Collins

Comment: I have reviewed the storm water permit and in particular have reviewed the provisions of the Watershed Urban Runoff Management Plan under the permit. The permit looks good.

Response: Comment noted.

Section: General **Sub-section**:

Commenter(s): Bob Collins

Comment: The Regional Board should prepare an annual executive report on water quality in the San Diego Region that describes the general condition of watersheds in the San Diego Region. The report should provide information on water quality and actions which the public can take to improve water quality in all the region's major watersheds. The information for the report can come from the Co-permittee's annual report to the Regional Board on the storm water permit. The Report should be distributed to media outlets in the San Diego Region.

Response: Comment noted. The Regional Board will take this suggestion under consideration. However, the suggestion is outside the scope of reissuance of the Tentative Order.

Section: General **Sub-section**:

Commenter(s): Bob Collins

Comment: The Regional Board should provide a map which is accessible to the public from its web site to show location of monitoring in all major watersheds. This will help to bring awareness to the public on the location of water quality monitoring.

Response: The County of San Diego has posted the Copermittees monitoring report on www.projectcleanwater.org. This report provides maps of monitoring locations. The Regional Board will consider providing a link to this report on its website.

Section: General **Sub-section**:

Commenter(s): Caltrans

Comment: We support the use of the triad approach for determining follow-up actions when monitoring indicates urban runoff impacts receiving waters (Tentative Receiving Waters Monitoring and Reporting Program, pg. 6). This approach will allow available public resources to be directed at runoff locations with demonstrated problems. We suggest that the triad approach be more explicitly integrated into the permit, particularly in those sections that address exceedances of standards.

Response: The triad approach is explicitly integrated into the Tentative Order by way of the monitoring and watershed requirements. The triad approach is the foundation of the monitoring requirements. The Copermittees' watershed efforts then rely on the results of the monitoring triad approach to identify watershed priorities.

Section: General **Sub-section**:

Commenter(s): Caltrans

Comment: Although source control is repeatedly mentioned as an effective measure to reduce runoff pollutants, the permit provides no indication on how to address major sources outside the jurisdiction of the permittees. For example, the Region 8 MS4 permits acknowledge that some pollutants, such as those from aerial deposition, cannot be controlled by the permittees. In these cases action by the State Board or ARB may be necessary.

Response: The Regional Board agrees that an interagency collaborative effort is needed to address cross-media pollution. As required by 40 CFR 122.26(d)(2)(i), the Tentative Order requires each Permittee to demonstrate legal authority that authorizes the Copermittee to control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees. It also encourages the development of interagency agreements with other owners of other MS4s. By providing free and open access to their MS4s, Copermittees efficiently collect and convey pollutants directly to receiving waters. Because they enable pollutants to reach receiving waters, the Copermittees are responsible for these pollutants and must reduce these pollutants in urban runoff discharges to the MEP.

Efforts to limit the creation of impervious surfaces and prevent the elimination of stream channels are new development source control activities encouraged by the Tentative Order that may reduce the threat of aerially-deposited pollution.

Section: General **Sub-section**:

Commenter(s): Carlsbad Watershed Network

Comment: Increases in impervious cover often come gradually over time long after a project's original construction. We need some method/ trigger to make these later changes subject to review and taken into account in evaluating total watershed impervious cover and cumulative impacts (e.g. to include small changes, as when a single homeowner changes their front yard from grass to concrete patio or builds a three-car garage). Current remote sensing tools now make such analysis feasible and affordable for jurisdictions. The annual report should therefore include impervious cover as well as water quality measures in a cumulative impacts analysis.

Response: The Tentative Order requires significant redevelopment creating more than 5,000 square feet of impervious surfaces to be subject to SUSMP requirements. This helps ensure that many incremental increases in impervious surfaces are reviewed and addressed. The suggestion that the Copermittees assess cumulative impervious cover is one approach the Copermittees can use to meet the Tentative Order watershed section's requirement that the Copermittees develop a program for encouraging collaborative, watershed-based, land use planning in their jurisdictional planning departments.

Section: General **Sub-section**:

Commenter(s): Carlsbad Watershed Network

Comment: There needs to be a mechanism whereby the stormwater management teams in the jurisdictions are more integrated into the planning process. At the moment, they are relegated to maintaining the structures and programs put in place by planners and engineers working at the front end of the process, and cannot offer creative alternatives early enough to prevent the business as usual model from prevailing. One mechanism to achieve this end might be early involvement of the Regional Board through the CEQA process.

Response: Many Copermittee storm water management teams are involved in storm water program planning processes, as well as storm water program implementation by planning and engineering departments. For example, the City of San Diego Storm Water Pollution Prevention Program receives annual reports from each department in the City regarding the departments' storm water management efforts. Effective participation and oversight by the Copermittee's storm water management teams of other Copermittee departments is the responsibility of the Copermittees. Section D.1 of the Tentative Order requires

storm water to be addressed early in the planning process by requiring the Copermittees to update their General Plans and environmental review processes (such as CEQA).

Section: General **Sub-section**:

Commenter(s): Carlsbad Watershed Network

Comment: We suggest that the specific requirement of cumulative impact analysis be given to the Copermittees as a condition of their permit. Without such analysis, it is difficult to see the justification for many of the tasks required in the permit, including the requirements for best management practices, monitoring and public education. Without such a requirement, we will continue to see degradation of watersheds, such as the Agua Hedionda Creek, while the jurisdiction responsible for planning, permitting, and even construction, continues current development practices, possibly even while remaining in compliance with the permit.

Response: The Copermittees are required to assess the impacts of their urban runoff discharges on water quality in the Receiving waters Monitoring and Reporting Program, which requires chemistry, toxicity, and bioassessment monitoring. The Copermittees are then required to use this monitoring data to assess the effectiveness of their programs in terms of water quality at section I of the Tentative Order. In addition, the Copermittees are required to conduct a detailed and extensive evaluation of program implementation to changes in water quality as part of their Long-term Effectiveness Assessment (section I.5 of the Tentative Order).

Section: General **Sub-section**:

Commenter(s): Carlsbad Watershed Network

Comment: Instream storm water retention facilities should be prohibited.

Response: In-stream storm water treatment facilities are not allowed under the Tentative Order. Section D.1.d.(6)(d)i states that treatment control BMPs shall "not be constructed within a receiving water."

Section: General **Sub-section**:

Commenter(s): Carlsbad Watershed Network

Comment: We very much appreciate the efforts of the Regional Board to improve water quality by strengthening key provisions of the San Diego Municipal Storm Water Permit. We enthusiastically support the direction you have taken with this amendment- the focus on watershed based improvements, encouraging multi-jurisdictional cooperation to beneficially affect watersheds, restricting hydromodification and adding important quantifiable targets for BMPs to achieve. We hope you will continue to increase your emphasis on enforcement, education (especially of staff and officials of the jurisdictions), and public participation.

Response: Comment noted.

Section: General **Sub-section**:

Commenter(s): Carlsbad Watershed Network

Comment: There is no distinction between required actions in watersheds that already have a very high percentage of impervious cover as compared to those that are relatively low. It seems like those with the highest percentage are already so impaired that they should have even more stringent requirements. One such change might be that even small projects are not exempted in those watersheds.

Response: All significant projects are subject to the SUSMP requirements which address hydromodification. These requirements are expected to be sufficient to prevent hydromodification in both low- and high-impervious watersheds. Smaller projects which are not subject to SUSMP requirements are expected to pose a minimal risk for hydromodification, due to their reduced amounts of impervious surfaces.

Section: General **Sub-section**:

Commenter(s): City of Carlsbad

Comment: Add the number reference to each requirement on each page as in old permit. Currently it is very difficult to find the full citation of a requirement.

Response: The Table of Contents can aid in finding the correct section reference. It includes section numbers and page numbers.

Section: General **Sub-section**:

Commenter(s): City of Chula Vista

Comment: Legal authority for the Regional Board to impose new requirements that may significantly impact the Copermittees' fiscal state has not been cited in the Tentative Order. The City of Chula Vista requests that such legal authority be presented for the new requirements where such legal authority exists under the Federal Clean Water Act.

Response: Legal authority provided under federal law has been cited in the revised Fact Sheet for all requirements of the Tentative Order.

Section: General **Sub-section**:

Commenter(s): City of Chula Vista, San Diego Unified Port District

Comment: Several sections of the Tentative Order require the Copermittees to reduce the discharge of pollutants in urban runoff to the MEP and achieve Water Quality Standards. Meeting both standards simultaneously is neither justified nor feasible because the Tentative Order does not provide adequate flexibility to the Copermittees in controlling their urban runoff programs and, therefore, being responsible for their results.

Since the compliance criteria for urban runoff (MS4s) is the MEP standard, and in order to provide consistency in the application of, and requirements to meet, performance standards, applicable sections of the Tentative Order must be revised to eliminate "water quality standards" as a performance standard. This point carries through many facets of the Tentative Order, including the assessment and modification of programs based on the achievement of meeting defined standards, specifically the MEP performance standard.

Performance standards cannot be a moving target or multi-layered if they are intended to support effectiveness assessment and guide programmatic evolution and development. As mentioned above, the inclusion of "water quality standards" as a performance standard, and as defined in the Tentative Order, may unintentionally set up the application of numeric limits in order to maintain compliance. The definition of water quality standards in the tentative order directly references water quality objectives, which by definition include both numeric and narrative limits for pollutants. As such, the City of Chula Vista objects to the use of water quality objectives as a performance measure for urban runoff and requests that the language in the Tentative Order be revised to eliminate any ambiguity regarding the application of numeric limits as a measure of compliance with Permit requirements.

Response: The principal issue of BIA's lawsuit over the current permit (Order No. 2001-01) was whether the Regional Board appropriately required compliance with receiving water quality standards. The Court of Appeals, Fourth Appellate District ruled that "the Permit's Water Quality Standards provisions are proper

under federal law" (Building Industry Association of San Diego County et al. v. State Water Resources Control Board et al.) The Tentative Order's requirements regarding receiving water quality standards are the same as those of Order No. 2001-01. In addition, the receiving water quality standards requirement language of section A.3 of the Tentative Order is required to be included in municipal storm water permits by SWRCB Order WQ 99-05. Moreover, USEPA anticipates that municipal storm water permits will require compliance with receiving water quality standards when it states: "Today's rule specifies that the 'compliance target' for the design and implementation of municipal storm water control programs is to reduce pollutants to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA" (FR 68753). Finally, the requirement for compliance with receiving water quality standards is consistent with the Clean Water Act's overall objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Compliance with the MEP standard and receiving water quality standards are compatible. Where receiving water quality standards are met, the Copermittees should tailor their programs to meet the MEP standard. However, where the Copermittees' urban runoff discharges are causing or contributing to a violation of receiving water quality standards, the Copermittees cannot continue to implement programs which do not rectify the situation. In such cases, the Copermittees must improve their programs until compliance with receiving water quality standards is achieved.

Section: General **Sub-section**:

Commenter(s): City County Managers Association

Comment: We express our concern over the potential fiscal impact of the proposed permit. For example, the regional monitoring requirements will increase between hundreds of thousands of dollars to $2 million depending on the final terms of the permit. The HMP is estimated to cost approximately $2 million and a regional education program may cost between $50,000 and $2 million. Further, there are yet to be quantified program costs which will be unknown until the permit is implemented and we have identified priorities. This is further aggravated by the fact that many expenses are heavily loaded in the early years of the permit. It would be helpful if these costs could be spread over a longer period.

Response: The regional monitoring program is largely based on the Copermittees' monitoring proposal and regional guidance. Increases in regional monitoring costs can be controlled by incorporation of new monitoring efforts in existing monitoring programs, where applicable. Development of the HMP is roughly estimated to cost $480,000 - 700,000. A regional residential education program is appropriate due to the Copermittee's finding that residences are a

high priority pollutant source within the region. Regional residential education program costs can be offset to some extent by reductions in jurisdictional residential education. It is worth noting that costs for the above programs are shared by 21 Copermittees. The Tentative Order has been modified to spread program costs over several years, rather than the first year of implementation. This should help reduce the impact of increased costs.

Section: General **Sub-section**:

Commenter(s): City of Del Mar

Comment: The Permit contains many provisions that are vague. The Permit, therefore, can not be enforced nor can the Copermittees know how to comply with its terms. 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, Copermittees could suffer arbitrary enforcement. For example, the term structural flood control device in D.3(2)(d) is not defined. A broad interpretation of this would result in inappropriate requirements placed on a City to prescriptively retrofit the current storm drain system, instead of applying structural retrofits only when pollution prevention and source control BMPs have been ineffective in meeting the MEP standard.

Response: The language of the Tentative Order is crafted to balance detailed requirements with flexible requirements. Where requirements are not detailed, it is to provide the Copermittees flexibility in implementing their programs. Copermittees are typically receptive to this flexibility. Regarding use of the term "flood control device," this term appears in the federal NPDES regulations at 40 CFR 122.2.6(d)(2)(iv)(A)(4). The use of the term in the Tentative Order is consistent the use of the term in the federal NPDES regulations.

Section: General **Sub-section**:

Commenter(s): City of Del Mar

Comment: We disagree that a municipality is fully or solely responsible for receiving water quality. The MS4 NPDES permit is intended to regulate the point source discharges from a publicly-owned municipal separate storm sewer system. The permits do not cover privately-owned direct discharges to receiving water. There are currently no permits to cover agricultural discharges or other non-point source discharges. The State's management programs do not enforce runoff requirements in these areas at any level equivalent to the individual MS4 permits. Pollutant contributions to surface water also occur through atmospheric deposition and from wildlife. Because of these difficult to address sources, it

appears that the Regional Board is inappropriately placing an inordinate amount of the burden for surface water quality on the municipality through this Order.

Response: 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. 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.

Section: General **Sub-section**:

Commenter(s): City of Imperial Beach

Comment: Interpretation of Tentative Order findings and requirements is, in many cases, dependent upon the definition of keywords and phrases in Attachment C. It would be helpful if the permit text called attention to keywords and phrases that are defined in Attachment C by using a different font (i.e., italics, bolded, or underlined text).

Response: Due to the numerous terms that have been defined, these terms have not been highlighted in the text in order to maintain readability. All defined terms are included in one location (Attachment C), which should ease reference to these terms.

Section: General **Sub-section**:

Commenter(s): City of Imperial Beach

Comment: The Tijuana River Watershed presents a set of circumstances unique from other watersheds in the region. Most important of these is that 75% of the watershed falls within the jurisdiction of Mexico. Finding D.1.a in the Draft Permit states, "Absent evidence to the contrary, [the] continual assessment, revision, and improvement of urban runoff management program implementation is expected to ultimately achieve compliance with water quality standards." The Tijuana River Watershed is clearly an exception to this statement. Until long-term solutions can be found, larger cross-border water quality issues will continue to trump any measurable gains that can be achieved by implementing urban runoff management programs on this side of the border. Yet, the Draft Permit calls for Imperial Beach to continually augment its urban runoff management program until water quality standards are met. This is an unachievable goal.

Response: The Tentative Order does not hold the Copermittees responsible for pollution originating in Mexico that occurs in the Tijuana River watershed. Instead, the Tentative Order holds the Copermittees responsible for their contribution of pollutants in the Tijuana River watershed. 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. The language of Finding D.1.a is consistent with this position.

Section: General **Sub-section**:

Commenter(s): City of Imperial Beach

Comment: In too many instances, a "one-size-fits-all" approach has been favored over more flexible requirements that could be modified to fit individual circumstances at the jurisdictional and watershed levels. The reasoning for its support of "cookie cutter" requirements has been clearly articulated by Regional Board staff; a uniform Permit with minimum measurable outcomes facilitates enforcement of compliance with Permit mandates and assists in making cross-jurisdictional comparisons more meaningful. The upshot from our perspective, however, is that the Draft Permit would require the City to spend considerable energy satisfying requirements that are only marginally beneficial in the local circumstance.

Response: The purpose of detailed requirements in the Tentative Order is to provide a level of assurance that an adequate level of activity will be implemented by the Copermittees in order to meet the MEP standard and protect water quality. Where the Tentative Order contains detailed requirements, the requirements provide the Copermittees sufficient flexibility by allowing multiple implementation options or prioritization schemes. In addition, where the Regional Board included new detailed requirements in the Order to address particular issues, it first requested the Copermittees' proposals for addressing the issues in their Report of Waste Discharge. Short of receiving detailed proposals from the Copermittees, the Regional Board crafted detailed language into the Tentative Order. In response, the Copermittees have now provided the Regional Board with detailed proposals for addressing many issues. These Copermittee proposals have largely been incorporated into the Tentative Order.

Section: General **Sub-section**:

Commenter(s): City of La Mesa

Comment: As additional requirements are added onto existing requirements from the Tentative Order 2001-01, the City of La Mesa is interested in knowing

how has the implementation of the aforementioned order improved water quality? With the Copermittees implementing the JURMP to ensure compliance with the permit, what proof is there that the approach is an effective approach? Adding additional requirements will be costly and may not produce the same results or any results based on the time frame for assessing water quality improvements from program implementation. Since the program effectiveness has been an integral part of the permit, shouldn't the effectiveness of the Municipal Permit Order No. 2001-01 be evaluated before it is significantly modified?

Response: The Copermittees are responsible for implementing programs which are effective in protecting water quality. They must annually assess the effectiveness of their programs to ensure their programs are effective. If they Copermittees are not aware of the effectiveness of their programs, they must improve their effectiveness assessments. Moreover, if the Copermittees programs are not effective in protecting water quality, they are not meeting the MEP standard. In addition, such programs must be improved per section C of the current permit (section A.3 of the Tentative Order). Responsibility lies with the party that is discharging the pollutants causing water quality problems.

The Report of Waste Discharge was the Copermittees opportunity to propose specific programs to protect water quality. Short of receiving specific proposals from the Copermittees, the Regional Board crafted specific requirements into the Tentative Order to address water quality and implementation problems. These requirements are based on guidance and findings made by USEPA, the SWRCB, CASQA, and other urban runoff authorities. Where the Copermittees have subsequently provided specific program proposals that are supportable, they have largely been incorporated into the Tentative Order. Because the Tentative Order includes supportable requirements based on guidance from urban runoff authorities, implementation of its requirements is expected to be protective of water quality. However, such results are reliant on full implementation by the Copermittees, including compliance with sections E, I, and A.3 of the Tentative Order.

Section: General **Sub-section**:

Commenter(s): City of La Mesa

Comment: The City is concerned with the significant financial impact posed by the proposed requirements. As presented in the regional comments sent by the County of San Diego, the hydromodification plan will incur a significant cost of a million dollars at a minimum. The new requirements for monitoring may increase annual costs of $2-3 million dollars per year. Additionally, there are costs that cannot be quantified at this time until the permit is fully implemented. The fiscal impact can be detrimental, especially to smaller jurisdictions where resources are limited.

Response: The regional monitoring program is largely based on the Copermittees' monitoring proposal and regional guidance. Increases in regional monitoring costs can be controlled by incorporation of new monitoring efforts in existing monitoring programs, where applicable. Development of the HMP is roughly estimated to cost $480,000 - 700,000. It is worth noting that costs for the above programs are shared by 21 Copermittees. The Tentative Order has been modified to spread program costs over several years, rather than the first year of implementation. This should help reduce the impact of increased costs.

Section: General **Sub-section**:

Commenter(s): City of Oceanside

Comment: We will be impacted over $500,000, and during the actual Implementation of the permit system, we will be affected almost $900,000. Those figures are on top of the existing cost of almost $2,700,000. Our City cannot afford these huge increases at this time!

Response: Comment noted. Discussion of program costs and benefits is included in section VII.

Section: General **Sub-section**:

Commenter(s): Coast Law Group

Comment: In general, the San Diego Bay Council ("Bay Council") urges the Regional Water Quality Control Board ("Regional Board") to adopt the proposed permit. While we have numerous suggestions, comments, and concerns regarding the permit's language, we feel it is absolutely critical that Board members understand the importance of this permit to not just San Diego County's water quality, but to its citizens' quality of life as well.
Because our collective economy, health, and happiness depend on clean beaches and bays, as well as the tributaries that carry water to them, the need for a strong MS4 permit cannot be overstated. Environmental community and State lawyers fought long and hard to ensure the Building Industry Association and some Copermittees were not able to weaken the San Diego Region's landmark 2001 MS4 permit. And now, we must build on past successes to make this permit even stronger.

Despite the fact that the Phase I NPDES storm water permits have been in place since 1990, empirical evidence from the Copermittees' monitoring program suggests we are not yet even beginning to achieve the necessary reductions in storm water pollutants to meet Water Quality Standards as mandated. Though

efforts to abate dry weather flows of urban runoff have met some success, the same cannot be said in wet weather. As the Board considers proposed changes to the 2006 MS4 permit, we urge you to remember that each and every time it rains in the region, we are told to stay out of the water for at least 72 hours. Many have come to accept this as the price we pay for living in an urbanized environment. Like us, you should be offended by such a notion.

Response: Comment noted.

Section: General **Sub-section**:

Commenter(s): Coast Law Group

Comment: Board staff should clarify that the entire Order could be based solely upon the federal Clean Water Act. In the past we have seen the Building Industry Association ("BIA") go to great lengths to show that legal support for portions of the permit could not have been found in federal law, and therefore should have undergone additional environmental review pursuant to the State law.

The Bay Council hereby incorporates by reference all of the briefs and court orders pertaining to the 2001 MS4 permit filed by the environmental intervenors, the State Attorney General, the BIA, and all Amici. To the extent the BIA or any other parties to the litigation seek to raise issue identical to those disposed of in the prior litigation, they are precluded from doing so under administrative theories of res judicata and collateral estoppel.

Response: The requirements of the Tentative Order do not exceed federal law. The federal Clean Water Act and NPDES storm water regulations provide the Regional Board with adequate authority for all of the requirements found in the Tentative Order. The Tentative Order's requirements are necessary to comply with federal law. Therefore, the requirements do not exceed federal law, as some commenters have asserted.

The Tentative Order's requirements mirror the requirements of the current Order, Order No. 200-01. Where the Tentative Order contains new requirements not specifically found in Order No. 2001-01, the new requirements only provide additional detail to requirements already in existence in Order No. 2001-01. Any new requirements in the Tentative Order simply elaborate on Order No. 2001-01's pre-existing requirements. For example, the Tentative Order's requirements addressing hydromodification expand on the pre-existing Order No. 2001-01 requirement that Copermittees develop criteria "to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat" (Order No. 2001-01 section F.1.b.(2)(j)).

In its review of Order No. 2001-01 requirements, the State of California Court of Appeal, Fourth Appellate District "determined that none of the challenged Permit requirements violate or exceed federal law" (Building Industry Association of San Diego County, et al., v. State Water Resources Control Board et al., 2004). The Building Industry of San Diego County used an across the board approach to its lawsuit, challenging a wide range of requirements. Since the requirements of the Tentative Order and Order No. 2001-01 are comparable, the finding that requirements of Order No. 2001-01 do not exceed federal law is also applicable to requirements of the Tentative Order.

The Court of Appeal ruling discusses several findings made by USEPA and other courts that explain why NPDES storm water permit writers have discretion to craft specific permit requirements and are not limited to requirements expressly dictated in the federal NPDES storm water regulations. In the discussion, the court cites Defenders of Wildlife v. Browner (1999), which states: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], section 1342(p)(3)(B)(iii) states that '[p]ermits for discharges from municipal storm sewers…shall require…such other provisions as the Administrator…determines appropriate for the control of such pollutants.' That provision gives the EPA discretion to determine what pollution controls are appropriate."

As exhibited in Defenders of Wildlife v. Browner, permit writers clearly have discretion to determine what pollution controls are appropriate, and therefore can include more detailed requirements than those specifically found in the federal NPDES storm water regulations. By including such requirements in the Tentative Order, the Regional Board has not exceeded federal law, but instead has complied with the Clean Water Act's requirements that municipal storm water permits meet the MEP standard and shall include "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

Use of permit writer discretion and the inclusion of more detailed requirements in the Tentative Order is consistent with USEPA guidance. For example, the preamble to the Phase I NPDES storm water regulations states "this rule sets out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions" (FR 48038). In addition, in its review of a City of Irving Texas NPDES municipal storm water permit, the USEPA Environmental Appeals Board stated that Congress "created the 'maximum extent practicable' ('MEP') standard and the requirement to 'effectively prohibit non-storm water discharges' into the MS4 in an effort to allow permit writers the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges" (2001).

Section: General **Sub-section**:

Commenter(s): Project Design Consultants

Comment: A final concern is the continued absence of a program that will provide real water quality improvements for the region. This Draft Order continues the recent trend of focusing regulatory efforts on new development and except for sampling requirements, pays little attention to existing areas or existing infrastructure. While I understand the desire to prevent a loss of beneficial uses due to new developments, the failure to incorporate existing areas of the region into a program ensures that future water quality at our beaches, bays and streams will not be dramatically altered due to this Draft Order.

Response: The Tentative Order includes an increased focus on water quality results, rather than simply focusing on program implementation. The emphasis on watershed programs in the Tentative Order focuses the Copermittees' efforts directly on water quality results. Addressing urban runoff management on a watershed scale focuses on water quality results by emphasizing the receiving waters within the watershed. The conditions of the receiving waters drive management actions, which in turn focus on the water quality problems of the receiving waters each watershed. These watershed requirements focus on existing development, rather than new development. In addition, sections D.3.a, D.3.b, and D.3.c all address existing development by requiring the Copermittees to focus on existing municipal, commercial, industrial, and residential sources. Sections D.4 and D.5 also address existing development through illicit discharge detection and education requirements. Moreover, the Tentative Order includes a new emphasis on assessment of the effectiveness of the Copermittees' programs. As the Copermittees continually assess and improve their programs' effectiveness with regards to existing development, water quality improvements are expected.

Section: General **Sub-section**:

Commenter(s): San Diego Copermittees

Comment: Compliance timelines for one-time deliverables should generally be specified as the time elapsed from adoption of the Order rather than as firm dates.

Response: For consistency, timelines for one-time deliverables have been modified in the Tentative Order to reflect time elapsed from adoption, rather than as specific dates.

Section: General **Sub-section**:

Commenter(s): San Diego Copermittees

Comment: In numerous instances, the Tentative Order requires new or modified programs that will impose significant additional costs on Copermittees. These include, but are not limited to, the development and implementation of the following programs and activities: Hydromodification Management Plan, Post-construction Treatment BMP Inspections, Regional Residential Education Plan, Business Notifications and Inspections, MS4 Inspection and Cleaning, Street Sweeping, Monitoring Programs, Reporting and Assessment Programs, Standardized Fiscal Analyses. The Copermittees are continuing to work together to complete a comprehensive evaluation of these costs, and intend to submit updated information on fiscal impacts under separate cover.

Response: Comment noted. However, Business Notifications and Inspections, MS4 Inspection and Cleaning, Street Sweeping, Monitoring Programs, Reporting and Assessment Programs are all existing programs currently implemented to some extent by the Copermittees.

Section: General **Sub-section**:

Commenter(s): San Diego Copermittees

Comment: In evaluating the requirements of the Tentative Order, an issue of particular concern to the Copermittees has been to accurately define the workload increases associated with the implementation of new and revised programs. The Tentative Order contains a considerable number of requirements that must be implemented concurrently, especially over the first and second years of the permit cycle. Appendix B.1 illustrates many of the major task and deliverable deadlines required under the Tentative Order. As shown, a disproportionate amount of the total required work occurs in the first year, and to a lesser degree in the second year.

This illustrates the critical need to identify specific modifications to spread out the workload where possible. A second reason for projecting this workload is to examine each individual timeframe to ensure its sufficiency for completing the required work. Taken together, these considerations have formed an important focus in the Copermittees' review. A small number of needed timeline extensions are identified and discussed further by the Copermittees in this submittal. These include: Development and implementation of a Hydromodification Management Plan (HMP), Required notifications of industrial and commercial businesses, Two-year phased implementation of industrial and commercial business

inspection requirements, and Development and implementation of standardized fiscal analyses.

Response: In Order to spread out the workload required by the Tentative Order, several timelines have been extended. These include timelines for HMP development, notification of industrial and commercial sites/sources, inspections of industrial and commercial sites, and development of a standardized fiscal analysis approach.

Section: General **Sub-section**: Multiple

Commenter(s): Caltrans

Comment: The Tentative Order makes several references to the Department's MS4. The Department will collaborate in the TMDL process and other opportunities with other agencies on a watershed basis in proportion to the Department's relative contribution of runoff or pollutants to the receiving waters being monitored once a program has been developed in final form.

Response: Comment noted.

Section: General **Sub-section**: Multiple

Commenter(s): Caltrans

Comment: The Tentative Order lists requirements for highways and freeways (Sections B.8, D.2 (h), D.4 (7), etc.). The Department has its own statewide NPDES permit and Statewide Storm Water Management Plan (SWMP) that outlines the requirements for management of storm water runoff as it pertains to the Department's highways and freeways. Unless there are highways and freeways within the San Diego region not owned and maintained by the Department, it is suggested that any reference to "highways" and/or "freeways" be deleted from the Order to avoid confusion.

Response: The Tentative Order does not address highway and freeways under Caltrans' jurisdiction. Only highways or freeways under the jurisdiction of the Copermittees are addressed by the Tentative Order. Rather than being confusing, this arrangement is quite straightforward.

Section: General **Sub-section**: Multiple

Commenter(s): City of Chula Vista

Comment: As written, several sections within the Tentative Order impose stricter Best Management Practices (BMPs) for developments and existing land uses within watersheds that include 303(d) listed impaired segments. The language in the Tentative Order should be revised to clarify that only jurisdictions discharging to 303(d) listed impaired segments or with TMDL designations are to implement stricter BMPs or to participate in TMDL activities, rather than all Copermittees in the same watershed.

Response: For clarification, the Tentative Order has been revised to require additional BMPs where the source is tributary to an impaired water body segment, as opposed to an impaired water body. Tentative Order directives which require consideration of receiving water quality have not been modified because these directives allow for consideration of the water quality of particular water body segments, as appropriate.

Section: General **Sub-section**: Multiple

Commenter(s): City of Del Mar

Comment: All references to "tributary to" (which is not defined) should be changed to "directly adjacent" or "discharging directly to" as specified in D.1.d.(2)(f).

Response: It is not appropriate to change references to "tributary to" to "directly adjacent" of "discharging directly to" because a pollutant source does not have to be directly adjacent or discharging directly to a receiving water to have an impact on the receiving water. For example, pollutants can travel unimpeded for great distances in MS4s. These pollutants can have a significant impact on receiving waters, even though the source may be far away.

Section: General **Sub-section**: Multiple

Commenter(s): San Diego Copermittees

Comment: 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) 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 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.

The Copermittees recommend that each of the sections cited above, as well as the remainder of the entire Tentative Order, be thoroughly reviewed for potential inconsistencies with the language in Sections A and B. To avoid ambiguity and potential internal conflicts, we recommend that they be removed from any sections other than A or B of the Tentative Order.

Response: Sections D, D.1, D.2, D.3, D.4, E.2, and F discuss the prohibitions in sections A and B in order to clarify that each of the programs developed and implemented by the Copermittees must result in compliance with the prohibitions. Each of the sections has been reviewed and modified to ensure it is consistent with the prohibitions in sections A and B.

Section: General **Sub-section**: Multiple

Commenter(s): San Diego Copermittees, City of San Diego

Comment: The Tentative uses the word "ensure" inappropriately in at least 38 locations throughout section D. This phrasing would make Copermittees responsible for ensuring that discharges do not cause or contribute to a violation of water quality standards, rather than simply prohibiting such discharges from the their MS4.
In the context of the Copermittees role in implementing oversight programs for industries, such as commercial and industrial businesses, it is not reasonable, nor within an MEP standard, to expect that a Copermittee can ensure that private entities will not discharge pollutants that cause or contribute to a violation of water quality standards. Each of the sections using the term "ensure" in the Tentative Order should be thoroughly reviewed for potential inconsistencies with the language in Sections A and B. To avoid ambiguity and potential internal conflicts, they should be removed from any sections other than A or B of the Tentative Order.

Response: In order to avoid conflicting permit language, the term "ensure" has been replaced throughout the Tentative Order.

Section: General **Sub-section**: Multiple

Commenter(s): San Diego Copermittees, San Diego Unified Port District

Comment: While the Copermittees agree that BMP selection should focus on the most efficient BMPs wherever possible, we recommend that the term “effective” be removed as a condition of BMP selection. Effectiveness is only one of several

factors to be considered in meeting a MEP standard. While the definition of MEP provided in Attachment C of the Tentative Order (which relies primarily on a February 11, 1993 memo from Senior SWRCB Staff Counsel Elizabeth Jennings entitled "Definition of Maximum Extent Practicable") emphasizes technical feasibility, and even the need to choose effective BMPs in achieving a MEP standard, it does not establish an "effectiveness" requirement for each BMP within Copermittees' "minimum sets of BMPs and other measures." Moreover, the MEP definition clearly states that BMP selection should consider effectiveness, regulatory compliance, public acceptance, cost, and technical feasibility. The addition of "effective" to the above sections, absent these other factors, implies that the adequacy of BMPs can be judged solely on their effectiveness.

This requirement is also potentially in conflict with the process for iterative program improvement established in section A.3.a of the Tentative Order, which requires only that BMPs be implemented and modified, augmented, or replaced in response to demonstrated violations of water quality standards. This is a crucial distinction since the provision establishes a context for evaluating BMP or program effectiveness rather than establishing a stand-a-lone and potentially arbitrary standard for the BMP itself. Similarly, the Tentative Order requires an extensive process for assessing effectiveness. The establishment of BMP ineffectiveness as a violation of the Tentative Order outside of that context appears to present an inconsistency, as well as a potentially significant bias for Copermittees in evaluating BMP effectiveness.

Response: Since BMPs must essentially be effective for the MEP standard to be met, the additional requirement that BMPs be effective is not necessary. For this reason, requirements for effective BMPs have been removed from the Tentative Order.

Section: General **Sub-section**: Multiple

Commenter(s): San Diego Unified Port District

Comment: Currently, the reporting requirements are located in several different areas of the Permit. This makes it extremely difficult to determine how and what must be reported, both in the program submittals and in the annual reports. Recommendation: Place reporting requirements in a single section (or attachment) only. Do not discuss reporting requirements in the individual program component requirements.

Response: All reporting requirements have been moved to section J of the Tentative Order. Monitoring reporting requirements remain in the Receiving Waters Monitoring and Reporting Program, in order to place all monitoring requirements in one location.

Section: General **Sub-section**: Legal

Commenter(s): Coalition for Clean Water and a Healthy Economy

Comment: The Tentative Order requires the Copermittees to adopt and apply ordinances to prohibit or otherwise regulate discharges into and from MS4s caused by third parties. (See, e.g. Finding D.3.d; Tentative Order Sections A.1., C.1., D.1.d.2, D.1.d.4, and D.2.) However, the Tentative Order makes no meaningful legal distinction between private third parties and local government agencies third parties. Under California law, cities and the County (i.e. nearly all of the Copermittees) 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." (Gov. Code 53091 (d) and (e).)

Local agencies are broadly defined in Government Code 53090, and include 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." Essentially all storm water design and treatment BMPs fall into the category described in Government Code 5 53091 (d). Thus, in effect, the Tentative Order places a burden upon the Copermittees that most cannot legally achieve vis-à-vis school districts, redevelopment agencies, joint powers authorities, water districts, and many other local agencies. At a minimum, the Regional Board must revise the Tentative Order to reflect the forgoing legal limitations on the Copermittees' land use authority.

Fortunately, as with the issue of due process, the Tentative Order can be revised to resolve this issue in one of two ways. The Regional Board can direct staff to amend the Tentative Order to absolve the Copermittees of responsibility for local agencies and regulate those agencies directly under the Phase II Small MS4 General Permit. Alternatively, the Regional Board can direct staff to include these local agencies as Copermittees under this Tentative Order.

Response: Since the Copermittees own and operate their MS4s, they cannot passively receive discharges from third parties (FR 68766). Discharges of pollutants from MS4s must be reduced to the maximum extent practicable, including discharges from MS4s originating outside the Copermittees' jurisdiction. In such cases, the MEP standard can be met through implementation of coordination efforts and agreements with the third parties outside of the Copermittees' jurisdictions. The Tentative Order does not require the Copermittees to apply building, zoning, or related land use controls on parties outside of the Copermittees' jurisdiction. Finding D.3.f states "Each Copermittee is individually responsible for adoption and enforcement of ordinances and/or

policies, implementation of identified control measures/BMPs needed to prevent or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, administrative, and enforcement expenditures necessary to implement and enforce such control measures/BMPs under its jurisdiction." However, urban runoff treatment control BMPs are not addressed by Government Code sections 53091(d) and (e). These sections clearly address facilities involved with utilities, such as water districts, POTWs, energy agencies, etc. Urban runoff and MS4s are not utilities such as these. Therefore, 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.

Section: General **Sub-section**: Legal

Commenter(s): Coalition for Clean Water and a Healthy Economy

Comment: The Coalition is concerned that the procedure by which the plans are to be developed violates the holding of the Ninth Circuit in Environmental Defense Center, Inc. v. Environmental Protection Agency (9th Cir. 2003) 344 F.3d 832. In Environmental Defense Center, supra, 344 F.3d 832, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") considered, among other issues, whether the Phase II general permitting scheme allowed regulated small MS4s to design storm water pollution control programs without adequate regulatory review and public participation in violation of the Clean Water Act, 33 U.S.C. 5 125 1, et seq. The Ninth Circuit explained, "Under the traditional general permitting model, each general permit identifies the output limitations and technology based requirements necessary to adequately protect water quality from a class of dischargers." (Id. at p. 853.) A Notice of Intent ("NOI"), therefore, would not require review by the permitting authorities because it is no more than a formal acceptance of the terms in the general permit. (See id.)

In contrast, the Phase II general permitting scheme required that each NOI contain information on an individualized pollution control program addressing six specified categories or "minimum measures." (See Environmental Defense Center, supra, 344 F.3d at p. 853.) The Ninth Circuit concluded, "Because a Phase II NOI establishes what the discharger will do to reduce discharges to the 'maximum extent practicable,' the Phase I NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime." (Id.) At least in some regards, the Phase II NOI is "functionally equivalent to a detailed application for an individualized permit." (Id.) If the Phase II NOI is not reviewed, "nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own storm water situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable." (Id. at 855.) 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." (Id. at p. 856.)

The Ninth Circuit also considered the issue of public participation in the review process, and it concluded that the Environmental Protection Agency's failure to make the Phase II NOIs available to the public or subject to public hearings contravened the express requirements of the Clean Water Act. (See Environmental Defense Center. supra, 344 F.3d at p. 858.) The Phase II NOIs, as opposed to the general permits, contain the substantive information about how the operator of a small MS4 would reduce discharges to the maximum extent practicable, and they are functionally equivalent to the permit applications envisioned by Congress when it created the Clean Water Act's public availability and public hearing requirements. (See id. at p. 857.)

The Tentative Order requires that each Copermittee develop an updated JURMP for its jurisdiction. (Tentative Order, Section D.) The Tentative Order defines a JURMP as "[a] written description of the specific jurisdictional runoff management measures and programs that each Copermittee will implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP [Maximum Extent Practicable] and do not cause of contribute to a violation of water quality standards." (Tentative Order, Attachment C.) The Tentative Order gives the Copermittees flexibility in developing their plans to determine what specific measures and programs they will implement to ensure that pollutant discharges in urban runoff are reduced to the MEP. For example, the Tentative Order directs each Copermittee to designate a minimum set of effective BMPs for all municipal areas and activities, which shall be area or activity specific as appropriate. (Tentative Order, Section D(3)(a)(2)(b).)

Thus, the JURMP is more than an item of procedural correspondence. It contains substantive information about the specific jurisdictional runoff management measures and programs that each Copermittee will implement to comply with the Tentative Order, and knowledge of what is contained in the JURMP is required to determine whether the standards are met. Therefore, it is functionally equivalent to a permit application or Phase II NOI under the Ninth Circuit's analysis in Environmental Defense Center, supra, 344 F.3d at pp. 852-858. Like the Phase II NOI, it must be subject to both meaningful review by the appropriate regulatory authority and public participation. The Coalition recognizes that each Copermittee is required to submit its updated and revised JURMP to the Principal Permittee by the date specified by the Principal Permittee, and the Principal Permittee must submit the Unified JURMP to the Regional Board on July 1, 2007. (Tentative Order, Section J(l).) However, the Tentative Order must then require the Regional Board to review and approve the Unified JURMP. The Coalition also recognizes that each Copermittee is required to incorporate a mechanism for public participation in the updating, development and

implementation of the JURMP. (Tentative Order, Section D(6).) However, the Regional Board must provide an opportunity for public participation, including public hearings as part of its review process as the regulatory agency.

Response: The judicial ruling referenced in the comment refers to general NPDES permits for Phase II MS4s. The Tentative Order is not a general Phase II NPDES permit; it is an individual Phase I NPDES permit. The judicial ruling has not been extended to permits such as the Tentative Order.

General Phase II permits contain very little requirements to assure standards are met. For example, the SWRCB's Phase II permit is essentially just a reiteration of the federal NPDES regulations. In such instances, a required NOI or plan contains information necessary to ensure standards are achieved. The permitting approach used in the Tentative Order is significantly different than the general Phase II permitting approach. 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. Rather than require the Copermittees to simply develop and implement a plan which describes a program, the Tentative Order requires the Copermittees to implement a program which meets specific requirements. The plans only serve as descriptions of the programs, to be used by the Copermittees to guide their program implementation. As such, the plans do not serve as "functional equivalents" of the Tentative Order. Moreover, the level of detail included in the requirements of the Tentative Order ensures that use of the plans as "functional equivalents" of the Tentative Order is not necessary.

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coalition for Clean Water and a Healthy Economy

Comment: The Tentative Order also requires that each Copermittee collaborate with other Copermittees within its watershed to develop and implement an updated WURMP for each watershed. (See Tentative Order, Section E.) The Tentative Order defines a WURMP as "[a] written description of the specific watershed urban runoff management measures and programs that each watershed group of Copermittees will implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards." (Tentative Order, Attachment C.) While the Tentative Order includes some requirements, it directs the Copermittees to develop their own plan and also gives the Copermittees the flexibility to determine the specific watershed urban runoff management measures and programs they will implement. For example, Tentative Order directs the Copermittees to "[develop and update annually a list

of potential short and long-term Watershed Water Quality Activities that will (1) abate the sources of the watershed's high priority water quality programs, and (2) reduce the discharge of pollutants causing the watershed's high priority water quality problems." (Tentative Order, Section E(2)(f).)

Like the JURMP, the WURMP is also more than an item of procedural correspondence. It contains substantive information regarding the specific watershed urban runoff management measures and programs that each watershed group of Copermittees will implement to comply with the Tentative Order. It must be reviewed by the appropriate regulatory authority to ensure that the specific measures and programs reduce pollutant discharges in urban runoff to the MEP. The Tentative Order requires each Lead Watershed Permittee to submit the WURMP to the Principal Permittee by the date specified by the Principal Permittee, and the Principal Permittee is to assemble and submit the Unified WURMP to the Regional Board by July 1, 2007. (See Tentative Order, Section J(2)(b) &(c).) Again, the Tentative Order must then require the Regional Board to review and approve the Unified WURMP in order to provide for public participation required by the Clean Water Act.

Response: The judicial ruling referenced in the comment refers to general NPDES permits for Phase II MS4s. The Tentative Order is not a general Phase II NPDES permit; it is an individual Phase I NPDES permit. The judicial ruling has not been extended to permits such as the Tentative Order.

General Phase II permits contain very little requirements to assure standards are met. For example, the SWRCB's Phase II permit is essentially just a reiteration of the federal NPDES regulations. In such instances, a required NOI or plan contains information necessary to ensure standards are achieved. The permitting approach used in the Tentative Order is significantly different than the general Phase II permitting approach. 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. Rather than require the Copermittees to simply develop and implement a plan which describes a program, the Tentative Order requires the Copermittees to implement a program which meets specific requirements. The plans only serve as descriptions of the programs, to be used by the Copermittees to guide their program implementation. As such, the plans do not serve as "functional equivalents" of the Tentative Order. Moreover, the level of detail included in the requirements of the Tentative Order ensures that use of the plans as "functional equivalents" of the Tentative Order is not necessary.

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coalition for Clean Water and a Healthy Economy

Comment: The Tentative Order directs each Copermittee to collaborate with the other Copermittees to develop, implement, and update as necessary a RURMP. (See Tentative Order, Section E.) A RURMP is defined as "[a] written description of the specific regional urban runoff management measures and programs that the Copermittees will collectively implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause of contribute to a violation of water quality standards." (Tentative Order, Attachment C.) Again, the Tentative Order gives the Copermittees flexibility in their development of the RURMP. For example, the Tentative Order requires that the RURMP "[develop and implement urban runoff management activities on a regional level, as determined to be necessary by the Copermittees." (Tentative Order, Section (F)(1).)

Thus, the RURMP, like the JURMP and the WURMP, is a management program which provides specific information regarding the urban runoff management measures and programs implemented by the Copermittees. This information must be subject to meaningful review by the appropriate regulatory authority to ensure that pollutant discharges in urban runoff are reduced to the MEP. While the Principal Permittee must submit the RURMP to the Regional Board on July 1, 2007, language must be included to require the Regional Board to review and approve the RURMP. (See Tentative Order, Section J(3)(b) .) Further, this review must include an opportunity for public participation.

Response: The judicial ruling referenced in the comment refers to general NPDES permits for Phase II MS4s. The Tentative Order is not a general Phase II NPDES permit; it is an individual Phase I NPDES permit. The judicial ruling has not been extended to permits such as the Tentative Order.

General Phase II permits contain very little requirements to assure standards are met. For example, the SWRCB's Phase II permit is essentially just a reiteration of the federal NPDES regulations. In such instances, a required NOI or plan contains information necessary to ensure standards are achieved. The permitting approach used in the Tentative Order is significantly different than the general Phase II permitting approach. 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. Rather than require the Copermittees to simply develop and implement a plan which describes a program, the Tentative Order requires the Copermittees to implement a program which meets specific requirements. The plans only serve as descriptions of the programs, to be used by the Copermittees to guide their program implementation. As such, the plans do not serve as "functional equivalents" of the Tentative Order. Moreover, the level of detail

included in the requirements of the Tentative Order ensures that use of the plans as “functional equivalents” of the Tentative Order is not necessary.

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coalition for Clean Water and a Healthy Economy

Comment: Each of these plans is a substantive component of the Tentative Order's scheme. Because the JURMPs, RURMPs, and WURMP are analogous to the Phase II NOIs described in Environmental Defense Center, supra, 344 F.3d 832, they too are subject to the review and public participation requirements of the Clean Water Act. Therefore, the Tentative Order, as written, is procedurally defective. Fortunately, this defect is curable through a relatively simple modification to the Tentative Order, which this Regional Board has utilized in previous orders.

When this Regional Board promulgated Order No. 2001-01, it incorporated an analogous management program to regulate the quality of storm water discharges from new construction to the MEP. The Standard Urban Storm water Management Plan ("SUSMP") directive included provisions for review and opportunity for public comment as part of the process. (See Order No. 2001-01, Section F.1 .b.(2).) That process provided the Copermittees with 365 days to develop a model SUSMP and submit it to the Regional Board. The Regional Board then adopted the model SUSMP in a public process. The Order then granted the Copermittees an additional 180 days to adopt the elements of the model SUSMP and adjust their ordinances accordingly. We recommend that the Regional Board direct its staff to modify the Tentative Order to include the same procedural methodology for the adoption of the JURMPs, WURMPs, and the RURMP, thereby curing the procedural defect in the current Tentative Order.

This revision will not delay implementation of the JURMPs, WURMPs, and the RURMP in any meaningful way. By exposing these plans to review and comment by the public, we believe that the quality of the plans will be significantly improved, thereby expediting attainment of improved water quality in the region. Moreover, by correcting this procedural defect now, the Regional Board avoids what could be a long period of litigation on the question of federal due process, by parties other than the Coalition. A court may temporarily enjoin the enforcement of this Tentative Order while such litigation is pending.

Response: The process suggested in the comment is 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.

In addition, it is worth noting that the Regional Board did not adopt the Model SUSMP, but rather approved it. This approval was found to be necessary because of the groundbreaking nature of the SUSMP requirements. The SUSMP requirements necessitated development of totally new programs, the type of which had not been implemented in San Diego County before. The urban runoff management programs required in the Tentative Order, on the other hand, are not totally new. Many of the requirements have been in place for over 15 years, while the majority have been in place for over five years. Any new requirements in the Tentative Order are essentially extensions or enhancements of already existing requirements. As such, the approval process used for the Model SUSMP is not applicable to the urban runoff management programs.

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coast Law Group

Comment: The Tentative Order suffers from several flaws that may hamper its ability to survive judicial scrutiny should a final Order be issued with the same or similar provisions. Among the principle defects are the failure to incorporate Runoff Management Plans into any final permit, thereby failing to clearly and accurately reflect the public participation requirement and citizen enforcement opportunities mandated by the Clean Water Act ("CWA").

A. The Tentative Order Improperly Fails to Explicitly Define Runoff Management Programs as "Effluent Limitations"

The Clean Water Act defines effluent limitation to mean "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . ." 33 U.S.C. § 1362(11). As detailed below, Runoff Management programs inarguably act as effluent limitations. The narrative management practices that comprise Runoff Management Programs are intended to reduce, or eliminate, the discharge of storm water pollutants into, and from, municipal MS4s. Jurisdictional Urban Runoff Management Programs ("JURMPs") developed by Copermittees, as part of their Storm Water Management Plans, must "reduce the discharge of pollutants to the MEP (maximum extent practicable), and ensure that urban runoff discharges to not

cause or contribute to a violation of waters quality standards." Order at 15. As such, JURMPs are self-evidently "effluent limitations" that embody restrictions upon "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . ." 33 U.S.C. § l362(11).

Likewise, Watershed Urban Runoff Management Programs ("WURMPs") implemented by Copermittees effectively reflect the Minimum Control Measures required by EPA storm water regulations. See 40 C.F.R. 122.34(b). As such, the provisions of the WURMPs are intended to reduce discharges of storm water pollutants to the MEP, and therefore function as effluent limitations.

Regional Urban Runoff Management Programs, as developed, implemented and updated by the Copermittees "shall.. .reduce the discharge of pollutants to the MEP (maximum extent practicable), and ensure that urban runoff discharges to not cause or contribute to a violation of waters quality standards." Order at 46. As with JURMPs and WURMPs, these regional level programs are "effluent limitations" upon municipal storm water discharges, as that term is defined by the Clean Water Act.

B. As Effluent Limitations, the Runoff Management Plans Must Be Incorporated Into NPDES Permits

The Clean Water Act also clearly requires that all relevant effluent limitations, including the Runoff Management Plans in the Tentative Order, bearing on a point source be contained within an NPDES permit. Section 301 of the Clean Water Act "mandates that every permit contain (1) effluent limitations that reflect the pollution reduction achievable by using" technologically practicable controls." American Paper Inst. v. EPA, 996 F.2d 346, 349 (D.C. Cir. 1 993); see 33 U .S.C. § 1311. Section 402(b)(l)(A), which outlines requirements that state-issued NPDES permits must meet, reiterates that NPDES permits must "apply, and insure compliance with, any applicable requirements" of sections 301,302, 306,307, and 403.

Recent case law reinforces this clear CWA requirement. In two recent decisions by the United States Courts of Appeal for the 9th Circuit and 2nd Circuit federal rulemakings have been struck down for failure to adhere to the Clean Water Act's mandate to incorporate applicable effluent limitations into the permitting process, thereby denying effective public review and participation. Failure to incorporate Runoff Management Plans into any final NPDES permit under a final Order here could produce similar results.

EPA established a general permit system whereby MS4s submitted a notice of intent ("NOI") for coverage under a general permit. Id. at 842. The Phase II Rule required the NOI to include an individual storm water management plan designed by the MS4 to implement six general criteria. Id. at 853. Regulated MS4s decided

which terms to include in a storm water management plan without any review or approval by permitting authorities to evaluate whether, in fact, the minimum measures selected by the MS4 would reduce discharges to the required standard. Id. at 855. Significantly, the storm water management plan was never incorporated into the final NPDES permit and, therefore, was never subject to proper review and public participation, much like the scheme offered here in the Tentative Order with respect to Runoff Management Plans.
The Ninth Circuit rejected this aspect of the Phase II Rule as contrary to the clear intent of Congress, reasoning that under the Phase II Rule:

[Nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own storm water situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.. .No one will review that operator's decision to make sure that it was reasonable, or even good faith. Environmental Defense Center, 344 F.3d at 855.

The court further emphasized:

EPA is still required to ensure that the individual programs adopted are consistent with the law.. . storm water 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 reduced the discharge of pollutants to the maximum extent practicable. Id. at 856 (emphasis added).

Similarly, in reviewing an analogous federal regulatory program, EPA's 2002 Effluent Limitations and NPDES Permitting Regulations for CAFOs, the 2d Circuit held that nutrient management plans - similar to the Runoff Management Plans offered here - must be incorporated into a facility's NPDES permit.

There is no doubt that under the CAFO Rule, the only restrictions actually imposed on land application discharges are those restrictions imposed by the various terms of the nutrient management plan, including the waste application rates developed by the Large CAFOs pursuant to their nutrient management plans. Indeed, the requirement to develop a nutrient management plan constitutes a restriction on land application discharges only to the extent that the nutrient management plan actually imposes restrictions on land application discharges. To accept the EPA's contrary argument - that requiring a nutrient management plan is itself a restriction on land application discharges - is to allow semantics to torture logic.

Because we believe that the terms of the nutrient management plans constitute effluent limitations, we hold that the CAFO Rule - by failing to require that the terms of the nutrient management plans be included in NPDES permits - violates the Clean Water Act and is otherwise arbitrary and capricious in violation of the

Administrative Procedure Act. Waterkeeper Alliance v. EPA, 399 F.3d 486, 502-503 (2d Cir. 2005)

The Tentative Order purposefully ignores this clear requirement where it merely describes the requirements of the Runoff Management Programs each copermitted MS4 is obligated to develop. Instead, in order to meet minimal CWA mandates, the final Order should explicitly declare that each of these Programs is an integral part of the NDPES permit coverage granted to the MS4s, and that each term, requirement, limitation, and prohibition within the Runoff Management Programs is wholly incorporated into the NPDES Permit coverage associated with an individual MS4 Copermittee.

Response: The Tentative Order includes effluent limitations in the form of specific requirements which must be implemented by the Copermittees as part of their urban runoff management programs. These detailed requirements ensure that compliance with discharge prohibitions, receiving water limits, and the narrative standard of MEP will be achieved. The plans only serve as descriptions of the programs, to be used by the Copermittees to guide their program implementation. As such, incorporation of the plans into the Tentative Order is not necessary.

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coast Law Group

Comment: Prior to the issuance of an NPDES permit pursuant to any final Order, the Board is required to ensure that all provisions contained therein comply "with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.4(d). Specifically, the Board is prohibited from issuing a permit "when the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA," or "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." 40 C.F.R. 5 l22.4(a) and (d). Although the Tentative Order recognizes that increasing amounts of contaminated runoff are have a significant impact on water quality of receiving waterways, it apparently fails to provide provisions which guarantee that the issuance of any NPDES permits will not lead to violations of applicable water quality standards. 33 U.S.C. 1311(b)(l).

These statutory provisions, accompanying regulations and subsequent case law demand that the Board consider the impacts of discharges of pollutants on receiving water quality. The Ninth Circuit, in precedent binding upon this Board,

has long recognized the necessity of water quality based effluent limitations to comply with applicable WQS;

Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. 1311 (b)(l)(C), 1313. These state water quality standards provide "a supplementary basis ... so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." EPA v. California ex re/. State Water Resources Control Bd., 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12,48 L.Ed.2d 578 (1 976). PUD No. I of Jefferson County v. Washington Department of Ecology, 51 1 U.S. 700,704 (1994)(emphasis added).

Response: The requirements of the Tentative Order are expected to achieve compliance with receiving water quality standards (Finding D.1.a). The approach to be used is the continual assessment, revision, and improvement of Copermittee best management practice implementation. This approach is consistent with the Clean Water Act and SWRCB guidance. In Defenders of Wildlife v. Browner (1999, 197 F. 3d 1035), the United States Court of Appeals for the Ninth Circuit states: “Under 33 U.S.C. section 1342 (p)(3)(B)(iii), the EPA’s choice to include either management practices or numeric limitations in the permits was within its discretion.” In addition, the approach is consistent with SWRCB Order WQ 99-05, which outlines an iterative approach for achieving compliance with water quality standards.

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coast Law Group

Comment: he Tentative Order is sorely deficient in that it fails to contain provisions that properly provide for adherence to either the federal antidegradation requirements contained in 40 C.F.R. § 131.l2 or the state mandates contained in State Board Resolution No. 68-16, the "Statement of Policy with Respect to Maintaining High Quality of Waters in California." Instead of offering anything of substance, the Proposed Permit contains the following reference to compliance with federal and state antidegradation requirements:

Conscientious implementation of URMPs that satisfy the requirements contained in this Order will reduce the likelihood that discharges from MS4s will cause of contribute to unreasonable degradation of the quality of receiving waters. Therefore, this Order is in conformance with SWRCB Resolution No. 68-16 and the federal antidegradation policy described in 40 CFR 131.12. Tentative Order at p. 8, paragraph 39.

Such language is inadequate to meet either the federal or state antidegradation requirements for two reasons. First, the provision puts forth an improper presumption that implementation of the URMPs will not result in a degradation of water quality. Under a proper antidegradation analysis, the burden is on the permittee to show that its activities will not impact instream use or lower water quality of higher quality waters; this burden is recognized in the State policy contained in Resolution No. 68-1 6, but the presumption contained in the Tentative Order improperly shifts that burden onto those who might seek to challenge the issuance of permit under antidegradation grounds. Second, the federal and state antidegradation policies do not contemplate the implementation of standards that will result in simply a "likelihood" that discharges will be reduced to levels that will not cause an "unreasonable" degradation of water quality. "Likelihood" and "unreasonable" are terms that do not appear anywhere in either state or federal antidegradation mandates and cannot form part of the Tentative Order's antidegradation provision.

A. Federal Antidegradation Requirements

The federal antidegradation policy defines levels of protection for quality of a state's waters by delineating three tiers of protection. Tier I is the bottom line of water quality protections. Tier I protections require that existing uses be protected in all of the nation's waterways, prohibiting any degradation that would harm those existing uses. 40 C.F.R. § 131.12(a)(l). Existing uses are "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." 40 C.F.R. § 131.3(e). "Existing instream water uses and the level of water quality necessary to protect the existing use shall be maintained and protected." 40 C.F.R. 131.12(a)(l).

The Tier II designation applies to higher quality waters, requiring that where the quality exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected. 40 C.F.R. l3l.l2(a)(Z). A state can obtain an exemption from this requirement but only if it finds that allowing lower water quality ---as opposed to water uses --- is necessary to accommodate important economic or social development in the area. Id. (This exemption is discussed in more detail below.) The state must nonetheless assure that water quality remains adequate to protect existing uses fully. Finally the state must assure the achievement of the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable "Best Management Practices" (BMPs) for non-point source control. Id.

This language was not intended to create a loophole allowing widespread degradation. U.S. EPA has stated that the exception:

"is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for 'fishable/swimmable' water, and both cannot be achieved ." EPA
Handbook at_____

Tier III protections prohibit degradation of Outstanding National Resource Waters (ONRWs). Tier III requires such designated waters as deserving special protection. The ONRW designation includes waters in National Parks, National Wildlife Refuges, and waters of "exceptional recreational or ecological significance." For all Tier III waters, "water quality shall be maintained and protected," with no exception for economic or social necessity. 40 C.F.R. 131.12(a)(3). It is important to note that "significant" waters need not be pristine in terms of water quality. For example, a river that was home to a unique or threatened community of fish could be of "exceptional ecological significance" even if the river violated water quality standards for some pollutants.

B. State Antidegradation Requirements

In response to these federal antidegradation mandates, the California State Water Resources Control Board issued a memorandum ("Memo") on October 7, 1987 to Regional Board Executive Officers that explained the need for the State's policy to be "at a minimum, consistent with the principles set forth in 40 C.F.R. 131.12." Memo at p. 1. The Memo further explained that it was the Board's position that State Board Resolution No. 68-16, the Statement of Policy with Respect to Maintaining High Quality Waters in California, incorporated and satisfied the federal antidegradation requirements set forth in 131.12. Memo at p. 2. Significantly, the State Board Resolution goes one step further than even the federal policy; whereas the federal policy applies to just waters of the United States, the State policy contained in 68-1 6 applies to all waters of the State.

The October Memo also contains several useful interpretations of the federal three-tiered system of water quality protection. For Tier I protections, the Memo states that "the State must assure full protection of existing instream beneficial uses, including the health and diversity of aquatic life. Memo at p. 11. For higher quality, Tier II waterways, the Memo makes clear, as does the federal requirements, that water quality may only be lowered to "accommodate important economic or social development in the area in which the waters are located." Id. (emphasis added).

C. The Proposed Rule Improperly Shifts the Burden to Shown Water Quality Degradation to the Public and Ignores the Case-By-Case Analysis Required for Tier Two Protections

The Tentative Order offers a presumption that antidegradation standards across all tiers of waterways will be met with "conscientious implementation" of the

Management Plans. Such a presumption is improper under a common understanding of burden allocation in a proper CWA permitting analysis. Permit applicants always bears the burden of showing that a permit authorizing pollutants to be discharged will meet all applicable Water Quality Standards, including antidegradation provisions; this burden does not shift. Oklahoma v. EPA, 908 F.2d at 629 (10th Cir. 1990). "In other words, it is the proponent of a permit who bears the burden of showing that a discharge will comply with all applicable standards, not the opponent of a permit who must show that a discharge will violate applicable requirements." Id.

The State itself recognizes the proper allocation of burden in Resolution No. 68-16 in it's Tier II antidegradation section when it states that "[the burden of proof, to demonstrate that the change in water quality is justified, should be on the project proponent." Memo at p. 12. By uniformly granting MS4 Copermittees an across-the-board presumption that their discharges will meet applicable, mandatory antidegradation standards, the Tentative Order has improperly placed the burden to show that these permits will illegally degrade water quality on those seeking to challenge such permits.

Not only does the Tentative Order improperly shift the burden of proof, its blanket presumption of antidegradation compliance ignores the case-by-case analysis required when Tier II waterway degradation may occur under both state and federal guidelines. Resolution 68-16 lays out a detailed and cautious process that must take place before any degradation of Tier II waterways can occur. This process includes an analysis of where the social and/or economic development will take place (i.e.: community vs. regional), the extent of the lowering of water quality and the nature of the development made possible by the project, among several other factors. "Obviously, the information needed to apply this part of the federal antidegradation policy will vary according to the particular case." Memo at 13. The Tentative Order ignores this particularized analysis by deeming all permits to be in general compliance with all antidegradation standards.

D. The Proposed Rule Embraces a Reasonableness Standard that is Absent in Both the State and Federal Antidegradation Policies

"Reasonable" degradation of the Nation's waterways is not a standard contemplated by appropriate application of state or federal antidegradation provisions. The three tier federal structure, to which the State of California adheres, does not allow any degradation of waterways except under specific circumstances, none of which allows for a reasonable analysis. As explained above, for Tier I protections, existing instream uses can never be compromised whether degradation may be considered reasonable or not; the maintenance of existing uses must be protected at any cost.

Tier II protections do contemplate a "balancing" analysis between allowing degradation and promoting important social and economic development. 40

C.F.R. 131.12(a)(2). The State's Resolution 68-1 6 provides valuable insight into how this balancing should be achieved; significantly, however, a "reasonable" standard is not part of the State's own Tier II analysis. Instead, the Resolution states that "even where an expanded or relocated discharge is clearly justified, the balancing required by the second part of the federal antidegradation policy's three part test may require a higher level of treatment that would otherwise be required by applicable Clean Water Act requirements." Memo at p. 13. The Tentative Order fails to provide for this higher standard or even delineate additional protections for Tier II waters.

With respect to Tier III waterways, the Tentative Order is even more deficient. Typically, Tier III protections are only afforded to waterways that have been officially designated by the state as "Outstanding National Resource Waters." 40 C.F.R. 131.I2(a)(3). However, California has gone one step further: "Even if no formal designation has been made, individual permit decisions should not allow any lowering of water quality or waters which, because of the exceptional recreational and ecological significance, should be given the special protection assigned to outstanding National resource waters." Memo at p. 15. The State Resolution fully recognizes that the water quality of these types of waterways must be protected and that the reasonable standard contemplated by the Tentative Order is inapplicable. "No permanent or long-term reduction in water quality is allowable in areas given special protection as outstanding National resource waters. Memo at p. 14 (citing 48 Fed. Reg. 51402 (Nov. 1983)). Again, the Tentative Order fails utterly to recognize the special protection given to these types of waterways by taking its one-size-fits-all approach to antidegradation compliance.

Response: The finding at issue is identical to a finding in the current permit, Order No. 2001-01. The finding is accurate and in conformance with antidegradation law and policy. The Tentative Order requires the Copermittees to implement programs which meet the MEP standard and prevent urban runoff discharges from causing or contributing to a violation of water quality standards. If the Copermittees implement their urban runoff management programs as required by these Tentative Order provisions, it is expected that they will be in compliance with antidegradation requirements. The burden for exhibiting compliance with antidegradation requirements remains with the Copermittees. The finding discusses Copermittee responsibility regarding antidegradation, stating that achieving compliance with antidegradation requirements relies upon Copermittee implementation of programs meeting the requirements contained in the Order (including prohibitions).

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coast Law Group

Comment: Public participation in the development of NDPES permits is one of the bedrock principles enshrined in the Clean Water Act. As enunciated by the 2d Circuit; Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act. The Act unequivocally and broadly declares, for example, that "public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e). Consistent with this demand, the Act further provides that there be an "opportunity for public hearing" before any NPDES permit issues, see 33 U.S.C. § 1342(a), 1342 (b)(3); that a "copy of each permit application and each permit issued under this section [I3421 shall be available to the public," see 33 U.S.C. 5 7342u); and that "any citizen" may bring a civil suit for violations of the Act, see 33 U.S.C. § 1365(a). Waterkeeper Alliance v. EPA, 399 F.3d at 503.

The Tentative Order makes no place for the public in the development of the central mechanisms MS4s must undertake to ensure compliance with the NPDES permit. Again, as determined by two U.S. Courts of Appeal, this blindness to public participation violates the express requirements of the Clean Water Act. In the Environmental Defense Center decision discussed above, the 9th Circuit rejected EPA's Phase II Rule in part because of the Agency's refusal to allow the public to review and comment upon MS4 notices of intent to be covered under a storm water general permit. "[Clear Congressional intent requires that [notices of intent to be covered by a general storm water permit] be subject to the Clean Water Act's public availability and public hearings requirements." Environmental Defense Center v. EPA, 344 F.3d 832, 856 (9th Cir. 2003). The court held that the notices of intent were "functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements." Id.

The 2d Circuit has adopted and furthered the Environmental Defense Center reasoning. That court has held that CAFO nutrient management plans, which like storm water control measures are developed by the permittee, must be made available to the public for review and comment. As with the overturned Phase II rule and the Tentative Order at issue here, EPA's CAFO regulations neglected to include any provisions for public involvement in the review of nutrient management plans:

This scheme violates the Act's public participation requirements in a number of respects. First and foremost, in light of our holding that the terms of the nutrient management plans constitute effluent limitations that should have been included in NPDES permits, the CAFO Rule deprives the public of its right to assist in the

"development, revision, and enforcement of ... [an] effluent limitation." 33 U.S.C. § 1251 (e) (emphasis added). More specifically, the CAFO Rule prevents the public from calling for a hearing about - and then meaningfully commenting on – NPDES permits before they issue. See 33 U.S.C. § l342(a), 1342 (b)(3). Waterkeeper Alliance, 399 F.3d at 503. Clearly, the Board must accommodate the requirement for public review and comment with respect to storm water pollution control measures, including all Runoff Management Plans developed by the Copermittees; by neglecting to set forth public participation standards for Copermittees the Tentative Order violates well settled law.

Response: 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.

Regarding the setting forth of participation standards for the Copermittees, the Copermittees are required to “incorporate a mechanism for public participation in the updating, development, and implementation of the Jurisdictional Urban Runoff Management Program” at section D.6 of the Tentative Order. The Watershed Urban Runoff Management Program requirements also require a watershed-specific public participation mechanism within each watershed.

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coast Law Group

Comment: Nowhere is the Board's failure to ensure compliance with WQS more evident then in its omission of provisions to ensure that new NPDES permits will not be issued where such discharges will cause or contribute to ongoing water quality standards violations. Specifically, 40 CFR 122.4(i) of the Clean Water Act prohibits, with limited exception, the granting of discharge permits to "a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." See also 40 CFR 123.25 (applying the new source prohibition at 40 CFR §122.4(i) to state NPDES programs). Significantly, there is no requirement that a waterbody must be listed on 303(d) impaired water list in order for the § 122.4(i) moratorium on new discharges to apply.

This prohibition has been largely ignored by the Board in its Tentative Order. Commentators believe at a minimum that any permit issued pursuant to any final Order should require municipalities to demonstrate that new storm drains will not cause or contribute to exceedances of water quality standards. We believe that this determination should be made before any new drains are allowed. We suggest the following language:

Discharges from a new storm water outfall, constructed after the issuance of this permit, shall not cause or contribute to a violation of applicable water quality objectives. Copermittees shall demonstrate compliance with this requirement before construction of such outfall commences by submitting to the Regional Board prior to construction documentation evidencing how compliance will be achieved and any water quality data to support such claims.

For purposes of this permit, a new storm water outfall means an outfall that is constructed at a location where a municipal separate storm water discharge did not previously exist. For purposes of this permit, the point of compliance for discharges from a new storm water outfall is in the naturally-occurring or man altered surface water body at the point of discharge.

In addition, in order to make certain that storm water discharges from the Copermittee MS4s do not cause or contribute to violations of water quality standards, the Board and each Copermittee must either ensure that storm water discharges have been reduced to levels allocated by any applicable TMDL or, where there is criteria of Part no TMDL, perform a load allocation and otherwise meet the strict 122.4(i) prior to issuing coverage under the storm water NPDES permit. E.g. Sierra Club v. Hankinson, 939 F.Supp. 872, 873-874 (N.D. Ga. 1996).

Finally, for waters that are Section 303(d) listed as impaired, the Reasonable Potential Analyses for discharges of impairing pollutants must be undertaken. Discharges above WQS have the reasonable potential to cause, or contribute, to excursions above State WQS. Similarly, developing the WQBEL to be included in the General Permit is simple: the WQBEL is the NTR or State WQS for that pollutant. For waters not impaired, and thus with some assimilative capacity, the RPA and the development of the WQBEL can be more complicated. Nonetheless, the Board is required to undertake this analysis in developing all NPDES permits, including the proposed MSGP. The Tentative Order completely fails to undertake such an analysis.

Response: The Tentative Order does not allow urban runoff discharges to cause or contribute to violations of water quality standards, whether the source is old or new. Section A.3 of the Tentative Order states: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited."

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Coast Law Group

Comment: The history and importance of the Clean Water Act's citizen enforcement provisions are well documented. However, the storm water permitting regime countenanced by the Tentative Order fails to clarify the empowerment of citizens to fulfill this role. By delegating almost all compliance responsibilities to the Copermittees, the Board creates a specter of insulation from enforcement actions taken by members of the public. As stated above, the Runoff Management Programs are effluent limitations, and as such, are required to be incorporated into the storm water NPDES permit. Citizens must be given the opportunity to enforce the terms, requirements, and restrictions that make up these Programs. See 33 U.S.C. § l365(a).

In the context of permittee developed compliance plans, such as the Runoff Management Programs, it is unlawful for a permitting agency to frustrate this requirement. The 2nd Circuit has refused to sanction limitations on the public's ability to participate in the development of permit compliance plans:

The CAFO Rule also impermissibly compromises the public's ability to bring citizen-suits, a "proven enforcement tool" that "Congress intended [to be used …] to both spur and supplement government enforcement actions." Clean Water Act Amendments of 1985, Senate Environment and Public Works Comm., S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1 985). Under the CAFO Rule, as written, citizens would be limited to enforcing the mere requirement to develop a nutrient management plan, but would be without means to enforce the terms of the nutrient management plans because they lack access to those terms. This is unacceptable. Waterkeeper Alliance, 399 F.3d at 503-504.

In similar measure, the Board cannot purport to limit citizens to enforcing the requirement to develop Runoff Management Programs. The effluent limitations that benchmark actual compliance with discharge restrictions are housed in the terms and conditions of those Programs. The Clean Water Act demands that citizens have the right and the ability to enforce compliance with those terms and conditions.

Response: The Tentative Order does not limit citizens to enforcing the requirement to develop urban runoff management programs. For each urban runoff management program, there are specific detailed requirements in the Tentative Order. Moreover each urban runoff management program must reduce the discharge of pollutants to the MEP and prevent urban runoff

discharges from causing or contributing to violations of water quality standards. These requirements are all enforceable.

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): Natural Resources Defense Council

Comment: A more general inadequacy of the Proposed Permit is its failure to otherwise limit the flow of pollution using the most effective and tailored permit limits: numeric effluent limitations. EPA policy requires numeric effluent limitations in individual storm water permits wherever feasible, that is, whenever there are sufficient data to determine the limits." EPA reiterated that numeric limitations are appropriate for toxic pollutants in storm water flows wherever possible when it promulgated the California Toxics Rule (40 C.F.R. Part 13 1.38, the "CTR"). (CTR, 65 Fed. Reg. 3 1682,3 1703, May 18,2000.) EPA's view reflects more than thirty years of experience in conditioning pollutant discharges. This experience has led EPA to conclude that numeric limitations are the most efficacious way of limiting the discharge of pollutants.

More generally, water quality-based effluent limitations (WQBELs) are mandatory when necessary to meet water quality standards, including toxics standards. The test is whether the Regional Board finds that a pollutant "may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an excursion above any State water quality standard . . .." This is precisely what the Regional Board found here. As Board staff has recognized, "urban runoff discharges continue to cause or contribute to violations of water quality standards" in the San Diego region. Indeed, the Copermittees' own water quality monitoring data show that urban runoff remains a primary cause of water quality impairment in San Diego County:

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. Persistent toxicity has also 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.

In light of the persistence of significant water quality problems in the San Diego area, Board staff has recognized that it is imperative that the focus for evaluating the success of Copermittees' storm water programs shift from program implementation to the realization of water quality results in the coming permit

cycle: "After over 15 years of Copermittee program implementation, it is critical that the Copermittees link their efforts with positive impacts on water quality."

The structure of the Proposed Permit, however, does not sufficiently reflect the facts in the record-or staffs own recognition that water quality demands better-tailored limitations on pollutants. The Proposed Permit relies on a BMP-based approach, both with respect to meeting the applicable Clean Water Act technology-based limitation, MEP, and in meeting the requirement not to cause or contribute to excursions of water quality standards. Indeed, with respect to WQBELs, evidently no specific limitation has been calculated or set forth in the Proposed Permit, either expressed as a number or expressed as one or more BMPs. There is no evidence, nor are there findings, that adequately support this approach under the circumstances. Indeed, a generic BMP-based approach is precisely the tack taken over the last fifteen years. This structure has resulted in a lack of sufficient progress, which is reflected in the record and acknowledged by the Copermittees and Board staff.

Some parties may contend that numeric WQBELs, or numeric interpretation of MEP in the form of numeric effluent limitations, are not required for storm water permits. This is not the case. EPA requires that numeric limitations be incorporated into individual storm water permits whenever there is sufficient information to develop them:

In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits as necessary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effluent limitations. (EPA, Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761, Aug. 26, 1996.) In fact, California courts have emphasized that "[In most cases, the easiest and most effective chemical-specific limitation would be numeric."

Likewise, the fact that federal regulations authorize BMPs for storm water where numeric effluent limitations are infeasible, does not support departure from the usual approach here. (40 C.F.R. 122.44(k).) The additional authority provided by Section 122.44 for storm water does not change the underlying rule that numeric limitations are the presumptive tool. Likewise, the infeasibility provision only applies when the determination of effluent limits is infeasible due to lack of data, something which the record here does not support. Indeed, no subsection of Section 122.44(k) provides that non-numeric limitations shall be the only limitation imposed on the flow of pollutants in storm water permits.

For these reasons, the Proposed Permit's failure to include numeric limitations on the discharge of pollutants violates the Clean Water Act, the Porter-Cologne Act, and is otherwise an abuse of discretion. The situation here is simple: the record

contains overwhelming evidence that discharges from the MS4 are causing violations of water quality standards; the Proposed Permit, however, retains the same structural approach to pollution limitation that, for fifteen years, has not yielded sufficient results. No evidence or analysis demonstrates that the Proposed Permit contains limitations which will effectively address the region's leading source of water quality impairment. To fail to include better-tailored, more specific, and more effective pollution limitations on these facts cannot be justified.

Response: The Tentative Order's reliance on BMPs, as opposed to numeric effluent limits, is consistent with USEPA and SWRCB guidance. USEPA's Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits states: "The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards" (1996). The SWRCB commissioned Storm Water Panel on Numeric Limits recently found that adequate information does not exist to develop numeric effluent limits for storm water, stating: "It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges" (Storm Water Panel on Numeric Limits, 2006).

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): San Diego Copermittees

Comment: Issuance of the Permit is a quasi-judicial function. City of Rancho Cucamonga, 135 Cal. App. 4th at 1385. As such, substantial evidence must support the findings of the Board. Id. at 1386. Substantial evidence is defined as "relevant evidence that a reasonable mind might accept as adequate support for a conclusion". Bhatt v. Department of Health Services, 133 Cal. App. 4th 923, 928 (2005). Other courts have defined substantial evidence as evidence of ponderable legal significance in nature, credible, and of solid value. Ofsevit v. Trustees of California State University of Colleges, 21 Cal. 3d 763, 773 n.9 (1978).

The opinion of staff has been recognized as constituting substantial evidence. Coastal Southwest Development Corporation v. California Coastal Zone Conservation Commission, 55 Cal. App. 3d 525, 535-536 (1976). However, the opinion must still be substantiated and based on factual foundation. Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego, 2006 DJDAR 5600, 5609 (2006).

Many of the findings contained within section X of the Fact Sheet contain no factual foundation to support the opinions of Board staff. Examples include Sections D.1.f, D.1.g, D.3.a(3), D.3.a(5), D.3.b(3), D.4.a, D.4.b, D.4.d, E.2.

Response: The Fact Sheet discussion of section D.1.f provides supporting evidence and factual foundation for the requirement. The discussion cites findings by USEPA's contractor Tetra Tech, as well as USEPA guidance found in the Phase II storm water regulations.

The Fact Sheet discussion of section D.1.g provides supporting evidence and factual foundation for the requirement. Several studies exhibiting the need for the requirement are cited. The permit's approach for regulating the issue is supported by citation of several other California storm water programs that have utilized a similar approach.

The Fact Sheet discussion of section D.3.a.(3) provides supporting evidence and factual foundation for the requirement. The rationale for the requirement is provided, and the Copermittees' Report of Waste Discharge is cited as support for the requirement. The following information is provided to augment the discussion:

"Maintenance is critical to the successful implementation of every urban runoff management program. USEPA finds that “Lack of maintenance often limits the effectiveness of storm water structural controls such as detention/retention basins and infiltration devices. […] The proposed program should provide for maintenance logs and identify specific maintenance activities for each class of control, such as removing sediment from retention ponds every five years, cleaning catch basins annually, and removing litter from channels twice a year. If maintenance activities are scheduled infrequently, inspections must be scheduled to ensure that the control is operating adequately. In cases where scheduled maintenance is not appropriate, maintenance should be based on inspections of the control structure or frequency of storm events. If maintenance depends on the results of inspections or if it occurs infrequently, the applicant must provide an inspection schedule. The applicant should also identify the municipal department(s) responsible for the maintenance program” (1992). The MS4 maintenance requirements are based on the above USEPA recommendations. This maintenance will help ensure that structural controls are in adequate condition to be effective year round but especially at the beginning of and throughout the rainy season.

Maintenance of municipal facilities, control structures, and the MS4 is considered so essential by US EPA that the requirement to conduct a maintenance program is specifically directed in both the Phase I and Phase II storm water regulations. In both cases, the maintenance programs must include a training component and have the ultimate goal of preventing pollutant runoff from municipal operations.

Municipal activities should set a good example for all non-municipal personnel and the public."

The Fact Sheet discussion of section D.3.a.(5) provides supporting evidence and factual foundation for the requirement. The rationale for the requirement is provided. The following information is provided to augment the discussion:

"Federal NPDES storm water regulation 40 CFR 122.26(d)(2)(iv)(A)(3) requires 'practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal separate storm sewer systems.' These practices are necessary, because USEPA finds that "public streets, roads, and highways can be significant sources of pollutants in discharges from MS4s" and "in almost all instances, the pollutant concentrations in initial storm water discharge from heavily traveled streets is significant" (1992). To address these discharges, USEPA states "maintenance activities that can reduce pollutants in storm water discharges include catch basin cleaning, litter control, and targeted street sweeping" (1992). The Wisconsin Department of Transportation has found that a high efficiency street sweeper can reduce total suspended sediment levels due to regular sweeping (2002). Since the Copermittees have found trash to be a regional water quality problem (San Diego Storm water Copermittees, 2005), it is reasonable to require street sweeping prioritization based on observed trash/debris levels in streets."

The Fact Sheet discussion of section D.3.b.(3) provides supporting evidence and factual foundation for the requirement. The discussion cites USEPA contractor Tetra Tech findings, as well as USEPA guidance, in support of the requirement.

The Fact Sheet discussion of section D.4.a provides supporting evidence and factual foundation for the requirement. The rationale for the requirement is provided. The following information is provided to augment the discussion:

"Illicit discharges and connections can constitute a significant portion of urban runoff discharges from MS4s. USEPA states “A study conducted in 1987 in Sacramento, California, found that almost one-half of the water discharged from a local MS4 was not directly attributable to precipitation runoff. A significant portion of these dry weather flows were from illicit and/or inappropriate discharges and connections to the MS4" (2000).

MS4 discharges attributable to illicit discharges and connections can be a significant source of pollutant loading to receiving waters. The NURP study concluded that the quality of urban runoff can be adversely impacted by illicit discharges and connections (USEPA, 1983). Furthermore, USEPA states that illicit discharges and connections result in “untreated discharges that contribute high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies. Pollutant levels from

these illicit discharges have been shown in EPA studies to be high enough to significantly degrade receiving water quality and threaten aquatic wildlife and human health" (2000).

For these reasons, CWA section 402(p)(3)(B)(ii) requires each Copermittee to prohibit non-storm water discharges into its MS4. The detection and elimination of illicit discharges and connections is also clearly identified in the federal regulations as a high priority (40 CFR 122.26(d)(2)(iv)(B) and 122.26(d)(2)(iv)(B)(1)). As guidance for detecting and eliminating illicit discharges and connections, the USEPA suggests "The proposed management program must include a description of inspection procedures, orders, ordinances, and other legal authorities necessary to prevent illicit discharges to the MS4" (1992)."

The Fact Sheet discussion of section D.3.b.(3) provides supporting evidence and factual foundation for the requirement. The discussion cites previous correspondence from the Regional Board to the Copermittees. The following information is provided to augment the discussion:

"The quality of urban runoff can be adversely impacted by illicit discharges and connections (USEPA, 1983). Elimination of these sources of pollutants can therefore result in a dramatic improvement in the quality of urban runoff discharges from MS4s, which in turn can result in improved receiving water quality. If field screening results indicate the presence of illicit discharges to the MS4, that portion of the MS4 must be investigated to eliminate the illicit discharge and prevent further potential degradation of receiving waters. To determine when follow-up procedures should be undertaken, USEPA states "Applicants should propose criteria to identify portions of the system where follow-up investigations are appropriate" (1992)."

The Fact Sheet discussion of section E.2 provides supporting evidence and factual foundation for the requirement. The discussion cites previous correspondence from the Regional Board to the Copermittees, Copermittee Annual Reports, and Regional Board reports.

Section: General **Sub-section**: Legal

Commenter(s): San Diego Copermittees

Comment: The Permit defines the MS4 and receiving waters too broadly and in a manner that appears to exceed both federal and state law. Finding D.3.c. is not legally supportable under federal law. The basic premise of the Clean Water Act is that the addition of pollutants from point sources into waters of the U.S. is prohibited. See 33 U.S.C. §§ 1342, 1362(12). In the case of MS4s, federal regulations build on this basic premise, defining the outfall of the MS4 as the

"point source" and expressly excluding from the definition of "outfall" – and therefore from the definition of point source – "open conveyances connecting two or more MS4s or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States." 40 C.F.R. § 122.26(b)(9). Thus, under federal law, the MS4 ends at the outfall; the MS4 does not and cannot convey waters of the United States because such conveyances have been excluded by definition. Therefore, Finding D.3.c. is inconsistent with federal law since it states that receiving waters are both part of the point source and the outfall.

Finding D.3.c fares no better under state law. Under the Porter-Cologne Act, requirements apply with relation to the conditions existing "in the . . . receiving waters upon, or into which, the discharge is made or proposed." Water Code § 13263(a). Hence, a substance cannot be both the discharge and the receiving waters into which that waste is discharged.

Response: The definition of the term "outfall" in the federal NPDES storm water regulations does not dictate what is or is not a MS4 or point source. Rather, the term "outfall" is used in the federal regulations as a vehicle for identifying where field screening should be conducted. In the preamble to the Phase I federal regulations, USEPA makes clear that it "intends to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA and court decisions to include any identifiable conveyance from which pollutants might enter waters of the United States" (FR 47997). As such, the definition of "outfall" cannot be considered a limitation on the definition of point source. Moreover, urban streams carrying urban runoff clearly correspond with USEPA's intent for the definition of point source described above. Urban streams carrying urban runoff also fit the definition of point source: "any discernable, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged" (40 CFR 122.2). Therefore, urban streams are part of the Copermittees' MS4s where the Copermittees channel urban runoff to the urban stream. The SWRCB supports this approach, stating "We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use 'waters of the United States' as part of their sewer system [...]" (2001).

Section: General **Sub-section**: Legal

Commenter(s): San Diego Copermittees

Comment: Water Code section 13360(a) states in relevant part that "[n]o waste discharge requirement issued under Division 7 [Porter-Cologne Act] shall specify design, location, type of construction, or particular manner in which compliance

may be had with that requirement . . . . and persons so ordered shall be permitted to comply with the order in any lawful manner." A waste discharge requirement is the equivalent of a waste discharge permit issued in accordance with the Porter-Cologne Act. City of Burbank v. State Water Resources Control Board, 35 Cal. 4th 613, 631 (2005); see also, Building Industry Association of San Diego County v. State Water Resources Control Board, 124 Cal. App. 4th at 875. "Section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement." Tahoe-Sierra Preservation Council v. State Water Resources Control Board, 210 Cal. App. 3d 1421, 1438 (1989). It was intended to preserve the freedom of those subject to the requirements to elect between available strategies that comply with a requirement. Id. Contra, Pacific Water Conditioning Association, Inc. v. City Council of the City of Riverside, 73 Cal. App. 3d 546 (1977) (upheld a Cease and Desist Order that simply ordered compliance with a portion of state mandate; it did not order the manner in which compliance should be had).

Recently, the court in City of Rancho Cucamonga v. Regional Water Quality Control Board—Santa Ana Region, 135 Cal. App. 4th 1377 (2006), discussed the Board's authority to impose permit conditions that require management practices, control techniques and system, design and engineering methods, and other appropriate measures for the control of pollutants. This more explicit authority is derived from federal law under the Clean Water Act. Id. at 1389. However, even under federal law, the court recognized that "[i]t is the permittees who design programs for compliance, implementing best management practices selected by the permittees in the [Drain Area Management Program] report and approved by the Regional Board." Id. The permittee develops the criteria, establishes its own priorities for inspection requirements and programs for new development. The development and implementation of programs to control the discharge of pollutants is primarily the responsibility of the permittee. Id.

The Regional Board staff has argued that the Draft Permit must contain adequate specificity to properly enforce its terms. However, Water Code section 13360 clearly states that those subject to the requirements must have the freedom to elect how best to comply with the Permit. Moreover, the Board has stated that the iterative process—the Board and the Copermittee working together to identify violations of water quality standards—is the centerpiece to achieving water quality standards. Building Industry Association of San Diego County v. State Water Resources Control Board, 124 Cal. App. 4th at 890. Thus, enforcement must first occur through the iterative process, not through overly prescriptive permit conditions.

Response: The requirements of the Tentative Order provide the Copermittees with sufficient flexibility to choose how they will achieve compliance. The requirements provide the Copermittees with numerous compliance options. As such, the requirements do not specify design, location, type of construction, or particular manner in which compliance my be had.

Where the Tentative Order includes detailed requirements, it is to be in compliance with Clean Water Act section 402(p)(3)(B)(iii), which mandates that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." Clearly, the Clean Water Act provides the Regional Board with the discretion to include specific requirements in the Tentative Order. This discretion is supported in the preamble to the Phase I NPDES storm water regulations, which states "this rule sets out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions" (FR 48038).

Regarding enforcement, the commenter misrepresents the iterative process. The iterative process only applies to compliance with water quality standards; it does not apply to compliance with other permit requirements. Therefore, the iterative process does not in some way preclude the Tentative Order from including detailed requirements, as the commenter asserts.

Section: General **Sub-section**: Legal

Commenter(s): San Diego Copermittees

Comment: Prior to the adoption of Proposition 1A, state mandates could be imposed on a local jurisdiction if fees could be raised to pay for the program. (Govt. Code § 17566.) Proposition 1A superseded this Government Code provision. The ability to raise fees is not one of the three exceptions listed under Article 13B, §6b of the State Constitution (Proposition 1A).

Cities have relied upon fees as a significant source of financing permit activities. Currently, the City of Solana Beach is defending an action brought by the Howard Jarvis Taxpayers Association challenging a non-property related solid waste fee which was imposed to recover a portion of the cost of the program. Previously, the City of Encinitas settled with the Jarvis group and repealed a water-based fee for its Storm water Program.

In December 2005, the Regional Board received a memorandum from the Copermittees addressing the fee issue. A copy of that memorandum is attached as Appendix A-1. It listed some of the problems local governments face in funding the mix of state and federal mandates the Permit imposes. We requested that the Board take action to assist the Copermittees in their attempt to seek clarification of the fee issue at the state level. The Board took no action and the state took no action, either legislatively or through an Attorney General's opinion to address the fee issue. The Copermittees now face the possibility of having no

fee source to pay for the programs under the Permit if the most recent Jarvis case is successful because few potential fee types remain for the Copermittees to impose to fund Permit activities. Even if local jurisdictions find a fee source, there are aspects of the Permit, as discussed in the December 2005, letter that cannot use fees to support the programs mandated, including the regional and watershed programs and other programs discussed in these comments. The Permit renewal should be considered with these funding and mandate issues in mind.

Response: The requirements of the Tentative Order are not unfunded state mandates because they do not exceed federal law. The federal Clean Water Act and NPDES storm water regulations provide the Regional Board with adequate authority for all of the requirements found in the Tentative Order. Since none of the Tentative Order's requirements are state-mandated, Proposition 1A has no effect.

The Tentative Order's requirements mirror the requirements of the current Order, Order No. 200-01. Where the Tentative Order contains new requirements not specifically found in Order No. 2001-01, the new requirements only provide additional detail to requirements already in existence in Order No. 2001-01. Any new requirements in the Tentative Order simply elaborate on Order No. 2001-01's pre-existing requirements. For example, the Tentative Order's requirements addressing hydromodification expand on the pre-existing Order No. 2001-01 requirement that Copermittees develop criteria "to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat" (Order No. 2001-01 section F.1.b.(2)(j)).

In its review of Order No. 2001-01 requirements, the State of California Court of Appeal, Fourth Appellate District "determined that none of the challenged Permit requirements violate or exceed federal law" (Building Industry Association of San Diego County, et al., v. State Water Resources Control Board et al., 2004). The Building Industry of San Diego County used an across the board approach to its lawsuit, challenging a wide range of requirements. Since the requirements of the Tentative Order and Order No. 2001-01 are comparable, the finding that requirements of Order No. 2001-01 do not exceed federal law is also applicable to requirements of the Tentative Order.

The Court of Appeal ruling discusses several findings made by USEPA and other courts that explain why NPDES storm water permit writers have discretion to craft specific permit requirements and are not limited to requirements expressly dictated in the federal NPDES storm water regulations. In the discussion, the court cites Defenders of Wildlife v. Browner (1999), which states: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], section 1342(p)(3)(B)(iii) states that '[p]ermits for discharges from municipal storm sewers…shall require…such other

provisions as the Administrator…determines appropriate for the control of such pollutants.' That provision gives the EPA discretion to determine what pollution controls are appropriate."

As exhibited in Defenders of Wildlife v. Browner, permit writers clearly have discretion to determine what pollution controls are appropriate, and therefore can include more detailed requirements than those specifically found in the federal NPDES storm water regulations. By including such requirements in the Tentative Order, the Regional Board has not exceeded federal law, but instead has complied with the Clean Water Act's requirements that municipal storm water permits meet the MEP standard and shall include "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

Use of permit writer discretion and the inclusion of more detailed requirements in the Tentative Order is consistent with USEPA guidance. For example, the preamble to the Phase I NPDES storm water regulations states "this rule sets out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions" (FR 48038). In addition, in its review of a City of Irving Texas NPDES municipal storm water permit, the USEPA Environmental Appeals Board stated that Congress "created the 'maximum extent practicable' ('MEP') standard and the requirement to 'effectively prohibit non-storm water discharges' into the MS4 in an effort to allow permit writers the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges" (2001).

Additional information in response to this comment may be developed.

Section: General **Sub-section**: Legal

Commenter(s): San Diego Copermittees

Comment: Permit Finding E.9 recognizes that certain mandates in the Permit exceed the requirements of federal law. Finding E.9 provides that "[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)(iii) and are necessary to meet the MEP standard." Similarly, the Fact Sheet/Technical Report ("Technical Report") provides that the "CWA explicitly preserves independent state authority to enact and implement its own standards and requirements, provided that such standards and requirements are at least as stringent as those that would be mandated by the CWA and the federal regulations." Both the Permit and the Technical Report, at various locations, cite to the federal law that supports certain mandates in the Permit. However, in many other instances, the report and Permit cite no federal authority to support the imposition of a proposed mandate by the Regional Board. The Copermittees

must assume that, without a specific citation to federal authority, mandates in the Permit are state mandates that exceed the mandates of federal law. (See Topanga Assn'n for a Scenic Community v. County of Los Angeles, 214 Cal. App. 3d 1348 (1989).) Please either confirm this assumption or, for each mandate in the Permit, specify the federal authority that requires the mandate.

The Permit and the Technical Report contain many examples of mandates for which no citation to legal authority is provided. Chief among these examples is the hydromodification mandate. This mandate creates a number of noteworthy new requirements which will result in significant new, unfunded costs. However, neither the Permit nor the Technical Report cite to any federal authority that requires a hydromodification program. Consistent with Finding E.9, the Copermittees assume that the new hydromodification mandate is a state law requirement. Please either confirm this assumption or specify the federal authority that requires this mandate.

A second example of a mandate for which no citation to federal authority is provided relates to the mandates which regulate the flow of water "into" the MS4 rather than "from" the MS4. In State Water Resources Control Board Order WQ 2001-15, the State Board struck language in the prior permit, which regulated under federal law the flow of water "into" the MS4. The State Board recognized that regulation of water "into" the MS4 was authorized by state law and certain very specific provisions of federal law. Therefore, the Copermittees must assume that, in the absence of a specific citation to federal authority, the mandates that regulate the flow of water "into" the MS4 are mandated by state law. Please either confirm this assumption or specify the federal authority that mandates each regulation of flows "into" the MS4.

In addition to these two significant examples, the following items are examples of other mandates that lack a specific reference to federal authority:
•Annual Inspection and Cleaning of MS4s: This mandate appears to be based on the prohibition under state law that waste may not enter the MS4. Please confirm this assumption or specify the federal law which requires this mandate.
•Street Sweeping: This mandate also appears to be based on the prohibition under state law that waste may not enter the MS4. Please confirm this assumption or specify the federal law which requires this mandate.
•General Plan/Land Use Review: Under Section D.(1)(a) of the Permit, the Copermittees are required to revise their General Plans "as needed". The Technical Report provides no legal authority for this requirement and the Copermittees are unaware of any legal authority under either federal law or state law which allows the Regional Board to mandate a General Plan amendment. In coastal cities, amending the General Plan requires Coastal Commission approval. State law specifically delegates to the Coastal Commission the authority to oversee the Local Coastal Plan elements contained in a General Plan. However, nothing in either state or federal law gives similar authority to the Regional Board for General Plan provisions that either affect or are affected by

the Permit. Exclusive General Plan authority is granted to each Copermittee pursuant to the planning and zoning law found in the Government Code. (Gov't. Code § 65000, et. seq.; Technical Report, pp. 49-50.) Please specify the legal authority for this requirement.

•Environmental Review: The Permit also contains a requirement that the Copermittees revise their environmental review process on an "as needed" basis to reflect storm water issues. (Permit, D.(1)(b); Technical Report, pp. 49-50.) It is unclear what this section requires. The California Environmental Quality Act (Pub. Res. Code § 20000, et. seq.) already requires that local jurisdictions assess issues related to storm water in the same manner as they assess other significant environmental impacts. This provision adds a redundant requirement that already exists in state law. Please confirm that the Regional Board is relying upon state law for this requirement or specify the federal authority for this mandate.
•Regional Monitoring: This mandate appears to be based on the prohibition under state law that waste may not enter the MS4. Please confirm this assumption or specify the federal law which requires this mandate.
•Watershed Program: This mandate appears to be based on the prohibition under state law that waste may not enter the MS4. Please confirm this assumption or specify the federal law which requires this mandate.
•Additional Monitoring: This mandate appears to be based on the prohibition under state law that waste may not enter the MS4. Please confirm this assumption or specify the federal law which requires this mandate.

The request from the Copermittees' that the Board specify the legal authority (federal or state) for the new mandates of the Permit is important for several reasons. First, as detailed in Section A, mandates required by state law, which exceed the requirements of federal law, potentially constitute unfunded state mandates. It is the Copermittees' intent to pursue an unfunded state mandate test case in order to help fund the increased costs of the Permit which exceed the requirements of federal law. It is, therefore, imperative that the Board specify the legal authority for each mandate.

Second, to the extent mandates in the Permit are based upon state law, they are subject to the accompanying requirements of state law. For example, Water Code section 13360 restricts the ability of the Regional Board to dictate the manner of compliance with requirements imposed under state law. Many of the mandates of the Permit are highly prescriptive. If those mandates are based upon state law, their prescriptive nature is inconsistent with Water Code section 13360. In addition, the Regional Board's attempt to make the Permit more prescriptive actually creates more ambiguity in the Permit and will only serve to increase the costs of compliance for the Copermittees. Because the provisions of Water Code section 13360 are critical to the Copermittees' ability to determine methods of compliance, it is discussed in detail below.

Third, specific citation to the underlying legal authority for the mandates in the Permit is needed because the Copermittees cannot pass the mandates of the Permit onto users of the MS4s through local laws and regulations without proper authority. If the source of the legal authority for the mandate is unclear, users of the MS4s will likely challenge the Copermittees' authority to regulate on a local level. Absent a clearly stated legal basis for their actions, the Copermittees will have difficulty responding to such a challenge and enforcement actions related to potential violations of those portions of the Permit lacking legal underpinnings will be difficult for the Copermittees to pursue.

Finally, the legal counsels of Copermittees will be unable to make the certification required by Section C.2 unless there is a clear delineation of the source of the mandates in the Permit.

Response: The requirements of the Tentative Order do not exceed federal law. The federal Clean Water Act and NPDES storm water regulations provide the Regional Board with adequate authority for all of the requirements found in the Tentative Order. The commenter misrepresents Finding E.9 when stating that the finding acknowledges that certain requirements of the Tentative Order exceed federal law. The plain language of the finding states that the Tentative Order contains requirements more explicit than the federal NPDES storm water regulations, for the purpose of achieving compliance with the Clean Water Act's provision that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable" (Clean Water Act section 402(p)(3)(B)(iii)). As such, the Tentative Order's requirements are necessary to comply with federal law, rather than exceed it.

The Tentative Order's requirements mirror the requirements of the current Order, Order No. 200-01. Where the Tentative Order contains new requirements not specifically found in Order No. 2001-01, the new requirements only provide additional detail to requirements already in existence in Order No. 2001-01. Any new requirements in the Tentative Order simply elaborate on Order No. 2001-01's pre-existing requirements. For example, the Tentative Order's requirements addressing hydromodification expand on the pre-existing Order No. 2001-01 requirement that Copermittees develop criteria "to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat" (Order No. 2001-01 section F.1.b.(2)(j)).

In its review of Order No. 2001-01 requirements, the State of California Court of Appeal, Fourth Appellate District "determined that none of the challenged Permit requirements violate or exceed federal law" (Building Industry Association of San Diego County, et al., v. State Water Resources Control Board et al., 2004). The Building Industry of San Diego County used an across the board approach to its lawsuit, challenging a wide range of requirements. Since the requirements of the Tentative Order and Order No. 2001-01 are comparable, the finding that

requirements of Order No. 2001-01 do not exceed federal law is also applicable to requirements of the Tentative Order.

The Court of Appeal ruling discusses several findings made by USEPA and other courts that explain why NPDES storm water permit writers have discretion to craft specific permit requirements and are not limited to requirements expressly dictated in the federal NPDES storm water regulations. In the discussion, the court cites Defenders of Wildlife v. Browner (1999), which states: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], section 1342(p)(3)(B)(iii) states that '[p]ermits for discharges from municipal storm sewers…shall require…such other provisions as the Administrator…determines appropriate for the control of such pollutants.' That provision gives the EPA discretion to determine what pollution controls are appropriate."

As exhibited in Defenders of Wildlife v. Browner, permit writers clearly have discretion to determine what pollution controls are appropriate, and therefore can include more detailed requirements than those specifically found in the federal NPDES storm water regulations. By including such requirements in the Tentative Order, the Regional Board has not exceeded federal law, but instead has complied with the Clean Water Act's requirements that municipal storm water permits meet the MEP standard and shall include "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

Use of permit writer discretion and the inclusion of more detailed requirements in the Tentative Order is consistent with USEPA guidance. For example, the preamble to the Phase I NPDES storm water regulations states "this rule sets out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions" (FR 48038). In addition, in its review of a City of Irving Texas NPDES municipal storm water permit, the USEPA Environmental Appeals Board stated that Congress "created the 'maximum extent practicable' ('MEP') standard and the requirement to 'effectively prohibit non-storm water discharges' into the MS4 in an effort to allow permit writers the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges" (2001).

The commenter requests citation of the Regional Board's federal legal authority for several of the Tentative Order's requirements. The specific requirements mentioned by the commenter are addressed here, while legal authority citations have also been added to the Fact Sheet/Technical Report for all requirements.

Hydromodification – Once a NPDES permit is required, the NPDES permit provisions must protect beneficial uses (33 U.S.C. 1342(a)). In addition, federal anti-degradation policy requires the state to ensure that any discharge maintains and protects instream uses (40 CFR 131.12). Moreover, the Clean Water Act's

objective is to maintain the “chemical, physical and biological integrity of the Nation’s waters” (33 U.S.C. 1251(a)). The negative impact of urban runoff flow on the beneficial uses of receiving waters has been documented in the Tentative Order’s findings and fact sheet. USEPA finds that the level of imperviousness resulting from urbanization is strongly correlated with the water quality impairment of nearby receiving waters (1999b). USEPA further attributes much of this water quality impairment to changes in flow conditions from urbanization, stating “[I]n many cases, the impacts on receiving streams due to high storm water flow rates or volumes can be more significant than those attributable to the contaminants found in storm water discharges” (1999). Therefore, in order to protect the beneficial uses of waters receiving urban runoff flows (as required by federal law), the Regional Board has under certain circumstances placed limits on urban runoff flows in the Tentative Order.

In addition, the authority to regulate flow under federal law in order to protect water quality standards has been addressed by the U.S. Supreme Court in PUD No. 1 v. Washington Department of Ecology, 511 U.S. 700 (1994). In this case the U.S. Supreme Court found that the Clean Water Act applies to water quantity as well as water quality, stating “[p]etitioners also assert more generally that the Clean Water Act is only concerned with water ‘quality’ and does not allow the regulation of water ‘quantity.’ This is an artificial distinction. In many cases, water quantity is closely related to water quality.” The U.S. Supreme court goes on to refer to the Clean Water Act’s definition of pollution (“the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water” 33 U.S.C. 1362(19)) and states “[t]his broad conception of pollution – one which expressly evinces Congress’ concern with the physical and biological integrity of water – refutes petitioners’ assertion that the Act draws a sharp distinction between the regulation of water ‘quantity’ and water ‘quality’.” In this context, the U.S. Supreme Court held that the regulation of flow was “a limitation necessary to enforce the designated use of the River as a fish habitat.”

This approach is supported by USEPA in the Preamble to the Phase II federal NPDES storm water regulations, which states: “consideration of the increased flow rate, velocity, and energy of storm water discharges must be taken into consideration in order to reduce the discharge of pollutants, to meet water quality standards, and to prevent the degradation of receiving streams” (FR 68761). The SWRCB also supports this approach in its review of the current permit (Order No. 2001-01), stating “It is absurd to contend that the permit should have ignored [the erosion] impact of urban runoff” (2001).

“Into” the MS4 - The commenter misrepresents the findings of the SWRCB in Order WQ 2001-15 regarding discharges into and from the MS4. The Copermittees are clearly responsible for discharges into their MS4. On this issue, the SWRCB states: "It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control" and "there are other provisions in the permit the refer to

restrictions 'into' the MS4. (See, e.g., Legal Authority D.1) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate control for discharges into their system. For example, the federal regulations require that MS4s have a program 'to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system….' (40 CFR 122.26(d)(2)(iv)(D))" (SWRCB, 2001). The SWRCB is supported by the Clean Water Act, which requires the Copermittees to "effectively prohibit non-stormwater discharges into the storm sewers" (402(p)(3)(B)(ii)). Moreover, the preamble to the Phase II Federal NPDES storm water regulations states that MS4s "cannot passively receive and discharge pollutants from third parties" and that an MS4 that does not "prohibit and/or control discharges into its system essentially accepts 'title' for those discharges" (USEPA, 1999).

Annual Inspection and Cleaning of MS4s – The broad legal authority for annual inspection and cleaning of MS4s is as follows: CWA sections 402(p)(3)(B)(ii-iii) and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E, and F) and 40 CFR 122.26(d)(2)(iv). The specific legal authority is as follows: Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A)(1,3, and 4).

Municipal maintenance is critical to the successful implementation of every urban runoff management program and is necessary for the MEP standard to be achieved. USEPA finds that “Lack of maintenance often limits the effectiveness of storm water structural controls such as detention/retention basins and infiltration devices. […] The proposed program should provide for maintenance logs and identify specific maintenance activities for each class of control, such as removing sediment from retention ponds every five years, cleaning catch basins annually, and removing litter from channels twice a year. If maintenance activities are scheduled infrequently, inspections must be scheduled to ensure that the control is operating adequately. In cases where scheduled maintenance is not appropriate, maintenance should be based on inspections of the control structure or frequency of storm events. If maintenance depends on the results of inspections or if it occurs infrequently, the applicant must provide an inspection schedule. The applicant should also identify the municipal department(s) responsible for the maintenance program” (1992). The maintenance requirements included in the Tentative Order are based on the above USEPA recommendations.

Street Sweeping - The broad legal authority is as follows: CWA sections 402(p)(3)(B)(ii-iii) and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E, and F) and 40 CFR 122.26(d)(2)(iv). The specific legal authority is as follows: Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A)(3).

General Plan Update - The broad legal authority is as follows: CWA sections 402(p)(3)(B)(ii-iii) and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E,

and F) and 40 CFR 122.26(d)(2)(iv). The specific legal authority is as follows: Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A)(2).

USEPA finds that the Copermittee "must thoroughly describe how the municipality's comprehensive plan is compatible with the storm water regulations" (1992). To achieve this, the Copermittee shall incorporate water quality and watershed protection principles and policies into its General Plan (or equivalent plan). USEPA supports addressing urban runoff problems in General Plans (or equivalent plans) when it states "Runoff problems can be addressed efficiently with sound planning procedures. Master Plans, Comprehensive Plans, and zoning ordinances can promote improved water quality by guiding the growth of a community away from sensitive areas and by restricting certain types of growth (industrial, for example) to areas that can support it without compromising water quality" (2000).

Environmental Review - The broad legal authority is as follows: CWA sections 402(p)(3)(B)(ii-iii) and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E, and F) and 40 CFR 122.26(d)(2)(iv). The specific legal authority is as follows: Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A)(2).

USEPA finds that "Proposed storm water management programs should include planning procedures for both during and after construction to implement control measures to ensure that pollution is reduced to the maximum extent practicable in areas of new development and redevelopment. Design criteria and performance standards may be used to assist in meeting this objective" (1992). USEPA further finds that "The municipality should consider storm water controls and structural controls in planning, zoning, and site or subdivision plan approval" (1992). The SWRCB Urban Runoff Technical Advisory Committee advises that the Copermittees' CEQA initial study checklists be revised to include consideration of water quality effects from new development or redevelopment (1994).

Regional and "Additional Monitoring" - The broad legal authority is as follows: CWA sections 402(p)(3)(B)(ii-iii) and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E, and F) and 40 CFR 122.26(d)(2)(iv). The specific legal authority is as follows: The Copermittees must conduct a comprehensive monitoring program under Federal NPDES regulations 40 CFR 122.26(d)(2)(iii) and 40 CFR 122.26(d)(2)(i)(F).

Watershed Program - The broad legal authority is as follows: CWA sections 402(p)(3)(B)(ii-iii) and Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E, and F) and 40 CFR 122.26(d)(2)(iv). The specific legal authority is as follows: 40 CFR 122.26(a)(3)(ii) states: "The Director may […] issue distinct permits for appropriate categories of discharges […] including, but not limited to […] all discharges within a system that discharge to the same watershed […]"; 40 CFR 122.26(a)(3)(v) states: "Permits for all or a portion of all discharges from large or

medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system"; 40 CFR 122.26(a)(5) states: "The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)91)(v) of this section on a system-wide basis, a jurisdiction-wide basis, watershed basis, or other appropriate basis"; 40 CFR 122.26(d)(2)(iv) states: "Proposed programs may impose controls on a system wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls."

USEPA expresses the importance of a watershed approach to the regulation of municipal storm water when it states that its definition of MS4 "must be flexible enough to accommodate development of the program on a watershed basis […]" (FR 48039). The watershed approach is also supported by USEPA in the preamble to the Phase II NPDES storm water regulations, stating that a "goal of the NPDES program approach is to provide flexibility in order to facilitate and promote watershed planning […]" (FR 68739). The SWRCB Technical Advisory Committee recommends that "All NPDES permits and Waste Discharge Requirements should be considered for reissuance on a watershed basis" (1994). The Regional Board also recommends watershed based water quality protection, stating in its Basin Plan that "public agencies and private organizations concerned with water resources have come to recognize that a comprehensive evaluation of pollutant contributions on a watershed scale is the only way to realistically assess cumulative impacts and formulate workable strategies to truly protect our water resources. Both water pollution and habitat degradation problems can best be solved by following a basin-wide approach."

Section: General **Sub-section**: Legal

Commenter(s): San Diego Copermittees, City County Managers Association, City of La Mesa, City of Oceanside, City of Chula Vista, City of Lemon Grove

Comment: The Permit proposes to increase the level of service required of Copermittees. To the extent that federal law requires this new level of service, the Copermittees are required to bear the cost of this unfunded federal mandate. However, as to those portions of the Permit that fall under the legal authority of the state, the level of service increases are state mandated costs that are subject to reimbursement by the State of California.

The permit that Copermittees are currently operating under, was issued in 2001. Since that time, Cal. Const. art. XIIIB, § 6 requires the state to reimburse local agencies for the costs of programs that "any state agency" mandates for a "higher level of service". (Cal. Const. art. XIIIB, § 6.) In 2004, the voters approved a constitutional amendment that provides that reimbursements to local

agencies for state mandated programs must be appropriated by the Legislature into the state budget or the mandated program will be suspended for the fiscal year in which no appropriation was made. (Cal. Const. art. XIIIB § 6(b), Proposition 1A.) The proposed Permit contains provisions, discussed below, which add additional levels of service to the existing permit and, therefore, are covered by Proposition 1A. Proposition 1A requires reimbursement for costs from the 2005-2006 Fiscal Year onward for every state mandated program meeting the criteria set forth in the Proposition. (Cal. Const. art. XIIIB, § 6(b)(1).) Article XIIIB, § 6 prohibits the state from shifting the financial responsibility for carrying out state mandated governmental functions to local agencies which are often ill-equipped to absorb the costs of the additional levels of service. County of Los Angeles v. Commission on State Mandates, 110 Cal. App. 4th 1176, 1188 (2003). The state may not force extra programs on local governments in a manner that negates the ability of a local agency to carefully budget for expenditures, particularly where the cost of compliance with a program restricts local spending in other areas. Id. at 1193.

As discussed in these comments, the Permit contains numerous increases in the level of service for program elements not required by the Clean Water Act. The new Permit requires new conditions in the general watersheds of each jurisdiction by requiring efforts by the Copermittees before any flow enters into the MS4. (40 Code of Federal Regulations ("C.F.R.") § 122.26(a)(iii), (b)(4) & (b)(7).) This new level of effort includes the, yet to be adopted, hydromodification program. (Permit, D (1)(g).) Most of the watershed management program will also fall into the category of mandates not required by the Clean Water Act but which require levels of effort above the MEP. The Permit does not differentiate between the federal and state mandates in most portions of the Permit. However, before a local agency may avail itself of the reimbursement provisions of Proposition 1A, the Regional Board must make findings to demonstrate which new levels of service are mandated by it as a "state agency" so that the Legislature can determine which Permit requirements must be funded.

Response: The requirements of the Tentative Order are not unfunded state mandates because they do not exceed federal law. The federal Clean Water Act and NPDES storm water regulations provide the Regional Board with adequate authority for all of the requirements found in the Tentative Order. Since none of the Tentative Order's requirements are state-mandated, Proposition 1A has no effect.

The Tentative Order's requirements mirror the requirements of the current Order, Order No. 200-01. Where the Tentative Order contains new requirements not specifically found in Order No. 2001-01, the new requirements only provide additional detail to requirements already in existence in Order No. 2001-01. Any new requirements in the Tentative Order simply elaborate on Order No. 2001-01's pre-existing requirements. For example, the Tentative Order's requirements addressing hydromodification expand on the pre-existing Order No. 2001-01

requirement that Copermittees develop criteria "to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat" (Order No. 2001-01 section F.1.b.(2)(j)).

In its review of Order No. 2001-01 requirements, the State of California Court of Appeal, Fourth Appellate District "determined that none of the challenged Permit requirements violate or exceed federal law" (Building Industry Association of San Diego County, et al., v. State Water Resources Control Board et al., 2004). The Building Industry of San Diego County used an across the board approach to its lawsuit, challenging a wide range of requirements. Since the requirements of the Tentative Order and Order No. 2001-01 are comparable, the finding that requirements of Order No. 2001-01 do not exceed federal law is also applicable to requirements of the Tentative Order.

The Court of Appeal ruling discusses several findings made by USEPA and other courts that explain why NPDES storm water permit writers have discretion to craft specific permit requirements and are not limited to requirements expressly dictated in the federal NPDES storm water regulations. In the discussion, the court cites Defenders of Wildlife v. Browner (1999), which states: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], section 1342(p)(3)(B)(iii) states that '[p]ermits for discharges from municipal storm sewers…shall require…such other provisions as the Administrator…determines appropriate for the control of such pollutants.' That provision gives the EPA discretion to determine what pollution controls are appropriate."

As exhibited in Defenders of Wildlife v. Browner, permit writers clearly have discretion to determine what pollution controls are appropriate, and therefore can include more detailed requirements than those specifically found in the federal NPDES storm water regulations. By including such requirements in the Tentative Order, the Regional Board has not exceeded federal law, but instead has complied with the Clean Water Act's requirements that municipal storm water permits meet the MEP standard and shall include "such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

Use of permit writer discretion and the inclusion of more detailed requirements in the Tentative Order is consistent with USEPA guidance. For example, the preamble to the Phase I NPDES storm water regulations states "this rule sets out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions" (FR 48038). In addition, in its review of a City of Irving Texas NPDES municipal storm water permit, the USEPA Environmental Appeals Board stated that Congress "created the 'maximum extent practicable' ('MEP') standard and the requirement to 'effectively prohibit non-storm water discharges' into the MS4 in an effort to allow permit

writers the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges" (2001).

Additional information in response to this comment may be developed.

Section: Multiple **Sub-section**: Multiple

Commenter(s): San Diego Copermittees

Comment: Under the Tentative Order, existing directives to "implement" activities and programs are modified to "fully implement" in the introductory portions of Sections D, E, and F, and Monitoring & Reporting Program section D.7 (Interim Reporting Requirements). At the April 24 RWQCB Workshop, the Copermittees requested clarification on what RWQCB staff considers "fully implement" to mean. RWQCB staff agreed that it could be reasonably interpreted to mean "program development or modification is being completed within specified dates, and implementation activities progressing in accordance with specifications or schedules". While this helps to understand staff's thinking on this issue, the modification of this term in the Final Order would still present a vagueness and ambiguity in interpreting the Copermittees' compliance obligations. "Implementation" of Copermittee programs is an ongoing and iterative process over the course of the permit cycle, and as such cannot be "set in stone" upon submittal of a deliverable or the passing of a compliance deadline. To avoid further confusion, and to provide an achievable and enforceable standard for program implementation, the Copermittees recommend replacing each occurrence of "fully implement" with "commence implementation of."

Response: The phrase "fully" has been removed from the Tentative Order to ensure consistency throughout the Tentative Order. Use of the phrase "commence implementation of" is not necessary because directives which are not required to be implemented immediately are provided with implementation timeframes in the Tentative Order. For example, the Tentative Order requires inspections to be conducted on an annual basis, providing the Copermittees with a year to implement all required inspections.

RESPONSES TO COMMENTS ON FINDINGS

Section: Finding **Sub-section**:

Commenter(s): Caltrans

Comment: Certain activities that generate pollutants present in storm water runoff may be beyond the ability of the permittees to eliminate. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear and leaching of naturally occurring minerals from local geography. [from California Regional Water Quality Control Board Santa Ana Region, Order No. R8-2OO2-OOlO]

Response: While the Copermittees may not be able to eliminate the generation of pollutants from certain sources, their MS4s collect and efficiently convey these pollutants, enabling their discharge to receiving waters. As such, the Copermittees are responsible for reducing MS4 discharges of these pollutants to the maximum extent practicable.

Section: Finding **Sub-section**:

Commenter(s): Coast Law Group

Comment: Discharge Characteristics - The proposed Order utilizes the term "urban runoff' to mean both storm water and illicit dry weather discharges. As such, generalized impacts of urban runoff do not distinguish between wet and dry weather discharges. Both to reinforce the prohibition of dry weather discharges to MS4s and to allow for clarification of impacts specific to wet weather conditions, Board staff should seek to differentiate between discharge characteristics of wet and dry weather flows in MS4s.

Response: Per federal regulations both dry-weather and storm water discharges are addressed in the Tentative Order using different management approaches . For instance, the Tentative Order requires BMPs be implemented to protect receiving water quality from storm water discharges and clearly prohibits all dry weather discharges except those exempted by the federal regulations. BMPs must be implemented to address the non-prohibited dry-weather discharges, unless a municipality chooses to prohibit them, in cases where such discharges cause or contribute to pollution. Receiving water monitoring required by the Tentative Order will promote a better understanding of the characteristics, variability, and influences of dry-weather and wet-weather discharges. Those monitoring results will enable the municipalities to better refine the programs.

Section: Finding **Sub-section**: Finding C.6

Commenter(s): City of Imperial Beach, City of Chula Vista, City of Carlsbad, San Diego Unified Port District

Comment: Table 2 of the Tentative Order lists all water quality impairments identified on the State Water Resources Control Board's most recent Clean Water Act Section 303(d) List of Water Quality Limited Segments. The listings are organized by watershed management area (WMA), but do not specify which particular receiving water segments the listings apply to. The table gives the false impression that water quality impairments apply to the entire WMA, rather than to specific segments of the receiving water.

Response: A footnote has been added to the Tentative Order, indicating that the 303(d) listings found in Table 2 do not necessarily apply to the WMAs listed in their entirety. Please see Table 2 of the Tentative Order for this modification.

Section: Finding **Sub-section**: Finding C.7

Commenter(s): Coast Law Group

Comment: The Copermittees should be on notice that they may be subject to Regional Board and/or third party enforcement for persistent exceedances of Basin Plan water quality objectives. Unless and until urban runoff discharges no longer cause or contribute to water quality impairments, enforcement exposure will remain.

Response: The Tentative Order (section A) describes the process each Copermittee must implement in response to situations where MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard. Section A.3.c of the Tentative Order makes clear that the Copermittees are responsible for discharges causing or contributing to violations of water quality standards until the situation is rectified. The Regional Board will require the process be followed and pursue enforcement consistent with the Water Quality Enforcement Policy (State Water Resources Control Board, 2002).

Section: Finding **Sub-section**: Finding C.8

Commenter(s): City of Imperial Beach

Comment: Finding C.8 on Page 4 of the Tentative Order states, "runoff leaving a developed urban area is significantly greater in runoff volume, velocity, peak flow rate, and duration than pre-development runoff from the same area." The Fact Sheet contains no justification for this statement with respect to increases in

the duration of post-development runoff. Page 20 of the Fact Sheet actually asserts the contrary: "increases in population density and imperviousness result in changes to stream hydrology including … decreased travel time to reach receiving water." The finding should be augmented if there is adequate evidence suggesting that development leads to flow durations that are significantly greater than those of pre-development. If there is no evidence to suggest that this is true, flow duration should not be regulated.

Response: When an area is developed, impervious surface area is increased, preventing infiltration of runoff. This reduced infiltration results in a greater volume of runoff. If only the peak flow rate of the increased volume of runoff is controlled, the duration of runoff will increase. This results in erosive flows occurring over a longer duration, increasing erosion of channels. Therefore, when addressing channel erosion, both flow rates and durations of runoff must be controlled. To only address flow rates results in an increase in erosive flow durations. Finding C.8 will be modified to more clearly explain this relationship.

Section: Finding **Sub-section**: Finding C.8

Commenter(s): Coast Law Group

Comment: The Order should detail not only the potential problems with conversion of natural land to impervious surface, it should also discuss (to the extent available) estimates of the amount of impervious cover already constructed.

Response: Finding C.7 discusses the impacts of urban runoff discharges on receiving waters. The impacts can be attributable to both pollutants in urban runoff and changes in urban runoff flow conditions. As such, the Tentative Order addresses the impacts of changes in urban runoff flows caused by existing impervious surfaces.

Section: Finding **Sub-section**: Finding C.9

Commenter(s): City of San Diego

Comment: Include a paragraph calling out the threat storm water runoff poses to drinking source waters. The general concept is that one entity's storm water runoff may be another entity's drinking source water.

Response: Finding C.6 notes that urban runoff discharges enter drinking water reservoirs. Finding E.2 notes the beneficial uses of receiving waters addressed by the Tentative Order, including the Municipal and Domestic Supply beneficial use.

Section: Finding **Sub-section**: Finding C.9

Commenter(s): City of San Diego

Comment: This section (C.9.) attributes urban storm water pollution on development. Finding should acknowledge that urban redevelopment many times eliminates sources of pollution by elimination of surface parking lots, elimination of impervious surfaces, etc.

Response: Finding C.9 describes the general circumstances that occur with new development. While it is likely that exceptions exist, as a general finding, Finding C.9 is accurate.

Section: Finding **Sub-section**: Finding C.10

Commenter(s): Coast Law Group

Comment: This paragraph understates the impact of additional discharges of pollutants to impaired water bodies. Because beneficial uses must already be impacted for a water body or segment to be listed on the federal Clean Water Act ("CWA") 303(d) list, the Order should mandate a strict prohibition on additional loading of pollutants of concern into listed waters. This would accelerate completion of TMDLs and provide Copermittees with additional enforcement opportunities.

Response: The Tentative Order requires permittees to develop and implement BMPs and program processes specific for pollutants causing known impairments. In particular, permittees must require new development and redevelopment priority projects (see Section D.1.d.3) to be designed specifically to address pollutants on the 303(d) list and to implement BMPs accordingly. The watershed requirements also emphasize BMP implementation specifically targeting impairments. TMDLs will be developed, as resources allow, for each waterbody on the 303(d) list. The Regional Board recognizes that even TMDLs allow a phased approach to pollutant reductions and an immediate prohibition on such discharges within the Tentative Order would be inappropriate.

Section: Finding **Sub-section**: Finding D.1.a

Commenter(s): City of Imperial Beach

Comment: The Draft Permit calls for watershed Copermittees to continually augment their urban runoff management programs until water quality standards are met. This is an unachievable goal.

Response: The expectations discussed in Finding D.1.a of the Tentative Order are in reference to urban runoff discharges. They are not in reference to discharges from Mexico or other discharges which do not originate from the Copermittees' MS4s.

Section: Finding **Sub-section**: Finding D.1.a

Commenter(s): City of Imperial Beach, City of Carlsbad, San Diego Unified Port District

Comment: In reference to the maximum extent practicable (MEP) performance standard, Finding D.1.a states, "as urban runoff management knowledge increases, the Copermittees' urban runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc." This language is inconsistent with Page 22 of the Fact Sheet, which suggests that, "Reducing the discharge of storm water pollutants to the MEP requires Copermittees to assess each program component and revise activities, control measures, best management practices (BMPs), and measurable goals, as necessary to meet MEP." The latter statement conforms with federal law; the former does not. Program modification and assessment are not open-ended requirements as currently suggested in the draft permit text. Rather, they are constrained and governed by the MEP standard. That fact is crucial and must be acknowledged in the language of the Tentative Order.

Response: Both statements referred to in the comment are consistent. The statements find that assessment and revision of activities is necessary to meet the MEP standard. Finding D.1.a expands on this concept by stating that as what constitutes MEP evolves, the Copermittees' programs must continually be modified to meet the evolving MEP standard. In other words, the Copermittees cannot continue to implement what constituted MEP in 1995; new knowledge must be taken into account and the Copermittees' programs must reflect that new knowledge. Finding D.1.a has been modified to clarify this issue.

It is also important to note that the Copermittees' urban runoff discharges are prohibited from causing or contributing to a violation of water quality standards, regardless of the MEP standard. The Copermittees' urban runoff management programs are required to be designed to achieve compliance with water quality standards. Moreover, where violations of water quality standards persist notwithstanding implementation of the Copermittees' programs, the Copermittees are required to implement additional BMPs that will achieve compliance with

water quality standards. Therefore, the MEP standard is not a ceiling for Copermittee program implementation, but is rather a minimum level of effort required of the Copermittees.

Section: Finding **Sub-section**: Finding D.1.a

Commenter(s): Coast Law Group

Comment: This paragraph should make clear that mere participation in the "iterative process" as described does not provide a safe harbor for Copermittees which discharge, or allow discharges, that result in violations of relevant water quality standards. Legally, though appropriate to find that the totality of the permit, including the iterative process, is expected to achieve water quality standards, until such standards are met, the discharging entity would be in violation of the Order.

Response: The existence of impaired waters does not necessarily mean that permittees would be in violation of the Tentative Order's requirements. Permittees are required to implement the iterative process as described in Section A of the Tentative Order when MS4 discharges are found to cause violations of water quality standards. Failure to comply with that process would be a violation of the Order subject to enforcement by the Regional Board. Section A.3.c of the Tentative Order clearly demonstrates the Regional Board does not intend for participation in an iterative process to be a "safe harbor" from potential enforcement. The iterative process proposed by the Copermittee, for instance, must reasonably be expected to reduce the discharge of the pollutant of concern.

Section: Finding **Sub-section**: Finding D.1.a

Commenter(s): Coast Law Group

Comment: Finding D.1.a should make clear that MEP is the appropriate standard on various scales. In other words, just as the Order must reflect MEP, so the RURMPs, WURMPs, and JURMPs must reflect MEP. Importantly, MEP must be met even at the BMP level. Therefore, it will not be enough for a Copermittee to argue that the totality of its JURMP implementation is MEP so long as a condition of discharge exists anywhere in its jurisdiction where pollutants are not removed to the maximum extent practicable.

Response: Permittees must have programs capable of reducing the pollutants in discharges to the maximum extent practicable (MEP). JURMP, WURMP, and other requirements of the Tentative Order describe the measures for achieving MEP. It is likely that some discharges will continue to contain pollutants that

have not been reduced to the MEP, such as illicit discharges and discharges from sources that are low on the implementation prioritization lists developed by a Copermittee (e.g., the last of facilities to be inspected). Where such cases, however, are found to be discharging pollutants in violation of water quality standards or against discharge prohibitions, the Tentative Order requires the Copermittee to take management steps (e.g., incident investigation, BMP implementation, enforcement, etc.) using the processes and tools required by the Tentative Order or developed by the Copermittee to meet the requirements of the Tentative Order. The Tentative Order does not provide for a Copermittee to ignore problematic discharges of pollutants from a source as long as other aspects of the program are properly sustained.

Section: Finding **Sub-section**: Finding D.1.c

Commenter(s): City of Imperial Beach

Comment:

Response: The Tentative Order includes directives and findings supporting the directives. Since the statement at issue is not a directive or finding in support of a directive, it is not included in the Tentative Order.

Section: Finding **Sub-section**: Finding D.1.c

Commenter(s): Coast Law Group

Comment: It should be noted that WURMPs and RURMPs are also designed to facilitate consistency between Copermittees and their JURMPs.

Response: The WURMPs and RURMP requirements are intended to ensure that priority pollutants of concern in a watershed are addressed in a collaborative fashion. The permittees may choose to promote consistency among their jurisdictional programs when addressing a priority pollutant, but the Regional Board expects that each Copermittee will develop and implement measures best suited for its situation.

Section: Finding **Sub-section**: Finding D.2.a

Commenter(s): Coast Law Group

Comment: The Bay Council hereby incorporates by reference comments on this Order by the Natural Resources Defense Council. In particular, the Board should consider how development and redevelopment urban runoff treatment standards

have evolved since the 2001 Order was adopted. MEP, as judged on a national scale, mandates that the 2006 Order redefine more stringently the priority development categories to which the
SUSMP provisions will apply.

Response: Comment noted.

Section: Finding **Sub-section**: Finding D.3.a

Commenter(s): Coast Law Group

Comment: The "dual enforcement" strategy adopted in the 2001 Order has proven a highly effective means to increase compliance by industrial and construction site dischargers. While significant violations of the Statewide General Permits persist, the requirement that Copermittees enforce the permits or be held liable themselves finally creates an appropriate incentive for inspectors and investigators at the municipal level to utilize the police power granted them under the State Constitution. Given the large number of such dischargers, it is simply impossible to rely on State agency or third party enforcement to achieve compliance. Council strongly supports this provision of the permit.

Response: Comment noted. Dual responsibility is clearly the intent of federal NPDES regulations, and the Regional Board appreciates the efforts of MS4 Copermittees in this regard.

Section: Finding **Sub-section**: Finding D.3.c

Commenter(s): Caltrans

Comment: Man-made conveyances and other drainage features which are not natural waterways are not "waters of the US" and cannot be subject to an NDPES permit. The point of compliance of an NPDES permit is at the location of a discharge into a "water of the US " (or edge of mixing zone) not at the location of discharge of runoff into an MS4.

Response: Man-made conveyances and other drainage features can be waters of the U.S. For example, a creek which has been converted into a man-made channel is a water of the U.S. However, man-made drainage features which exist in locations where waters of the U.S. did not previously exist are not necessarily waters of the U.S. Instead, such features can be part of the MS4. Due to the vast array of drainage conditions, situations may need to be assessed on a case by case basis, however. The Clean Water Act places requirements on both discharges into and from an MS4. For example, non-storm water

discharges are prohibited from entering into an MS4, while discharges of pollutants from an MS4 must be reduced to the maximum extent practicable.

Section: Finding **Sub-section**: Finding D.3.c

Commenter(s): City of Del Mar

Comment: The Finding in D.3.c. (page 8) states that the urban stream is both an MS4 and a receiving water. This is inconsistent with the legal definitions of "Waters of the State", "MS4" and "Waters of the US." If a "receiving water" is a "Water of the US." as defined in the Order, then the MS4 is not a receiving water. This appears to be an attempt by the Regional Board to make the municipality solely responsible for the water quality in a creek flowing through a municipality, which goes beyond the scope of the MS4 permit. These point source discharges to surface water are the reason that NPDES municipal storm water permits are issued, but that does not justify a misapplication of State and Federal definitions in order to apply more stringent standards for storm water discharges.

Response: A MS4 is defined in the federal regulations as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains), owned or operated by a Copermittee, and designed or used for collecting or conveying urban runoff. Natural drainage patterns and urban streams are frequently used by municipalities to collect and convey urban runoff away from development within their jurisdiction. Therefore, the Regional Board considers natural drainages that are used for conveyances of urban runoff, regardless of whether or not they've been altered by the municipality, as both part of the MS4s and as receiving waters. To clarify, an unaltered natural drainage, which receives runoff from a point source (channeled by a Copermittee to drain an area within their jurisdiction), which then conveys the runoff to an altered natural drainage or a man-made MS4, is both an MS4 and a receiving water.

Section: Finding **Sub-section**: Finding D.3.c

Commenter(s): Coast Law Group

Comment: This paragraph should explicitly state that as receiving waters, "natural" MS4 drainage features have beneficial uses due the same levels of protection as any other non-MS4 receiving water.

Response: The Basin Plan assigns beneficial uses to all waters of the State in the San Diego Region.

Section: Finding **Sub-section**: Finding D.3.f

Commenter(s): Coast Law Group

Comment: Virtually every Copermittee is lacking in enforcement of its ordinances and regulations, as well as the 2001 Order.

Response: Findings from the program evaluations demonstrate varied enforcement efforts and practices among the Permittees. The Tentative Order requires permittees to use enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders, and it provides broad latitude for how permittees use the enforcement mechanisms. Pursuant to the iterative process, permittees are expected to escalate enforcement mechanisms if the chosen enforcement tools fail to reduce the pollutants in discharges that lead to violations of water quality standards.

Section: Finding **Sub-section**: Finding E.1

Commenter(s): Coast Law Group

Comment: The second sentence of Finding E.1 ("The RWL [Receiving Water Limitations] in this Order require compliance with water quality standards through an iterative approach requiring the implementation of improved and better-tailored BMPs over time") represents a significant change from the current status of the law, and should be amended to be consistent with the 2001 Order. This was a central issue in the 2001 Order litigation, and there is no reason for backsliding in this Order. The "iterative approach" described in the Order as the means for meeting MEP is a remedy provision for noncompliance with water quality standards. Liability is established per se when water quality standards are violated, and mere participation in an iterative process to achieve such standards does not render a violation unenforceable. While we agree with the iterative process as a means for achieving water quality standards, this is NOT a measure of compliance with receiving water limitations.

Response: The Tentative Order requires compliance with receiving water quality standards. The iterative process is a means for achieving compliance with receiving water quality standards, but does not constitute compliance in and of itself. Compliance is ultimately achieved when urban runoff discharges no longer cause or contribute to violations of receiving water quality standards. This position is consistent with the SWRCB's Order WQ 2001-15, which reviewed the requirements of the current permit, Order No. 2001-01. Finding E.1 of the Tentative Order has been modified to clarify this issue.

Section: Finding **Sub-section**: Finding E.10

Commenter(s): Caltrans

Comment: Finding E.10 and the discussion that follows would appear to preclude the use of a dilution factor or a mixing zone in assessing the compliance status of storm water runoff. While the general intent of the finding is appropriate, the finding should also state that in appropriate circumstances, a mixing zone can be considered.

Response: The Regional Board does recognize that natural streams do possess some capacity to assimilate pollutants, and the Board promotes the restoration of natural flow regimes and habitats. Restoration could be an appropriate management measure to lessen the pressure on treatment BMPs. The Tentative Order does not allow receiving waters to be used as storm water treatment BMPs because relying on in-stream mixing zones to serve as pollutant BMPs would be in contrast with the federal MS4 NPDES regulations. In addition, the Clean Water Act prohibits states from designating pollution conveyance as a designated beneficial use. Per federal NPDES regulations, source control and structural storm water BMPs are required to reduce pollutants in discharges and municipalities are required to control the contribution of pollutants into the storm drain system.

RESPONSES TO COMMENTS ON SPECIFIC SECTIONS

Section: A **Sub-section**: Multiple

Commenter(s): Coast Law Group

Comment: The discharge prohibitions are the most important provisions of the Order and should not be weakened in any way.

Response: Comment noted. The discharge prohibitions have not been weakened.

Section: A **Sub-section**: A.1

Commenter(s): San Diego Copermittees

Comment: An identical prohibition was challenged by the Copermittees when the 2001 permit was issued. The State Water Resources Control Board, cognizant of the legal issues associated with regulating discharges into the MS4, took the novel approach of interpreting the permit to apply only to discharges from the MS4. See Order No. WQ 2001-15. The expedient means of alleviating this problem is to simply re-write the ”discharge into” provision so it unambiguously expresses the interpretation articulated by the State Board in Order No. WQ 2001-15.

Response: While the SWRCB did review the language of prohibition A.1 as it appears in Order No. 2001-01, it declined to alter the language of the prohibition, contrary to the assertion of the commenter. Instead, the SWRCB found: "Discharge prohibition A.1 also refers to discharges into the MS4, but only prohibits pollution, contamination, or nuisance that occurs in 'waters of the state.' Therefore, it is interpreted to apply only to discharge to receiving waters" (SWRCB, 2001). The language of prohibition A.1 of the Tentative Order is identical to the prohibition language reviewed and left intact by the SWRCB during its review of Order No. 2001-01.

It is also worth noting that the commenter misrepresents the findings of the SWRCB in Order WQ 2001-15 regarding discharges into and from the MS4. The Copermittees are clearly responsible for discharges into their MS4. On this issue, the SWRCB states: "It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control" and "there are other provisions in the permit the refer to restrictions 'into' the MS4. (See, e.g., Legal Authority D.1) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate control for discharges into their system. For example, the federal regulations require that MS4s have a

program 'to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system….' (40 CFR 122.26(d)(2)(iv)(D))" (SWRCB, 2001). The SWRCB is supported by the Clean Water Act, which requires the Copermittees to "effectively prohibit non-storm water discharges into the storm sewers" (402(p)(3)(B)(ii)). Moreover, the preamble to the Phase II Federal NPDES storm water regulations states that MS4s "cannot passively receive and discharge pollutants from third parties" and that an MS4 that does not "prohibit and/or control discharges into its system essentially accepts 'title' for those discharges" (USEPA, 1999).

Section: A **Sub-section**: A.2

Commenter(s): San Diego Copermittees

Comment: The second discharge prohibition states: Discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited. This prohibition is overbroad to the extent that it appears to apply to all discharges, regardless of their potential to affect waters of the U.S. or waters of the state. In that regard, this condition could be misconstrued to prohibit dry weather diversions, which divert dry weather urban runoff into sanitary sewers, to the benefit of the receiving waters. This condition should be modified to make clear that it prohibits discharges to receiving waters that have pollutants that have not been reduced to the MEP.

Response: The prohibition is not meant to apply to discharges which receive subsequent treatment to reduce pollutants to the MEP prior to entering receiving waters, such as when urban runoff is diverted to the sanitary sewer system for treatment. For this reason, a footnote has been added to the prohibition for clarification.

Section: A **Sub-section**: A.3

Commenter(s): Caltrans

Comment: Prohibition A.3.a. references Prohibition #5 (from the Basin Plan) in Attachment A states: The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. Allowances for dilution may be made at the discretion of the Regional Board. Consideration would include stream flow data, the degree of treatment provided and safety measures to ensure reliability of facility performance. As an example, discharge of secondary effluent would probably be permitted if stream flow provided 100: 1 dilution capability. This requirement provides for possible consideration of dilution in assessing compliance. Permit prohibition A.3. requires specific actions by the Copermittees

when an exceedance occurs. The permit should address whether dilution is to be considered when determining compliance as well as identifying other factors which are part of the compliance assessment.

Response: The requirements of section A.3 are based on receiving water conditions. If urban runoff discharges are diluted in a receiving water so that the receiving water's water quality standards are continually met both spatially and temporally, the urban runoff discharges are not in violation of the Tentative Order. However, it should be noted that antidegradation requirements must also be met. The language used in section A.3 of the Tentative Order is specified by the SWRCB in Order WQ 99-05. For these reasons, the language of the Tentative Order for this section has not been modified.

Section: A **Sub-section**: A.3

Commenter(s): Coast Law Group

Comment: Once again, it should be made clear to Copermittees that participation in the iterative process in response to a violation of the discharge prohibitions is a prescribed remedy, and not a safe harbor from a finding of liability. Violations of any of the discharge prohibitions may result in an enforcement action by a third party pursuant to the citizen suit provisions of the federal CWA. It should be clarified that the iterative process requires participation of the Regional Board and the stated report submissions to qualify as a "diligent prosecution" under the CWA. A Copermittee which fails to make the "determination" described in paragraph A.3.a.(1), but who purports to internally demonstrate an iterative process to address exceedances of water quality standards would still be subject to enforcement by a third party.

Response: The Tentative Order makes clear that the iterative process is not a safe harbor from a finding of violation. Section A.4 of the Tentative Order states: "Nothing in section A.3 shall prevent the Regional Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report."

Section: A **Sub-section**: A.3.a

Commenter(s): Caltrans

Comment: Since BMPs are not available to control all runoff pollutants so that they do not cause or contribute to violations, the Copermittees are being placed in a situation of structural non-compliance. For example, BMPs are not available that reduce bacteria, dioxins, and several metals to levels that would allow the runoff to comply with standards. It may be appropriate to introduce the triad

approach into this section. The triad approach as described in the monitoring program acknowledges that exceedances occur but prioritizes the responses based on toxicity and actual damage to waterways.

Response: USEPA finds that BMPs can be sufficient to ensure that urban runoff discharges do not cause or contribute to violations of receiving water quality standards. For example, regarding Phase II municipal storm water permits, USEPA "anticipates that a permit for a regulated small MS4 operator implementing BMPs to satisfy the six minimum control measures will be sufficiently stringent to protect water quality, including water quality standards" (USEPA, 1999). Moreover, the language used in section A.3 of the Tentative Order is specified by the SWRCB in Order WQ 99-05. For these reasons, the language of the Tentative Order for this section has not been modified.

Section: A **Sub-section**: A.3.a.(1)

Commenter(s): City of Imperial Beach, San Diego Unified Port District, City of Carlsbad

Comment: This requirement makes the assumption that all exceedances observed from the MS4 can be confidently traced to an identified source. This is not true in the majority of cases, especially for pollutants such as bacteria that are ubiquitous and diffuse. A source or sources of the pollutant in question must first be identified before additional BMPs can be appropriately selected and implemented. It is therefore recommended that the Draft Permit text be amended as follows: “Upon a determination by either the Copermittee or the Regional Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, and where that discharge has been traced to an identified source or sources, the Copermittee shall promptly notify and thereafter submit a report to the Regional Board that describes BMPs that are currently being implemented …”

Response: The requirement does not place a timeframe on identification of BMPs to be implemented and submittal of the required report. Therefore, the Copermittees can be provided with appropriate time to identify sources, if warranted. However, it should be noted that pollutants can be controlled by methods other than source control, such as through the use of treatment methods. Implementation of treatment BMPs may not require lengthy source identification efforts, and may be appropriate in many cases. Finally, the language used in section A.3.a.(1) of the Tentative Order is specified by the SWRCB in Order WQ 99-05. For these reasons, the language of the Tentative Order for this section has not been modified.

Section: A **Sub-section**: A.3.c

Commenter(s): San Diego Copermittees

Comment: Section A.3.c. of the Permit allows the Board to take action to enforce any provisions of the Permit while the Copermittees prepare and implement the reports required by the iterative process in Section A.3.a. Please explain how this section relates to 33 U.S.C. § 1342(k).

Response: Section A.3 prohibits discharges from MS4s that cause or contribute to the violation of water quality standards. Preparation and implementation of an iterative process report alone does not constitute compliance with section A.3, since the effectiveness of the report implementation is not assured. The preparation and implementation of the iterative process report is not a "safe harbor" from enforcement as violations of water quality standards continue. The preparation and implementation of the report is a means to achieve compliance with section A.3, but does not constitute compliance in and of itself. This issue was raised during the Building Industry Association of San Diego County appeal of the current permit, Order No. 2001-01. In its review of the issue, the SWRCB stated: "Compliance is to be achieved over time, through an iterative approach requiring improved BMPs" (SWRCB, 2001). In other words, the iterative approach of report preparation and implementation does not constitute compliance with water quality standards, but rather leads to achieving receiving water quality standards over time.

Section: B **Sub-section**: B.1

Commenter(s): San Diego Copermittees

Comment: The intended import or meaning of using the term "effectively," to modify prohibit, is unclear in Section B.1 (page 12) of the Permit states that "[e]ach Copermittee shall effectively prohibit all types of non-storm water discharges . . ."

Response: Federal NPDES storm water regulations implement the Clean Water Act, which states in section 402(p)(3)(B)(ii) that municipalities shall “effectively prohibit non-storm water discharges into the storm sewers.” Effective programs require adequate legal authority and sufficient resources dedicated toward implementing the legal authority to prohibit such discharges.

Section: B **Sub-section**: B.2

Commenter(s): Caltrans

Comment: The list of non-prohibited, non storm water discharge categories should include Slope Lateral Drainage (hillside drainage) and Water line and hydrant flushing. Road cuts often create permanent drainage situations and this flow is generally directed into the storm drain system.

Response: The list of non-prohibited, non-storm water discharges in Section B.2 comes from Federal NPDES regulations (40 CFR 122.26(d)(2)(iv)(B)(1)). The Regional Board cannot add classes of discharges. Uncontaminated groundwater discharges to the MS4 system created by road cuts and irrigation runoff from slopes fall within the list of non-prohibited, non-storm water discharge categories. Discharges from water line and hydrant flushing not subject to Regional Board Order No. R9-2002-0020 (NPDES No. CAG679001), "General Waste Discharge Requirements for Discharges of Hydrostatic Test Water and Potable Water to Surface Waters and Storm Drains or Other Conveyance Systems," are not prohibited.

Section: B **Sub-section**: B.2

Commenter(s): Coast Law Group, Carlsbad Watershed Network

Comment: This paragraph should clarify that should a third party identify (in writing, with sufficient evidentiary support) any such non-storm water discharge category as a significant source of pollutant, the Copermittee will be deemed noticed of a potential violation of this Order unless said discharge(s) are abated or addressed. In particular, evidence in numerous of the Copermittee' jurisdictions suggests landscape irrigation and lawn watering are contributing to impairments of receiving waters. The Board should consider removing both of these categories from the list of exempted discharges. In the alternative, the Order should require that Copermittees certify in their JURMPs that each of the discharge categories listed are not causing or contributing to violations of water quality standards. The burden of proof should be on the individual Copermittee should it choose not to regulate any such category of discharge. Discharges from individual car washing should also be prohibited.

Non-storm water discharges:
the following categories would seem more appropriately considered sources of pollutants, and should be prohibited unless a BMP is implemented that reduces pollutant discharge to insignificance:
e. Foundation drains
h. Footing drains
l. Landscape irrigation
n. Irrigation water
o. Lawn watering
p. Individual residential car washing

Response: The Tentative Order establishes a process that requires an appropriate response from municipalities when non-storm water discharges are suspected of causing or contributing to pollution. Consistent with the Federal regulations (40 CFR 122.26(d)(2)(iv)(B)(1)), a municipality is required to implement a program to prevent illicit discharges of non-storm water to the MS4 system, and that program must address the categories in Section B.2. of the Tentative Order when the municipality identifies them as sources of pollutants. In addition, municipalities are required to conduct field screening and implement an illicit discharge detection and elimination program, which includes, among other items, a public reporting system. Those programs are part of the suite of information that must be used by a municipality to determined whether a non-storm water discharge is a source of pollution. While non-storm water discharges might contain pollutants, the effects of such discharges may vary among receiving waters such that a Countywide prohibition may be inappropriate.

Section: B **Sub-section**: B.2

Commenter(s): San Diego Copermittees

Comment: Section B.2 (page 13): ". . . . identifies the discharge category as a significant source of pollutants to waters of the United States . . . ." This phrase is not defined and is therefore susceptible to different interpretations.

Response: The subject language in Section B.2 is taken from the from Federal NPDES regulations (40 CFR 122.26(d)(2)(iv)(B)(1)), which state that the list of exempted "non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States." The responsibility lies with the municipalities, therefore, to determine whether such discharges are significant sources of pollutants, and the Tentative Order requires the municipalities to review monitoring and other data to identify sources of pollutants being discharged from the MS4 system.

Section: C **Sub-section**: C.1.b

Commenter(s): Coast Law Group

Comment: Copermittees' compliance with this provision should provide for both discharge prohibitions and escalating enforcement for repeat offenders. In addition, Copermittees should be required to work together to maintain a centralized database of violators. For instance, mobile operators (C.1.b.4) by their very nature cross jurisdictional boundaries and are difficult to track. Copermittee regulations should specify if and when it is appropriate to discharge to landscaped areas adjacent to specified mobile operations.

Further, it should be the responsibility of contracting parties to ensure contractors are aware of relevant discharge prohibitions and comply with said regulations. Contracting parties who neglect to select compliance contractors should themselves be held liable for the actions that take place on any piece of property. This vicarious liability especially includes Copermittees who contract for such services.

Response: Section C.1.b requires legal authority to prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2. The administrative and legal procedures for escalating enforcement could vary among municipalities, but do generally make such an option available to the municipal program, based on circumstances. Developing a shared database of violators is not required by the Tentative Order, but could be useful for program components relating to prioritization and illicit discharge detection. It is less clear how a shared database of violators of local requirements would assist a municipality's enforcement considerations if that municipality is restricted to considering violations of its own regulations when using escalating enforcement options. The Copermittees are encouraged to collaborate on oversight of mobile businesses at section D.3.b.(4)(b). With respect to contracting parties, Section C.1.e requires Permittees to require relevant conditions within its contracts. The Tentative Order leaves discretion to pursue enforcement on contracting parties and/or contractors consistent with local regulations.

Section: C **Sub-section**: C.1.g

Commenter(s): City of Del Mar, Caltrans

Comment: In this draft permit, the Regional Board improperly attempts to make the municipality regulate the discharges from other permitted MS4s (NCTD), dischargers (like the 22nd DAA) or non-permitted agencies, when the City has no legal jurisdiction over that discharger. Contrary to C.1.g. in the draft order, a municipality cannot force another agency into an agreement. Additionally, California drainage law does not allow the City to "terminate a storm water discharge to the MS4" as the Regional Board cites on page 33 of the Fact Sheet. If the Regional Board is issuing storm water permits to other entities (industrial facilities, construction sites, small MS4s, etc.), then the Regional Board must fully enforce the requirements with these other dischargers at the same level you require us to do under this permit. Without a change in the law providing legal authority, it is inappropriate to simply require a municipality to enter into agreements or regulate discharges from State or other agencies.

Response: The Tentative Order requires each Copermittee to demonstrate legal authority that authorizes the Copermittee to control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through

interagency agreements among Copermittees as required by 40 CFR 122.26(d)(2)(i). It also encourages the development of interagency agreements with other owners of the MS4 such as Caltrans, the Department of Defense, or Native American Tribes. Special districts are considered an MS4 under Phase II of the Federal Municipal NPDES program. In addition, it requires that illicit discharges be prohibited to the MS4 controlled by the Copermittee.

These requirements to address discharges from other entities discussed at length in the USEPA's Final Rule for the Phase II MS4 program (Federal Register, Vol. 64, No. 235, pp.68722 - 68851). In the Summary discussion USEPA recognizes that third parties discharges into a municipal MS4 system might contain pollutants and notes that the passive acceptance of such pollution into its MS4 could enable a waterbody impairment. As a result, USEPA states that regulated MS4s cannot passively receive and discharge pollutants from third parties. USEPA concludes, therefore, that based on the Clean Water Act, regulated MS4 are required to implement control measures and recognizes that there are costs associated with such activities. USEPA also recognized that the requirement for ordinances or other regulatory mechanisms need to be implemented to the extent allowable under State, Tribal or local law.

Essentially, the Copermittees must meet the MEP standard when dealing with parties discharging to their MS4 over which they do not have jurisdiction. They must conduct efforts to control third party pollutants ultimately being discharged from their MS4s to the MEP. Interagency agreements, coordination, and other efforts are options for meeting the MEP standard, provided they are effective. The Tentative Order does not specify criteria for the content of interagency agreements. An effective agreement would address such issues as responsibility for implementing BMPs for illicit discharges and storm water discharges, pollutants of concern in the watershed, and protocols for investigating sources of pollution from commingled flows.

Section: C **Sub-section**: C.2

Commenter(s): San Diego Copermittees

Comment: As drafted, Section C.2 of the Permit infringes upon the attorney-client relationship. California Rules of Professional Conduct, Rule 3-100(A), provides that “[a] member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.” It is also the duty of an attorney to counsel or maintain only those actions or proceedings as appear to him or her legal or just. Bus. & Prof. Code § 6068(c). An attorney must employ, for the purpose of maintaining the causes confided to him or her, only those means as are consistent with truth, and never seek to

mislead the judge or any judicial officer by an artifice or false statement of fact or law. Bus. & Prof. Code § 6068(d).

Given these rules and statutes, the requirement of the Permit that chief legal counsel state that his or her client has taken the "necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 C.F.R. 122.26(d)(2)(i)(A-F) and the Order", potentially places the Copermittees' counsels at odds with their clients. It is the duty of counsel to provide advice to their clients and to provide legal support for the actions and proposed actions of their clients. It is not the obligation of counsel to determine the necessary steps or actions a Copermittee must take to implement and enforce the requirements under the Permit. Nor can counsel determine the allocation of resources and the funding sources for implementation. Those decisions are within the exclusive jurisdiction of the legislative body of each Copermittee. Therefore, any opinions held or advice given by counsel regarding the level of adequacy of those decisions remain the work product of the attorney and is the type of communication that, by law, stays between the attorney and the client.

As such, Section C.2 should be amended to state that "[e]ach Permittee shall include as a part of its JURMP a statement certified by its chief legal counsel that the Copermittee has the legal authority to implement and enforce each of the requirements contained in 40 C.F.R. 122.26(d)(i) and this Order." Subsection (d) should also be deleted for the same reasons.

Response: The Copermittees must take 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 the Order. Without taking these steps, it is likely a Copermittee will not be able to comply with the Order. It is appropriate for a Copermittees' chief legal counsel to make the required determination due to their expertise with the Copermittees' legal authority and ordinances.

Additional information in response to this comment may be developed.

Section: C **Sub-section**: C.2

Commenter(s): San Diego Copermittees

Comment: Section C.2 of the Permit (page 15) requires a "statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 C.F.R. 122.26(d)(2)(i)(A-F) and this Order." (Emphasis added). In particular, the statement shall include a "finding of

adequacy of enforcement tools to ensure compliance with this Order." Section C.2 of the Draft Permit (page 15).

A reading of 40 C.F.R. § 122.26(d) does not impose the type of certification required in the Permit. In fact, 40 C.F.R. § 122.26(d)(i) simply states that the permittee must demonstrate that it "can operate pursuant to legal authority established by statute, ordinance or series of contracts. . . ." 40 C.F.R. § 123.25, which imposes the requirements on all state programs, provides no greater authority than that contained in 40 C.F.R. § 122.26(d). Therefore, Section C.2 should be amended to require a certification by the Copermittees' chief legal counsel that the Copermittee has the legal authority to implement and enforce the requirements under 40 C.F.R. § 122.26(d)(i) and the Permit.

Response: The information required in section C.2 of the Tentative Order is necessary for the Copermittees to demonstrate that they have adequate legal authority to meet the requirements of the Tentative Order. Without adequate legal authority to meet the requirements of the Tentative Order, the Copermittees will not achieve compliance with the federal MEP standard. Section C.2 essentially requires the same information to be submitted as was required by the current permit, Order No. 2001-01, with the exception of item d. To promote consistency, item d has been removed from the Tentative Order.

Section: D **Sub-section**:

Commenter(s): Coast Law Group

Comment: The time period for implementation of Section D requirements is too long. Copermittees have had five years to consider virtually all of the Section D requirements, and therefore the Order should specify that additional time for JURMP element implementation applies only to those requirements not contained in the 2001 Order.

Response: While the Copermittees are developing the new portions of their Jurisdictional Urban Runoff Management Programs, the Tentative Order requires them to continue implementing their existing programs at section D.

Section: D **Sub-section**: D.1

Commenter(s): Bob Collins

Comment: Land use authorities should provide statements in their planning reports on the general condition of the watershed and the impact of the proposed development will have on the watershed.

Response: The Tentative Order requires the Copermittees to update their General Plans to include watershed protection principles at section D.1.a. The purpose of inclusion of watershed protection principles in the General Plans is to guide land-use decisions and require implementation of consistent water quality protection measures for Development Projects.

Section: D **Sub-section**: D.1

Commenter(s): Bob Collins

Comment: I'd suggest that the amount of impervious cover be calculated in all watersheds using 2006 as the baseline. Further jurisdictions should be required to track increases in impervious cover and report to the Regional Board on the increase in impervious cover annually. This would provide a running total of the impervious cover in major watersheds in the region. Just tracking impervious cover will in itself do little, but tracking will bring awareness to the impervious cover issue, that is, there needs to be a balance between natural and covered ground for watershed to function
properly.

Response: As part of the Watershed Urban Runoff Management Program requirements of section E, the Copermittees are required to implement mechanisms to facilitate watershed-based land use planning. Tracking of impervious cover is one approach the Copermittees are encouraged to implement in order to meet this requirement. However, in order to preserve the Copermittees' ability to implement other equally effective approaches, tracking of impervious cover is not expressly required.

Section: D **Sub-section**: D.1

Commenter(s): City of Carlsbad

Comment: In the phrase beginning with "(3)" after the words "potential to cause increased erosion" add "and reduce water quality from its existing condition". Any amount of discharge treated to the MEP has a "…potential to cause increased erosion…silt pollutant generation…" New development installations of BMPs can reduce the particle load of a drainage course therefore improve the existing water quality. However, by doing so, it can make the flow "hungry" for sediment in order to achieve equilibrium. Hence creating cleaner water would appear to be in violation of the order.

Response: The subject phrase addresses the issue of hydromodification and is based on the requirement at section D.1.g. Since the phrase deals with the hydromodification issue, it refers to the impact of urban runoff discharge rates

and durations on channel erosion and in-stream pollutant generation, rather than the impact of urban runoff discharge pollutant (sediment) load levels on channel erosion and in-stream pollutant generation. As such, "creating cleaner water" would not be in violation of the Tentative Order. However, in order to clarify this issue, section D.1 has been modified.

Section: D **Sub-section**: D.1

Commenter(s): Coast Law Group

Comment: The Order should clarify that should a Development Project be approved by a Copermittee, notwithstanding purported compliance with the Order and the Copermittee's implementing ordinances and regulations, such Copermittee may nonetheless be held liable for failing to ensure the post-construction condition of development complies as anticipated at project approval.

Response: The Copermittees are required to verify that Priority Development Projects and their BMPs are constructed according to approved plans at section D.1.f.

Section: D **Sub-section**: D.1.b

Commenter(s): Coast Law Group

Comment: Copermittees should be required to include, as a provision of their environmental review processes, to report to the Regional Board any instance where water quality impacts are found to be significant and unmitigable.

Response: Since water quality impacts can be attributable to causes other than solely urban runoff, it is more appropriate for the Regional Board to track such impacts through the CEQA process, rather than municipal storm water permits.

Section: D **Sub-section**: D.1.c

Commenter(s): City of Imperial Beach

Comment: Section D.1.c on Page 16 would mandate that Copermittees require all development projects to implement “applicable and effective pollution prevention BMPs” as well as “site design BMPs where feasible which maximize infiltration, provide retention, slow runoff, minimize impervious footprint …” Attachment C defines pollution prevention as “practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control

BMPs, treatment control BMPs, or disposal." It is the City's understanding that the Regional Board is using the terms pollution prevention BMPs and site design BMPs synonymously in this instance since all pollution prevention strategies would occur at the site design phase. If this is the case, there is no need for duplicative requirements.

Response: Pollution prevention BMPs are implemented during the construction and "use" phases of a project, rather than the development planning phase. For this reason, the requirement for pollution prevention BMPs has been removed from this section of the Order. However, pollution prevention BMP requirements still apply in sections D.2 and D.3. Please see section D.1.c.(1) for this change.

Section: D **Sub-section**: D.1.c.(3)

Commenter(s): Coast Law Group

Comment: Site design BMPs are rarely implemented, and virtually never required, throughout the region. The Order should require site design BMPs unless specified waiver criteria can be met.

Response: Site design BMPs are required for all Priority Development Projects at section D.1.d.(4). They are also required for Development Projects where feasible at section D.1.c.(3).

Section: D **Sub-section**: D.1.c.(4)

Commenter(s): Bob Collins

Comment: Jurisdictions with land use authority should develop uniform buffering requirements to protect receiving waters and to insure that buffers filter pollutants in storm water effectively. Monitoring should be done to determine the effectiveness of buffer widths and types of buffers and the results should be shared on a watershed basis and region wide.

Response: The Copermittees are required to apply buffer zone requirements to Development Projects at section D.1.c.(4). It is at the Copermittees discretion to collaborate to develop uniform buffering requirements. Assessment of effectiveness of BMPs is required at section I.1.a.(1)(a).

Section: D **Sub-section**: D.1.c.(4)

Commenter(s): Coast Law Group

Comment: Minimum appropriate buffer zones should be required for all natural water bodies. If infeasible, proposed development should be denied.

Response: While buffer zones are certainly applicable in most cases, there may be specific Development Projects where an exception may be appropriate. For example, mitigation could be used offset partial loss of a buffer zone. For this reason, buffer zones are not expressly required in all cases.

Section: D **Sub-section**: D.1.c.(4)

Commenter(s): San Diego Unified Port District

Comment: The Draft Permit requires that "where buffer zones are infeasible, require project proponent to implement other buffers such as trees, access restriction, etc." This requirement is infeasible. Due to the close proximity of the Bay, most projects within Port jurisdiction will not meet this requirement.

Response: The requirement has been modified to acknowledge conditions where any buffers are not feasible. Please see section D.1.c.(4) for this modification.

Section: D **Sub-section**: D.1.d

Commenter(s): Coast Law Group

Comment: The Bay Council specifically incorporates by reference comments of the Natural Resources Defense Council as regards the Order's SUSMP provision and definitions of Priority Development Projects.

Response: Comment noted.

Section: D **Sub-section**: D.1.d

Commenter(s): San Diego Unified Port District

Comment: Flooding during heavy rain events is another significant issue impacting San Diego. The SUSMP and Hydromodification plans should provide a mechanism to assist copermittees in minimizing flooding. Slowing water runoff or retaining storm water along the coast has the potential to increase flooding. Especially where water is discharged to reinforced channels then to the receiving water, a waiver should be included for water retention and infiltration at those locations.

Response: It is expected that potential flooding resulting from new development will be addressed on a case by case basis by each Copermittee. Regarding the SUSMP treatment control BMP requirements, sufficient flexibility is provided in determining BMP implementation to avoid increases in flooding risk. If detention BMPs implemented in a lower portion of a watershed have the potential to cause flooding, they need not be implemented. Other BMPs, such as those that provide filtration, can be used in such instances to minimize increased flood risk. Regarding the hydromodification requirements, their purpose is to match runoff pre- and post-project flow rates and durations. If pre- and post-project runoff flow rates and durations are appropriately matched as required by the hydromodification requirements, increased risk of flooding will not result.

Section: D **Sub-section**: D.1.d.(1)

Commenter(s): Caltrans

Comment: Page 17, Definition of Priority Development Project states, "Priority Development Projects are: a) all new Development Projects, and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site.. ... Where a project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP." The last sentence appears inconsistent with the previous text. The requirement to treat the entire parking lot appears inconsistent with requirements in other MS4permits. The statement, "Where redevelopment results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, the numeric sizing criteria applies to the entire development" should also apply to parking lots, which seem to be addressed differently.

Response: The last sentence of section D.1.d.(1) refers to new Development Projects, rather than redevelopment projects. As such, it is not inconsistent with the previous sentences, which address redevelopment projects. The sentence addresses those new Development Projects where only a portion of the project falls into the Priority Development Project Categories. For example, the sentence would apply to a 10,000 square foot commercial development with a 5,000 square foot parking lot. While the commercial portion of the project would not trigger the SUSMP requirements, the parking lot would. The sentence clarifies that when a portion of a project is subject to the SUSMP requirements (such as the parking lot in the example), the entire project is subject to the SUSMP requirements (both the parking lot and the commercial portion of the development project). This approach is a continuation of the approach used under Order No. 2001-01 and the Model SUSMP. The Model SUSMP states "in the instance where a project feature, such as a parking lot, falls into a priority project category, the entire project footprint is subject to these SUSMP requirements." Section D.1.d.(1) has been modified to clarify this issue.

Section: D **Sub-section**: D.1.d.(1)

Commenter(s): City of Encinitas

Comment: This definition does not provide an exception for linear projects that do not lend themselves to post-construction BMPs, such as sidewalks and pavement overlays. The word “replace” can be struck or a specific exception can be included for linear projects.

Response: A definition of redevelopment is found in Attachment C. The definition is based on the definition found in the Model SUSMP, approved by the Regional Board June 12, 2002. The definition discusses exceptions for certain redevelopment project types.

Section: D **Sub-section**: D.1.d.(1)

Commenter(s): City of Imperial Beach, City of Encinitas, City of Santee, San Diego Unified Port District

Comment: The permit language should be modified to more clearly convey that in order for a project to be classified as a Priority Project, the development shall meet a requirement under Section D.1.d.(1) and at least one characteristic of subsection two, D.1.d.(2). The current wording may be interpreted to state that all new development projects will be categorized with Priority Project status regardless of whether any of the characteristics listed in Section D.1.d.(2) are present.

Response: Section D.1.d.(1) has been modified to clarify which Development Projects are Priority Development Projects.

Section: D **Sub-section**: D.1.d.(2)

Commenter(s): Natural Resources Defense Council

Comment: The existing thresholds do not meaningfully match the pace of development in the San Diego region. Information regarding the types of building permits being issued in the San Diego Region raises a significant red flag about the extent to which the current regime applies SUSMP requirements to new development and redevelopment. For instance, several of the Copermittees' annual JURMP reports cite strikingly low figures for the number of development projects that have been SUSMP-conditioned over the permit term. For example, for permit year 2004-2005, the County of San Diego issued 9,376 permits, and

reported in its annual report that 115 discretionary projects were SUSMP-conditioned.

Even taking in to account that these figures include permits that do not represent construction on the ground (e.g., electrical, plumbing, gas line), the data evidence a huge disparity between the overall amount of development occurring in the area and the amount of development that actually falls within a Priority Project Category. Thus, while the categories as defined in the existing permit apply SUSMP requirements to some of the largest or most polluting types of development, the landscape of the San Diego Region continues to rapidly urbanize through the addition of development that does not trigger SUSMP requirements. This is significant because broadly speaking, nearly all development ("urbanization") contributes to the creation of impervious surface in the landscape. Although some of the Copermittees appear to require BMPs for non-priority development projects, many conventional BMPs (e.g., stenciling, signage, and providing pet waste bags), applied without accompanying site design practices, are inadequate to achieve significant runoff volume and pollutant loading reduction. Moreover, the fact that some Copermittees may apply more stringent BMP requirements-and in some cases, SUSMP-level BMP requirements-to non-priority development projects is further evidence that implementing more inclusive SUSMP thresholds is indeed practicable, and that not doing so is arbitrary.

Response: The Priority Development Project categories and their corresponding thresholds are based on the development project categories reviewed and approved by the SWRCB in Order WQ 2000-11. The SWRCB Order determined that SUSMPs appropriately apply to most of the Priority Development Project categories included in the Tentative Order and reflect a reasonable interpretation of MEP. Where the Regional Board has identified adequate information supporting an additional Priority Development category (such as retail gasoline outlets) or alternative threshold (parking lots with 15 spaces), it has incorporated them into the Tentative Order. Therefore, the Priority Development Project categories and corresponding thresholds in the Tentative Order appropriately reflect SWRCB guidance and other additional supporting information specific to particular development project categories.

There does not appear to be a direct link between number of permits issued and amount of pollutant generating surfaces developed. As the commenter acknowledges, Copermittees issue many permits that that not represent construction on the ground. Based on findings of audits of the Copermittees' SUSMP programs, it is not likely that significant development or redevelopment is occurring without meeting the SUSMP requirements. However, it is important to note that the Tentative Order requires that "where a project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements" (section D.1.d.(1)). This helps ensure that entire development projects must meet SUSMP requirements, even if

only a portion of the project falls into a SUSMP Priority Development Project category.

Section: D **Sub-section**: D.1.d.(2)

Commenter(s): Natural Resources Defense Council

Comment: The existing thresholds do not meet MEP because they are significantly under-inclusive compared to those in place in comparable communities. The maximum extent practicable standard requires just that-a maximum level of storm water control effort in the Permit. As Regional Board staff has noted, "since MEP is a dynamic performance standard which evolves over time as urban runoff management knowledge increases, the Copermittees' urban runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices, etc." Across the nation, states, counties, and cities have adopted requirements to address runoff from development projects that are far more inclusive and stringent than the Proposed Permit would mandate. For example:

City of Santa Monica, California - defines "new development," to which specific storm water runoff control 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." (Santa Monica Municipal Code, Chapter 7.1 0 .030(d)(3));

Contra Costa County, California - applies storm water runoff control requirements to "new and redevelopment projects that create 10,000 square feet or more of impervious area." (RWQCB, San Francisco Bay Region, Contra Costa Countywide NPDES Municipal Storm water Permit Amendment Order No. R2-2003-0022 (amending Order No. 989-058, NPDES Permit No. CAS0029912) at pp. 9-10 (lowering the current one-acre threshold for the application of performance standards effective August 15,2006);

State of New Jersey - defines "major development," to which specific storm water runoff control requirements apply, as "any development that ultimately provides for disturbing one or more acres of land or increasing impervious surface by one quarter acre or more." (New Jersey Storm water Rules, N.J.A.C. § 7:8-1.2);

State of Washington - applies numeric storm water treatment requirements to any Project adding 5,000 square feet or more of new impervious surface. (Phase I Municipal Storm water NPDES General Permit (Draft Feb. 15,2006) Appendix I (Minimum Technical Requirements for New Development and Redevelopment), at pp. 7, 8,20);

State of Maryland - requires storm water management plans for any development that disturbs 5,000 square feet or greater. (Maryland Code, Title 26, Subtitle 17, Chapter 2, §5B; see also Maryland Model Storm water Management Ordinance, (July 2000) at pp. 2, 5, 8);

City of Portland, Oregon - employs "a citywide pollution reduction requirement for all development projects with over 500 square feet of impervious development footprint area, and all existing sites that propose to create new off-site storm water discharges." (Storm water Management Manual (adopted July 1, 1999; updated September 1,2004) Chapter 1 S.2 (Pollution Reduction Requirements) at p. 1-25);

State of Missouri - requires storm water management plans for any new development that "disturbs greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale." (Missouri State Operating Permit No. MO-ROO-4000 (Mar. 10,2003) at p. 15);

State of Illinois - requiring implementation of plans to control storm water runoff "from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale." (Illinois General NFDES Permit No. ILR40 (Dec. 20,2002) at p. 6);

State of West Virginia - requires a 'program to address post-construction storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale" (West Virginia General NFDES Permit No. WV0116025 (March 7,2003) at p. 5).

Stafford County, Virginia - uses an exemption approach under which low impact development practices apply to all development except a) mining, oil & gas operations; b) agriculture; c) linear development projects that are less than 1 - acre, insignificant increases in peak flow, and no flooding or downstream erosion problems; d) single family not part of a subdivision; e) structure ancillary to single-family homes; and e) "land development projects that disturb less than two thousand five hundred (2,500) square feet of land." (Stafford County Muni. Code §25.5-I(f).)

These examples illustrate what is practicable in terms of requiring and enforcing specific storm water management practices for new and redevelopment in communities comparable to, or smaller than, the San Diego Region. Indeed, they show that an appropriate new development threshold for SUSMP purposes is 5,000 square feet or less for all development, no matter its characterization as a restaurant, housing development, or other category.

The 5,000 square feet threshold for redevelopment projects, as required by the 2001 permit, has been upheld by courts and the State Water Board. Applying the threshold as a "catch-all" category in the Proposed Permit would further the purpose of SUSMP and low impact development ("LID") type practices, i.e. expressly to ensure that when highly developed communities, such as those in San Diego County, replace themselves through generations, the opportunity to mitigate the adverse impacts of storm water pollution from urbanization is not lost. This threshold could be used not to weaken any currently applicable category, but rather to strengthen less stringent categories and sweep additional project types into the "Priority Development Project" category. Because the 5,000 square feet threshold is consistent with those used in other regions and states and is appropriate in light of the rapid pace of development and the irrefuted storm water pollution problems in the San Diego Region, it should be included in the new permit.

Indeed, the Proposed Permit's "Priority Development Project" categories are also insufficiently inclusive when compared to federal storm water rules. While some "Priority Development Projects" are relatively small, such as a restaurant, many others must be enormous before being subject to the SUSMP requirements, such as commercial developments of 100,000 square feet. By contrast, a one-acre standard is a conventional threshold that applies generally to post-construction storm water management requirements. EPA requires this threshold for Phase II MS4 under 40 C.F.R. § 122.34(b)(5)(i), which states that municipalities "must develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre . . . ." Even this standard, employed as a "catch-all" in addition to the current Priority categories, would improve the efficacy of the SUSMP program. This requirement illustrates that, in key respects, the Proposed Permit would be less stringent than Phase II permits, if adopted without modification.

The fact that Phase I Permits and rules have been issued for nearly 15 years now, while Phase II Permits are first generation permits throughout the nation, makes it impossible to justify such an outcome. In fact, EPA give "maximum flexibility" in promulgating Phase II rules to smaller cities since they were obtaining permits for the first time. (64 Fed. Reg at 68,739.) Yet, in many instances, their new development control requirements are broader than those that apply in San Diego. Moreover, as noted above, water quality conditions in the San Diego Region necessitate a lower threshold.

Response: The Priority Development Project categories and their corresponding thresholds are based on the development project categories reviewed and approved by the SWRCB in Order WQ 2000-11. The SWRCB Order determined that SUSMPs appropriately apply to most of the Priority Development Project categories included in the Tentative Order and reflect a reasonable interpretation of MEP. Where the Regional Board has identified adequate information

supporting an additional Priority Development category (such as retail gasoline outlets) or alternative threshold (parking lots with 15 spaces), it has incorporated them into the Tentative Order. Therefore, the Priority Development Project categories and corresponding thresholds in the Tentative Order appropriately reflect SWRCB guidance and other additional supporting information specific to particular development project categories. It is also important to note that the Tentative Order requires that "where a project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements" (section D.1.d.(1)). This helps ensure that entire development projects must meet SUSMP requirements, even if only a portion of the project falls into a SUSMP Priority Development Project category.

However, since the Tentative Order is a Phase I NPDES municipal storm water permit, reflecting a program that has been in place for over 15 years, the Tentative Order should be at least as stringent as the Phase II NPDES storm water regulations, which have been in place approximately five years. The Phase II NPDES storm water regulations require development, implementation, and enforcement of a "program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre" (40 CFR 122.34(b)(5)). In order to be consistent and as protective of water quality as the Phase II NPDES storm water regulations, the commercial development Priority Development Project category threshold has been reduced from 100,000 square feet to one acre. See section D.1.d.(2)(b) for this modification.

Section: D **Sub-section**: D.1.d.(2)

Commenter(s): Natural Resources Defense Council

Comment: Include public projects as a Priority Development Project category. The MEP standard is informed by other communities' storm water regimes that apply evenly to private and public development projects; indeed some demand greater effort for public projects. The new Permit should at least reflect such requirements in keeping with the Regional Board's duty to protect the beneficial uses of California's water resources. More fundamentally, a project's public or private ownership is unrelated to its impact on storm water quality, and basing an exclusion on this criterion appears to be illogical, arbitrary, and impermissible.

Response: There are many different types of public projects, which may generate different levels of pollutants in urban runoff. Due to this variance in pollutant loads generated by public projects, a general SUSMP Priority Development Project category for public projects is inappropriate. However, it should be noted that public projects which meet any of the other criteria for SUSMP Priority Development Projects are subject to the SUSMP requirements. For example, public projects which include roads, parking lots, restaurants, or

commercial activity are subject to the SUSMP requirements. It is expected application of SUSMP requirements to these types of public projects will sufficiently address public projects which generate significant levels of pollutants.

Section: D **Sub-section**: D.1.d.(2)

Commenter(s): Natural Resources Defense Council

Comment: Include heavy industrial development projects in the Priority Development Project category. It appears that the exclusion of new industrial development projects as a category may be based on the presumption that industrial sources are already regulated under other schemes. This view of the statutory and regulatory requirements is incorrect. Federal regulations broadly require municipal storm water permits to regulate industrial activities and discharges. Further, Copermittees must provide legal authority demonstrating their ability to control "the contribution of pollutants to the [MS4] by storm water discharges associated with industrial activity." Moreover, a SUSMP category is appropriate where evidence shows that the "category can be a significant source of pollutants and/or runoff following development." Studies show that industrial activities "can be considered as a hot spot" source of pollutants, and have demonstrated the importance of controlling such pollutants from new development. Because the existing regulatory regime covers the operation of existing industrial development, but does not impose standards on the development of industrial development, and in light of evidence that new industrial development significantly contributes to pollutant loading in storm water runoff, it is necessary to apply SUSMP requirements to new industrial development in order to maintain consistence with MEP and water quality standards.

Response: Heavy industrial sites can be a significant source of pollutants in urban runoff. In an extensive review of storm water literature, the LARWQCB found widespread support for the finding that "industrial and commercial activities can also be considered hot spots as sources of pollutants" (LARWQCB, 2001). It also found that "industrial and commercial areas were likely to be the most significant pollutant source areas" of heavy metals (LARWQCB, 2001). Likewise, runoff from heavy industry in the Santa Clara Valley has been found to be extremely toxic (Schueler and Holland, 2000). Five years of data from the Copermittees' land use station monitoring also finds that event mean concentrations of pollutants in runoff from industrial land uses exceed USEPA benchmark values for total suspended solids, nitrate-nitrite nitrogen, and total zinc (City of San Diego, 2001). These findings are corroborated by USEPA, which states in the preamble to the 1990 Phase I NPDES storm water regulations that "Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges

associated with industrial activity through their system in their storm water management program." Since heavy industrial sites can be a significant source of pollutants in urban runoff in a manner similar to other SUSMP project categories such as commercial development or automotive repair shops, it is appropriate to include heavy industrial sites as a SUSMP category in the Tentative Order.

The Phase I NPDES storm water regulations require the Copermittees to "control through ordinance, permit, contract, order, or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity" (40 CFR 122.26(d)(2)(i)). In addition, it has been established that the MEP standard for the control of urban runoff from new development projects includes incorporation of the SUSMP requirements. Since the Copermittees must both control pollutants from industrial sites and meet the MEP standard for new development, it is appropriate to apply the SUSMP requirements to heavy industrial sites.

The SWRCB's Order WQ 2000-11 indicates that it is appropriate to apply SUSMP requirements to categories of development where evidence shows the category of development can be a significant source of pollutants. As evidenced above, heavy industrial sites can be a significant source of pollutants. Therefore, section D.1.d.(2)(b) of the Tentative Order has been modified to add heavy industrial sites as a SUSMP Priority Development Project category.

Section: D **Sub-section**: D.1.d.(2)

Commenter(s): Natural Resources Defense Council, Coast Law Group

Comment: The existing thresholds appear to be arbitrary in light of persistent water quality problems. Where an agency sets thresholds for storm water management requirements that are not supported by evidence, courts have rejected such actions. Here, water quality data for the San Diego Region provides stark evidence that the previous permit's BMP requirements for new development and significant redevelopment have not affected the urban landscape at an acceptable pace. Moreover, evidence from other programs in California and around the country indicates that the current thresholds do not reflect MEP, either. In light of data showing that the existing thresholds are inadequate to meet water quality standards, evidence that more inclusive thresholds would better represent MEP, and absent any evidence to support maintaining the thresholds at the existing levels, there is no basis in the record upon which to continue those thresholds in the new permit.

The seemingly arbitrary nature of at least some of the existing threshold levels is further underscored by the observation that thresholds for some of the Priority

Development Project categories in the previous permit are objectively large. For instance, the threshold for commercial developments in the previous permit, which has not changed in the Tentative Order, is 100,000 square feet. To put this figure in perspective, 100,000 square feet is equivalent to 2.3 acres-larger than two football fields together-which is a very large development in any setting but represents an enormous development in the urban context. So-called big-box retail stores such as Home Depot, Target, and large grocery stores are typically 50,000 sq ft or more; these massive developments often would fall below the commercial priority project threshold under the existing permit, while it would take a "super center" type development to trigger the 100,000 square feet threshold in the commercial category. Given the documented water quality challenges that remain and the centrality of the SUSMP program to achieving beneficial improvement, there is no support for continuing to exclude projects such as these that, by their sheer size, can substantially contribute to runoff volume and pollutant loading.

There is no reasonable rationale for setting the Commercial priority development criteria at such a large square footage. Given that significant redevelopment and infill development is occurring and will likely increase, throughout the region, coupled with the proven inability of Copermittees to comply with water quality standards during wet weather, the Commercial priority development trigger should be 5,000 square feet.

Response: The Priority Development Project categories and their corresponding thresholds are based on the development project categories reviewed and approved by the SWRCB in Order WQ 2000-11. The SWRCB Order determined that SUSMPs appropriately apply to most of the Priority Development Project categories included in the Tentative Order and reflect a reasonable interpretation of MEP. Where the Regional Board has identified adequate information supporting an additional Priority Development category (such as retail gasoline outlets) or alternative threshold (parking lots with 15 spaces), it has incorporated them into the Tentative Order. Therefore, the Priority Development Project categories and corresponding thresholds in the Tentative Order appropriately reflect SWRCB guidance and other additional supporting information specific to particular development project categories. It is also important to note that the Tentative Order requires that "where a project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements" (section D.1.d.(1)). This helps ensure that entire development projects must meet SUSMP requirements, even if only a portion of the project falls into a SUSMP Priority Development Project category.

However, since the Tentative Order is a Phase I NPDES municipal storm water permit, reflecting a program that has been in place for over 15 years, the Tentative Order should be at least as stringent as the Phase II NPDES storm water regulations, which have been in place approximately five years. The Phase II NPDES storm water regulations require development, implementation,

and enforcement of a "program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre" (40 CFR 122.34(b)(5)). In order to be consistent and as protective of water quality as the Phase II NPDES storm water regulations, the commercial development Priority Development Project category threshold has been reduced from 100,000 square feet to one acre. See section D.1.d.(2)(b) for this modification.

Section: D **Sub-section**: D.1.d.(2)(e)

Commenter(s): Carlsbad Watershed Network

Comment: Projects on hillsides that impact 2500 square feet or greater (not 5000 square feet) should be considered priority developments.

Response: The 5,000 square feet threshold for hillside development is based on SWRCB guidance in Order WQ 2000-11, which uses a size threshold of 5,000 square feet for significant redevelopment. The 5,000 square feet threshold is a continuation of the threshold used in Order No. 2001-01.

Section: D **Sub-section**: D.1.d.(2)(h)

Commenter(s): Caltrans

Comment: What is the basis for the 5,000 square feet impervious area trigger? The Department's research has found no justification for this requirement. This trigger is especially inappropriate for the highway environment. The Department's roadways differ in several fundamental ways from the projects regulated by existing SUSMPs. The linear nature of the ROW imposes unique constraints such as:

Space - Especially for existing right-of way (ROW), space may not be available for collecting runoff and for providing treatment during roadway reconstruction. Acquisition of new ROW in developed areas means an additional expense of public funds and hardship for the displaced landowner. In some locations such as dense urban areas, additional ROW is virtually unattainable. In addition, acquisition of new right-of-way for treatment can change the environmental status of the project, increase the amount of time needed for project approval, and also significantly increase costs.

Maintenance - Roadway managers must select BMPs that can operate passively with relatively longer maintenance intervals. Due to traffic and safety concerns on state highways, BMP maintenance will often require that traffic control measures be implemented.

Public Safety - The construction and maintenance of controls can have major implications for the safety of the traveling public. Highways, however, are often essential transportation corridors and cannot be fully closed. Partial closures to install, maintain, or replace BMPs creates situations of danger to the public because of high speeds and lack of reaction time. Devices that are within the traveled way or shoulder area (e.g., drain inserts) are not practical, as this places both motorists and staff in dangerous conditions. BMPs need to be installed in situations that prevent impact to motorists, so that they do not perceive unusual conditions that result in elevated risk to their safety whether it be accidents directly related to the change in conditions (temporary traffic controls and presence of maintenance vehicle and equipment) or accidents related to localized congestion caused by the maintenance activity. Furthermore, it should be realized that there are other environmental drawbacks associated with these conditions, such as spills (resulting from accidents, overheating, etc.), and excessive braking (due to stop and go traffic).

Worker Safety -The situations described above that create hazards for the motoring public also cause dangerous conditions for highway workers. BMPs selected for use on highways need to be accessible from off-highway locations. Maintenance staff need access to be a feature of the design of BMPs, not only to minimize impact to the public, but to allow for escape routes when conditions are defined as confined spaces or subject to near the roadway prism. This places design constraints on BMPs and makes BMPs infeasible in some locations.

Configuration - The linear nature of the state highway system creates a complex system of drainage distribution across watersheds. Drainage for urban development typically mimics the natural drainage conditions, while linear projects can cross multiple drainage courses and / or other MS4s.

Differences in Parking Categories - Park and ride lots substantially benefit the environment by reducing automotive use. Park and ride lots should have a higher threshold. This would make these facilities more cost effective and increase the likelihood of their implementation.

Threshold for Highways - The Department has recommended a 90,000 sq. ft. threshold for highways based on an analysis that showed that an impervious surface of approximately 2 acres was needed to produce adequate runoff to justify, the construction of treatment BMPs.

An economic analysis has been prepared by the Department (see Attachment B) based on actual implementation of treatment controls within the San Diego region. The findings of this economic practicality analysis based on impervious area criteria has identified a minimum tributary area of 2 acres (90,000 square feet) as economically feasible for the following treatment devices: Detention Devices, Infiltration Basin. Infiltration Trench, MCTT. Media Filter, and Wet Basin.

Unless some highway and freeways are under the jurisdiction of the Copermittees, these terms should be deleted from this category of development.

Response: The 5,000 square feet threshold is based on guidance in SWRCB Order WQ 2000-11. In this presidential Order, the SWRCB finds a size threshold of 5,000 square feet to be appropriate for significant redevelopment and parking lots. In addition, a 5,000 square feet threshold has been used for retail gasoline outlets in various Orders throughout southern California. It is appropriate for streets, roads, highways, and freeways to have a threshold similar to parking lots and retail gasoline outlets, since pollutant loads for each of these project categories are automobile-generated and have been identified as significant. For example, parking lots and retail gasoline outlets have been identified as hydrocarbon hotspots (Schueler and Holland, 2000), while transportation corridors have exhibited high total nickel and lead concentrations (Schueler and Holland, 2000). Moreover, a Federal Highway Administration "Pollutant Loading and Impacts of Highway Storm water Runoff, Volume 3; Analytical Investigation and Research Report" (1990) finds that concentrations of total suspended solids, nitrate + nitrite nitrogen, and zinc exceed USEPA benchmark values for concentrations of these pollutants in urban runoff. It is also worth noting that streets, roads, highways, and freeways consist solely of impervious surfaces, which alter flow regimes and increase potential for hydromodification.

The 5,000 square feet threshold for streets, roads, highways, and freeways has also been used in other parts of the country. Both Western Washington (Washington State Department of Ecology, 2005) and Maryland (Maryland Department of the Environment, 2000) have 5,000 square feet thresholds which apply to streets, roads, highways, and freeways under municipalities' jurisdictions. Application of the 5,000 square feet threshold in other parts of the country indicates the appropriateness and feasibility of its application. In addition, the 5,000 square feet threshold is a continuation of the threshold currently being implemented by the Copermittees under Order No. 2001-01. The Copermittees current implementation of the threshold also indicates its feasibility.

The economic analysis provided by Caltrans does not determine economic feasibility of treatment control BMP implementation for highways and freeways. The analysis only shows the point where BMP cost per cubic foot of runoff treated tends to stabilize in terms of drainage area. The fact that BMP cost per cubic foot of runoff treated tends to stabilize as drainage area increases does not indicate that implementation of BMPs treating runoff from smaller drainage areas is infeasible.

Finally, the threshold only applies to streets, roads, highways, and freeways under the Copermittees jurisdiction. If the Copermittees do not have jurisdiction over any freeways, the threshold will not apply to freeway projects. Therefore, removal of the term if not necessary.

Section: D **Sub-section**: D.1.d.(2)(i)

Commenter(s): Coast Law Group

Comment: The Order's SUSMP provisions should apply to all new RGO's.

Response: The SWRCB's precedential Order WQ 2000-11 dictates that application of SUSMP requirements to RGOs must include a threshold triggering the requirements. In order to conform with the SWRCB's Order, thresholds have been provided for RGOs.

Section: D **Sub-section**: D.1.d.(3)

Commenter(s): Caltrans

Comment: Given the extensive list of pollutant typically present in storm water runoff more guidance is needed in how pollutants of concern are to be identified.

Response: Guidance for identifying pollutants of concern for Priority Development Projects has been developed and included in the Model SUSMP, available at http://www.waterboards.ca.gov/sandiego/programs/sd_stormwater.html.

Section: D **Sub-section**: D.1.d.(4)

Commenter(s): Caltrans

Comment: Since new BMPs are continuously being developed, the Copermittees should have the option of using BMPs not on the list. Copermittees should be allowed to submit alternatives to the Executive Officer for approval; upon approval these new BMPs should be added to the list. Otherwise, the permit is describing "means of compliance" rather than a performance goal.

Response: The Copermittees have discretion to require additional BMPs that are not on the lists provided. However, BMPs chosen from the lists must also be implemented. BMPs chosen from the lists are required to be implemented to ensure that the site design BMPs incorporated into Priority Development Projects are proven and well-documented. The site design BMPs listed are recommended by primary sources such as CASQA's Storm water Best Management Practice Handbook - New Development and Redevelopment, the Bay Area Storm water Management Agencies Association's Start at the Source, and the Model SUSMP. The lists of site design BMPs from which BMPs are to

be selected do not dictate means of compliance. The lists provide numerous options for how compliance can be achieved. Moreover, the BMPs listed are well-documented and have been widely implemented in many areas. Therefore, failure to implement any of the BMPs would likely constitute failure to meet the MEP standard.

Section: D **Sub-section**: D.1.d.(4)

Commenter(s): Carlsbad Watershed Network

Comment: It is not clear how many of the BMPs from the list (D.1.d.(4)(a-c)), must be selected (one, one from each of the (a) and (b) lists, or more). The exemption for " Priority Development Projects with no landscaping or low traffic areas ..." seems counterproductive, and could lead to increased impervious cover. In addition, some performance criteria for these and other BMPs are needed.

Response: All site design BMPs listed in section D.1.d.(4)(a) and D.1.d.(4)(b) must be implemented if determined to be applicable and feasible by the Copermittee. This requirement mirrors the current site design BMP requirements of Order No. 2001-01 and the Model SUSMP. However, in order to provide a minimum measurable baseline for site design BMP implementation, at least two site design BMPs must be implemented from the lists provided. The exemption for projects with no landscaping or low traffic areas is not expected to be counterproductive, since section D.1.c.(3) requires all Development Projects to minimize impervious footprint where feasible. Performance of these BMPs will be assessed as part of the Copermittees' program effectiveness assessments required in section I.

Section: D **Sub-section**: D.1.d.(4)

Commenter(s): City of Chula Vista

Comment: There are many development and redevelopment projects in which implementation of some Site Design BMPs are not feasible due to site constraints, such as parcel size, lack of adequate landscape areas, high density land uses, safety concerns, etc. As such, the City of Chula Vista recommends that the language in this Section be revised to waive site design BMP requirements found in Section D.1.d (4), when such Site Design BMPs have been determined to be infeasible, at the discretion of the Copermittees.

Response: The permitting approach discussed in the comment was utilized in the Model SUSMP. Audits of ten of the Copermittees' SUSMP programs found that such a permitting approach was ineffective and that site design BMPs were

not adequately being implemented. In response to this issue, minimum site design BMP requirements were added to the Tentative Order. These site design BMP requirements provide adequate flexibility when site design BMP implementation is difficult. For example, BMPs from List 1 do not need to be implemented for projects with no landscaping or low traffic areas. In addition, only portions of projects are required to have site design BMPs implemented. If a project has difficulty implementing site design BMPs, the Copermittee can apply the site design BMP requirements to a limited portion of the project.

Section: D **Sub-section**: D.1.d.(4)

Commenter(s): City of Imperial Beach, City of Santee

Comment: Section D.1.d.4 on Pages 18 and 19 would require every Priority Development Project (i.e., SUSMP project) to implement at least one BMP from each of two lists of site design BMPs. Compliance with the second of these lists (Section D.1.d.4.b) will often be infeasible for projects in substantially built-out areas. The Regional Board has not adequately justified how separating minimum site design BMP requirements into two artificial groupings would benefit water quality. At the very least, priority development projects should be given the discretion to choose two site design BMPs from either of the lists in D.1.d.4.a and D.1.d.4.b.

Response: During the Regional Board's audits of the Copermittees' SUSMP programs, it found that plans submitted by project proponents in compliance with SUSMP requirements more frequently included the site design BMPs found in the Tentative Order's second list of site design BMPs, rather than those site design BMPs included in the first list. This is likely due to the fact that implementation of the site design BMPs in the second list is largely subjective. Because review of the site design BMPs found in the second list is largely subjective, these site design BMPs have been separated from the more objective site design BMPs found in the first list. This will help ensure that at least one objective site design BMP will be implemented at Priority Development Projects. Requirements for implementation of objective site design BMPs are important to ensure that the site design BMPs implemented at a Priority Development Project are effective.

However, to increase flexibility of implementation of site design BMPs, section D.1.d.(4) has been modified to require implementation of two site design BMPs, with at least one of the implemented site design BMPs to be chosen from the first site design BMP list. This will allow project proponents to only implement site design BMPs from the first list, if they so choose.

Section: D **Sub-section**: D.1.d.(4)

Commenter(s): Coast Law Group

Comment: We believe the permit should include provisions whereby facilities (such as large vegetated areas) can be constructed to serve multiple Priority Development Projects adjacent to each other. Under appropriate circumstances, such "common area site design BMPs" would have to accept discharges prior to their entering the MS4, and in every case, would have to be demonstrated no less effective than full application of Low Impact Development standards on the individual properties (plus a margin of safety to assure adequate performance).

Response: The use of "common site design BMPs" is not precluded by the Tentative Order. Priority Development Projects have to implement site design BMPs, but nothing prevents use of "common site design BMPs."

Section: D **Sub-section**: D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: Require incorporation of low impact site design BMPs prior to issuing permits for the addition of impervious surface in existing developments to increase the scope of storm water controls in the urban landscape. While it is imperative to incorporate LID practices into the design of new developments, much of the San Diego Region is already built out. By requiring low impact site design BMPs when impervious surface is added in existing development, the Permit can more effectively address the source of storm water runoff: the developed urban landscape.

Response: The Tentative Order does require implementation of low impact site design BMPs for existing developments that are increasing impervious surface areas. Any redevelopment project that creates, adds, or replaces at least 5,000 square feet of impervious surface must implement low impact site design BMPs.

Section: D **Sub-section**: D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: While the previous permit took significant strides toward laying the foundation for LID practices in the San Diego Region, its language left too much latitude to project proponents and permitting authorities to actually achieve widespread use of low impact site design strategies in new development. Likewise, the Proposed Permit does not solve these problems sufficiently or adequately require LID approaches to address ongoing water quality problems in

the San Diego region. Because of the robust ability of LID approaches to address water quality and water supply problems, the Proposed Permit must require LID techniques as the presumptive tool to address the impacts of new and redevelopment projects.

As the Copermittees have acknowledged, LID "[site design and source control solutions are often more effective than many types of structural treatment for protecting water quality since design considerations eliminate the necessity of addressing sources of pollution, rather than attempting to remove a percentage of the pollution after it has entered storm water runoff." In fact, LID practices offer myriad benefits-including both the primary benefits of pollution reduction and reducing storm water runoff volume and rate, as well as secondary benefits such as greater cost-effectiveness, groundwater recharge, and habitat protection---over conventional BMPs.

Moreover, NRDC commissioned a formal study and report by a leading, nationally recognized expert, Dr. Richard Homer, entitled Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID '7 for the San Diego Region (2006) (attached hereto as Attachment I). Dr. Homer confirms that the benefits of LID would be substantial in the San Diego Region and that these benefits can, in fact, be obtained given local building patterns. The Report verifies that implementing LID practices would make the Permit more consistent with MEP and is necessary to meet water quality objectives.

In the context of the NPDES municipal storm water permit for the San Diego Region, the primary benefits of LID techniques are reducing runoff volume, rate, and pollution load-results that have been studied and documented in dozens of reports, case studies, and pilot projects in California and across the nation. Contrary to the Copermittees' unsubstantiated assertion in the 2005 Report of Waste Discharge that low impact development techniques are not proven and are too costly, the overwhelming body of literature shows that LID strategies are effective and can be cost-saving in both the short and long-term.

In addition to helping reduce pollutant loading in storm water and reducing the volume and rate of storm water runoff, LID practices offer other economic, aesthetic, and practical benefits to developers, municipalities, and homeowners in addition to benefiting natural ecosystems by conserving natural resources such as soil, water, and vegetation and restoring natural hydrologic processes in the watersheds.

Groundwater recharge - The extensive groundwater resources beneath the San Diego River provide a cost-effective and reliable water supply to four water districts and the City of San Diego. On undeveloped land, a considerable percentage of rainfall infiltrates into the soil and contributes to the groundwater. These aquifers not only provide drinking water but also help maintain base flow essential to the biological and habitat integrity of streams.

As San Diego becomes more developed, a much larger percentage of rainwater hits impervious surfaces including streets, sidewalks, and parking lots rather than infiltrating into the ground. By using LID techniques that reduce the amount of impervious surfaces and increase vegetation and soil features, the landscape can retain more of its natural hydrological function. Thus, LID practices have the added benefit of recharging groundwater aquifers and preserving base flow to streams and wetland.

Improving groundwater supplies in Southern California would also save money now spent on imported water, and "may be the key to continued development in the area. As the Board Members are no doubt well aware, southern California faces serious water supply challenges. Continued, rapid growth in the San Diego Region puts increasing pressure on the local water resources including water supply, and the Region already imports most of its water." The traditional storm water management regime, with its infrastructure emphasis on collection and conveyance, simply wastes a valuable resource. Captured water can recharge the water supply or be otherwise reused; LID's runoff prevention is a benefit that represents substantial cost savings.

Minimize infrastructure requirements - Low impact development practices can also reduce conventional storm water drainage infrastructure, such as pipes, gutters, and detention basins, thereby reducing infrastructure costs. Traditional curbs, gutters, storm drain inlets, piping and detention basins can cost two to three times more than engineered grass swales and other low impact development techniques to handle storm water runoff from roadways. Clustering homes can reduce infrastructure costs to the builder, since fewer feet of pipe, cable, and pavement are needed, and maintenance costs are reduced for homeowners. Studies in Maryland and Illinois show that new residential developments using green infrastructure storm water controls saved $3,500 to $4,500 per lot (quarter- to half-acre lots) when compared to new developments with conventional storm water controls.

Low impact development can also minimize the need for irrigation systems. This can be crucial in a hot, dry climate, where as much as 60 percent of the municipal water demand can be attributed to irrigation. LID techniques can even improve air quality by filtering air pollution and helps to counteract urban heat island effect by lowering surface temperatures.

Increased parkland and wildlife habitat, preserving natural features and natural processes - LID strategies include vegetative and grassy swales, tree-box filters, and preserved vegetation, thereby increasing the amount of green spaces in a community. These strategies can also protect regional trees and flora and fauna. Thus, LID measures result in less disturbance of the development area and conservation of natural features. In fact, harvesting rainwater for use in gardens, rather than allowing storm water runoff into storm drains, can even result in

"bigger, healthier plants" because rainwater is better for plants than chlorinated tap water.

Using LID techniques, development can be reconfigured in a more eco-efficient and community-oriented style. Clustering homes on slightly smaller lot areas can allow more preserved open space to be used for recreation, visual aesthetics, and wildlife habitats. Builders in many areas have been able to charge a premium price for "view lots" facing undisturbed natural vistas, or pond areas that also function as bioretention cells.

Enhanced property values - In addition to the aesthetic appeal of more parkland and vegetation, "greening" a neighborhood can often increase property values.

Cheaper development costs - LID not only raises property values for owners, but it can result in more cost savings for developers as well. Using LID can reduce land clearing and grading costs, potentially reduce impact fees and increase lot yield, and increase lot and community marketability. For example, the Gap Creek residential subdivision in Sherwood, Arkansas used LID methods instead of conventional methods. The results were 17 additional lots, $3000 more per lot than the competition, $4800 less cost per lot, 23.5 acres of green spaces and parks, and ultimately, over $2.2 million in additional profit.

Require that all Priority Development Projects use low impact site design BMPs. Low impact development practices have been documented to be effective and cost-saving for over a decade, and should be included in the Regional Board's permit as a primary tool to meet the challenges posed by urban runoff in the San Diego Region. The new Permit should explicitly require the implementation of low impact site design BMPs because the language in the previous permit, which required site design BMPs to be implemented where determined to be applicable and feasible, failed to effect broad implementation of site design BMPs. Indeed, in light of the pervasive problem of priority project proponents selecting BMPs without regard to their efficiency, an affirmative requirement to employ LID techniques in new development is imperative for enforcement of low impact site design BMP requirements.

Therefore, the new Permit should require all Priority Development Projects to meet the 85th percentile runoff event treatment standard using LID practices. 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 Priority Development 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 LID BMPs to meet the standard. Such an approach would obviate the need for most feasibility analyses because project proponents would employ LID practices as a rule. In addition to achieving much broader implementation of LID, and the realization of LID-associated storm water management and secondary benefits, the benefits of this plain requirement approach include "time and cost

savings to jurisdictions and applicants," as well as "increased acceptance of LID controls in jurisdictional development regulations and design standards [and] [greater usage of LID controls by applicants."

Response: The Tentative Order's site design BMP requirements have been strengthened from the Order No. 2001-01 site design BMP requirements. Specifically, site design BMPs are required for all Priority Development Projects at section D.1.d.(4). The site design BMP requirements specify implementation of extensive site design BMPs where applicable and feasible, while also specifying a minimum level of site design BMP implementation. In conjunction with strengthened site design BMP requirements, the Tentative Order's treatment control BMP requirements are also more detailed than the treatment control BMPs in Order No. 2001-01. Requirements have been included in the Tentative Order to better ensure that the treatment control BMPs implemented at Priority Development Projects are effective at capturing the project's pollutants of concern. These more detailed treatment control BMP requirements provide a backup assurance of effective post-construction BMP implementation at Priority Development Projects if extensive site design BMPs are not implemented in some cases. It should also be noted that the Tentative Order promotes extensive site design BMP implementation by encouraging the Copermittees to develop a Site Design BMP Substitution Program, under which extensive site design BMP implementation can be implemented in lieu of treatment control BMPs.

However, it is acknowledged that site design BMPs provide numerous benefits such as groundwater replenishment, minimization of construction of infrastructure, enhanced property values, etc. Therefore, the Tentative Order has been modified to better assure that effective site design BMPs will be implemented at Priority Development Projects where applicable and feasible. To help remove the uncertainty regarding the determination of applicability and feasibility, the Tentative Order has been modified to require the Copermittees to develop criteria to aid in conducting the applicability and feasibility analyses. In addition, requirements for design criteria for site design BMPs to be developed by the Copermittees has been added to the Tentative Order to ensure site design BMPs are correctly designed and constructed. Finally, several additional effective site design BMPs have been added to the Tentative Order's site design BMP lists in order to improve overall site design BMP implementation.

Section: D **Sub-section**: D.1.d.(4)(a)

Commenter(s): City of Santee

Comment: “Construct a portion of walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces, such as pervious concrete,

porous asphalt, unit pavers, and granular materials." This requirement is unclear; what does "a portion" represent?

Response: Only a "portion" of low traffic areas are required to use permeable surfaces in order to provide the Copermittees with flexibility in determining how much of a project should be susceptible to the requirement. It 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.

Section: D **Sub-section**: D.1.d.(4)(c)

Commenter(s): City of Santee

Comment: Subsection c should be deleted as it causes confusion and may result in a situation of either the City or the developer having to explain in detail why each option was discounted in each project.

Response: The comment exhibits why the site design BMP requirements needed improvement. The section D.1.d.(4)(c) requirement reflects the current requirements of Order No. 2001-01 and the Model SUSMP. At present, a Copermittee or developer must be able to explain why any of the options listed has not been incorporated into a particular project. All of the site design BMPs listed have been widely implemented in many areas and are well-documented; therefore, they should be implemented wherever they are applicable and feasible. As such, the requirement is appropriate. However, this relatively subjective requirement is augmented by the more objective requirements of sections D.1.d.(4)(a) and D.1.d.(4)(b).

Section: D **Sub-section**: D.1.d.(5)

Commenter(s): City of Santee

Comment: Among six mandatory requirements is a new one requiring storm drain system stenciling and signage. What is the distinction between stenciling and signage? Why are both required? It is suggested that either stenciling or signage be required.

Response: The requirement for storm drain stenciling and signage is not new. The requirement currently exists in Order No. 2001-01. However, the intent of the requirement is to have some kind of notification at newly constructed storm drains. This notification can be achieved by stenciling or signage. Therefore, section D.1.d.(5)(b) has been modified to clarify this issue.

Section: D **Sub-section**: D.1.d.(6)

Commenter(s): Coast Law Group

Comment: Prior to approval of a shared treatment control BMP, the Copermittee should be required to ensure appropriate sizing to accommodate full project build-out and post-construction use in perpetuity.

Response: The Copermittees are required to ensure appropriate sizing of treatment control BMPs to accommodate full project build-out. Section D.1.d.(6)(b) requires that "all treatment control BMPs shall be located so as to infiltrate, filter, or treat the required runoff volume or flow." Ongoing use of shared treatment control BMPs will be tracked by the Copermittees' Treatment Control BMP Maintenance Tracking program (section D.1.e.)

Section: D **Sub-section**: D.1.d.(6)(a)

Commenter(s): City of Encinitas

Comment:

Response: The requirement for treatment of runoff from landscaped areas is a continuation of the current requirements in Order No. 2001-01. The discussion of landscaped areas has been included in the requirement for the purposes of clarification. Treatment of runoff from landscaped areas is not a disincentive for developers to maximize natural or pervious areas, since runoff from all impervious surfaces also requires treatment. An incentive for maximization of natural or pervious areas is still provided by the requirements, because treatment control BMPs can be sized smaller if natural or pervious areas are maximized. Treatment of runoff from landscaped areas is necessary because landscaped areas can be significant sources of pollutants such as nutrients, sediment, and pesticides. There is no requirement for treatment of runoff from BMPs which happen to be landscaped. As long as a landscaped treatment control BMP meets appropriate design criteria, further treatment is not needed.

Section: D **Sub-section**: D.1.d.(6)(c)

Commenter(s): City of Carlsbad

Comment: Please remove the ending phrase “multiplied by a factor of two.” Doubling the treatment capacity would reduce the storm event to below the 85th percentile. This can be a significant increase in the required treatment capacity and make the 85th percentile rule meaningless.

Response: The phrase "multiplied by a factor of two" is a current requirement under Order No. 2001-01. The requirement that flow-based BMPs be designed to mitigate runoff generated by a rainfall intensity of 0.2 inches per hour is based on hourly rainfall data from Lindbergh Field in San Diego. The 85th percentile hourly rainfall intensity was calculated from this data to be 0.1 in/hr. In developing the numeric sizing criteria for flow-based BMPs, this number was doubled to account for intense bursts of rainfall which may occur within an hour period. The 0.1 in/hr rainfall intensity assumes that rain falls at an even rate over an hour period. This is frequently not the case. Rainfall often occurs in intense bursts over periods of time shorter than an hour in duration. If 0.1 inches of rainfall were to occur in a short intense burst, as opposed to falling at an even rate over an hour, the flow rate resulting from the short intense burst of rainfall would be greater than the flow rate generated by the steady hour-long rain. Therefore, a BMP sized to treat or filter the peak flow rate resulting from a steady hour-long 0.1 in rainfall would be inadequately sized to treat peak flows from a 0.1 in rain event falling over a 30 minute period. For this reason, the 85th percentile hourly rainfall intensity was doubled to develop the numeric sizing criteria for flow-based BMPs. A flow-based BMP sized to treat or filter runoff resulting from a 0.2 in/hr rainfall intensity (as the proposed numeric sizing criteria would require) would be adequately sized to capture most peak flow rates resulting from 0.1 inch of rain falling over time periods shorter than one hour. It is worth noting that this approach of doubling the design hourly rainfall intensity for developing numeric sizing criteria for flow based BMPs is supported by CASQA (CASQA, 2003).

Section: D **Sub-section**: D.1.d.(6)(d)i

Commenter(s): San Diego Unified Port District

Comment: The ranking of BMPs efficiencies has not been verified and appropriately studied. The Regional Board should assist the Copermittees by offering scientific evidence of the BMP efficiencies of at least the most common BMPs and a list of approved BMPs. The Regional Board should also provide a standard to reference.

Response: BMP efficiencies have been studied extensively. The Model SUSMP provides pollutant removal efficiency rankings for treatment control BMPs. CASQA's Storm Water Best Management Practice Handbook - New Development and Redevelopment (2003) also provides data on treatment control BMP effectiveness, including summaries of the removal effectiveness of each BMP for different pollutants. The International Storm water Best Management Practice Database, sponsored by USEPA, ASCE, and others is also an exceptional source of information on treatment control BMP performance (www.bmpdatabase.org).

Section: D **Sub-section**: D.1.d.(7)

Commenter(s): Caltrans, City of San Diego

Comment: Streets exclusion would preclude the possibility of applying this approach to parkways with significant amounts of landscaping where highly effective site design could be applied. Granted, the approach should not be applicable to all roadway types, but criteria could be developed as part of the program to eliminate inappropriate application of the program. Recommend that streets, roads, highways and freeways not be excluded in this program, if developed.

Response: While some streets, roads, highways, and freeways have relatively high levels of pollutants discharged from them, this is not the case in all instances. For example, infrequently traveled roads may have less pollutants associated with them. For this reason, it may be appropriate to apply the Site Design BMP Substitution Program to some streets, roads, highways, and freeways, provided they meet certain criteria designed to ensure they are not sources of high levels of pollutants. Section D.1.d.(7)(e) has been modified to allow the Site Design BMP Substitution Program to apply to streets, roads, highways, and freeways that do not have high average daily traffic.

Section: D **Sub-section**: D.1.d.(11)(a)

Commenter(s): Carlsbad Watershed Network

Comment: Waiver Provisions need to be more specific and to have more oversight: It seems likely that many development proponents would claim that an alternative to their plan is infeasible, due to cost or design constraints, and that a waiver is thus justified. In addition, it would seem prudent to allow waivers only following early consultation by the Board staff with the jurisdiction (as is done for take permits under the MHCP) and after a public hearing, rather than having the jurisdiction inform the Board staff that a waiver has been granted, five days after the fact.

Response: The waiver requirements in the Tentative Order mirror current waiver requirements in Order No. 2001-01. To date, the Regional Board is not aware of any waivers that have been issued under the requirements of Order No. 2001-01. For this reason, it does not appear that the waiver provisions need more specificity or oversight. The requirements provide a balance of Copermittee discretion and Regional Board oversight. Review of waivers five days after their issuance provides the Regional Board the opportunity to take prompt corrective action if warranted.

Section: D **Sub-section**: D.1.d.(11)(a)

Commenter(s): City of Del Mar

Comment: D.1.d.(11) requires the Copermittee to notify the Regional Board within 5 days of the issuance of a waiver of infeasibility, presumably so the Regional Board can review and dispute the finding. Del Mar is obligated to implement the new development requirements in our Standard Urban Storm Water Mitigation Plan (SUSMP) and would detail any waiver procedures in the SUSMP. In addition, Del Mar is obligated to file an annual report with the Regional Board. This annual report combined with the detailed SUSMP should be sufficient to satisfy compliance with this order, as the 5 day notification is burdensome, has no benefit, and results in Regional Board micromanagement of Del Mar's program.

Response: The requirement to notify the Regional Board of SUSMP waivers is a current requirement under Order No. 2001-01. Since application of SUSMP requirements to Priority Development Projects is appropriate in most all cases, waivers should only be issued in rare circumstances. The requirement allows the Regional Board to ensure that waivers are not commonly being issued. Notification within five days of issuance of the waiver is necessary, since notification in the annual reports would occur at a time when corrections to inappropriate waivers may be precluded.

Section: D **Sub-section**: D.1.d.(11)(a)

Commenter(s): Coast Law Group

Comment: The SUSMP waiver provision should be eliminated. In the alternative, the Copermittees should be required to disclose in its JURMP annual report the information submitted to the Regional Board pursuant to section D.1 d.(11)(a) for each waiver granted that year. Similar reporting requirements and program effectiveness assessments should be required if a mitigation fund is established as provided in section D.1.d.(11)(b).

Response: Attachment E of the Tentative Order requires annual reports to include a listing of any projects which received a SUSMP waiver. To avoid duplication of reporting, submittal of additional information in the annual report is not required. Sections I.1.a.(1)(a) and I.3.a.(1)(a) require assessment of the effectiveness of each significant jurisdictional or regional activity implemented, which would include assessment of mitigation fund implementation. Annual reporting requirements for mitigation fund implementation have been added to Attachment E.

Section: D **Sub-section**: D.1.d.(12)

Commenter(s): Caltrans

Comment: Characterizing storm water runoff from municipal areas as 'High threat to water quality' is inconsistent with other jurisdictions such as Fresno that have found storm water infiltration to be beneficial and not a threat to groundwater. Fresno has over 130 infiltration basins for storm water and has not identified adverse impacts. Infiltration treatment control BMPs is a favorable treatment device for storm water pollution especially for complying with stringent TMDL requirements. If this statement remains in the Order, the Department requests the Regional Board to provide the scientific and technical basis for this statement. The design standards which are part of the SUSMP requirements contained in this Order essentially require that urban runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated and the permit establishes this as the MEP standard. If infiltration is removed from the treatment control tool chest, then roadways have much less potential for meeting the design standards. The infiltration requirement specifies that "All dry weather flows containing significant pollutant loads shall be diverted from infiltration devices; " However, in some cases infiltration is appropriate and effective. In general, the categories are too broadly defined. For example, an enclosed repair shop at a maintenance station would potentially be included in this category.

Response: Focusing infiltration of large volumes of urban runoff in small areas has the potential to adversely impact groundwater quality. For this reason, infiltration restrictions have been placed on the use of structural infiltration BMPs. These restrictions only apply to structural infiltration BMPs specifically designed to infiltrate large amounts of urban runoff, such as infiltration basins or trenches. These restrictions on structural infiltration BMPs are appropriate and are based directly on USEPA guidance. The restrictions are predominantly recommended by the USEPA Risk Reduction Engineering Laboratory (USEPA, 1994). Other infiltration restrictions are based on restrictions used elsewhere, such as Los Angeles, the State of Washington, and the State of Maryland. Furthermore, the restrictions are supported by the SWRCB in Order WQ 2000-11. The Order states: "The Regional Board did consider the potential impacts to groundwater from infiltration, and included appropriate limitations and guidance on its use as a BMP." The limitations and guidance the SWRCB refers to in Order WQ 2000-11 include most of the restrictions on infiltration included in the Tentative Order.

However, it is acknowledged that infiltration restrictions may not be necessary in all cases. For this reason, the Tentative Order allows the Copermittees to develop their own restrictions on the use of structural infiltration BMPs. In addition, in order to encourage the use of structural infiltration BMPs where applicable, the Tentative Order has been modified to allow variances to the

restrictions if negligible risk to groundwater can be demonstrated. See section D.1.d.(12) for this modification.

Section: D **Sub-section**: D.1.d.(12)

Commenter(s): City of Carlsbad

Comment: After the sentence ending with “groundwater quality objectives”, add the words “of groundwater being utilized in a beneficial manner”. All infiltration devices, by operation, can introduce surface flows into the groundwater. Any surface flow can carry, or leech from the soil, constituents that have the potential to “add to the exceedance of groundwater quality objectives.” Therefore the City suggests that the restrictions be placed only on infiltration if it will have a detrimental effect to groundwater being utilized in a beneficial manner. Otherwise all infiltration BMPs would be prohibited.

Response: The Tentative Order requires that infiltrated urban runoff not "cause or contribute to an exceedance of groundwater quality objectives." The restrictions on infiltration BMPs included in the Tentative Order are designed to ensure that this requirement is met. An infiltration BMP which meets the restrictions included in the Tentative Order is unlikely to cause or contribute to an exceedance of groundwater quality objectives. Therefore, infiltration BMPs which meet the restrictions would not need to be prohibited.

Groundwater that is not being used in a beneficial manner is identified in the Basin Plan and is not assigned water quality objectives. For example, regarding groundwater in some Hydrologic Areas the Basin Plan states "water quality objectives do not apply westerly of the easterly boundary of Interstate Highway 5." For this reason, the requirement for compliance with groundwater quality objectives will not be qualified by a discussion of beneficial use.

Section: D **Sub-section**: D.1.d.(12)

Commenter(s): City of San Diego

Comment: Language in subsections supersedes last sentence in introductory paragraph, which gives Copermittees the authority to change the restrictions. This would not be possible as worded. Recommend clarifying section so that restrictions can be modified.

Response: Section D.1.d.(12) has been modified to clarify that alternative restrictions on infiltration developed by the Copermittees would supersede the restrictions listed in the Tentative Order.

Section: D **Sub-section**: D.1.d.(12)

Commenter(s): Natural Resources Defense Council

Comment: Permit the use of infiltration devices for development projects in areas of industrial or light industrial activity; areas subject to high vehicular traffic; automotive repair shops; car washes; fleet storage areas; nurseries; and other "high threat to water quality land uses and activities" designated by Copermittees where the groundwater contamination risk is demonstrated to be below an acceptable level. By requiring proponents of development projects in these categories or land use areas to perform hydrogeological analysis using site-specific soils and groundwater data to demonstrate low risk, the goals of reducing runoff, recharging groundwater, and avoiding groundwater contamination can be accomplished.

Response: Focusing infiltration of large volumes of urban runoff in small areas has the potential to adversely impact groundwater quality. For this reason, infiltration restrictions have been placed on the use of structural infiltration BMPs. These restrictions only apply to structural infiltration BMPs specifically designed to infiltrate large amounts of urban runoff, such as infiltration basins or trenches. These restrictions on structural infiltration BMPs are appropriate and are based directly on USEPA guidance. The restrictions are predominantly recommended by the USEPA Risk Reduction Engineering Laboratory (USEPA, 1994). Other infiltration restrictions are based on restrictions used elsewhere, such as Los Angeles, the State of Washington, and the State of Maryland. Furthermore, the restrictions are supported by the SWRCB in Order WQ 2000-11. The Order states: "The Regional Board did consider the potential impacts to groundwater from infiltration, and included appropriate limitations and guidance on its use as a BMP." The limitations and guidance the SWRCB refers to in Order WQ 2000-11 include most of the restrictions on infiltration included in the Tentative Order.

However, it is acknowledged that infiltration restrictions may not be necessary in all cases. For this reason, the Tentative Order allows the Copermittees to develop their own restrictions on the use of structural infiltration BMPs. In addition, in order to encourage the use of structural infiltration BMPs where applicable, the Tentative Order has been modified to allow variances to the restrictions if negligible risk to groundwater can be demonstrated. See section D.1.d.(12) for this modification.

Section: D **Sub-section**: D.1.e.(1)

Commenter(s): Coast Law Group

Comment: The Bay Council strongly supports the requirement that Copermittees inventory and track treatment control BMP maintenance. But, we believe that the Copermittees should be encouraged to jointly develop and maintain such a database, and that it be web-accessible and freely available to the public. Copermittees will likely benefit from the community's ability to track and enforce BMP implementation and maintenance.

Response: Attachment E requires the Copermittees to provide an updated treatment control BMP inventory in their annual reports. These annual reports are available for review by the public at the Regional Board offices. However, the Copermittees are encouraged to make their annual reports web-accessible and/or place their treatment control BMP maintenance tracking database on the web.

Section: D **Sub-section**: D.1.e.(2)

Commenter(s): Carlsbad Watershed Network

Comment: While we support adding requirements for BMP maintenance/inspection, these activities often result in damage to sensitive habitat and/or the actual waterbody. Please consider adding requirements that these maintenance/ inspection activities are included in the project CEQA/NEPA reviews so the impacts can be adequately mitigated and are subject to some public accountability. It would also be helpful to include some guidelines about how these can be done in the least damaging way.

Response: Treatment control BMPs are prohibited from being located in receiving waters. Therefore, maintenance of the treatment control BMPs is not expected to result in damage to sensitive habitat or receiving waters.

Section: D **Sub-section**: D.1.e.(2)(b)

Commenter(s): City of Encinitas

Comment: It is unclear why the entire project would be prioritized and not just the BMPs. Often once the project is complete there is no longer a “project”, but there are individual homes or buildings that incorporate BMPs. The prioritization should only apply to the BMPs themselves and not the entire project.

Response: Since projects can have numerous treatment control BMPs (such as drainage inserts), it can be simpler to prioritize the project, rather than each specific treatment control BMP. In addition, treatment control BMPs can often be part of a project's "treatment train." In such cases, it is likely to be more efficient to prioritize the entire "treatment train," rather than each treatment control BMP in

the system. If the Copermittees wish to prioritize each individual treatment control BMP, in addition to each project with treatment control BMPs, they have the discretion to do so.

Section: D **Sub-section**: D.1.e.(2)(c)

Commenter(s): San Diego Copermittees, City of San Diego

Comment: The program does not anticipate the continual growth in the program's BMP inventory, which would necessitate an ever increasing amount of inspections. Even at lower inspection frequencies, Copermittees would required additional staff and resources each year. The Copermittee alternative includes an upper limit on required inspections of 200% of the average annual number of treatment BMP project approvals. 200% of the average annual number of treatment BMP project approvals is roughly equivalent to a 40% per year maximum over five years except that, by expressing it as a percentage of annual approvals, the higher value is essentially fixed during the first year of implementation.

Establishing a reasonable level of budgeting certainty through an upper limit to inspections is critical since the Tentative Order would require Copermittees to inspect an increasing number of BMPs each year in perpetuity. Copermittees must be able to anticipate and reasonably control potential workload and costs in ensuing permit years. Additionally, as their programs mature, continued effective program implementation will result in higher rates of compliance, and Copermittees and responsible parties will continue learning through an iterative maintenance and inspection process. As the program increases in its sophistication, rate of inspections should reach a static level, provided that the program effectiveness continues to be demonstrated.

Response: As the number of treatment control BMPs constructed continues to increase, the Copermittees inspection burden will likewise continue to increase. Overtime, the number of treatment control BMP inspections required could drain resources from other important urban runoff management activities. Therefore, capping the number of inspections which must be conducted in a given year is reasonable. The Copermittees proposed cap of 200% of the average annual number of approved treatment control BMPs would eventually constitute annual inspection of 40% of treatment control BMPs approved during this permit term, and annual inspection of 20% of treatment control BMPs approved during this and the previous permit term. These rates of inspection meet or exceed the Tentative Order's requirement that 20% of all treatment control BMPs be inspected annually. Because the proposed inspection cap meets or exceeds the Tentative Order's minimum inspection requirements, it is an appropriate cap on treatment control inspections. The cap can be reassessed at the end of the permit term. See section D.1.e.(2)(c) for this modification.

Section: D **Sub-section**: D.1.e.(2)(c)

Commenter(s): San Diego Copermittees, City of San Diego, City of Escondido

Comment: A review of the Fact Sheet / Technical Report and the RWQCB's May 15, 2006 letter (SWU:10-5000.02phammer) shows that a technical and factual basis for the adoption of these specific frequencies in the Final Order has not been sufficiently demonstrated.

The Fact Sheet / Technical Report discusses the need for a minimum inspection frequency of once per Permit cycle for all BMPs, and from this an additional requirement to inspect 20% (or one fifth) of the total BMP inventory annually is derived. The basis provided for this additional requirement is that "treatment control BMPs are typically recommended to be maintained semi-annually or annually." This justification lacks specific detail or technical support for a minimum inspection frequency. In particular, the use of "typical" recommended maintenance frequencies as a basis for applying a minimum frequency for all treatment BMPs is simplistic and over-reaching. It should be noted that this prescriptive minimum would likely force Copermittees to inspect certain treatment BMPs at a frequency that is excessive for their low maintenance requirements. For example, "natural" treatment BMPs, such as infiltration trenches, vegetated swales and vegetated buffer strips, require low to moderate maintenance, and most maintenance is typically associated with regular landscaping work. These are not "out of sight, out of mind" BMPs with a high risk of neglect, nor of failure due to improper maintenance. While an overall minimum inspection rate per year may be appropriate to define a minimum level of effort for Copermittee programs, Copermittees should determine specific inspection schedules for each type of treatment BMP.

The Fact Sheet / Technical Report also fails to provide any factual basis for the establishment of the specific inspection frequencies proposed for Medium and High Priority BMPs. With regard to drainage inserts only, it states:

"… projects with drainage insert treatment control BMPs must be categorized as at least a medium priority. This will ensure that such projects will be inspected every other year. Tracking of these projects in this manner is necessary because of the frequent maintenance that drainage inserts require, as well as the sensitivity of drainage insert performance to adequate maintenance. Drainage inserts fill relatively rapidly, causing plugging and bypass, rendering them ineffective."

Assuming that other concurrently required controls are insufficient to ensure compliance, this may provide a reasonable justification for a once every second year inspection of drainage inserts. It does not, however, provide specific

support for a broader requirement to inspect all Medium Priority controls every second year. Moreover, since no additional explanation of the proposed inspection rates for Medium or High Priority controls is provided, the Fact Sheet / Technical Report fails to provide support for their adoption. Similarly, the Regional Board's May 15, 2006 letter (SWU:10-5000.02phammer) responding to issues discussed at the April 25, 2006 public workshop only states that "the Tentative Order's inspection requirements… are based on the frequency with which treatment control BMP maintenance should occur." Again, while the Copermittees agree that a relationship should be established between maintenance frequencies and inspection rates, RWQCB staff has failed to provide any justification for the Medium and High Priority frequencies required in the Tentative Order.

While not a justification in itself, comparison to other existing programs can help to provide perspective, and to establish precedent. For instance, a review of the 26 adopted municipal permits available on the SWRCB's web site shows that 21 do not contain treatment BMP inspection requirements. Of the five Region II Municipal Permits that do have requirements , all have identical language requiring Copermittees only to inspect a subset (i.e., high priority treatment BMPs) on an annual basis. None of these require inspection of minimum percentages of inventories or define how treatment BMPs must be prioritized. The Copermittees have also found that the proposed inspection requirements are in excess of similar Regional Board-regulated spot inspection programs. For instance, the City of San Diego's Industrial Pretreatment Program, requires inspection of all high priority facilities annually, but the high priority facilities comprise only 4% of that total inventory.

The Tentative Order should be modified to incorporate the following Treatment BMP Maintenance Tracking Program requirements:

• Inspection of all (100%) high priority sites annually (in line with other Municipal Permits);
• Inspection of no less than 20% of the total BMP inventory annually;
• Inspection of drainage insert treatment BMPs every other year;
• Eventual limit to the total number of annual inspections to 200% of the average number of BMPs approved annually.

This alternative would surpass of all other Municipal Permit in the State by establishing a minimum percentage of Copermittee BMP inventories to be inspected annually, and would provide a reasonable, yet aggressive, program to ensure ongoing maintenance of structural BMPs.

It bears emphasis that a reduction in inspection frequencies from those proposed under the Tentative Order cannot be considered a reduction in water quality protection per se since those benefits have not been demonstrated. Even with lower inspection frequencies more appropriate for a spot inspection program, the

threat of inspection would continue to provide an effective tool to ensure proper maintenance by responsible parties. It is notable that, in addition to the proposed inspection frequencies, a variety of other compliance assurance mechanisms would still be required, including:

• Submittal of proof of a mechanism (i.e., maintenance agreements) prior to permit issuance which will ensure ongoing long-term maintenance of all structural post-construction BMPs,
• BMP verification inspections prior to occupancy of the site,
• Submittal of annual maintenance verification by the responsible party to the Copermittee, and
• Establishment of enforcement mechanisms to ensure compliance.

As a final consideration, the Copermittees' modifications place an appropriate emphasis on the likely cost and staffing impacts associated with the proposed levels of implementation. Although these factors are clearly a necessary consideration in determining practicability, the Fact Sheet / Technical Report provides no such analysis.

Response: When provided with full flexibility under Order No. 2001-01, the vast majority of the Copermittees did not inspect treatment control BMPs for maintenance. To rectify this situation, the Regional Board requested the Copermittees propose a treatment control BMP maintenance inspection program in their Report of Waste Discharge. The Copermittees' proposed that the Tentative Order provide the Copermittees with the option of developing a treatment control BMP maintenance verification program. This proposal lacked any detail indicating that the proposal would be implemented or successful. In response, the Regional Board has crafted a treatment control BMP maintenance inspection program into the Tentative Order. The treatment control BMP maintenance inspection program requirements include specific inspection frequencies for treatment control BMPs of various priority designations. These inspection frequencies were included in the Tentative Order because of the lack of a specific proposal from the Copermittees.

In their comments on the Tentative Order, the Copermittees have now provided a proposal which includes specific inspection frequencies for treatment control BMPs. The Copermittees proposal is reasonable, since it ensures all high priority treatment control BMPs are inspected annually and sets a minimum annual inspection frequency at 20% of approved treatment control BMPs. Inspection of 20% of approved treatment control BMPs is roughly equivalent to inspection of all treatment control BMPs once during the permit cycle, but allows the Copermittees to focus on particular treatment control BMPs, rather than inspecting treatment control BMPs the Copermittees have identified as not needing inspections. It is also appropriate to inspect drainage inserts every other year, due to their need for frequent maintenance and relative likelihood of failure due to lack of maintenance. See section D.1.e.(2)(c) for this modification.

Section: D **Sub-section**: D.1.e.(3)

Commenter(s): San Diego Copermittees, City of Escondido, City of San Diego

Comment: As Tentative Order Section D.1.e.(3) is written, only inspections conducted during the five-month dry season (May through September) could be counted toward the mandated inspection requirements. In their May 15, 2006 response to Copermittee comments (SWU:10-5000.02phammer), RWQCB staff acknowledges that it may be appropriate to inspect lower priority treatment control BMPs during the wet season. A year-round treatment BMP inspection program would increase the program's ability to ensure compliance by maintaining a constant the threat of inspection, especially during the winter when adequate BMP operation is critical. Additionally, by encouraging winter inspections, Copermittees would have greater opportunities for identifying non-compliance and learning maintenance issues. Allowing year-round inspections would also reduce seasonal spikes in staffing needs.

RWQCB staff's May 15 letter also indicated that "the types of BMPs proposed to be inspected during the dry and wet season should be clearly stated" by the Copermittees. This requested detail is unnecessary in evaluating the merits of this proposed modification. It should also be noted that neither the Fact Sheet / Technical Report nor staff's May 15 letter provide a factual basis for the restriction of all BMP inspection work to the dry season.

Response: Inspections of treatment control BMPs during the rainy season can be useful, by providing greater opportunities for identifying non-compliance while the BMPs are in use. The constant threat of inspection can also encourage better maintenance practices. In addition, year-round inspections can reduce seasonal spikes in staffing needs. However, it is critical to ensure that high priority BMPs be maintained prior to the rainy season. High priority BMPs have a higher potential to negatively impact receiving water quality at a greater magnitude if they are not maintained. For these reasons, the Tentative Order has been modified to require only high priority treatment control BMPs to be maintained during the dry season. The Tentative Order has been modified to allow medium and low priority treatment control BMPs to be inspected during the rainy season. See sections D.1.e.(3) and D.1.e.(4) for these modifications.

Section: D **Sub-section**: D.1.g

Commenter(s): Building Industry Association of San Diego County, American Public Works Association

Comment: Our second concern is the lack of a statement in the Draft Order acknowledging that a registered civil engineer must prepare hydrologic calculations and other technical backup for the HMP, for both legal and safety reasons. Civil Engineering includes the studies or activities in connection with fixed works for drainage, flood control, municipal improvements, and purification of water.

Included within this definition is the preparation of designs, plans, and specifications. Moreover, California Business and Professions Code section 6730.2 requires that at least one registered engineer shall be designated the person in responsible charge of professional engineering work for each branch of professional engineering practiced in any department or agency of the state.

There can be no doubt that the specifications in section D.1.g. and the supporting definitions and descriptions in Section C of the permit and the Technical Report constitute the preparation of designs, plans and specifications as those terms are defined by the statute. Continuous simulation of the entire rainfall record to identify a range of rainfall events for which Priority Development Projects post development runoff rates and duration shall not exceed pre-development runoff rates and durations meets the definition of civil engineering. Additionally, the specification of the range of storm events for design and the development of management measures constitutes the preparation of specifications in connection with fixed works of drainage. Management measures that are practicable to implement must consider several anticipated engineering issues that will directly affect the health and safety of the community, such as slope stability, vector control, street design standards, and maintenance procedures. Thus, a licensed professional civil engineer must prepare this work.

Neither the Draft Order, nor the supporting Technical Report identifies which RWQCB staff member is designated the responsible person in charge of the civil engineering supporting section D.1.g. Therefore, it is essential that the Draft Order clearly delegate this responsibility to the Copermittees.

In order to safeguard life, health, property and public welfare, any person, either in a public or private capacity who practices, or offers to practice, civil engineering in this state, including any person employed by the State of California, shall submit evidence that he is qualified to practice, and shall be registered accordingly as a civil engineer. The state legislature had good reason to insure that those who engage in civil engineering are appropriately qualified to engage in the practice. Whenever stream volumes and velocities are modified, there is a potential to affect health, property and public welfare. Improperly detained water could result in public health problems including such diseases as West Nile Virus. If the erosion potential of a stream segment is not properly calculated, it could result in down-gradient flooding. Without the signature of a professional civil engineer responsible for the work, the Draft Order fails to provide the necessary assurances that health, property, and public welfare are

protected. Apparently, this task has been left to the Copermittees. In order to fulfill their legal obligation the Draft Order must provide the Copermittees sufficient time to engage and utilize the services of appropriately qualified registered engineers. Moreover, a professional engineer must sign any final Hydromodification Management Plan produced by the Copermittees to indicate his or her responsibility for the plan.

Response: Since the Copermittees are required to develop the HMP, it is at their discretion who prepares the hydrologic calculations and other technical backup for the HMP.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Carlsbad

Comment: Clarify or remove language stating "utilize continuous simulation of the entire rainfall record." By using the term 'continuous simulation' it would sound that we are talking about computer programs that are fed all rainfall records to identify the range of events. Then the requirement is not to exceed the lower boundary of the range of rainfall events. This seems to indicate that if there are any rainfall events, whether or not any development has taken place, that would exceed the lower boundary of the range, they would be found in violation. Again, to do such 'continuous simulation' and gather the detailed rainfall records makes compliance infeasible and impracticable.

Response: Continuous simulation is used to identify the cumulative amount of time (duration) that various flow rates occur over the entire rainfall record. This information can be used to identify which various flow rates cumulatively exert the most work on channels. From this information, the range of flow rates that should match under pre- and post-project conditions in order to prevent downstream erosion can be identified. For simplification, this range of flow rates to be controlled is often expressed as a "range of rainfall events," such as 0.1Q2 - Q10.

There is no requirement that the lower boundary of the "range of rainfall events" not be exceeded. The requirement is that the cumulative duration of post-project flow rates falling within the "range of rainfall events" match pre-project cumulative durations. Therefore, post-project flow rates can exceed the lower boundary of the "range of rainfall events," but they must match pre-project cumulative durations as long as they fall within the "range of rainfall events.".

Section D.1.g.(1) has been modified to clarify this issue.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Chula Vista

Comment: The underlying geological formations of the coastal regions of the San Diego County are impermeable. Infiltrated water will not flow vertically down through the soil, but will travel under topsoil and along the surface of impermeable layers and will emerge down slope. Any attempt to infiltrate runoff on a large scale could result in the flooding of residences, endanger slope stability, cause settlement of foundations, and lead to premature road and pavement failures.

Response: The hydromodification requirements do not require large scale infiltration. If soil conditions are a concern, other methods, such as detention, can be used to meet the hydromodification requirements.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Chula Vista

Comment: Retention of extra volumes of runoff in retention basins will result in the proliferation of vectors, gophers, and other pests. With the threat of West Nile Virus a reality in Southern California, and in order to comply with the directions from the County Department of Health to minimize stagnant water, retention is not a recommended option.

Response: The hydromodification requirements do not require use of retention. However, retention systems can be maintained to prevent the proliferation of pests. Moreover, detention basins which drain within 72 hours can meet the hydromodification requirements while preventing proliferation of pests.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Chula Vista

Comment: Currently, the City of Chula Vista requires the first developer in each drainage basin to develop master facility and financing plans for wastewater collection systems, drainage systems, etc. It is recommended that development of Hydromodification Plans also be included with these requirements, thus developing Hydromodification Plans as projects are initially proposed and are obtaining their development entitlements, rather than in advance of their need.

Response: Only one Hydromodification Management Plan is required to be developed for the entire area covered by the Tentative Order. This one document is required to include criteria which must be met by all Priority

Development Projects to prevent downstream erosion. Based on results elsewhere in California, it is expected that only one or a few different criteria will need to be developed to adequately address all areas covered by the Tentative Order. Each Priority Development Project will then be required to comply with the applicable criteria included in the Hydromodification Management Plan. However, if a Copermittee wishes to make the first developer in a drainage basin responsible for compliance with the Hydromodification Management Plan for all future development within the drainage basin, that is at the Copermittee's discretion, so long as runoff from each Priority Development Project is managed in compliance with the Hydromodification Management Plan.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Chula Vista

Comment: The City of Chula Vista has reservations over the unknown success rate of the implementation of Hydromodification Plans. Such plans, although developed in other regions of California and other states, have not passed the test of time and, at this stage, are experimental. Such experimental methods should not be mandated throughout a large region such as San Diego County where they could have significant fiscal and physical impacts, with little certainty of success.

Response: Development of the Hydromodification Management Plan for Santa Clara County, upon which the hydromodification requirements of the Tentative Order are based, included extensive field studies, modeling, and calibration in order to be able to accurately predict the performance of the plan's methods and standards. The plan's methods and standards were compared to observed field conditions to exhibit that they are a reliable predictor of stream channel erosion and instability. Moreover, the Santa Clara Hydromodification Management Plan and its methods and standards were peer reviewed by several of the leading academics in the field of fluvial geomorphology. As such, implementation of a Hydromodification Management Plan in compliance with the requirements of the Tentative Order is not an experiment, but is rather the implementation of a well founded methodology. It should also be noted that the Copermittees can observe and learn from progress made in the Bay Area and Los Angeles regions regarding Hydromodification Management Plan implementation.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Chula Vista

Comment: Due to the various natural and human-caused factors impacting stream stability, it is not clear how the success of Hydromodification Plans implementation would be reliably measured.

Response: Methods for evaluating Hydromodification Management Plan success are to be developed as part of the Hydromodification Management Plan. One potential method would be monitoring of change of downstream cross sections.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Encinitas, City of Chula Vista, City of Santee

Comment: The requirement prohibits any increase in runoff volume to be generated by a project. During the workshop, Phil Hammer of the RWQCB indicated that duration of post-development discharge would in fact be allowed to increase above the pre-development duration provided that discharge rates would be maintained at or below a pre-project level.

The Tentative Order requires Copermittees to control peak runoff rates and durations from developments to pre-project levels. The City of Chula Vista's Subdivision Manual includes requirements to control peak runoff rates. However, as a result of this requirement, duration of flows will increase due to the inverse proportionality of flow rates and durations.

The objective of the hydromodification plan, as presented on page 24 of the tentative order is to ensure that "post project discharge rates and durations will not exceed estimated pre-project rates where there is an impact on beneficial uses." Note that with development on a previously vacant property there will be either an increase in discharge rate and/or duration, as there will be an increased flow of water off of the development area. Some runoff may be redirected by infiltration, but this would not be physically possible for 100 percent of the runoff. Therefore either an increase in flow rate or duration would be inevitable. This text needs to be revised to take this into account.

Response: The requirement does not prohibit increases in runoff volume generated by a project. It requires that post-project runoff discharge rates and durations shall not exceed estimated pre-project rates and durations where the increased rates and durations will result in increased potential for erosion. Increased duration of flow is allowable so long as the flow rate during the period of increased duration is not erosive. For example, flow rates below the receiving channel's critical flow rate can be of an extended duration, since they are not erosive.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Santee

Comment: The hydromodification plan will be unevenly applied across the region, as some jurisdictions use concrete channels and some are more intensively developed than others. This places some jurisdictions, such as City, in an unfair economic disadvantage, and will render some smaller properties undevelopable. It will place a massive burden on development within the City, compared to other jurisdictions which are exempt due to their use of concrete channels or more developed status. In addition, we will likely incur increased costs for monitoring the effectiveness of the HMP, compared to jurisdictions which do not have to implement the HMP to such an extent.

Response: The hydromodification requirements should not render smaller properties undevelopable, since smaller properties need correspondingly smaller hydromodification controls. The impact to smaller projects relative to their size should be similar to impacts to larger projects. Compliance with hydromodification requirements should not place a massive burden on development. Site design BMPs can significantly control urban runoff discharge rates and durations, while saving on infrastructure costs and enhancing property values. In addition, treatment control BMPs (required in all jurisdictions regardless of channel status) can serve dual purposes as flow control BMPs, also reducing costs. Regarding monitoring costs, sharing of monitoring costs is at the discretion of the Copermittees.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Santee

Comment: It is the City's opinion that the money would be better spent on implementing improved BMPs prior to the discharge of storm flows into creeks and channels.

Response: The primary purpose of the hydromodification requirements is implementation of BMPs which address runoff rates and durations prior to the discharge of storm flows into creeks and channels. The HMP will develop standards and criteria for how this is to be achieved.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Santee

Comment: Based on a review of the technical basis for this requirement, we consider this to be a mis-application of hydraulic engineering. The requirement looks at channels, creeks and rivers as if they were continuously flowing (like, for example the Colorado River), however many of these features only flow on a seasonal basis. The application of this to a dry bed stream is inappropriate.

Response: Continuous simulation is used to identify the cumulative amount of time (duration) that various flow rates occur over the entire rainfall record. This information can be used to identify which various flow rates cumulatively exert the most work on channels. From this information, the range of flow rates that should match under pre- and post-project conditions in order to prevent downstream erosion can be identified. Time periods when flows are not occurring are not used in the analysis.

Section: D **Sub-section**: D.1.g

Commenter(s): City of Santee

Comment: This requirement has been implemented at other locations in California, has the RWQCB studied the effect of these plans? Has there been a net benefit to water quality? Has a cost-benefit analysis been completed for the development and implementation of hydromodification plans? Has it been shown that it has been worthwhile to implement these hydromodification requirements?

Response: Development of the Hydromodification Management Plan for Santa Clara County, upon which the hydromodification requirements of the Tentative Order are based, included extensive field studies, modeling, and calibration in order to be able to accurately predict the performance of the plan's methods and standards. The plan's methods and standards were compared to observed field conditions to exhibit that they are a reliable predictor of stream channel erosion and instability. Moreover, the Santa Clara Hydromodification Management Plan and its methods and standards were peer reviewed by several of the leading academics in the field of fluvial geomorphology. As such, it is reasonably expected that implementation of the Hydromodification Management Plan will be successful in controlling stream bed and bank erosion and sediment pollutant generation resulting from urban runoff discharges from Priority Development Projects. It should also be noted that the Copermittees can observe and learn from progress made in the Bay Area and Los Angeles regions regarding Hydromodification Management Plan implementation to maximize the plan's benefit.

While a cost-benefit analysis has not been conducted, costs have been considered. It is difficult to estimate the costs incurred by the Copermittees for HMP development because of variable factors such as consultant costs and

number of watersheds to be studied. However, some cost estimates are available that provide a general idea of the approximate cost for HMP development. The consulting firm which developed the Santa Clara HMP estimates that conducting the necessary field work, developing an Erosion Potential ratio standard, developing flow rate and duration control criteria, and writing a supporting technical report would cost approximately $200,000-300,000 for the first watershed studied, and $70,000-100,000 for each watershed studied thereafter. Based on a cursory review of the area covered under the Tentative Order, the consulting firm estimates that the area can possibly be divided into approximately five representative areas or watersheds for study. Such a scenario would result in costs estimated to be $480,000-700,000. Additional costs for converting the technical report into a final HMP would also be incurred, but would be a small fraction of the costs discussed above.

Cost of HMP development in other areas is also useful in estimating potential costs in San Diego County. According to the consulting firm that developed the HMP in Santa Clara County, approximately $1 million was spent on the Santa Clara HMP. However, it is important to note that this was the first HMP developed, and costs included conducting several feasibility analyses and developing the process that was ultimately used. Since it is unlikely that these efforts would need to be repeated, costs should currently be lower than those incurred in Santa Clara County. For example, the same consulting firm reports that it developed a technical report containing the necessary information for an HMP in the Suisun/Fairfield area for approximately $100,000.

Cost estimates associated with implementation of HMP requirements can be found in the Santa Clara County HMP. Costs associated with construction of a regional flow duration control (FDC) basin for a 716-acre residential development (with moderate infiltration rates (0.2 in/hr) and no site design BMP implementation) was estimated to cost approximately $600 per lot, assuming four houses per acre. This cost estimate did not include design, environmental documents, or land costs. However, implementation of site design BMPs can be expected to reduce FDC basin costs, and FDC basins can be located in conjunction with areas such as neighborhood parks.

Costs associated with construction of a FDC basin for a small 12-lot residential subdivision (with low infiltration rates (0.06-0.20 in/hr) and site design BMP implementation) was estimated to cost approximately $5,000 per lot. This cost estimate did not include design, environmental documents, or land costs.

Costs associated with construction of a FDC basin for a 12-acre commercial project (with a high infiltration rate (0.5 in/hr)) was estimated to cost approximately $115,000. This cost estimate did not include design, environmental documents, or land costs.

In addition, the Cost Analysis – Washington Department of Ecology Year 2001 Minimum Requirements for Storm water Management in Western Washington study provides cost estimates for constructing BMPs which meet Western Washington's permanent storm water BMP requirements. Western Washington's permanent storm water BMP requirements are similar to those in the Tentative Order, though oftentimes they are more stringent. For example, BMPs implemented for flow control are often sized to control the 100-year 24-hour storm event. Likewise, Western Washington requires enhanced treatment under certain development situations, which can involve implementation of treatment trains incorporating more than one treatment BMP. Since these requirements exceed those of the Tentative Order, cost estimates from Western Washington likely exceed costs that will be incurred in San Diego County from implementing the Tentative Order's SUSMP and HMP requirements.

Some cost estimates for meeting Western Washington's permanent storm water BMP requirements are as follows: (1) A 10-acre residential development with 5.5 units per acre would spend approximately $181,200 for runoff treatment and flow control (without infiltration), for a total of approximately $3295 per unit; (2) A 1-acre commercial development with 90% impervious cover would spend approximately $273,100 for runoff treatment and flow control (with infiltration); and (3) A 10-acre commercial development with 85% impervious cover would spend approximately $265,800 for runoff treatment and flow control (with infiltration).

The above estimates for Western Washington include cost considerations for materials, construction, permitting fees, and contingencies (25%).

Section: D **Sub-section**: D.1.g

Commenter(s): City of Santee

Comment: What is the basis for this requirement? This is a highly expensive and time-consuming requirement for a benefit that is not defined. Tentative order number R9-2006-0011 relates to the protection and improvement of water quality. How does this requirement to protect channels and creeks directly affect water quality? The RWQCB has not made a clear linkage between erosion of channels and creeks in the watersheds affected by the draft tentative order, a change in water quality and the need for a hydromodification plan.

Response: Urban runoff discharges from development causes urban stream flows have greater peaks and volumes. When flow rates are managed (such as for flood control purposes), greater runoff durations can also result. The greater peak flows, volumes, and durations result in stream degradation through increased erosion of stream beds and banks. This accelerated erosion of stream beds and banks, and the discharge of excessive sediment pollution it causes,

can be a significant cause of water quality degradation. As the Basin Plan states, "Suspended sediment in surface waters can cause harm to aquatic organisms by abrasion of surface membranes, interference with respiration, and sensory perception in aquatic fauna. Suspended sediment can reduce photosynthesis in and survival of aquatic flora by limiting the transmittance of light." Development and implementation of a Hydromodification Management Plan will prevent or reduce stream erosion and sediment pollution generation through the control of urban runoff discharge flow rates and durations from Priority Development Projects.

Section: D **Sub-section**: D.1.g

Commenter(s): Coast Law Group

Comment: The HMP requirement has received a lot of criticism due, in part, to (1) the need to collect data and perform modeling to obtain the numerical parameters needed to calculate the "erosive potential" (Ep) (See Attachment C, page C-3); and (2) the short 24 month time frame to develop the model HMP. Opponents argue that the watersheds of San Diego County are very diverse, and it will require up to three years to develop and implement the HMPs.

A potential means of easing the burden of developing the HMPs and simplifying the Ep parameter determination is to recognize that the dominate factors affecting Ep in San Diego County - the geology and topography - lend themselves to a simple classification scheme.

The geology of the County can be simplified to three types: 1. Jurassic-Cretaceous granites and volcanic rocks; 2. Well-indurated Tertiary sedimentary rocks; and 3. Quaternary sediments.

The topography can be simplified to three slope categories: 1. Steep; 2. Moderate; and 3. Low (Actual percentage slope values can be fine-tuned during the initial study.)

Every reach of every watercourse in the County could be assigned to one of the classes of the geology/topography combinations. The shear stresses and exponent parameters needed to define Ep could then be determined for each of one of the limited number of classes. Thus, relatively few parameter determinations need actually be made, thereby reducing both expense and effort of the Copermittees while at the same time allowing them to comply with the development and implementation schedules proposed in the Order.

Response: It is expected that representative drainages or segments of drainages can be selected and used to develop the standard and criteria to be included in the Hydromodification Management Plan. Data collection and

modeling of each drainage in the County is not required. This is expected to minimize costs and time needed to develop the Hydromodification Management Plan.

Section: D **Sub-section**: D.1.g

Commenter(s): San Diego Copermittees

Comment: The term "amount and timing" may be interpreted to have a different meaning than "discharge rates and durations," which provides a clearer statement of the intent of the HMP.

Response: Section D.1.g of the Tentative Order has been modified to remove the term "amount and timing of runoff" in order to promote consistency of language in the section.

Section: D **Sub-section**: D.1.g

Commenter(s): San Diego Copermittees, City of Escondido, City of San Diego

Comment: Since the intent of this section is to require the development of the range of rainfall events to be controlled so as not to cause increased channel erosion, the Copermittees should not be directed to a specific approach, but instead should be required to evaluate and select the most suitable method for identifying the range of events needed to accomplish the goals of the HMP. The Copermittees have consulted with municipalities at Contra Costa County who participated in the development of their HMP, as well as those retained by the Copermittees, who have both recommended that instead of requiring the use of an Ep standard and creek-specific critical channel flow or Qc (this would be an exhaustive undertaking given the number and variability in our region's streams), the Copermittees should instead be required to utilize a literature review, Technical Advisory Committee (TAC), and other applicable input to develop standards and methodologies that are most suitable for the watersheds, climate, and channel systems within the region. It is also important to note that none of the previous HMP efforts that have relied to varying degrees on an Ep approach have been implemented, so it is premature to conclude that it would be successful, let alone the best approach for the San Diego region.

A thorough analysis of the various hydromodification approaches is needed before selecting a recommend course of action. Specifying the inclusion of or method by which the Ep and Qc standards are developed does not allow the Copermittees to conduct the assessment using all of the potential methods, variables and factors that need to be considered.

Response: While utilization of Ep to develop a channel standard to control downstream erosion is a peer-reviewed, defensible approach which can be applied to San Diego County, the Tentative Order is not intended to prevent the use of other equally valid and protective approaches. For this reason, reference to Ep has been removed from the Tentative Order. However, it is still necessary for the Copermittees to develop a channel standard that will maintain channels' stability conditions. Such a standard is needed in the event that in-stream management measures will be used to control hydromodification for particular Priority Development Projects in lieu of onsite measures. In these cases, onsite control of a range of runoff flow rates will not occur, necessitating use of a channel standard to guide implementation of the in-stream management measures so that the in-stream controls maintain the channel's stability conditions. Ep is one example of a channel standard approach that can be used to maintain channel stability conditions. The Copermittees have discretion to use other equally defensible and protective approaches to development of a channel standard.

Reference to critical channel flow (Qc) has also been removed from the Order, since it connotes the particular approach utilized in Santa Clara County. However, control of the runoff rates which corresponds to the channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks is critical for control of hydromodification impacts. By definition, increased durations of this flow result in increased erosion of receiving channels. Since this flow is generated by relatively small and frequent rainfall events, the cumulative duration over which this flow occurs over the entire rainfall record is greater than for other erosive flows that must be controlled. This extended cumulative duration results in the flow accounting for a significant amount of erosive force exerted on the channel (Santa Clara Valley Urban Runoff Management Program, 2005). Therefore, failure to control the cumulative duration of this flow over the entire rainfall record will result in the channel being exposed to increased erosive force, which will result in increased erosion of channel beds/banks and sediment pollutant generation, in contradiction to the entire purpose of the HMP. For these reasons, control of the runoff rate which corresponds to the channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks continues to be required by the Tentative Order.

The Tentative Order has been further modified to refer to a range of runoff flows, as opposed to a range of rainfall events. The term "range of runoff flows" more accurately reflects what must be controlled to meet the HMP standard requiring control of increased potential for erosion. During rainfall events, runoff flows of various rates occur, including flows that are non-erosive. This variance of flows during rainfall events can lead to uncertainty regarding which flows resulting from the "range of rainfall events" actually need to be controlled. By specifying instead that a "range of runoff flows" must be controlled, this uncertainty is corrected. The specific range of runoff flows which needs to be addressed

should be identified and represented in terms of peak flow rates of rainfall events. This modification does not alter the intent of the Tentative Order. It is still expected that the Copermittees develop criteria such as requiring pre- and post-project runoff flow rates and durations to match from "10% of the pre-project 2-year peak flow up to the pre-project 10-year peak flow." Please see section D.1.g.(1) of the Tentative Order for these modifications.

Section: D **Sub-section**: D.1.g.(1)(a)

Commenter(s): San Diego Copermittees

Comment: Tentative Order sections D.1.g.(1)(a), (c), and (d) use the terms "pre-development" and "post-development." These terms should be replaced with "pre-project" and "post-project" for consistency with the introductory paragraph to section D.1.g, and to clarify that the intent of the hydromodification management plan requirements are to maintain channel characteristics based upon pre-project conditions, not on pre-development or pre-urban conditions.

Response: The Hydromodification Management Plan requirements are meant to maintain channel characteristics based upon pre-project conditions, not pre-urban conditions. Therefore, section D.1.g.(1)(a), D.1.g.(1)(c), and D.1.g.(1)(d) have been modified where applicable.

Section: D **Sub-section**: D.1.g.(1)(b)

Commenter(s): City of Santee

Comment: An erosion potential (Ep) should be maintained “close to 1.” Some channels will naturally be eroding or silting up even if there was no development in their vicinity. Does this requirement to meet a defined Ep take into account these natural processes? Would it be better to identify where those natural processes are occurring and allow them to continue?

Response: Ep is a ratio comparing pre-project conditions with post-project conditions. An Ep ratio "close to 1" will predominantly maintain pre-project conditions post-project. If natural erosion or siltation is occurring pre-project, an Ep ration "close to 1" will result in a continuation of those processes.

Section: D **Sub-section**: D.1.g.(1)(f)

Commenter(s): City of Santee

Comment: On page 24 subsection (f), the Copermittees are directed to include a review of "pertinent literature." What is the objective of this? A literature review may be appropriate for a research project, however it is not appropriate for taxpayers to be required to fund such an open-ended requirement which does not directly impact water quality in the region.

Response: Since the issue of hydromodification is complex and has been worked on extensively by other parties, the Copermittees can benefit from acquainting themselves with previous work that has been conducted. Ineffective and outdated approaches can be excluded, while state of the art approaches can be identified. This will help ensure that the Hydromodification Management Plan approach followed by the Copermittees is an effective one. An effective Hydromodification Management Plan will directly result in reduced channel bed and bank erosion and sediment pollution generation.

Section: D **Sub-section**: D.1.g.(2)

Commenter(s): City of Santee

Comment: What is the technical basis for excluding "non-natural" hardscape materials to avoid adverse impacts on beneficial uses? If a "non-natural" hardscape material is available; its use is consistent with CEQA/NEPA requirements; it does not negatively impact water quality and is aesthetically acceptable; why would it be discounted on the basis that it is "non-natural?" This severely restricts the options available, particularly to provide a prompt response to a problem while permits and funds are sought for more aesthetic options (such as revegetation).

Response: Section D.1.g.(2) allows the Copermittees to include in-stream measures to meet HMP requirements in place of on-site measures. The Tentative Order requires that these in-stream measures to be natural so that they preserve or enhance the natural watershed hydrologic processes and beneficial uses. Use of non-natural hardscape materials like riprap, concrete, and gabions in-stream is not allowed under the Tentative Order to meet the HMP requirements since they can disrupt the natural process and impact beneficial uses. However, the Tentative Order does not preclude the use of these hardscape materials in-stream to meet other type of requirements (i.e. flood control), provided appropriate permits are obtained.

Section: D **Sub-section**: D.1.g.(3)

Commenter(s): City of Encinitas

Comment: The City concurs with the County's comment regarding changing the >70% impervious area exclusion to <30% developable, however, this exclusion should be on a jurisdictional level, not watershed, since the HMP will ultimately be implemented on a jurisdictional level. With the incorporation of the possibility of exclusions from the HMP requirements based on developable land area, include a statement allowing qualified jurisdictions to opt out of HMP development as well as implementation.

Response: The exclusion regarding impervious area is watershed-based because conditions within an entire watershed dictate stream morphology, not just conditions within a watershed's specific jurisdictions. Exclusion of a particular jurisdiction from HMP development can be addressed by the Copermittees themselves, possibly through the Memorandum of Understanding process.

Section: D **Sub-section**: D.1.g.(3)

Commenter(s): City of Encinitas, Carlsbad Watershed Network, Preserve Calavera, City of Santee

Comment: This condition encourages the use of channel lining and discourages restoration of existing lined channels.

Response: The requirement applies to pre-existing conditions of channels. For example, if a channel is already hardened, it does not make sense to require the control of flow rates and durations on-site for erosion purposes, since increased flow rates and durations are not likely to cause erosion of an already hardened channel. The requirement does not encourage channel lining, since channel lining is subject to the 401/404 permitting process, which does not accommodate channel lining for such purposes. Section D.1.g.(3) has been modified to clarify that it applies to pre-existing channel conditions.

In addition, the requirement does not discourage restoration of existing lined channels. If a developer or other party wishes to restore a lined channel, they can incorporate any expected flow rate and duration increases resulting from future development into the restoration design. Taking such an approach would be in compliance with section D.1.g.(2), which would preempt the need for onsite flow rate and duration controls. Rather than be a disincentive for channel restoration, potential avoidance of the need for on-site flow rate and duration control is a channel restoration incentive.

If a channel restoration project cannot accommodate anticipated increased flow rates and durations resulting from future new development, flow rate and duration controls must be implemented on-site of any new development upstream. This is not a disincentive for channel restoration, since such channel

restoration projects are likely to fail if on-site controls are not implemented. A restored channel which cannot accommodate increased flow rates and durations resulting from new development necessitates onsite flow rate and durations controls, whether section D.1.g.(3) exists or not. Since on-site flow rate and duration controls cannot be avoided in such cases, section D.1.g.(3) does not provide a disincentive for this type of channel restoration.

Section: D **Sub-section**: D.1.g.(3)

Commenter(s): San Diego Copermittees, City of San Diego, City of Imperial Beach

Comment: The impervious criteria could potentially require "developed" (i.e., land that is either not susceptible to future development, such as open space parks, and developed areas) to still be required to implement HMP requirements on projects where the impervious criteria is not met. For example, the City's portion of the San Diego River watershed, that has a large amount of pervious open space (Mission Trails Regional Park), would likely not qualify for this exemption, even though the intent of the exemption would be met – the City's developable portion of the watershed is already built out and additional modification of the watersheds creeks/river is not expected with redevelopment. Recommend modifying exemption language to consider a watershed's percent of land area susceptible to future development ("developability") rather than percent imperviousness.

The term "highly impervious (e.g., > 70%)" should be replaced with "highly developed (e.g., <30% of the watershed is susceptible to new development). This better reflects the intent of the Tentative Order. Dedicated permanent open space should not be counted towards a less impervious watershed area if there is no possibility of development of the land. Potential runoff characteristic changes that are likely to cause downstream erosion will occur only when undeveloped land is converted to developed land, therefore, the dedicated open space land should not be considered when determining applicability of HMP requirements in any particular watershed.

It is unclear whether minimum impervious area would apply to the watershed as a whole (i.e., Tijuana River Watershed in its entirety), or only to smaller sub-basins.

Response: The developed or un-developed status of a watershed is not a reliable indicator that the watershed is not susceptible to hydromodification. For example, a watershed or sub-watershed can be 70% developed with low density residential housing with an imperviousness level of 20%. While such development may result in some hydromodification impacts, these impacts might be relatively minor due to the overall watershed low imperviousness of 14%.

However, if the remaining 30% of the watershed were to be heavily developed to 80% imperviousness, the overall watershed imperviousness would rise to 38%, which can be expected to result in significant hydromodification impacts. Conversely, a watershed that has already been developed to an impervious level of 70% can be expected to have existing significant hydromodification impacts which will not be greatly exacerbated by additional imperviousness within the watershed.

Moreover, just because a portion of land within a watershed is preserved and cannot be developed does not mean that the watershed is not susceptible to hydromodification. For example, if the lower 70% of a watershed is preserved with no development, but the upper 30% of the watershed is to be heavily developed, the development in the upper watershed can be expected to result in hydromodification impacts in the lower preserved watershed. For these reasons, imperviousness is more appropriate for use as a threshold for application of the HMP requirements than developed area or "developability" of a watershed. In addition, the 70% imperviousness threshold has precedent; it is included in the San Francisco Bay Area Regional Water Quality Control Board's municipal storm water requirements for Santa Clara County (Order No. R2-2005-0035).

It is also worth noting that redevelopment in already heavily developed areas is not likely to be adversely impacted by the HMP requirements. Post-project flow conditions must only meet pre-project conditions; if the redevelopment does not increase imperviousness or soil compaction levels on site, it is likely that this requirement will be relatively easy to achieve.

When assessing the applicability of the HMP requirements to individual projects, it is important to consider cumulative impacts. While one project may not cause a significant hydromodification impact on a relatively large creek, the cumulative impact of many projects can be significant. Therefore, care must be taken in applying exemptions to the HMP requirements. Significant cumulative impacts are not likely to occur in watersheds or sub-watersheds that are greater than 70% impervious due to the already impacted nature of the watersheds; on the other hand, significant cumulative impacts in watersheds or sub-watersheds that are only 30% developable are a distinct possibility, since it is possible for these watersheds to be largely non-impacted.

Finally, the 70% imperviousness threshold does not need to be applied by calculating levels of imperviousness over entire large watersheds, where the upper portion of the watershed is not developed or relevant to hydromodification conditions in the lower developed portions of the watershed. The 70% imperviousness threshold should be applied to sub-watersheds that will be directly affected by the Priority Development Project's discharge. Sub-watersheds that will be directly affected by the Priority Development Project's discharge are those sub-watersheds below the project's points of discharge. Section D.1.g.(3) has been modified to clarify this issue.

Section: D **Sub-section**: D.1.g.(4)

Commenter(s): City of Santee

Comment: Page 25, reference to J.1.4. Does not exist. Do you mean J.4.b? If so, change.

Response: The correct reference is section J.4. The Order has been changed to make this correction.

Section: D **Sub-section**: D.1.g.(5)

Commenter(s): City of Carlsbad

Comment: Amend the language to ensure the 180 day requirement for adoption and implementation is not conflicting with any other State agencies' review process timelines. For those jurisdictions that are under Coastal Commission jurisdiction, this requirement for 180 day adoption and implementation is not possible. In the City of Carlsbad, the SUSMP was specifically included in the adoption of the local coastal program approved by the Coastal Commission. Processing this change through Coastal Commission took over two years. Therefore, the assumption that this can be done in 180 days is unrealistic because of the impacts of state and federal agencies and their requirements.

Response: The timeline for development and implementation of the Hydromodification Management Plan is similar to timelines previously used under Order No. 2001-01 for the JURMPs, WURMPs, and Model SUSMP. It is incumbent upon the Copermittees to work with other agencies to obtain any necessary approvals. The three year timeline for the development of the Hydromodification Management Plan provides ample time to coordinate with the Coastal Commission and other agencies.

Section: D **Sub-section**: D.1.g.(6)

Commenter(s): American Public Works Association, Building Industry Association of San Diego County

Comment: We recognize that ongoing development in San Diego County has the potential to impact streams through hydromodification. We agree that it is important that the HMP be developed and implemented as soon as prudently possible to provide protection for the streams. However, the draft permit addresses this concern by including language in Section D. 1 .g.(6), Interim

Standards for Projects Disturbing 50 Acres or More, which addresses ongoing development. We suggest, however, that this time period be extended to eighteen months after approval of the Draft Order in order to allow sufficient time to adequately prepare for the implementation of this requirement. We believe that this is the minimum time required by the Copermittees to jointly develop a consistent set of minimum Interim Standards for the HMP and to implement the regulatory framework necessary to make the standards enforceable.

Response: The Copermittees have not objected to the Tentative Order's timeline for development of interim hydromodification criteria (originally one year after adoption). Since the Copermittees appear to be in agreement that the timeline is achievable for them, the timeline has not been extended.

Section: D **Sub-section**: D.1.g.(6)

Commenter(s): San Diego Copermittees, City of San Diego

Comment: The interim standards requirements under Tentative Order section D.1.g.(6) should be revised to require project applicants to identify the range of rainfall events to control from their project site to prevent downstream erosion (hydromodification). These changes also include criteria that would relieve a project of the HMP requirements. It is necessary to explicitly describe the conditions where a project should not be required to meet the Interim HMP standards. Several of the criteria are derived from the HMP exclusions already contained in the Tentative Order.

Response: The interim criteria requirements (section D.1.g.(6)) have been modified to require the Copermittees to identify a range of flow rates which must be controlled by Priority Development Projects to prevent downstream erosion. Based on the use of this approach in other areas (such as the San Francisco Bay Area and Western Washington), it is expected to be an effective approach on an interim basis. In addition, it has been clarified which projects may be exempt from the interim criteria. The exemptions match the exemptions for the principal hydromodification requirements. Please see section D.1.g.(6) for these modifications.

Section: D **Sub-section**: D.2

Commenter(s): Building Industry Association of San Diego, American Public Works Association

Comment: We suggest that the following language be inserted into the permit concerning the development of a set of construction BMPs, including Advanced Treatment in lieu of the current mandates in Section D.2.c. of the Draft Order.

Within 365 days of adoption of this Order, the Copermittees shall collectively develop a minimum set of BMPs and other effective measures to be implemented at construction sites ('Standard Construction Site Mitigation Practices" or "SCSMPs") utilizing authoritative sources including, but not limited to, those requirements set forth in section D.2.c.(l) of this order. Within 180 days of approval of the SCSMPs in a public process by the SDRWQCB, each Copermittee shall adopt its own local SCSMPs, and amend its ordinances consistent with the approved SCSMPs, and shall submit both its SCSMPs and ordinances to the SDRWQCB.

This revision would improve the permit both technically and legally. It would provide for a standard set of construction site practices across the County, thereby providing the consistency necessary for the development of effective WURMPs and RURMPs. The revision would correct many of the legal difficulties arising out of the current language. It would allow the Copermittees to use their limited resources and collective expertise gained during the last permit cycle to develop a state of the art set of construction site practices that are protective of the environment, feasible, and legally defensible.

The Draft Order requires that "each Copermittee shall designate a minimum set of effective BMPs and other effective measures to be implemented at construction sites," including Advanced Treatment. See Section D.2 .c.(l) page 27. This mandate creates significant challenges and opportunities for the Copermittees. Technically, the designation of a minimum set of effective BMPs requires professional expertise in areas that may not be available to each individual Copermittee including, but not limited to, engineers, chemists, geologists, and biologists. Legally, in order to make the use of a minimum set of effective BMPs enforceable against construction sites within their jurisdictions, Copermittees will need to give the general public adequate notice and opportunity to comment. Finally, in order to coordinate their efforts on a watershed and regional basis, as required by the Draft Order, it is important that the minimum set of effective BMPs be consistent across all jurisdictions.

Order No. 2001-01 presented the Copermittees with a similar challenge in the development of a Model SUSMP. Under that Order, the Copermittees were required to develop collectively a model SUSMP within 365 days of the adoption of the Order. The Copermittees were then granted a further 180 days after approval of the model SUSMP by the SDRWQCB, through a public hearing process, to adopt local SUSMPs and amend their ordinances consistent with the approved model SUSMP.

This process proved to be both effective and efficient. The Copermittees developed a model SUSMP together, pooling their technical expertise and resources. The final product met with the approval of the SDRWQCB and, with few exceptions, has been implemented as written by the Copermittees. We

believe that a similar process could be applied to the development and implementation of a minimum set of effective BMPs, including Advanced Treatment BMPs for use at construction sites. We suggest that the following language be inserted into the permit concerning the development of a set of construction BMPs, including Advanced Treatment in lieu of the current mandates in Section D.2.c. of the Draft Order.

Within 365 days of adoption of this Order, the Copermittees shall collectively develop a minimum set of BMPs and other effective measures to be implemented at construction sites ('Standard Construction Site Mitigation Practices" or "SCSMPs") utilizing authoritative sources including, but not limited to, those requirements set forth in section D.2.c.(l) of this order. Within 180 days of approval of the SCSMPs in a public process by the SDRWQCB, each Copermittee shall adopt its own local SCSMPs, and amend its ordinances consistent with the approved SCSMPs, and shall submit both its SCSMPs and ordinances to the SDRWQCB.

This revision would improve the permit both technically and legally. It would provide for a standard set of construction site practices across the County, thereby providing the consistency necessary for the development of effective WURMPs and RURMPs. The revision would correct many of the legal difficulties arising out of the current language. It would allow the Copermittees to use their limited resources and collective expertise gained during the last permit cycle to develop a state of the art set of construction site practices that are protective of the environment, feasible, and legally defensible.

Response: The previous Order No. 2001-01 required that each Copermittee designate a set of minimum BMPs to be implemented at construction sites without implementing a Standard Construction Site Mitigation Practices (SCSMP). The Copermittees complied with this requirement through their JURMP approval process without encountering technical and legal difficulties that could not be overcome. The current draft Order's requirement is similar to the previous Order in that it does not require the suggested Standard Construction Site Mitigation Practices. All of the BMPs required in the draft Order are already included in the Copermittee's minimum set of BMPs designated under Order No. 2001-01 with the exception of advanced treatment. The advanced treatment requirement is determined on a site by site basis considering highly variable factors such as soil types, location, and receiving water quality that effectively complicates the implementation on a set standard throughout the county. Although some jurisdictions may hypothetically prefer to mandate the construction BMP requirements to their neighboring cities, we feel it important to keep flexibility and independence in the BMP requirements in order that each Copermittee can designate the minimum set of BMPs in accordance with their grading ordinances, planning and approval process, construction activity, receiving water quality, geology and climate.

Section: D **Sub-section**: D.2.a.(2)(b)

Commenter(s): City of Carlsbad

Comment: Begin the sentence with the words 'Unless otherwise prohibited by law'. According to the State Subdivision Map Act, when a project is conditioned for approval, it can only be conditioned for requirements that are valid at the time of approval. Once a project has been designed and grading plans have been signed, there may be a time period in which the new order, and/or grading ordinance, takes effect. Copermittees may not be able to legally require the contractor to comply with those new conditions that did not exist at the time of project approval.

Response: The draft Order's requirement of a storm water management plan is repeated from the current Order No. 2001-01 requirement that project proponents develop and implement a storm water management plan to manage storm water and non-storm water discharges from the site at all times. Following the previous five years of requiring storm water management plans, a conflict with the State Subdivision Map Act and the requirement for a storm water management plan does not exist. .

Section: D **Sub-section**: D.2.b

Commenter(s): City of San Diego, San Diego Copermittees

Comment: The City should maintain the autonomy to manage it's databases in the most efficient manner possible. If a watershed based inventory was intended to be a tool used by the City, recommend deleting this section entirely and allowing Copermittees the flexibility to use database management tools/methods of choice.

The draft Order and Fact Sheet appears to confuse the "snapshot" inventories that are produced to comply with the Order and the databases that are used to produce those "snapshots." Producing "snapshots" of this or other large databases on a monthly rather than annual basis would be excessive since that "snapshot" plays little, if any, role in the assigning or managing inspection workload. Rather, that is a function of the database itself and other reports that are generated from it. So long as Copermittees regularly update their databases, and this information is used to accurately schedule and track storm water inspections, the Copermittees are meeting their compliance obligations. It should be no concern of RWQCB staff how often the "snapshots" are produced.

Response: The construction component of the Draft Order requires that each Copermittee maintain and update monthly a watershed based inventory of all

construction sites within its jurisdiction. A watershed based inventory is important in tracking construction sites contributing pollutants to an impaired waterbody; in particular sediment impaired waterbodies. The Copermittees will then be better equipped to manage their construction sites in a more efficient manner by identifying those construction sites requiring more attention, as needed to prevent further degradation of water quality in those impaired waterbodies.

The second comment appears to confuse the "monthly update" of inventories with "reporting" those inventories to the Regional Board. Nowhere in the draft Order does it require the Copermittees to produce a "snapshot" of their construction site inventories. The frequency of construction site inventories most certainly is a concern of the Regional Board, because regular updates of the Copermittee's construction inventory ensures that the Copermittee knows what construction activity is occurring within their jurisdiction that may be contributing pollutants to their MS4. Without regularly updating their inventories, the Copermittees will not know the presence of construction sites in their jurisdiction to conduct education, inspections and other measures to protect water quality. Updating their inventories continuously or at a frequency greater than one month meets this requirement.

Section: D **Sub-section**: D.2.c.(1)

Commenter(s): San Diego Copermittees

Comment: BMP implementation requirements are categorized by sub-heading for increased clarity.

Response: The draft Order has been modified to have subheadings for the BMPs as the commenter has requested.

Section: D **Sub-section**: D.2.c.(1)

Commenter(s): San Diego Copermittees, City of San Diego, City of Imperial Beach

Comment: Pollution prevention requirements have been moved from a separate section into the BMP requirements. In doing so, the phrase "where appropriate" has been omitted. The list is extensive and not all items would be applicable to all sites. The list would be more beneficial if presented as a suite of BMPs to consider as they are applicable to each individual project rather than a mandatory minimum. Additionally, construction BMPs are dynamic and change as construction progresses. This method does not seem to have the flexibility

that is necessary for construction. Recommend modifying second sentence to: "The designated minimum set of BMPs to be considered shall include:"

Response: BMPs can be designated for implementation at construction sites according to specific activities or conditions found at construction sites. For example, all construction sites conducting a particular activity can be required to implement the BMPs designated for that activity. As such, modification of the Tentative Order's language is not necessary. However, the requirement for pollution prevention BMPs has been modified to clarify that the requirements for their designation and implementation has not changed. Please see section D.2.c.1.(a)(i) of the Tentative Order for this modification.

Section: D **Sub-section**: D.2.c.(1)d

Commenter(s): City of San Diego, San Diego Copermittees

Comment: The Copermittees do not object to the proposed modification for erosion prevention, but have determined that the existing language regarding sediment control should be modified to remove the restriction. This change would provide recognition that sediment controls must be used exclusively in some cases. The suggested modifications to the draft permit language would retain the existing emphasis on the role of sediment control as a supplement to erosion prevention.

Response: We agree and have modified the draft Order's BMP requirements for sediment controls as requested.

Section: D **Sub-section**: D.2.c.(1)(j)

Commenter(s): American Public Works Association, Construction Industry Coalition on Water Quality, Building Industry Association of San Diego County, Pardee Homes, Project Design Consultants

Comment: The maximum disturbed area that the Copermittees allow needs to provide flexibility for larger grading projects to avoid unintended negative consequences to infrastructure and water quality. On larger projects, limiting the disturbance area to an arbitrarily low acreage will force other infrastructure elements (waterlines, sewer lines, drainage lines, dry utilities, roads, etc.) to compromise their design and construction standards. This in turn may lead to unforeseen consequences, which could have even greater impacts on water quality such as improperly functioning drainage systems, and additional sanitary sewage pump stations, which are prone to overflows.

Grading is but one element of many interrelated elements on a large land development project. Limiting the amount of grading area will force compromises in the proper design of the other elements of a land development project, potentially compromising the health and safety of the citizens in the community. In addition, limiting the size of a grading operation to an arbitrary acreage will increase the time a site is exposed to rain events, thereby increasing the number of storm events to which the disturbed areas are exposed. Extending the time it takes to complete the grading phase of a project increases the probability that an exposed area will be subject to a rain event, thereby increasing the risk to water quality.

As an alternative to limiting (phasing) the amount of exposed area during grading operations, it is more effective to require implementation of a phased finished-grading erosion control plan. This is the basis for the Caltrans Standard Specification section referenced. It limits grading operation to seventeen acres "before either temporary or permanent erosion control measures are accomplished". If we agree that Best Management Practices such as slope blankets, hydro seed, and bonded fiber matrix are effective erosion control measures, then the immediate implementation of erosion controls is the key ingredient in a grading operation, and not the limitation of grading area. Therefore, an immediate, concurrent erosion control implementation plan is more effective than limiting grading area.

Response: Although Caltrans has a phased grading limitation of 17 acres, the Tentative Order does not specify the acreage limitation. The reference to the Caltrans requirement shows that phased grading based on a maximum disturbed area has been successfully implemented by competent designers, engineers and grading contractors in large scale projects. Flexibility is provided in the phased grading requirement in two ways: First, the maximum disturbed area to be graded is determined by the Copermittee and second; the Copermittee has the option of temporarily increasing the disturbed soil area if the individual site is in compliance with applicable storm water regulations and the site has adequate control practices implemented to prevent storm water pollution. The phased grading limitation is not a limitation on constructing the infrastructure elements of a site. The implied unforeseen consequences of additional sewage lift stations and improperly functioning drainage systems may only occur when a site is poorly engineered and if a limitation was placed on the construction of such facilities which this Tentative Order does not do. Although the time it takes to complete the grading phase of a project increases the probability that an exposed area will be subject to a rain event, the phased grading requirement also increases the probability the exposed area will be of a smaller and more manageable size to adequately implement erosion and sediment controls prior to the rain storm, thereby decreasing the probability of a discharge of pollutants to the MS4 which would have a negative impact on the surface water quality.

As recommended, the Tentative Order's requirement for phased grading has been revised to be like the phased finished-grading requirement referenced in the Caltrans Standard Specification. The recommendation that exceptions be made for various construction activities seems to imply that those activities are grading which they are not and therefore not subject to the maximum disturbed area limitation for grading; thus an exception is not needed. The Copermittee's are free to place disturbed area limitations on other phases of construction other than grading but that is not a requirement of this Tentative Order. The recommendation that the setting of a grading limit be referred back to the Copermittees for their consideration is exactly what the current Tentative Order requires since the Copermittee determines the size of the maximum disturbed area for a grading limitation. As indicated in the fact sheet, phased grading was required under the previous Order but not implemented; nor did the Copermittees develop a consensus on phased grading requirements.

Section: D **Sub-section**: D.2.c.(1)(k)

Commenter(s): City of Encinitas, City of San Diego, San Diego Copermittees, American Public Works Association, Building Industry Association of San Diego, Pardee Homes, Project Design Consultants.

Comment: The City must have the ability to determine when advanced treatment is necessary and should not be put in the position of requiring advanced treatment on all high priority sites. Consideration of the site-specific conditions and a myriad of other factors must be made to select the most appropriate BMP for use in a given situation. The first requires its use downstream of all active slopes that have not been stabilized prior to a rain event. Most, if not all, construction sites in San Diego County are located within a watershed tributary to a 303(d) impaired water body for silt and sediment. The costs effectively prohibit the cities from requiring this type of BMP on all high priority sites.

Advanced treatment is removed as a BMP requirement and moved to its own section to emphasize that this control should be used only under special circumstances.

The Draft Order creates a mandated monopoly in favor of a single supplier. California Water Code section 13360 provides that "no waste discharge requirement or other order of a regional board . . . shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner." By mandating a specific patented technology, the Draft Order violates the mandates of Water Code section 13360. Neither the Draft Order nor the Technical Report provide any support for the proposition that the use of polymers and other additives have been demonstrated to be environmentally safe.

This portion of the permit should be modified, sending the discussion of when Advanced Treatment is necessary back to the Copermittees for their consideration. The Copermittees could then incorporate Advanced Treatment requirements into their grading ordinances and construction processes in a manner suitable for each jurisdiction and watershed. In certain situations, it may be infeasible to provide Advanced Treatment at a runoff location at a construction site due to access. Availability of devices at the numerous runoff locations and potential discharges of pollutants from the Advanced Treatment devices themselves (i.e. flocculants) is another reason the use of these devices should be limited.

Response: The draft Order provides the Copermittee with flexibility to determine when advanced treatment BMPs are necessary by considering site-specific conditions and other factors. The draft Order does not require that Copermittees designate the use of advanced treatment at all high priority sites. The draft Order does not specify that advanced treatment BMPs be implemented at all construction sites tributary to a 303(d) impaired water body for silt and sediment. Sensitivity to receiving water bodies and proximity to receiving water bodies are two of the eight factors for Copermittees to consider in addition to soil erosion potential, site's slopes and ineffectiveness of BMPs. Although the draft Order does not require the use of advanced treatment BMPs downstream of all active slopes, the slope stabilization requirement on all active slopes during rain events regardless of the season has been modified due to the comments confusing the requirement as requiring advanced treatment BMPs downstream of all active slopes. In addition, the Tentative Order has been modified to clarify that advanced treatment is not required at all high priority construction sites, but rather is required for exceptional cases, as determined by the Copermittee.

The advanced treatment section has been moved to its own section at the Copermittee's request. This editorial change of moving the text of the advanced treatment requirement will not have a detrimental effect on water quality.

The Draft Order does not create a monopoly for any one product, because the Draft Order does not require that a specific advanced treatment BMP is used. The decision on what specific advanced treatment BMP is used is left up to the construction site operator or the Copermittee. In Section A.1, the Draft Order does prohibit discharges into and from the MS4 in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in waters of the state. If a discharger chooses to use a chemical additive that could cause a condition of pollution, contamination or nuisance in waters of the state, the discharger would have to ensure that adequate filtration is implemented to prevent that chemical additive from discharging in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in waters of the state. No part of the advanced treatment requirements allows a construction site to pollute waters of the state.

The advanced treatment requirements do send the discussion of advanced treatment to the Copermittees. Since the Copermittee considers the factors in evaluating the threat to water quality, the requirement provides enough flexibility for the Copermittee to incorporate this requirement into their grading ordinances and construction processes suitable for their jurisdiction and watershed. Allowing the Copermittees to determine the threat to water quality based on the eight factors, rather than the draft Order specifically specifying the threat to water quality, allows the Copermittee the advanced treatment implementation discretion when it may be difficult due to multiple discharge points and cost considerations.

Section: D **Sub-section**: D.2.d

Commenter(s): City of San Diego

Comment: The construction site inspection frequency should be reduced for construction sites that are inactive for more than 7 days.

Response: Like the previous Order, the draft Order does not distinguish a separate inspection frequency for inactive construction sites. Inactive construction sites continue to pose a threat to water quality in exposed areas and materials. BMPs continue to need maintenance and implementation to protect water quality even when the construction site is inactive. In addition, some construction sites suspend activities during prolonged periods of wet weather and inspections will be very important at that time to verify effective BMP implementation and maintenance. In addition, an inspection of an inactive site should take less time to conduct than an inspection of an active site; therefore requiring less staff time.

Section: D **Sub-section**: D.2.d

Commenter(s): San Diego Copermittees

Comment: These requirements are modified to clarify that 1-acre inspection thresholds refer to disturbed soil only. This is consistent with the recommendations of the Copermittees' Report of Waste Discharge and the County's November 2005 draft permit language. It is important that these thresholds be tracked as disturbed acreage rather than site size because that is the threshold for coverage under the Statewide General Construction Permit. Deviations from that value would unnecessarily require the Copermittees to track two separate thresholds, one for verifying Construction Permit coverage, and one for determining their own inspection frequencies.

Response: The Regional Board's intent is that the 1 acreage threshold refers to the disturbed soil acreage. The draft Order's definition of a construction site has been modified to clarify that the acreage thresholds are for disturbed acreage and not the total lot size.

Section: D **Sub-section**: D.2.d.6.f

Commenter(s): San Diego Copermittees, City of Imperial Beach, San Diego Unified Port District

Comment: The Tentative Order requires the "creation of a written record" for each inspection conducted. The requirement should be modified to require "documentation" rather than a written record per se. So long as the Copermittees meet their obligations to conduct site inspections and report the results of those inspections as necessary to meet the requirements of the Order, the specification of particular methods of documentation is unnecessary. It is the City's understanding that written documentation logged into an electronic tracking database immediately following an inspection would satisfy this requirement. If the requirement is to document each inspection on a hard copy "field sheet", the City would argue that this contributes to the creation and maintenance of unnecessary paperwork. Clarify the Draft Permit text so that electronic documentation of inspection information would be acceptable.

Response: Inspections are an effective way to identify a variety of problems at a construction site for correction to improve water quality. As such, inspection requirements are a staple of storm water permits and required in all current Regional Board MS4 permits. The creation of a written record is an opportunity for the Copermittee to create a defensible, reproducible record that the inspections were conducted as required by the draft Order and that the inspections were conducted adequately to protect water quality. The creation of the written record also provides the Regional Board the opportunity to effectively review compliance with the draft Order's required inspection frequency and ensure that the Copermittee's inspection methods are adequate to protect water quality. The requirement has been revised to avoid confusion in this regard. We agree that electronic storage of the written record would be adequate to comply with this requirement, provided that the findings of any individual inspection can be produced separately to demonstrate permit compliance.

Section: D **Sub-section**: D.2.e

Commenter(s): City of San Diego

Comment: There are potential legal ramifications of taking "immediate" action (e.g., wrongful issuance). This City initiates its process immediately, but the

actual stop work issuance must occur after reviewing the site's history. The City first considers the notices issued to date for the site, historical cooperation of the contractor, and any other extenuating circumstances. Final decision is made with management to ensure the appropriateness of the decision. If there is an actual discharge, it is documented and referred to Storm Water Code Compliance for issuance of a NOV and a potential fine. Our process has been effective to date. Recommend striking or clarifying "immediate."

Response: The same legal ramifications for taking "immediate" actions exist for taking "non-immediate" actions (e.g., wrongful issuance). The major difference is that an immediate enforcement action will impel the construction site operator to more quickly correct the storm water violations. Regarding the issuance of stop work orders, the draft Order does not specify what types of enforcement actions that inspectors are to issue. The draft Order does say that the enforcement actions be issued when appropriate and necessary. The draft Order allows enough flexibility for the Copermittee's unique storm water programs and enforcement process.

Section: D **Sub-section**: D.2.f

Commenter(s): City of Encinitas

Comment: The notification requirement for high level enforcement actions taken at construction sites should be clarified for only enforcement actions resulting from storm water violations.

Response: The Regional Board agrees with the comment and has modified the draft Order.

Section: D **Sub-section**: D.3.a.(1)

Commenter(s): San Diego Copermittees

Comment: Section D.3.a(1) (page 30): "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. . . ." The use of the term potentially is speculative and subjective and can lead to arbitrary enforcement.

Response: The draft Order continues to use the term "potentially generated" because for some pollutants, a site may not generate that pollutant when implementing proper pollution prevention BMPs. When those pollution prevention BMPs have not been implemented properly, the pollutant is generated and other BMPs are needed to prevent that pollutant from threatening water quality. In order for the Copermittees to effectively designate BMPs and inspect

their facilities, the Copermittees need to know what pollutants may potentially be generated from the facility or activity.

Section: D **Sub-section**: D.3.a.(3)(a)

Commenter(s): Coast Law Group

Comment: The Bay Council generally agrees with the requirements of Order. Given that we are 16 years into the Phase I storm water permit program and have yet to achieve meaningful reductions in storm water pollution discharges, the minimum MS4 maintenance standards are appropriate. Assessment of impacts to water quality in receiving waters should be detailed in annual JURMP reports, and the requirement reconsidered when the MS4 permit term expires in 2011.

Response: The minimum MS4 maintenance standards will improve the accountability and enforceability of the tentative Order while preserving and enhancing water quality. As detailed in the Regional Board's preliminary response to comments, under the previous Order without the minimum standards, MS4 maintenance was irregular and infrequent. A regular schedule of inspection and then cleaning if needed is essential to protecting water quality from urban runoff discharges. As stated by the USEPA, "The removal of sediment, decaying debris and highly polluted water from catch basins has aesthetic and water quality benefits, including reducing foul odors, reducing suspended solids, and reducing the load of oxygen-demanding substances that reach receiving waters." and "Catch basin cleaning is an efficient and cost-effective method for preventing the transport of sediment and pollutants to receiving water bodies." [USEPA, 1999C]

Section: D **Sub-section**: D.3.a.(3)(b)

Commenter(s): San Diego Copermittees

Comment: As worded, the Tentative Order implies that accumulated waste can be immediately cleaned in all instances. The Copermittees' modified language provides a more reasonable standard for conducting cleaning in response to inspection results by clarifying that practical considerations must be a part of scheduling this work. It requires that facilities be cleaned "in a timely manner, and as early as reasonably possible, considering all relevant factors (the need for environmental permits and clearances, traffic interruption, worker safety, availability of equipment, etc.)."

Response: In some cases, MS4 facilities cannot be cleaned immediately upon identification of accumulated trash and debris. The Tentative Order has been

modified to allow more flexibility for the Copermittees to clean catch basins and inlets in a timely manner.

Section: D **Sub-section**: D.3.a.(3)(b)

Commenter(s): San Diego Copermittees

Comment: The accumulation of any visible waste is not a reasonable criterion for triggering cleaning unless such accumulation is likely to result in discharges from those devices. Many devices are designed to function effectively with some accumulation of waste. The Copermittees' recommend that catch basins, inlets, and open channels be cleaned when at 40% of their design capacity. Although conservative, this standard is consistent with other adopted permits in southern California , and conforms to the standard recommended in the CASQA Municipal BMP Handbook.

Response: The draft Order has been changed to require that catch basins and inlets be cleaned when debris and trash accumulates to 33% or greater of the facility's design capacity. Although the CASQA handbook specifies cleaning at 40% of the design capacity, the 33% capacity requirement is based on recommendation of the USEPA [USEPA, 1999C]. The draft Order requires that Copermittees remove any accumulated trash and debris collected in facilities designed to be self cleaning. Self cleaning facilities are designed not to accumulate trash and debris during rain events; therefore any trash and debris present in those facilities can reasonably be expected to be discharged from the MS4 system. Open channels are required to be cleaned of any observed anthropogenic litter. In some open channels, silt and debris may support beneficial uses for those waterbodies. In addition, the design capacity of an open channel may be difficult to estimate. The draft Order does not waive any other local, state, or federal requirements that may be needed for a Copermittee to maintain open channels in the manner that the Copermittee wishes.

Section: D **Sub-section**: D.3.a.(3)(b)

Commenter(s): San Diego Copermittees, City of San Diego, City of Chula Vista, City of Escondido, City of Santee

Comment: While it may be reasonable to establish an annual inspection frequency as a default, Copermittees should retain the discretion to establish other less stringent schedules that they can demonstrate to be appropriate (e.g., based on experience, observation data, or other appropriate factors). The Copermittees already have considerable experience prior to and during this permit cycle in inspecting and prioritizing maintenance of their storm drain systems. Existing inspection schedules, which are already prioritized, reflect that

knowledge. While improvements to existing programs can likely be made, Copermittee experience and expertise should not be wholly supplanted by "one size fits all" minimum frequencies, especially where that experience has shown annual inspections not to be needed. The Tentative Order, as currently worded, would in many cases force Copermittee cleaning efforts away from critical areas into those with little or no material to remove, thereby reducing the effectiveness of program efforts.

The inspection and cleaning frequencies proposed by the Copermittees follow the general approach recommended in the California Storm water Quality Association (CASQA) Municipal BMP Handbook and numerous adopted NPDES Permits across the state by directing resources and effort to higher priority areas. The approach also allows for reduction in inspections in the lowest priority areas where data demonstrates inspection and cleaning is not necessary on an annual basis.

Response: The draft Order has been changed to require more frequent inspection and cleaning for MS4 facilities that accumulate a high volume of trash and debris and less inspections for other MS4 facilities. This change will give the Copermittees the flexibility in managing and maintaining their MS4. Although the Copermittees have proposed cleaning basins filled to 40% capacity, the draft Order requires cleaning when a facility is up to 33% of capacity as suggested by the USEPA [USEPA, 1999C] The annual inspection and cleaning of high priority MS4 facilities is a minimum and a Copermittee can clean MS4 facilities more frequently than annually if they so choose. Some facilities may not need inspection and cleaning every year and the Copermittee may choose to inspect some facilities less than annually if they have historically documented that cleaning is not needed on an annually basis. Copermittees may use knowledge gained from years prior to the draft Order in determining which MS4 facilities receive high volumes of trash and debris and which MS4 facilities require cleaning less than annually.

Section: D **Sub-section**: D.3.a.(3)(b)i

Commenter(s): City of Santee, City of San Diego, San Diego Copermittees,

Comment: The May – Sep time frame is in conflict with other environmental regulatory requirements that prohibit activities during the summer breeding season within environmentally sensitive lands. Some cleaning may not be possible due to the need for environmental permits/clearances. The 5-month window would also cause inefficient seasonal peaks in staffing needs. Rather than assuming that all inspection and cleaning work can and should be conducted within a five-month window, the Order should require Copermittees to distribute their efforts over the portions of the year that they determine most appropriate. It is unreasonable to require that inspection and cleaning work be

completed between May and September for all facilities. Nor is it always best for water quality protection, as some portions of the storm drain system require maintenance during the winter months. Additionally, it makes sense to inspect for problems during the rainy season when problems will be most evident.

Response: The draft Order has been modified in two ways to address any potential problems from limiting MS4 inspection and cleaning. The MS4 cleaning and inspection requirement will not apply to portions of the MS4 where the cleaning activity is covered by a separate permit, such as the Army Corps of Engineers Regional General Permit No. 53 for flood control maintenance activities. The draft Order also was changed so that only MS4 facilities that receive or accumulate a high volume of trash are required to be inspected and cleaned at least once between May 1 to Sept. 30. Other MS4 facilities can be inspected throughout the year. This change will prevent problems arising with the previous language where Copermittees would require a temporary seasonal staff to inspect and clean MS4 facilities between May 1 and September 30.

Section: D **Sub-section**: D.3.a.(3)(b)ii

Commenter(s): City of Chula Vista

Comment: Clarification of open channel inspection and maintenance requirements is needed. Please provide specificity in maintenance requirements and restrictions for various open channel types, including concrete and unlined channels.

Response: The draft Order requires that open channels be cleaned of anthropogenic litter in a timely manner. The draft Order's open channel maintenance requirement does not provide an waive the requirement for any other local, state, or federal permits that may be required to conduct the maintenance that a Copermittee feels is needed.

Section: D **Sub-section**: D.3.a.(5)

Commenter(s): San Diego Copermittees, City of Escondido, City of Santee, City of San Diego, Caltrans

Comment: Street sweeping priorities should be modified to include only curbed and guttered roads, streets, highways, and parking facilities. This eliminates the need for a separate provision to decrease frequency based on average daily traffic or other factors, and brings this requirement into conformance with each of the six other permits in the state containing prescriptive sweeping requirements.

The City suggests that the frequencies should be based on past and current Copermittee efforts and their accumulated knowledge of what those efforts have achieved and where improvements can or need to be made in such municipal programs. Based on this accumulated knowledge, the City suggests that this section of the Tentative Order be reviewed and evaluated and that the Board consider designating a threshold (e.g. average daily traffic load) figure for the cleaning of roads, streets, and highways. Such a threshold would represent a baseline, above which high, medium and low cleaning frequencies would be triggered and below which cleaning would be conducted on an as-needed basis.

Streets are swept to achieve a number of objectives and not solely to prevent discharges to storm drains. The funds for street sweeping are raised through taxes on the population, and the funds are spent through the direction of their elected representatives on the City Council. There is a clear connection between revenue generation and accountability. It is not appropriate for the RWQCB to insert itself into the daily management of the City's affairs without justifying its requirements and providing a funding mechanism for these requirements.

Response: The Draft Order's street sweeping requirement has been modified to include improved roads, streets, highways, and parking facilities that possess a curb and gutter. The effectiveness of street sweeping depends on the presence of a curb to collect trash and debris for sweeping. Without curbs, dirt and pollutants from the street migrate towards adjacent landscaped areas. The draft Order does not include a threshold figure for the cleaning of roads, streets, and highways. Due to each Copermittees unique and independent jurisdiction, each Copermittee is allowed the flexibility to determine what areas require the highest sweeping frequencies. The frequencies required by the draft Order are in conformance with current practices of cities in the region. The CASQA BMP handbook for municipal activities recommends monthly sweeping for curbed streets and increased frequencies for areas with high pollutant loadings [CASQA, 2003]. Based on data, the USEPA asserts that "streets and parking lots can contribute significant pollutant loadings to urban runoff. Therefore sweeping programs that can remove a portion of these materials from streets and parking lots may significantly reduce the pollutant load contributions to urban runoff." [USEPA, 1999B]. In addition, a regular street sweeping schedule that prevents trash and debris from entering storm drains could result in reduced cleaning frequencies for catch basins.

Section: D **Sub-section**: D.3.a(5)(d)

Commenter(s): San Diego Copermittees, City of San Diego, City of Del Mar

Comment: This Permit section should acknowledge that there are multiple methods and practices the Copermittees and the responsible parties conducting

special events could employ to adequately prevent pollutant discharges. The Tentative Order should be modified to allow options used in other permits.

While other municipal permits in the State apply specific conditions to "any special event that can be reasonably expected to generate substantial quantities of trash and litter," the Tentative Order broadens that definition to all special events. The Tentative Order should be modified to conform to the definition used in these other permits. Propose a spot check program for Special Events for the first year or two to gather data to see if existing permit program is effective. Use data to propose improvements/modifications.

Response: The draft Order's section requiring street sweeping following special events has been moved to the section on BMP implementation because the new language includes other options than just street sweeping. The draft Order has also been modified to require that controls to protect water quality be implemented only at those special events within a Copermittee's jurisdiction that are expected to generate significant amounts of trash and litter rather than at all special events. These changes allow the Copermittee more flexibility in preventing trash generated from special events from entering the MS4.

Section: D **Sub-section**: D.3.a.(6)

Commenter(s): City of Del Mar

Comment: D.3.a.(6) Sanitary sewer: This and other references to sewage collection systems D.3.a.(7) should be removed completely from the Order, as the State Water Resources Control Board has issued Statewide Proposed General Waste Discharge Requirements for Sewage Collection System Agencies, which will apply to Del Mar. These new Waste Discharge Requirements will exceed the requirements listed in this draft order, and the Regional Board should not issue any duplicate or potentially conflicting regulations, which only increase administrative burden for municipalities.

Response: Regarding seepage from sanitary sewers, the US EPA states "Raw sewage can seep from sanitary sewage collection systems through leaks and cracks in aging pipes, poorly constructed manholes and joints, and main breaks. Sewage from a leaky sanitary system can flow to storm sewers or contaminate ground water supplies. Interaction between sanitary sewers and separate storm sewers may occur at manholes and where sanitary sewer laterals and storm sewer trenches cross. Separate storm sewers and sanitary sewers may share the same trench, which is generally filled with very porous material such as gravel" (1992). When raw sewage enters the storm water system, it can reach receiving waters untreated, posing a threat to water quality and public health. In order to prevent this condition, the draft Order requires the Copermittees to address infiltration from the sanitary sewer system to the MS4. The General

Waste Discharge Requirements for Sewage Collection System Agencies is concerned with the maintenance of the sewer system and discharge of sewage whereas the tentative Order is concerned with the maintenance of the MS4 system and discharges from the MS4 system. Since the San Diego region does not have any combined sewer systems, the requirements are for different waste discharges. As such where the requirements for sewage collection system agencies overlap with the tentative Order, compliance will be easier for the Copermittee.

Section: D **Sub-section**: D.3.a.(6)

Commenter(s): Coast Law Group

Comment: Copermittees should be required to implement controls and measures to eliminate, rather than just limit infiltration of seepage from sanitary sewers into MS4s. Further, sanitary sewer spills to MS4s should be reported separately in JURMP annual reports.

Response: The draft Order has been changed to require the Copermittees to implement controls to eliminate the infiltration of seepage from sanitary sewers into MS4s. Using the term "limit" may give the unintended impression that some level exists where seepage from sanitary sewers is acceptable to be discharged into and from the MS4. Since all non-storm water discharges are prohibited in the draft Order and the San Diego region does not have any combined sewer systems, seepage from sanitary sewers is prohibited and should be prevented and eliminated when found.

Section: D **Sub-section**: D.3.a.(7)(a)

Commenter(s): City of Del Mar

Comment: (a)ii. and iv.[3] should be removed, as these components of the MS4 are addressed in D.3.a.(3).

Response: Since the inspection and maintenance of the MS4 is more specifically described in section D.3.a.(3), the inspection of the MS4 system has been deleted from section D.3.a.(7)(a)iv.[3]. Since the inspection of flood management projects and flood control devices is not specifically described in section D.3.a.(3), the inspection of those facilities remains a requirement of D.3.a.(7)(a)ii.

Section: D **Sub-section**: D.3.a.(7)(a)i

Commenter(s): City of Del Mar

Comment: D.3.a. (7) Inspection of Municipal Areas & Activities: (a)i. should be deleted, as the roads and facilities are required to be swept in D.3.a.(5).

Response: The inspection of roads, streets, highways and facilities implies more than being street sweeping. An inspection of roads, streets, highways and parking facilities would also identify areas that need maintenance to prevent erosion and deterioration that results in the discharge of road surface material to the MS4. Inspections can also be of road maintenance activities, such as painting, graffiti removal, patching, resurfacing, concrete installation, and minor repairs to ensure that those activities are implementing BMPs to protect water quality.

Section: D **Sub-section**: D.3.a.(7)(a)viii

Commenter(s): City of San Diego

Comment: Inspection of each activity occurrence (each power washing event) is not practical or likely intended by the Board, but the Permit language is unclear. Propose language that would require the Copermittees to inspect at least one occurrence of each activity, or sub-sets of activities at least once annually.

Response: The draft Order does not require the Copermittee to conduct an inspection for every occurrence of power washing. Rather, the draft Order explicitly requires that the activity be inspected annually.

Section: D **Sub-section**: D.3.b.(1)

Commenter(s): City of San Diego

Comment: This section specifies in too great of detail what information must be captured in facility inventories. While it may be appropriate for the Permit to mandate a level of effort in implementing major program areas (e.g., number of site inspections), the City should maintain the autonomy to manage it's databases in the most efficient manner possible. Recommend revising the Permit to require that the Copermittee shall develop a database to adequately manage/inspect facilities.

Response: To effectively protect water quality, designate BMPs, assess threat to water quality and conduct inspections, the Copermittee needs to have adequate information in their facility inventory list. The facility name and address are important to know where the site is for inspections and proximity to sensitive water bodies. The pollutants generated, 303d water bodies, and narrative

description are needed for the Copermittee to adequately designate BMPs and assess the sites' threat to water quality. The narrative description will also assist the Copermittee's inspectors in preparing for inspections and conducting education and outreach.

Section: D **Sub-section**: D.3.b.(1)(a)

Commenter(s): San Diego Copermittees

Comment: The list of commercial facilities required to be included in Copermittee inventories has been divided into stationary and mobile sources. Since the Tentative Order establishes new requirements for mobile sources, this change will make it easier to determine where they apply.

Response: Although the draft Order does establish new requirements for mobile sources, the draft Order's source identification requirement does not separate the industrial and commercial site inventories into stationary and mobile sources. For any mobile source category, a potential stationary site could exist for the mobile business to store equipment, clean equipment, dispose of waste, and store chemicals. That stationary home base is a potential site or source of pollution that needs inclusion in the local Copermittee's site/source inventory in order for the Copermittees to designate BMPs, conduct inspections and enact enforcement.

Section: D **Sub-section**: D.3.b.(1)(b)

Commenter(s): Industrial Environmental Association

Comment: Facilities with coverage under the General Industrial Permit, or other permits with storm water requirements, such as an NPDES permit, should not be listed as high priority industrial facilities. By virtue of compliance with their existing permits, these already permitted and regulated industrial facilities should be "deemed to be in compliance" with the municipal permit. To avoid duplication of efforts, wasted resources and inefficiencies in the program, already permitted facilities should be addressed under an inspection/monitoring purview differently from otherwise unregulated facilities.

Response: The draft Order does not require that facilities with coverage under the General Industrial Permit or other NPDES permit be listed as a high priority facility. This is one of the criteria that a Copermittee uses to determine what sites pose a high threat to water quality. Enrollment in a NPDES permit does not ensure that facility's compliance with that NPDES permit or with the local jurisdiction's storm water ordinance. Nor does the existence of a NPDES permit lessen that facility's threat to water quality.

Section: D **Sub-section**: D.3.b.(2)(b)

Commenter(s): City of San Diego

Comment: This section requires the City to require industrial and commercial facilities to implement an effective combination of non-treatment BMPs (e.g., good housekeeping, trash control, container coverage, etc.). The language however, does not specifically say that only non-treatment control BMPs would be required. Recommend that the Permit language clarify that only non-treatment control BMPs would be required.

Response: Per previous conversation with the Copermittee, the BMPs designated by the Copermittee may not necessarily include treatment control BMPs for some specific industrial and commercial facilities. This determination on whether or not to require treatment control BMPs as part of the Industrial and Commercial component needs to be made by the Copermittee. The Copermittee may designate the implementation of treatment control BMPs is warranted for some specific industrial and commercial facilities due to the pollutants generated at the facility and the site's threat to water quality.

Section: D **Sub-section**: D.3.b.(2)(c)

Commenter(s): City of Escondido, City of San Diego, San Diego Copermittees

Comment: Many of the businesses designated by the Tentative Order to be notified regarding BMP requirements during the first year of JURMP implementation have already been provided with BMP requirements during the current Permit cycle. Because so many businesses have already been notified and since the Copermittees will be developing and updating their source inventories, mutually developing standards for various business types, and creating notification materials during the first year, the City suggests that the notification timeline be changed from the first year to the first three years of the new Permit cycle. Instead of notification during inspection, which may occur as frequently as once/year, education & outreach notification should be required once during the life of the permit (5 years), so that we have 100% notification of all sites by the end of the permit.

Response: The notification requirement in the draft Order has been changed from one year to three years. This change will allow the Copermittees the flexibility needed if coordinating their programs for notifying businesses that have similar BMP requirements across jurisdictions. The draft Order's inspection requirement to conduct education and outreach has been conditioned to occur "as conditions warrant". Some sites may not require education and outreach if

they are already aware of the BMP requirements and the site is in compliance with applicable storm water regulations.

Section: D **Sub-section**: D.3.b.(2)(d)

Commenter(s): City of San Diego

Comment: It may be interpreted from this paragraph that the City would be responsible for implementing BMPs at private industrial and commercial facilities. Recommend that the paragraph be modified to clarify that the City is responsible for implementing a program that requires the business to implement BMPs.

This section seems to suggest that the City would have to implement BMPs at these sites if an owner/operator fails to implement adequate BMPs. Recommend deleting the Permit language that would require the City to implement BMPs, and leave language that directs the City to require industrial and commercial sites to implement BMPs.

Response: The requirement in the draft Order for the Copermittees to implement or require implementation of the designated BMPs is no different than the requirement found in the Current Permit, Order No. 2001-01. A Copermittee may implement the designated BMPs at a commercial or industrial site if the site's representatives are unable or unwilling to implement the required BMPs so that water quality is protected. In the cases where this has occurred, the Copermittee has sought monetary compensation from the business owner for implementing the BMPs.

Section: D **Sub-section**: D.3.b.(3)

Commenter(s): Industrial Environmental Association

Comment: Dual party inspections should also be considered and are an acceptable alternative to industry, combining a sanitary sewer, building department or hazmat inspection to include storm water elements.

Response: Nothing in the draft Order prohibits the Copermittees from inspecting other requirements than storm water during an inspection of industrial and commercial facilities provided that such inspections comply with section D.3.b(3). The decision on whether or not to use a dual party inspection method is left up to each individual Copermittee to decide as best suits their local jurisdiction's storm water program.

Section: D **Sub-section**: D.3.b.(3)(a)vii

Commenter(s): Industrial Environmental Association

Comment: An important element of this section is "education and outreach on storm water pollution prevention." Violations from industrial facilities should be categorized for frequency and types (paperwork, reporting errors, threat to water quality, etc.) of violations. Training programs can then be developed in cooperation with industry to address these common violations and benchmarking can be implemented to measure reductions in the number of violations. We would very much like to offer our participation and support for education and outreach on storm water programs.

Response: The education and outreach is a component of requirements to include during an inspection. The specifics on the content of the education have been left up to the Copermittees to develop to best suit the needs within their respective jurisdictions. The Copermittees may if they choose solicit input from industrial and commercial business groups on developing and conducting their education program.

Section: D **Sub-section**: D.3.b.(3)(b)

Commenter(s): San Diego Unified Port District

Comment: Clarify the Permit language so it becomes clear that the prioritization is facility-specific, not category-specific. Each Copermittee shall annually inspect all sites determined to pose a high threat to water quality.

Response: The draft Order's language has been clarified to reflect the intent that the threat to water quality is site specific and not category specific. Under the previous Order, some Copermittees discovered that all of their commercial sites were considered a high priority site. With the requirement in the draft Order that all of the Copermittee's high threat to water quality sites be inspected, this would be considerably difficult to attain; therefore the threat to water quality is evaluated by the Copermittee on a site specific basis.

Section: D **Sub-section**: D.3.b.(3)(c)

Commenter(s): City of Santee

Comment: The City recognizes that inspections can be beneficial in ensuring that BMPs are appropriately implemented at facilities. However, the benefit that can be made by an inspection at a high priority industrial facility where there are numerous potential sources of discharge to storm water and a need for

continuous reinforcement of the need to implement appropriate BMPS, is much greater than that which can be obtained from inspecting a commercial facility (such as a Seven Eleven store, or a hairdressing salon).

Response: The Regional Board does not disagree that there are differences in industrial and commercial sites relative threat to water quality which is why the draft Order allows the Copermittee to determine a site's threat to water quality and also to determine what sites to inspect during a given year.

Section: D **Sub-section**: D.3.b.(3)(c)

Commenter(s): San Diego Copermittees, City of San Diego, City of Escondido, City of Santee

Comment: Per the Fact Sheet / Technical Report, a 40% value is consistent with current Copermittee levels of effort (56% in FY 2002-03 and 47% in FY 2003-04).

The Copermittees have determined that that average inspection rate for all Copermittees over the past three years is 26.5% of the total inventory, and 28.3% for FY 2004-05 only. The one adjustment that was made in calculating the regional averages was to modify the City of San Diego's totals. While they reported a figure of 9,306 for FY 2004-05, this total was adjusted upward to 21,913 based on an inventory review they recently contracted. Finally, the Tentative Order requires the addition of two new regulated source types, building material retailers and storage, and animal facilities.

Based on all of these considerations, the Copermittees recommend that the 40% inspection requirement be revised to 25%. The requirement to inspect 100% of High Priority Facilities would remain unchanged. Modifying this rate to 25% is consistent with the explanation of RWQCB staff in their May 15 letter because it represents a general average of the Copermittees inspection efforts as a whole.

The rates cited in the fact sheet (2002-03 and 2003-04) are for years which are not representative of the typical inspection rate conducted by jurisdictions. It was not intended that this rate of inspection would be maintained, rather there would be a reduced level of inspection focused in areas where the level of effort would be most effective. The definition of commercial and industrial facilities has been expanded to include more facilities, therefore the total from which the 40 percent rate is calculated is higher. The increased inspection rate would require significant additional staff and resources to inspect at a rate similar to Copermittee average.

Response: Based on the new information that the Copermittees submitted with the comments, the draft Order has been changed to require 25% of inventoried facilities be inspected annually including all high priority sites and excluding

mobile businesses. Although the 40% inspection rate was calculated based on the data in the Report of Waste Discharge submitted by the Copermittees, they now assert that the information that they submitted was incorrect and incomplete in light of a 40% inspection rate. If the information in the Copermittee's comments is correct, a 25% inspection rate is consistent with the past inspection levels. This inspection rate will provide greater flexibility for the Copermittees to conduct follow-up inspections and special investigations.

Section: D **Sub-section**: D.3.b(4)(a)

Commenter(s): City of San Diego, San Diego Unified Port District

Comment: There is currently no mechanism to even identify mobile businesses that operate within the City. There is not enough information about the number of mobile businesses to make a meaningful assessment of how much or long it will take to implement this program. In addition, because mobile businesses often operate in many cities, program should be developed regionally for consistency.

The regulation of Mobile Businesses should occur as one of the many items identified for regional standardization. Developing and maintaining a countywide mobile business database will provide the most benefit to the Copermittees. BMP development and/or outreach should also be conducted on a regional scale, enabling mobile businesses to implement the same BMPs within each jurisdiction. The Copermittees should also determine a mechanism to allow for escalated enforcement resulting from violations within multiple jurisdictions.

Response: We understand the difficulties in identifying mobile businesses within your jurisdiction and enforcing storm water regulations on those mobile businesses. The draft Order's requirement for Mobile Businesses provides flexibility in dealing with these difficulties by only requiring an inventory of mobile businesses that are known by the Copermittee to operate within their jurisdiction and by allowing the Copermittees to coordinate and share mobile business inventories. The Copermittees each have unique and independent jurisdictions that the Regional Board respects by not mandating regional collaboration on mobile businesses but giving the Copermittees the option of regional collaboration. As such, the mobile business section has been revised to include the option for the Copermittees to share enforcement information on mobile businesses. The Regional Board agrees that sharing information on enforcement actions will allow for escalated enforcement resulting from violations within multiple jurisdictions.

Section: D **Sub-section**: D.3.b.(4)(a)

Commenter(s): Coast Law Group

Comment: The Bay Council supports heightened regulation and enforcement of violations by mobile business discharger. While implementing citizen enforcement programs, we have found particularly recalcitrant operators of mobile automobile detailing businesses, carpet cleaners, and commercial power washers. Since adoption of the 2001 Order, we have repeatedly encountered mobile businesses with appropriate equipment on site, but who have chosen not to use it because they believed no one was watching. In such instances, where violations are clearly intentional and not the result of a lack of education, municipal enforcement should include mandatory minimum fines.

Response: The manner of enforcement is left up to each Copermittee to determine as each enforcement case could have unique circumstances that dictate different levels of enforcement. As such, nothing in the draft Order prohibits any Copermittee from issuing a mandatory minimum fine for particular violations.

Section: D **Sub-section**: D.3.b.(4)(b)

Commenter(s): San Diego Copermittees

Comment: The Tentative Order encourages collaborative approaches to regulating mobile businesses. The encouragement of collaborative approaches should be extended to stationary facilities, and further emphasized by extending deadlines for required notifications. The Copermittee alternative makes specific changes to that effect.

Response: Nowhere in the draft Order is a collaborative approach to regulating mobile business encouraged. The Regional Board neither encourages nor discourages a collaborative approach to regulating mobile businesses. The draft Order does make clear that a Copermittee may cooperate if they choose to in developing and implementing their mobile business program, because of the unique difficulties encountered in implementing a mobile business program. The decision on whether or not to cooperate is left up to the individual Copermittee. Although some Copermittees may wish to mandate and control their neighboring jurisdictions storm water programs, the Regional Board feels it is important to respect each Copermittees independence within their unique jurisdiction in regard to stationary industrial and commercial facilities.

Section: D **Sub-section**: D.3.b.(5)

Commenter(s): Industrial Environmental Association, San Diego Copermittees, City of San Diego

Comment: As currently drafted, there is little, if any, reason for Copermittees to seriously consider using any of these options. The ROWD and the draft Permit language submitted by the County both recommended the inclusion of such methods as an integral part of the Copermittees' overall compliance verification strategy. 3rd party inspections can provide a cost-effective means of supplementing Copermittee site inspections to assess compliance at a variety of business types. While the use of such methods should include appropriate limitations (e.g., based on threat to water quality or characteristics of the business type) and quality assurance controls, Copermittees should retain the discretion to use these methods to meet their basic compliance verification mandates in an effective and cost-efficient manner. If third-party inspectors are to be considered, then the following should be observed:

- the priority of third-party inspections shall be to identify non-filers.
- third-party inspection contractors shall be carefully scrutinized to avoid potential conflicts.
- third-party inspection parameters will be carefully set and monitored to avoid duplication of efforts or overextending the mandates of the program.
- cost-benefit analysis should be performed to compare in-house municipal inspectors versus outside contractors.
third-party inspections that would result in an NOV to a facility should first be reviewed by the relevant Copermittee.

Response: The draft Order has been modified to allow the use of third party inspections. As an incentive to use a third party program, up to 30% of the Copermittees inspection requirements may be fulfilled by a third party inspector program. For example, if a Copermittee has inventoried 400 commercial and industrial sites, then 25% or 100 sites are required to be inspected annually. A third party inspector could inspect 30 of those sites, leaving the Copermittee only having to inspect 70 sites. Also for every three inspections conducted by a third party, the Copermittee is required to inspect an additional site. In the example, the Copermittee would have to inspect an additional 10 sites to the 100 required to be inspected annually. The additional 10 sites could be inspected by the Copermittee or by a third party inspector. The Copermittees proposed that the third party inspections be used to wholly satisfy the inspection requirements; but the draft Order allows only partial fulfillment of the inspection requirements in exchange for additional inspections. This trade off is fair and appropriate because third party inspections have yet to be proven effective. The Copermittees have not provided references or guidance showing the effectiveness of third party inspections. The third party inspections program must comply with ten provisions to ensure their adequacy and effectiveness to protect water quality.

Section: D **Sub-section**: D.3.c

Commenter(s): Coast Law Group

Comment: The Residential component of the Order is lacking. On any given day, thousands of gallons of water are discharged from private residences into MS4s and, ultimately, into receiving waters. In addition, the majority of such discharges occur in the middle of the night or early morning, when enforcement is nonexistent. Copermittees should be required to conduct off-hours inspections at least once each month for the first year of the Order, and then quarterly for the remaining 4 years. Off-hours inspections should be conducted on Sundays, holidays, and between the hours of 12:00 p.m. and 4:30 a.m.

Response: The Copermittees have identified residential areas as one of the "highest priority sources across all pollutants and watersheds" (San Diego Storm water Copermittees, 2005), As such, residential areas can be a significant source of pollutants in urban runoff, in a manner similar to other areas such as commercial sites. Since residential areas can be a significant source of pollutants, Copermittee oversight of residential areas should be comparable to its oversight of other pollutant sources. The Tentative Order addresses residential areas through requirements for prioritization, BMP implementation, enforcement, and development of a regional residential education program. However, to ensure that their oversight of residential areas is appropriate in terms of pollutant loads generated, the Copermittees should evaluate their oversight methods of residential areas, including assessment of the need for inspections. The Tentative Order has been modified to encourage the Copermittees to conduct this evaluation. Because increased oversight or inspections of residential areas has not previously been discussed in detail, this provision of the Tentative Order is being added as guidance only. Please see section D.3.c.(4) of the Tentative Order for this modification.

Section: D **Sub-section**: D.4.b

Commenter(s): City of San Diego

Comment: Additional staff would be required to complete the mapping update and manage future updates. Because of the backlog of unmapped portions of the City's storm drain, this requirement is not achievable within a year. Recommend the Board phase this requirement: Phase 1: inventory of only storm drain construction activities (repair vs. new construction) by July 2007. Phase 2: inventory of 50% of MS4 by July 08. Phase 3: inventory of the remainder of the MS4 by July 09.

Response: The requirement to develop a map of the MS4 is a current requirement of Order No. 2001-01. The Copermittees have been required to have a map of their MS4s since February of 2002. Due to the amount of time the Copermittees have already had to develop a MS4 map, an extension of the time frame included in the Tentative Order for further developing and updating the MS4 map is not warranted.

Section: D **Sub-section**: D.4.d.(1)

Commenter(s): San Diego Copermittees, City of San Diego

Comment: Tentative Order section D.4.d.(1) specifies: "Each Copermittee shall develop/update and utilize numeric criteria action levels to determine when follow-up investigations will be performed." The Copermittees recommend modification as follows: "Each Copermittee shall develop/update and utilize action level criteria to determine when follow-up investigations will be performed." Numeric criteria action levels are not appropriate for all constituents monitored in the dry weather monitoring programs. The Copermittees currently have a Dry Weather Monitoring Workgroup that has developed regional action level criteria to be used to determine when follow-up investigations will be conducted. These action levels include both numeric values and best professional judgment.

Response: Since action level criteria are not always numeric, the Tentative Order has been modified to allow for non-numeric criteria where appropriate. Please see section D.4.d.(1) of the Tentative Order for this modification.

Section: D **Sub-section**: D.4.d.(2)

Commenter(s): City of San Diego

Comment: This requires conducting follow up investigations with in 48 hours of receiving results. This would require having enough personnel to conduct up to 23 investigations a day plus continue required routine monitoring. If this permit condition is adopted as is, a significant increase in staffing and water quality testing resources would be required.

We recommend the permit allow for a tiered approach to response times. This approach would be dependent upon the prioritized impact to the environment based upon visual observations, pollutant type and its laboratory analytical results. Suggested text follows:
"Follow up investigations shall be responded to based on the following criteria:
1. Obvious illicit discharges shall be investigated immediately.
2. Follow up investigations shall be initiated within two business days, where results indicate a discharge that is a serious threat to human health and the

environment. Example of this would include, but not be limited to, pH results of >=12.5 or <= 2, bacteria results where the total coliform and fecal coliform are equal and 50,000 MPN/CFU or greater, or where the ratio of total coliform: fecal coliform is 10:1, or MBAS results of 1.0 mg/L or greater.
3. Investigations shall be initiated within two weeks for results that indicate a potential discharge that poses a moderate threat to human health or the environment. Examples would include bacteria results that exceed established action levels for 2 or more indicator bacteria, metals or pesticides results that exceed California Toxic Rules standards, or any combination of results that indicate the likelihood of an illegal discharge (i.e. Ammonia and Phosphate both exceed action levels).
4. Investigations shall be initiated within 30 days where applicable and feasible for those results that indicate a discharge that poses a low threat to human health or the environment. Examples include high conductivity reading, nutrient results that are at the established action levels for one constituent only. For results that indicate an illicit discharge that is also accompanied by a separate report that a discharge that would account for the results occurred and was addressed."

The justification for this tiered approach is to maximize the efficiency with which we eliminate illicit discharges by prioritizing efforts towards human sources that can be abated. Based on past experience obvious discharges, tier 1, can be determined visually and are easily tracked to a source. These cases should be a top priority. The subsequent tiers require laboratory analysis in order to determine if action levels have been exceeded, thus requiring more time before follow up efforts can be initiated. Results that fall into tier 2 in the past have been discharges that were caused by human action or inaction. Responsible parties are able to be identified and enforcement action taken. An example of this type of discharge would be a broken/leaking sewer lateral. Tier 3 investigations have typically been of a more chronic nature and although they exceed accepted standards due to the nature of the pollutant and warrant investigation, these should not be considered as high of a priority as "one time" Tier 1 discharges because the ability to determine the source of the exceedance does not drastically diminish over time. In addition, Tier 3 exceedances typically are the result of chronic and pervasive sources that would not be easily abated via an ICID program. An example of this would be copper exceedances in Chollas Creek. This is a chronic problem and has exceeded CTR levels in the past, a single point source has yet to identified, hence the metals TMDL for Chollas. Clearly, ICID programs are not the most appropriate program for abating pervasive metals exceedances in Chollas Creek. The final (4th) tier is typically characterized by either natural sources or by exempted sources. These would include ground water seeps, irrigation runoff, or permitted dewatering. Because these sources are generally not directly from human activities (and thus difficult or impossible to abate), these exceedances should be given the lowest prioritization.

Response: The action level criteria are designed to identify pollutant levels that are unusually high or have the potential to impact beneficial uses. As such, results that exceed action level criteria should be followed-up promptly, where it is useful to do so. Since the field screening results are the dry weather monitoring results which are most useful for initiating investigations to identify sources of illegal discharges, the Tentative Order has been modified to only strictly require investigations within two business days in response to field screening results. Analytical results, on the other hand, are received several days after samples are collected, reducing their usefulness for initiating investigations. For example, by the time analytical results are received, many transient illegal discharges have ceased, making source identification difficult. Therefore, the Tentative Order has been modified to require follow-up investigations of analytical results within two business days only where applicable. This will allow the Copermittees to focus follow-up investigation activities on the more useful field screening results. Please see section D.4.d.(2) of the Tentative Order for this modification.

Section: D **Sub-section**: D.4.d.(2)

Commenter(s): San Diego Copermittees

Comment: Tentative Order section D.4.d.(2) specifies: "Within 48 hours of receiving dry weather field screening or analytical laboratory results that exceed action levels, the Copermittees 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. Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) shall be investigated immediately."

The Copermittees recommend modification as follows: "Within two business days, where applicable, of receiving dry weather field screening or analytical laboratory results that exceed action levels, the Copermittees 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. Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) shall be investigated immediately."

A 48-hour turnaround time for follow-up investigations based on field results is generally achievable. However, when initial investigations are conducted on Thursdays or Fridays, Copermittees would potentially be required to conduct additional site investigations during the weekend. Modification of "48 hours" to "two business days" would eliminate this problem.

Based on Copermittee experience, strict adherence to a 48-hour turnaround time for follow-up investigations based on laboratory results would provide negligible

water quality benefits. Most action level exceedances due to laboratory results are related to bacteria. Field experience with source investigations for bacteria has shown that in most cases obvious illicit connections or illegal discharges cannot be pinpointed as the sources. The main sources typically appear to be natural wildlife waste, organic material decomposition, and improper disposal of pet waste. These types of sources usually cannot be easily and quickly eliminated, and follow-up within 48 hours would be of minimal marginal benefit at best. Where discharges from sanitary sewer lines are the source of the high bacteria readings, they are also accompanied by high ammonia readings, which would be detected by the field screening for ammonia. Thus, discharges from sanitary sewer lines would still be investigated promptly.

Other laboratory analytical constituents occasionally observed to exceed their respective action levels include diazinon, heavy metals, and oil and grease. In virtually every instance in which one of these pollutants is reported to be over its action level, the source is a transient discharge, and the pollutant is well below the action level or not detected during the follow-up investigation. Generally the transient discharges leading to these exceedances do not last more than a day at most, and since laboratory results are not received until at least five days after sampling, returning within 48 hours for a follow-up investigation would not provide a significant water quality benefit.

Addition of "where applicable" would eliminate the need to return to sites unnecessarily or prematurely. When the exceedances of action levels is due to a significant illicit connection or illegal discharge, results are usually accompanied by other signs detectable by field screening, such as an oily sheen and abnormal color or odor. Where such observations are made, discharges would still be investigated promptly.

Response: Since the field screening results are the dry weather monitoring results which are most useful for initiating investigations to identify sources of illegal discharges, the Tentative Order has been modified to only strictly require investigations within two business days in response to field screening results. Analytical results, on the other hand, are received several days after samples are collected, reducing their usefulness for initiating investigations. For example, by the time analytical results are received, many transient illegal discharges have ceased, making source identification difficult. Therefore, the Tentative Order has been modified to require follow-up investigations of analytical results within two business days only where applicable. This will allow the Copermittees to focus follow-up investigation activities on the more useful field screening results. Please see section D.4.d.(2) of the Tentative Order for this modification.

Section: D **Sub-section**: D.4.e

Commenter(s): San Diego Copermittees

Comment: Tentative Order section D.4.e requires that "Each Copermittee shall eliminate all detected illicit discharges, discharge sources, and connections immediately." While this language is unchanged from that of Order No. 2001-01, the Copermittees recommend modification in accordance with the language adopted by this RWQCB in 2004 for the Riverside Municipal Permit (R9-2004-001), which is a more reasonable, achievable, and enforceable compliance standard. This modification is as follows: "Each Copermittee shall eliminate all illicit discharges, illicit discharge sources, and illicit connections as soon as possible after detection. 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. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately."

Response: The Tentative Order has been modified in order to clarify Regional Board expectations regarding elimination of detected illicit discharges. The Regional Board expects that the Copermittee take action immediately to eliminate detected illicit discharges, but acknowledges that actual elimination may not occur immediately in some cases. Please see section D.4.e of the Tentative Order for this modification.

Section: D **Sub-section**: D.4.g

Commenter(s): City of Imperial Beach

Comment: Section D.4.g on Page 39 would require Copermittees to 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). With respect to sewage spills, this requirement is redundant with other State mandates issued under separate regulatory programs. As such, its inclusion is unnecessary in this Order.

Response: This requirement specifically pertains to sewage spills entering the MS4. As such, it is an appropriate requirement for an MS4 permit. Moreover, it is consistent with the Clean Water Act, which prohibits non-storm water discharges into the MS4. In addition, this language is also found in the current MS4 permit (Order No. 2001-01), so its requirements are already being implemented by the Copermittees.

Section: D **Sub-section**: D.4.g

Commenter(s): City of San Diego

Comment: Please clarify whether and under what circumstances potable water can be used to clean sewage from the MS4.

Response: Potable water can be used to clean sewage from the MS4, provided the water and sewage is collected prior to discharge to receiving waters.

Section: D **Sub-section**: D.4.h

Commenter(s): Coast Law Group

Comment: There is little or no enforcement of off-hours violations. Public hotline reports are often no longer relevant if not responded to within a reasonable period of time. The Order should require response and resolution within two hours of every report.

Response: While off-hours oversight by the Copermittees is encouraged, a requirement for round-the-clock response to complaints could place a significant staffing burden on the Copermittees. For this reason, Copermittee discretion on when to respond to complaints is maintained in the Tentative Order. However, the Tentative Order has been modified to ensure the Copermittees respond to complaints in a timely manner. Please see section D.4.h of the Tentative Order for this modification.

Section: D **Sub-section**: D.5.a.(2)

Commenter(s): City of San Diego

Comment: Mobile businesses are hard to reach and collectively permit. County does not currently permit them. Recommend moving section to Regional Urban Runoff Management Program.

Response: Section D.3.b.(4) allows for Copermittee cooperation in developing and implementing an education program for mobile businesses. This provides the Copermittees with the option of educating mobile businesses jurisdictionally or regionally.

Section: D **Sub-section**: D.5.b.(1)(b)

Commenter(s): City of San Diego

Comment: It is not necessary to adequately implement BMPs, to require that "all" construction workers in the field be educated on all aspects of

regulations/requirements. Recommend requiring education of appropriate personnel of aspects/regulations germane to their work.

Response: Various types of construction personnel need education on various topics. For this reason, the Tentative Order has been modified to require construction education on only those topics that are applicable to the audience. Please see section D.5.b.(1)(b) of the Tentative Order for this modification.

Section: D **Sub-section**: D.5.b.(1)(c)

Commenter(s): San Diego Unified Port District

Comment: The current Draft Permit language states, "Each Copermittee shall train staff responsible for conducting inspections and enforcement of industrial and commercial facilities at least once a year." Many cities have staff that conduct inspections for reasons other than storm water compliance. It is unclear whether this refers to all staff, or only staff who conduct storm water compliance inspections. More clarity is needed.

Response: The requirement pertains to education of storm water compliance inspectors, and not every municipal inspector, regardless of their involvement in storm water issues. The Tentative Order has been modified to clarify this issue. Please see section D.5.b.(1)(c) for this modification.

Section: D **Sub-section**: D.5.b.(2)

Commenter(s): City of San Diego

Comment: It is not necessary to adequately implement BMPs, to require that "all" construction workers in the field be educated on all aspects of regulations/requirements. Recommend requiring education of appropriate personnel of aspects/regulations germane to their work.

Response: Various types of construction personnel need education on various topics. For this reason, the Tentative Order has been modified to require construction education on only those topics that are applicable to the audience. Moreover, the Tentative Order does not require the Copermittees to educate all construction workers, but rather requires the Copermittees to educate project applicants, contractors, and other applicable parties on the importance of educating their construction workers in the filed on storm water issues. The Tentative Order has been modified to clarify this issue. Please see section D.5.b.(2) of the Tentative Order for this modification.

Section: D **Sub-section**: D.5.b.(3)

Commenter(s): City of Encinitas

Comment: If the residential education program is required on a regional basis, it should be eliminated from the jurisdictional programs.

Response: The Copermittees are required to conduct or participate in development and implementation of a residential education program. Appropriate participation in the development and implementation of regional residential education program is sufficient for compliance with this requirement.

Section: D **Sub-section**: D.5.b.(3)

Commenter(s): City of Imperial Beach, San Diego Unified Port District

Comment: The feasibility of educating school children is contingent upon obtaining authorization from local school districts and classrooms to conduct such activities. It should, therefore, be encouraged in the Permit, but not required.

Response: The requirement to educate school children is a continuation of a current requirement in Order No. 2001-01. The Copermittees are currently required to educate school children and should continue doing so. Educating school children is important because behaviors are more easily influenced at a young age. If it is infeasible for a Copermittee to educate school children in school, the Copermittee can target school children in other forums, such as after school programs, camps, etc. For these reasons, the requirement for education of school children has not been modified.

Section: E **Sub-section**:

Commenter(s): City County Managers Association

Comment: Raising fees for watershed management presents a practical problem, at a minimum. More importantly, raising fees to pay for programs outside of each city's boundaries may be illegal. Proposition 218 comes into play, and jurisdictions may not raise fees to pay for actions outside their jurisdictions.

Response: The Tentative Order does not require the Copermittees to implement watershed activities outside of their jurisdiction. While Watershed Copermittees are expected to develop a watershed-based strategy together, implementation of that strategy can be achieved on a jurisdictional basis.

Section: E **Sub-section**:

Commenter(s): City of Del Mar

Comment: The City of Del Mar supports the City of Poway's request to be the lead for the Penasquitos Watershed.

Response: Table 4 of the Tentative Order has been modified to make the City of Poway the Lead Permittee for the Penasquitos watershed.

Section: E **Sub-section**:

Commenter(s): City of Poway

Comment: The City is requesting to remain Lead Permittee for the Penasquitos watershed.

Response: Table 4 of the Tentative Order has been modified to make the City of Poway the Lead Permittee for the Penasquitos watershed.

Section: E **Sub-section**:

Commenter(s): City of Poway

Comment: The City is requesting to be removed of its responsibility for the San Diego River Watershed. It has only 120 acres in the watershed, all of which is protected habitat, designated as open space, and cannot be developed.

Response: Since the portion of the City of Poway within the San Diego River watershed will not generate urban runoff, the City of Poway has been removed from Table 4 of the Tentative Order as a responsible Copermittee for the San Diego River watershed.

Section: E **Sub-section**:

Commenter(s): San Diego Copermittees, San Diego Unified Port District

Comment: The Copermittees believe that watershed-based programs should be process-driven and focused toward implementation based on water quality issues particular to the watershed. While strategies for addressing water quality issues must be defined and adopted at a watershed level, the activities

necessary to implement them should conducted be wherever it makes the most sense – jurisdictionally, at the watershed level or regionally.

Based on the San Diego County Municipal Storm Water Permit Re-issuance Analysis Summary conducted by the RWQCB in 2004, it was the Copermittees' understanding that if WURMP requirements increased in the Draft Permit, then the JURMP requirements would be somewhat lessened to compensate for the increased WURMP requirements. As currently written, there are very substantial prescriptive increases in both the JURMP and WURMP components of the Draft Permit. The requirements imposed in the WURMP section will be difficult to meet due to the increased requirements of the JURMP, particularly since all WURMP activities must exceed baseline JURMP requirements. Further, if facility prioritization (under the JURMP requirements) is evaluated as required and Copermittees identify each facility's potential pollutants and pollutant generating activities, then watershed strategies are being applied at the jurisdictional level. As such, jurisdictional efforts that address pollutants are a significant part of an effective watershed strategy itself and should be able to be identified accordingly.

Response: In order to improve integration of Copermittee jurisdictional and watershed efforts, the Tentative Order has been modified. Accounting of Watershed Activities has been changed from a jurisdictional basis to a watershed basis. Instead of two Watershed Water Quality Activities and Watershed Education Activities required per Copermittee annually, two Watershed Water Quality Activities and Watershed Education Activities are required per watershed annually. This reduces the Watershed Activity burden on individual Copermittees and allows for increased focus on Watershed Activity effectiveness. In addition, the definition of Watershed Water Quality Activity has been removed from Attachment C of the Tentative Order. This reduces the restrictions on what constitutes a Watershed Water Quality Activity, which increases the Copermittees' flexibility for program integration. In particular, activities implemented on a jurisdictional basis no longer are required to exceed baseline jurisdictional requirements, so long as they are organized and implemented to target a watershed's high priority water quality problems. The Copermittees can also use activities implemented on a watershed or regional basis to comply with Watershed Water Quality Activity requirements. Increased ability to integrate programs can offset increased jurisdictional requirements.

Section: E **Sub-section**:

Commenter(s): San Diego Unified Port District

Comment: The Port continues to be very concerned that language in the Draft Permit and Draft Permit Fact Sheet, as well as statements made by RWQCB staff, suggest that our current WURMP activities have been ineffective and insufficient as evidenced by a lack of visible improvement in receiving water

quality. These are seriously misleading statements. There are many factors that affect local water quality. Changes in water quality that occur as a result of our activities, or from sources outside our control, may not be realized on an annual or short-term basis. RWQCB staff has not provided sufficient evidence to demonstrate that Copermittee programs have been ineffective simply based on a lack of improvement in water quality.

Response: The language of the Tentative Order does not address the adequacy or effectiveness of the Copermittees' watershed programs. The Fact Sheet does not address the effectiveness of the Copermittees' watershed programs, but does state "the Regional Board previously found that Copermittee implementation of Watershed Water Quality Activities was inadequate over the course of several years." This finding is based on a review of the Copermittees' watershed program implementation, which found that "the Copermittees reported very few watershed activities which would reduce the discharge of pollutants" (Regional Board, 2005). Watershed programs which implement very few activities which reduce pollutant discharges are considered inadequate because of the likelihood that they will not have a significant impact on the high priority water quality problems within the watersheds.

Section: E **Sub-section**:

Commenter(s): San Diego Unified Port District

Comment: The Copermittees have been conducting effective watershed activities and demonstrating load reductions. For example, the 2004-2005 annual report for the San Diego Bay Watershed lists 21 water quality activities that were implemented during the reporting period. Six of those activities documented pollutant load reductions. It is believed that the reformatting of the annual report during this reporting process provided more clarity to the Copermittees' annual achievements.

Response: Comment noted.

Section: E **Sub-section**:

Commenter(s): San Diego Unified Port District

Comment: The Fact Sheet is misleading when it states that Copermittees failed to respond to the RWQCB staff requests for program improvements. The amount of flexibility in Order 2001-01 was not a factor in the delayed Copermittee response and/or improvements to watershed programs. The development of the Copermittees WURMP programs was not fully completed until 2003 with the submittal of the WURMP program documents. Additionally, the first annual

report was submitted in 2004 for the 2002-2003 reporting period. When the issue of non-compliance came before the Board in 2005, only two years of reporting had been completed. That, coupled with the fact that the RWQCB issues were raised after completion of the reporting periods, made it difficult for Copermittees to show timely response and/or program modifications in response to the RWQCB letters.

Response: The Regional Board first notified the Copermittees of needed improvements to their watershed programs in March 2003. The Copermittees' annual reports submitted in January 2005, which covered the fiscal year 2003-2004 reporting period, did not exhibit significant improvement to the Copermittees' watershed programs in response to the Regional Board's notification. Copermittee responses to subsequent Regional Board California Water Code section 13267 information requests, which covered watershed program implementation up to January 2005, also did not reflect significant Copermittee watershed program improvement. For these reasons, the discussion in the Fact Sheet is accurate.

Section: E **Sub-section**:

Commenter(s): San Diego Unified Port District

Comment: The Draft Permit allows for little integration due to prescriptive requirements placed on the jurisdictional, watershed, and regional programs. Especially concerning are the prescriptive reporting and assessing components, which essentially require the same prescriptive layer of assessment and reporting for every program. The Fact Sheet strongly emphasized the benefits and usefulness of integrating jurisdictional, watershed, and regional programs.

Response: The Tentative Order has been modified to ease integration of jurisdictional and watershed programs. Please see section E.2.f of the Tentative Order for this modification. Integration of jurisdictional, watershed, and regional reporting and assessment is encouraged at section J.5 of the Tentative Order.

Section: E **Sub-section**:

Commenter(s): San Diego Unified Port District

Comment: The Port also believes that the Draft Permit language, as well as comments from RWQCB staff, fails to recognize that some improvements in water quality have been demonstrated. Within the San Diego Bay Watershed, for example, levels of diazinon in receiving waters have decreased dramatically in the last few years and lead levels are showing a decreasing trend.

Response: The Tentative Order's language includes requirements and findings in support of the requirements. Because the requirements are meant to address water quality problems, the findings focus on water quality problems which need to be addressed. Discussions which do not support the Tentative Order's requirements are not included in the findings of the Tentative Order.

Section: E **Sub-section**:

Commenter(s): San Diego Unified Port District

Comment: The Port is extremely concerned that the Copermittees are being required to show annual load reductions from watershed activities that result in water quality improvements. Also of concern is the inference that an activity cannot be counted as a water quality activity unless a load reduction occurs during that current year. This supports the inaccurate perception that persistent water quality problems can be corrected annually or show changes in 5-year periods. In most cases, true load reductions may take several years to show water quality improvements. The requirement to show annual load reductions is in complete contradiction to the agreed upon approach and rationale for the long-term MLS monitoring. RWQCB staff accepted the proposed alternate-year MLS monitoring because of the scientific support showing that pollutant trends may take 20 years or longer to indicate change.

Response: The Tentative Order does not require that the Copermittees show annual load reductions. The Tentative Order requires use of assessment level 4 (load reductions) for watershed activities only "where applicable and feasible." In addition, the Tentative Order has been modified to require qualitative assessment watershed program impacts on water quality, as opposed to quantitative assessment.

It is appropriate that Watershed Water Quality Activities must reduce the discharge of pollutants. If pollutant discharges are not reduced, the MEP standard is not met. Continual planning, assessing, monitoring, etc. without pollutant discharge reduction does not meet the MEP standard.

Section: E **Sub-section**:

Commenter(s): San Diego Unified Port District

Comment: The Port wishes to remind the RWQCB that the watershed concept is relatively new. While we acknowledge that monitoring has been occurring for over 15 years within the region, the Copermittees have been implementing watershed-based programs only since 2002. As such, only recently have the monitoring approach and objectives been modified to better show changes on a

watershed scale. Although there is room for improvement, the Copermittees have made significant progress in addressing priority pollutants at the watershed level in this short time frame. Each year, the Copermittees have improved the type of watershed activities conducted and the way in which the information is presented in the annual reports. We fully recognize that we need to continually improve and build upon our programs, and we feel that the watershed language in Order 2001-01 allowed us to do this.

Response: Comment noted.

Section: E **Sub-section**: E.1

Commenter(s): City of Escondido

Comment: The City of Escondido is respectfully requesting to be removed from its responsibility for the San Luis Rey Watershed. The city only occupies 53 acres in the watershed, all of which is located in Daley Ranch - a 3,000 acre open space preserve that will remain undeveloped in perpetuity.

Response: Since the City of Escondido's jurisdiction in the San Luis Rey watershed is only 53 acres that will remain undeveloped, the City of Escondido has been removed from the Tentative Order as a responsible Copermittee for the San Luis Rey watershed. Please see Table 4 of the Tentative Order for this modification.

Section: E **Sub-section**: E.2.d

Commenter(s): City of Santee

Comment: Page 44, section d, last line, change “an” to “and.”

Response: The Order has been changed to make this correction.

Section: E **Sub-section**: E.2.h

Commenter(s): San Diego Copermittees

Comment: Section E.2.h: "Annually evaluate the pollutant reduction effectiveness of the potential . . . . activities . . . " How does a Copermittee ascertain whether it has properly evaluated the effectiveness of a potential activity?

Response: The Tentative Order has been modified to require Watershed Copermittees to provide a "description of the expected benefits of implementing the [proposed watershed] activity." Standard methods, such as research of previously conducted studies and monitoring, should be used to identify the expected benefits of an activity. Please see section E.2.f.(3) of the Tentative Order for this modification.

Section: E **Sub-section**: E.2.i

Commenter(s): City of Chula Vista

Comment: The Tentative Order does not recognize many jurisdictional water quality activities conducted by the Copermittees within the boundary of their jurisdictions as watershed activities, even though in fact all such activities directly benefit corresponding watersheds. The Tentative Order requires short-term and long-term Watershed Water Quality Activities and Watershed Education Activities that are in addition to jurisdictional water quality and education activities.

Response: The Tentative Order requires watershed activities in addition to jurisdictional activities in order to focus Copermittee efforts on particular high priority water quality problems within watersheds. While standard jurisdictional Copermittee activities are helpful in this regard, watershed activities are also necessary, since over 15 years of Copermittee jurisdictional activity implementation has not resulted in abatement of many high priority water quality problems. However, the Tentative Order has been modified to allow jurisdictional activities to be consider watershed activities, provided the jurisdictional activities are organized on a watershed basis, with consideration of the high priority water quality problems within a watershed. Please see section E.2.f.(1)(a) of the Tentative Order for this modification.

Section: E **Sub-section**: E.2.i

Commenter(s): City of San Diego

Comment: The City would not receive credit for activities addressing second-tier water quality problems (constituents of concern) that are still of concern and showing “hits” in the monitoring results. This is a significant disincentive for the City, which is spread across 6 watersheds, to conduct larger activities that span across watersheds unless a particular pollutant is a high priority in every watershed. It is also an disincentive for implementing activities to address pollutants BEFORE they become major problems. Recommend changing Permit so that if Copermittee implements watershed activity (water quality or education) in more than one watershed simultaneously (a regional activity), number of watershed activities required of Copermittee is reduced by one in each

watershed where watershed activity addresses either primary or secondary water quality problem (high priority pollutant or COC), provided at least one primary water quality is addressed in any one of the impacted watersheds.

Response: The purpose of the watershed approach is to focus efforts on the high priority (most important) water quality problems within watersheds. By focusing on the most important water quality problems within watersheds, implemented watershed activities will have the greatest impact on watersheds' beneficial uses. A jurisdiction-wide program that does not address the high priority water quality problems of the various watersheds is more accurately described as a jurisdictional program, rather than a watershed program. However, nothing prevents the Copermittees from raising their level of activity in all watersheds in order to address high priority water quality problems in particular watersheds, so long as all high priority water quality problems are ultimately addressed. It should be noted that the Tentative Order has been modified to account for watershed activities on a watershed basis, as opposed to a jurisdictional basis. This modification should minimize the difficulty in implementation of watershed activities for Copermittees in multiple watersheds, since the total number of watershed activities required has been reduced and is not reliant on efforts by any particular Copermittee.

Section: E **Sub-section**: E.2.i

Commenter(s): San Diego Copermittees

Comment: The watershed water quality activity definition and the watershed education activity definition found on page C-11 of Attachment C should be deleted. They are ambiguous and confusing.

Response: In order to simplify the watershed requirements of the Tentative Order, the definitions of Watershed Water Quality Activity and Watershed Education Activity have been deleted from Attachment C. The definitions have been replaced by discussion in the text of the watershed section of the Tentative Order. The majority of restrictions regarding what constitutes a Watershed Activity have been removed from the Tentative Order. Only two restrictions on Watershed Water Quality Activities remain for clarification purposes.

First, Watershed Water Quality Activities conducted on a jurisdictional level must be organized and implemented to target a watershed's high priority water quality problems, or they must exceed the baseline jurisdictional requirements. This restriction is necessary to ensure that basic jurisdictional activities implemented without regard for watershed conditions are not considered Watershed Activities. The restriction will provide the Copermittees with an incentive to continue to tailor their jurisdictional activities to watershed conditions. Organization of jurisdictional activities on a watershed basis is expected to improve jurisdictional

activity effectiveness by focusing the activities where they can have the largest impact - on watersheds' high priority water quality problems. It should be noted that this restriction has been crafted to provide the Copermittees with significant flexibility in implementation of Watershed Activities. It provides the Copermittees with the option of using jurisdictional activities to meet Watershed Activity requirements. The Copermittees can also use activities implemented on a watershed or regional basis to comply with Watershed Activity requirements.

The other restriction on Watershed Water Quality Activities involves capital projects. The restriction dictates that capital projects count as Watershed Water Quality Activities only in the year their construction is completed and operation begins. This restriction is necessary to ensure that ongoing operation of a capital project is not considered a Watershed Water Quality Activity. Once a capital project is completed, its operation typically involves little effort. At this point, the Watershed Copermittees should continue their Watershed Water Quality Activity efforts elsewhere, so that the overall level of watershed efforts does not decline. This restriction prevents two capital projects from being implemented at the beginning of the permit cycle to the exclusion of implementation of any additional Watershed Water Quality Activities for the rest of the permit cycle.

These limited restrictions, together with reporting requirements on proposed Watershed Water Quality Activities, are expected to ensure implementation of adequate Watershed Activities. Please see section E.2.f of the Tentative Order for these modifications.

Section: E **Sub-section**: E.2.i

Commenter(s): San Diego Copermittees

Comment: The Tentative Order definition states: “For jurisdictional or regionally based activities to be considered Watershed Water Quality Activities in a watershed, the Copermittee must implement the activities at all applicable and feasible location(s) throughout its portion of the watershed, and not just in one or a few locations.” This phrasing is too vague to be reasonably interpreted or enforced.

There may be certain activities that can only be implemented in one location, particularly treatment control BMPs. Efforts cannot be ignored as valuable water quality activities if they demonstrate load reductions, even if they do not occur at all applicable locations. The Copermittees should not be discouraged from implementing such activities if they are proven to be effective.

Response: For simplification and clarification purposes, the definition of Watershed Water Quality Activity has been removed from the Tentative Order. Removal of the definition will allow the Copermittees to implement effective

Watershed Water Quality Activities, even if they are not implemented at all applicable locations. However, it should be noted that Watershed Water Quality Activities should be implemented at a spatial and temporal scope that is adequate to have a significant impact on the high priority water quality problems within a watershed. Please see Attachment C of the Tentative Order for this modification.

Section: E **Sub-section**: E.2.i

Commenter(s): San Diego Copermittees, City of San Diego, City of Escondido

Comment: The Copermittees have found that this restriction is confusing due to the possibility of multiple interpretations. It appears that any activity conducted within a watershed under Order 2001-01 could not be utilized under the Tentative Order. For instance, if inspections or BMP requirements were increased at restaurants during Order 2001-01, they could not be used again under the Tentative Order. Additionally, newly implemented could mean that any activity that is in an implementation phase during Order 2001-01 could not be carried over into the Tentative Order.

Response: The intent of the requirement was not to require new activities annually, but to ensure that long-standing activities implemented without regard for watershed water quality problems were not considered Watershed Water Quality Activities. However, the Tentative Order has been modified to remove the requirement that Watershed Water Quality Activities be new. Instead, the Copermittees' proposal for watershed strategy development, together with the proposal that two Watershed Water Quality Activities be in active implementation phase annually, are expected to ensure adequate Watershed Water Quality Activity implementation. Please see section E and Attachment C of the Tentative Order for this modification.

Section: E **Sub-section**: E.2.i

Commenter(s): San Diego Copermittees, San Diego Unified Port District, City of Escondido

Comment: Under the Tentative Order, jurisdictional or regional activities which significantly exceed and are exhibited to be more protective of water quality than the baseline jurisdictional requirements of section D may be considered Watershed Water Quality Activities. This severely restricts the use of many valuable activities because Copermittees are concurrently being required to increase those “baseline” levels through their JURMPs. Moreover, this requirements serves as a disincentive to build comprehensive watershed strategies on a foundation of jurisdictional activities because the majority of them

cannot be counted. Because the jurisdictional requirements have been significantly elevated for the upcoming permit cycle, it will be difficult for many copermittees/watersheds to implement significant jurisdictionally-based watershed activities without compromising the finite resources needed to meet the augmented jurisdictional requirements proposed by the Tentative Order.

Response: The Tentative Order has been modified to provide the Copermittees with the option of using jurisdictional activities to meet Watershed Water Quality Activity requirements, even if the jurisdictional activities are implemented at a baseline level. So long as jurisdictional activities are organized and implemented to target a watershed's high priority water quality problems, they can be considered Watershed Water Quality Activities. This restriction is necessary to ensure that basic jurisdictional activities implemented without regard for watershed conditions are not considered Watershed Water Quality Activities. For example, it would not be appropriate for a Copermittee's construction site inspection program, which only meets the minimum requirements and is implemented identically in multiple watersheds, to be considered a Watershed Water Quality Activity. The restriction will provide the Copermittees with an incentive to continue to tailor their jurisdictional activities to watershed conditions. Organization of jurisdictional activities on a watershed basis is expected to improve jurisdictional activity effectiveness by focusing the activities where they can have the largest impact - on watersheds' high priority water quality problems.

Section: E **Sub-section**: E.2.i

Commenter(s): San Diego Copermittees, San Diego Unified Port District, City of Escondido, City of Encinitas

Comment: The Tentative Order unnecessarily restricts watershed water quality activity selection before an overall strategy is developed as part of the WURMP. The Tentative Order does not account for the degree, magnitude, or quality of a watershed water quality activity, but instead relies solely on the number of activities. Furthermore, the language contained within Section E of the Tentative Order is confusing and difficult to interpret. Through our review, the Copermittees have found that there are numerous interpretations of the requirements.

After extensive review, the Copermittees have determined that Section E of the Tentative Order should be replaced with the Copermittee's proposed alternative. This revised language provides a stronger emphasis on the development of a watershed strategy by providing a more detailed description of the steps the Copermittees must take in proposing and justifying individual activities and the strategy as a whole. Unlike the Tentative Order, it places no restrictions on the selection of activities except to require that two Watershed Water Quality and two

Watershed Education Activities be in an active implementation phase during each permit year.

Additionally, the Copermittees have also clearly defined the information that must be provided for each activity. This includes a description of the activity detailing how it will address priority watershed quality problem(s) or source(s), time schedules, specific responsibilities, the expected benefits, and how effectiveness will be measured. Because the Copermittees proposals must include adequate justification, RWQCB review should be sufficient to determine the adequacy of the proposed strategy and the activities comprising it. As such, this alternate proposal should increase Copermittee accountability and reduce the likelihood that ineffective BMPs are activities will be selected to meet the requirement for a minimum number of activities.

Response: In order to simplify the Tentative Order, it has been modified to use the majority of the Copermittee's watershed requirements proposal. The organization of the section is based on the Copermittee's proposal, as well as the approach for dealing with a watershed strategy and implementation of Watershed Activities. In order to improve integration of Copermittee jurisdictional and watershed efforts, accounting of watershed activities has been changed from a jurisdictional basis to a watershed basis. Instead of two watershed activities required per Copermittee annually, two watershed activities are required per watershed annually. This reduces the watershed activity burden on individual Copermittees and allows for increased focus on watershed activity effectiveness.

In addition, the definition of Watershed Water Quality Activity has been removed from Attachment C of the Tentative Order. This reduces the restrictions on what constitutes a Watershed Water Quality Activity, which increases the Copermittees' flexibility for program integration. Only two restrictions on Watershed Water Quality Activities remain for clarification purposes. First, Watershed Water Quality Activities conducted on a jurisdictional level must be organized and implemented to target a watershed's high priority water quality problems, or they must exceed the baseline jurisdictional requirements. This restriction is necessary to ensure that basic jurisdictional activities implemented without regard for watershed conditions are not considered Watershed Water Quality Activities. For example, it would not be appropriate for a Copermittee's construction site inspection program, which only meets the minimum requirements and is implemented identically in multiple watersheds, to be considered a Watershed Water Quality Activity. The restriction will provide the Copermittees with an incentive to continue to tailor their jurisdictional activities to watershed conditions. Organization of jurisdictional activities on a watershed basis is expected to improve jurisdictional activity effectiveness by focusing the activities where they can have the largest impact - on watersheds' high priority water quality problems. It should be noted that this restriction has been crafted to provide the Copermittees with significant flexibility in implementation of Watershed Activities. It provides the Copermittees with the option of using

jurisdictional activities to meet Watershed Water Quality Activity requirements, even if implemented at a baseline level. The Copermittees can also use activities implemented on a watershed or regional basis to comply with Watershed Water Quality Activity requirements.

The other restriction on Watershed Water Quality Activities involves capital projects. The restriction dictates that capital projects count as Watershed Water Quality Activities only in the year their construction is completed and operation begins. This restriction is necessary to ensure that ongoing operation of a completed capital project is not considered a Watershed Water Quality Activity. Once a capital project is completed, its operation typically involves little effort. At that point, the Watershed Copermittees should continue their primary Watershed Water Quality Activity efforts elsewhere, so that the overall level of watershed efforts does not decline. This restriction prevents two capital projects from being implemented at the beginning of the permit cycle to the exclusion of implementation of any additional Watershed Water Quality Activities for the rest of the permit cycle.

These limited restrictions, together with the strategy and reporting requirements for proposed Watershed Activities, are expected to ensure implementation of adequate Watershed Activities. Adequate Watershed Activities must include implementation of Watershed Water Quality Activities which actively reduce the discharge of pollutants and abate pollutant sources causing or contributing to a watershed's high priority water quality problems. Watershed Water Quality activities which do not reduce the discharge of pollutants or abate pollutant sources are unlikely to be effective in maintaining or improving water quality. As such, inadequate Watershed Activities that do not actively reduce pollutant discharges and abate pollutant sources causing or contributing to watershed water quality problems can necessitate implementation of the iterative process outlined in section A.3 of the Tentative Order in order to maintain or improve a watershed's water quality. Please see section E.2.f and Finding D.4.a of the Tentative Order for these modifications.

Section: E **Sub-section**: E.2.i.(1)

Commenter(s): City of Imperial Beach

Comment: The watershed activity requirements in Sections E.2.i.1 and E.2.k.1 are inequitable and impracticable for many jurisdictions. For example, the Cities of Imperial Beach, Solana Beach, and Del Mar, because they contain land area in multiple watershed management areas (WMAs), would each be required to annually implement two “watershed water quality activities” and two “watershed education activities” in each WMA, for a total of eight activities per year per jurisdiction. This requirement is disproportionate to the level of activity required

of many larger jurisdictions, which boast greater populations, more developed land area, and consequently, more potential pollutant sources.

Response: In order to avoid inequitable requirements due to the number of watersheds a Copermittee's jurisdiction falls within, the number of watershed activities required has been changed from a jurisdictional basis to a watershed basis. Please see section E.2.f.(4) of the Tentative Order for this modification.

Section: E **Sub-section**: E.2.k.(2)

Commenter(s): City of San Diego

Comment: Watershed concept-based education activities are non watershed specific and thus best implemented as regional activities to ensure unity/effectiveness of message and minimize conflicting and/or confusing statements. Recommend this section be moved from WURMP program to the regional urban runoff management program (RURMP) section and require 1 activity regionally.

Response: In order to simplify the watershed education requirements and increase implementation flexibility, the distinction between "watershed concept" and "source and pollutant discharge" watershed education activities has been removed from the Tentative Order. "Watershed concept" messages may be promoted by the Copermittees at whichever level they determine to be appropriate. Please see section E.2.f.1.(b) of the Tentative Order for this modification.

Section: F **Sub-section**:

Commenter(s): City of Carlsbad, City of Encinitas, San Diego Unified Port District

Comment: The need for consistency and collaboration is recognized for many of the required programs, and should be orchestrated at the regional level. However, the City disagrees with the requirement to form a new layer of program development and management, with the addition of the Regional Urban Runoff Management Program (RURMP). The City opposes the inclusion of the RURMP in the Draft Permit and requests that those requirements under Section F be met elsewhere in the permit. In meeting these requirements elsewhere in the permit, Section F should be struck from the Draft Permit.

The creation of the RURMP will require local jurisdictions to allocate resources to a regional program, which will in turn deplete budgets for the remaining watershed and jurisdictional programs. The addition of the RURMP is not in lieu

of any existing or proposed requirements under the Draft Permit, but is a new addition to the permit. The City of Encinitas, and likely many other Copermittees, is working under limited budgets at this time and do not see the advantage to reducing funding to the local jurisdictional and watershed programs to support a regional program. The creation of the RURMP, with the requirements listed in Section F (Regional Urban Runoff Management Program), in Section I.3. (Program Effectiveness Assessment. Regional), and in Section J.3. (Reporting. Regional Urban Runoff Management Plan) will require Copermittees to divert much needed resources, including staff time and money, to the Regional Programs and away from programs which are proving successful at the local jurisdictional and watershed levels.

Many of the requirements of the lead Copermittee can be addressed as they have been under Order 2001-01 and do not necessitate the creation of the RURMP. Requirements including the Long Term Effectiveness Assessment (LTEA) as stated in Section F.3, the Report of Waste Discharge (ROWD), and the Unified Jurisdictional and Watershed Urban Runoff Management Plans are one time submittals which need to be orchestrated at the regional level but do not require the creation of the RURMP.

In an effort to reduce the duplicative requirements of the tentative order, the City respectfully requests that the Regional Board consider removing the requirements of the formation of a Regional Urban Runoff Management Program and all associated reporting and assessment. These requirements will not serve to improve water quality, and will divert the focus and funding necessary to implement effective watershed based urban runoff management programs.

Response: The Copermittees conduct multiple efforts on a regional level. The inclusion of the RURMP requirements in the Tentative Order is designed to organize these efforts into one framework. This will improve Copermittee and Regional Board tracking of regional efforts. The RURMP requirements are not meant to necessitate new regional efforts on the part of the Copermittees, save for a few instances. Most of the RURMP requirements are optional - the requirements list several efforts that should be tracked and reported on a regional basis, should the Copermittees choose to undertake them. The Tentative Order has been modified to clarify that most of the RURMP requirements are optional.

The Copermittees already conduct and report on efforts on a regional basis in the Unified JURMPs and WURMPs. Rather than have two documents tracking and reporting regional efforts, the RURMP requirements move these efforts into one system and report. Rather than creating new reporting requirements, the RURMP reduces reporting from two efforts into one. Moreover, it is more appropriate to report on regionally developed programs in regional documents, rather than jurisdictional or watershed documents. The information in a report should match the scale at which it was conducted.

It should be noted that many Copermittees (typically the larger jurisdictions) do not object to the RURMP requirements. Regional approaches are also supported in the Copermittees' Report of Waste Discharge. In crafting the RURMP requirements, the Regional Board has attempted to meet the needs of both those Copermittees that support the RURMP approach and those that do not. This has been achieved by including RURMP requirements in the Tentative Order, while making the majority of the RURMP requirements optional.

In order to reduce the burden of the RURMP requirements, the RURMP effectiveness assessment requirements and reporting requirements in sections I.3 and J.3 of the Tentative Order which correspond with optional RURMP requirements have been removed from the Tentative Order. The standard effectiveness assessment requirements should be sufficient for assessment of the effectiveness of RURMP efforts.

Please see sections F, I, and J of the Tentative Order, and section III of the Tentative Receiving Waters Monitoring and Reporting Program for these modifications.

Section: F **Sub-section**: F.1

Commenter(s): City of Encinitas

Comment: Section F.1 to develop and implement urban runoff management activities on a regional level does not require the formation of the RURMP. While some programs do need regional development, they are included in other places in the permit and can be reported in the Unified Reports currently required under Order 2001-01.

Response: It is more appropriate to report on regionally developed programs in regional documents, rather than jurisdictional or watershed documents. The information in a report should match the scale at which it was conducted. In addition, the Unified Annual Reports have been added as components of the RURMP Annual Report. Therefore, whether reporting on activities occurs in the Unified Annual Reports or the RURMP Annual Report is not an issue.

Section: F **Sub-section**: F.2

Commenter(s): City of Encinitas

Comment: Requirement F.2 to develop minimum standards for the JURMP, WURMP, and RURMP programs is not necessary. The RWQCB has written the Draft Permit to be very prescriptive and sets forth the minimum standards for the

jurisdictional and watershed programs clearly. A regional effort to re-write these minimum standards a second time is not needed.

Response: The Tentative Order includes minimum requirements for jurisdictional, watershed, and regional program implementation. These minimum requirements are adequately detailed to ensure that the MEP standard is achieved. Therefore, additional minimum standards are not necessary. For this reason, section F.2 has been removed from the Tentative Order.

Section: F **Sub-section**: F.3

Commenter(s): City of Encinitas

Comment: Requirement F.3 to develop and implement a strategy to integrate JURMP, WURMP, and RURMP activities and reporting is much needed. However, there is not a need to report on the progress under the RURMP. The goals of the USEPA and the State of California Water Resources Control Board recognize the importance of focusing these programs around the watersheds, as these units provide for the ideal structure to implement programs aimed at pollution reduction and elimination. For this reason, the development of a strategy for integrating the programs must be focused on the needs of the watershed and should be reported in the Unified WURMP Annual Reports, already required under Order 2001-01 and the tentative order.

Response: Requirement F.3 is an option for the Copermittees. If the Copermittees find it to be unnecessary, they need not undertake it. However, any integration of the management, implementation, and reporting that is conducted on jurisdictional, watershed, and regional bases needs be strategized regionally. Without a regional strategy, different integration approaches could lead to difficulties in exhibiting and tracking compliance. This is especially true of integration of reporting. For example, if jurisdictional and watershed reporting were to be integrated using different approaches in different watersheds, the Regional Board would need to be familiar with multiple integration approaches in order to track compliance, further complicating already detailed programs. In addition, reporting of program integration progress needs to be included in the RURMP Annual Reports. This will keep the Regional Board apprised of the progress, and allow the Regional Board the opportunity to provide feedback. It should be noted that while a strategy for integration must be developed at the regional level, this does not prevent integration from occurring at the watershed and jurisdictional levels.

Section: F **Sub-section**: F.4

Commenter(s): City of Encinitas, City of San Diego, San Diego Unified Port District

Comment: Requirement F.4 for the RURMP to facilitate TMDL management and implementation is not an effort that should be undertaken by the regional group. Understanding that there may be certain pollutants that are listed across watersheds, this is where the similarities in the TMDLs will cease. Each impaired water body is unique and the watershed groups are most suited to assist in the development and implementation of the TMDLs. Stakeholder Advisory Groups, which include important responsible parties and stakeholders beyond the Copermittees, have been assembled to work on upcoming TMDLs in the region and further oversight is not necessary at this time. The watershed groups are aware of the respective studies underway in their watersheds and are most familiar with the water quality issues in each case. The watershed groups will utilize the data collected for their annual assessments of the watershed programs to assist in TMDL management and implementation. For these reasons, TMDLs should be assigned to their respective watershed groups for management and implementation and not to a regional group or as part of a regional program. Discussions regarding development and implementation of watershed based MOUs between Copermittees and other stakeholders in the watersheds are in progress and will ultimately guide the management and implementation of the TMDLs.

Response: Requirement F.4 does not require TMDL implementation on a regional basis; rather, it provides the Copermittees with the option of facilitating TMDL management and implementation regionally. If the Copermittees do not wish to undertake this effort, they do not need to do so. However, since several pending TMDLs address issues spanning several watersheds, it may be appropriate for the Copermittees to facilitate TMDL implementation from a regional standpoint. It is important to note that the Tentative Order principally requires TMDLs to be implemented on a watershed basis (section H), with TMDL reporting to occur in the WURMP Annual Reports.

Section: F **Sub-section**: F.6

Commenter(s): City of Encinitas

Comment: Requirement F.6 to facilitate the development of strategies for implementation of activities on a watershed level is not necessary at this time. There is currently an effective Regional Watershed Workgroup which was formed to fulfill this need under Order 2001-01. This group has been meeting regularly throughout the existing permit cycle and addressing larger scale needs of the watershed groups. There is no need for this under the RURMP as it is a regional

watershed group. Any strategies that are developed should be reported in the required Unified WURMP Annual Reports and need not be reported in the RUMRP Annual Report under the Draft Permit.

Response: Requirement F.6 is an option for the Copermittees. If the Copermittees do not wish to undertake this effort, they do not need to do so. However, because WURMP implementation has been an area of difficulty for the Copermittees, regional strategizing for WURMP implementation could be beneficial. The Regional Watershed Workgroup can serve the purpose of meeting this requirement, negating the need for duplicative efforts. The Unified WURMP Annual Report has been added as a component of the RURMP Annual Report. Therefore, whether reporting on this activity occurs in the Unified WURMP Annual Report or the RURMP Annual Report is not an issue.

Section: F **Sub-section**: F.7

Commenter(s): City of Encinitas

Comment: One primary example of diverting funds to the regional programs is in the RURMP requirement Section F.7 which requires the RURMP to develop and implement a Regional Residential Education Program. Operating on limited budgets, the City's will be asked to financially support the regional education efforts. This in turn will limit the amount of local education and outreach that can occur. Under the Draft Permit, education requirements will necessitate three programs, one at the jurisdictional level, one watershed based, and one regional. While it is understood that all three levels have a distinct purpose, the goal must be to move towards one effective program, meeting at the watershed levels.

The City of Encinitas has had a truly successful education program in conjunction with the North County Storm Water Education Group. This group has been primarily watershed based and has been successful at promoting watershed and pollution awareness at many levels, including education at the elementary schools, at local and regional events, and in several forms of media, including printed newspaper adds and articles. The City, operating under a limited budget, was able to successfully educate nearly every child in Encinitas from second to sixth grades with the Splash and Green Mobile Laboratories. A regional requirement will effectively eliminate the money necessary to support the current local programs and provide for a less effective regional program. The watershed education programs, such as the North County group, have been very successful and we believe that the watershed based programs have proven to be more beneficial than a regional program.

Response: In their Baseline Long-Term Effectiveness Assessment, the Copermittees identified residential areas as one of several "highest priority sources across all pollutants and all watersheds" (2005). This indicates that

residential areas are a significant regional concern. However, despite this widespread concern, residential areas typically do not receive the same level of oversight as other source areas, such as commercial or industrial areas. For example, residential areas are typically not inspected at the same level as commercial or industrial areas. Since residential areas do not receive the same level of oversight as other areas, enhanced education is critical. Moreover, because residential areas are a regional concern and are generally similar in terms of urban runoff conditions, regional education is an appropriate scale for addressing residential areas. The Regional Residential Education Program requires the Copermittees to specifically address the widespread and significant issue of pollutant discharges in urban runoff from residential areas. Without a regional program, residential education can be expected to continue at an uneven pace in different parts of the region. This would be inappropriate, based on the pervasive nature of residential runoff problems.

It should be noted that the Copermittees have significant flexibility in developing the Regional Residential Education Program. A balance can be achieved between regional residential education and residential education at other scales. If the Copermittees find residential education at other scales to also be effective, the Regional Residential Education Program can be appropriately scaled in response.

Section: F **Sub-section**: F.8

Commenter(s): City of Encinitas

Comment: Section F.8 (RURMP) requires the development of a standardized fiscal analysis method and Section G (Fiscal Analysis) requires that the Copermittees develop a standardized fiscal analysis for implementation by the jurisdictions. While the development will be accomplished most effectively at the regional level, the development and rationale should be submitted in the Unified Jurisdictional Urban Runoff Management Program (JURMP) Annual Report. Each jurisdiction is required to conduct and report on the fiscal analysis in their individual JURMP annual reports. There is no need to report on this activity in a separate, new report, adding another layer of cost and effort to an already excessive reporting structure.

Response: Since development of the standardized fiscal analysis method is accomplished most effectively at the regional level, plans and efforts to develop the method should be described in the regional documents. Moreover, the Unified JURMP Annual Report has been added as a component of the RURMP Annual Report. Therefore, whether reporting on this activity occurs in the Unified JURMP Annual Report or the RURMP Annual Report is not an issue.

Section: G **Sub-section**:

Commenter(s): City of Chula Vista

Comment: It is not clear how assessment of a Copermittee's fiscal analysis can be used as a measure of its compliance with Permit requirements.

Response: The Regional Board does not intend to use the Copermittees' fiscal analyses to assess compliance with permit requirements. However, additional fiscal analysis requirements have been added to the Tentative Order because the Copermittees' fiscal analysis data has been found to be inconsistent, with Copermittees using different methods to conduct their analyses. The Tentative Order requires the Copermittees to improve the consistency of their fiscal analysis reporting, so that the reported information may be useful in better understanding the cost of program implementation.

Section: G **Sub-section**: G.1

Commenter(s): City of Chula Vista

Comment: On Page 47, Section G.1, Fiscal Analysis, the Tentative Order requires "Each Copermittee shall secure the resources necessary to meet all requirements of this Order". According to the latest submitted Jurisdictional Urban Runoff Management Program (JURMP) Annual Report, during Fiscal Year 2004-2005, the City of Chula Vista spent over $1.6 M in direct costs for compliance with the existing Municipal Permit, most of which was funded by the City's General Fund. This is in addition to fiscal impacts to developers, businesses, and City Capital Improvement Projects. The Regional Board is aware that the Copermittees are unable to increase their storm drain fees as a result of Proposition 218. It is not clear how the Regional Board mandates that Copermittees should secure funds for ever-increasing requirements that have not been proven to be cost-effective or effective in improving water quality.

Response: The requirement to secure the resources necessary to meet all requirements of the Order is an existing requirement under Order No. 2001-01. The Federal Clean Water Act requires the Copermittees to develop and implement programs to reduce the discharge of pollutants from their MS4s to the MEP. The requirements of the Tentative Order are consistent with the Clean Water Act's MEP standard. They are also consistent with USEPA guidance, SWRCB guidance, and recommendations by organizations such as CASQA. USEPA expects that programs which meet the MEP standard will be effective in protecting water quality (USEPA, 1999). However, it is important to note that since the Copermittees own and operate the MS4s which discharge urban runoff pollutants, they are ultimately responsible for the effectiveness of their programs. The Tentative Order provides significant flexibility for the Copermittees to

improve their programs over the Tentative Order's minimum requirements, if the Copermittees find their programs to be ineffective. Moreover, the Report of Waste Discharge was an important opportunity for the Copermittees to provide detailed alternative program proposals to maximize program effectiveness.

Section: G **Sub-section**: G.1

Commenter(s): Coast Law Group

Comment: The Order should clearly articulate that a lack of funds is not a defense to noncompliance with an NPDES permit, including this Order. Elected officials and storm water managers alike call the permit an "unfunded mandate" of the State government. Such arguments were litigated and disposed of in the BIA litigation over the 2001 Order. The Regional Board should give such arguments no credence as regards this
Order.

Response: The Tentative Order is clear that lack of funds is not a defense for noncompliance. At section G, the Tentative Order states, "Each Copermittee shall secure the resources necessary to meet all requirements of this Order."

Section: G **Sub-section**: G.2

Commenter(s): San Diego Copermittees

Comment: Tentative Order section G.2 requires that a regional standardized method be submitted on July 1, 2007 with the RURMP document. This timeline is simply not achievable. As reported in the Copermittees' ROWD, the consensus development of a standard approach to fiscal reporting across 21 Copermittee organizations will likely be a multi-year task even with the cooperation and full participation of all Copermittees. The standardized methods should instead be submitted with the September 30, 2008 Unified JURMP Annual Report, and Copermittees should begin reporting according to these updated standards no earlier than Fiscal Year 2008-2009.

Response: In order to provide the Copermittees with adequate time to develop a regional standardized fiscal analysis method, the Tentative Order has been modified to require submittal of the method with the RURMP Annual Report due January 31, 2009. Please see Tentative Order sections G.3 and J.3.a.(8), Tentative Receiving Water Monitoring and Reporting Program section III.3.h, and Attachment D section 11 for these modifications.

Section: G **Sub-section**: G.2

Commenter(s): San Diego Copermittees, City of Santee

Comment: These requirements would add an unwarranted degree of difficulty to the development of improved fiscal reporting methods. Copermittee implementation activities are embedded in dozens of individual departments and programs. Developing and implementing methods to extricate these program costs for the purpose of tracking expenditures is likely to be extremely difficult, yet the Fact Sheet / Technical Report offers no rationale or factual basis for why it is either necessary or desirable.

One explanation is that RWQCB staff may be concerned that Copermittees are "over-reporting" existing program costs. If so, it should be noted that Copermittee expenditures are currently estimated in accordance with required program implementation responsibilities. For example, the reason that report household waste collection and street sweeping costs are reported, even though these activities are conducted pursuant to separate mandates, is that Order No. 2001-01 also requires them. Arbitrarily requiring the separation of costs that are applicable to "multiple programs" or that were "in existence prior to implementation of the urban runoff management program" is likely to waste considerable Copermittee time and effort for little, if any, gain. These provisions should be removed from the Tentative Order, and the Copermittees instead be required to define the scope and content of this effort.

It is also not clear how this requirement would benefit water quality, and it would inevitably direct resources away from activities that can directly benefit water quality (for example through developing and implementing additional accounting procedures).

Response: In order to ease the Copermittees' fiscal analysis reporting burden, the Tentative Order has been modified to eliminate the requirement to "distinguish between expenditures attributable solely to permit compliance and expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program." Instead, the Copermittees are simply required to identify when an expenditure meets other purposes in addition to urban runoff management. This identification will help the Copermittees and Regional Board better understand costs and benefits associated with program implementation. For example, expenditures meeting multiple purposes may be more beneficial than otherwise thought. In addition, such information can aid the Copermittees in assessing if program expenditures are effective, which is a requirement at section I of the Tentative Order. Methods for improving effectiveness assessments can have a direct impact on water quality by guiding Copermittee expenditures to areas where they are most effective. More effective Copermittee programs lead to reduced pollutant

discharges and improved receiving water quality. Please see section G.2.b of the Tentative Order for this modification.

The requirement that the Copermittees develop a metric or metrics for reporting program expenditures should not be a burden to the Copermittees. It is a means for reporting fiscal data, and does not require new accounting methods or changes to old accounting methods. Reporting using a metric normalizes the data reported. This can be used by the Copermittees to compare expenditures and learn where other Copermittees are expending funds and for what purpose. The Regional Board does not intend to use fiscal analysis data to determine compliance.

Section: G **Sub-section**: G.2.b

Commenter(s): City of San Diego

Comment: Would require the City to distinguish between expenditures attributable solely to permit compliance and expenditures that were in existence prior to implementation of the Urban Runoff Management Program (URMP) that addressed water quality. Recommend that the Permit state which year would be considered the first year of implementation of the URMP to benchmark the initiation of expenditures.

Response: The first San Diego County Municipal Storm Water Permit (Order 90-42) was issued in 1990. The year 1990 should serve as the benchmark for initiation of expenditures.

Section: G **Sub-section**: G.3

Commenter(s): San Diego Copermittees, City of Escondido, City of San Diego, City of Chula Vista

Comment: The existing requirement under Order No. 2001-01 to project budget expenditures for the upcoming fiscal year provides sufficient documentation of the Copermittees' ability to carry out their implementation responsibilities. As discussed at the RWQCB December 14, 2005 Workshop on fiscal analysis requirements, the Copermittees disagree that a requirement to report on past year expenditures is reasonable or appropriate. For most Copermittees, implementation activities are embedded in dozens of individual departments and programs. Many of the costs currently projected in Copermittee fiscal analyses must be estimated as a percentage of an existing cost (e.g., BMP implementation costs are estimated as a percentage of a CIP, staff costs as a percentage of existing inspections, etc.). While it is generally reasonable to use such methods for projecting costs during program planning, it would be almost impossible to

track the actual expenditures associated with those estimates over the reporting period. Additionally, the value of this information in assessing Copermittee compliance is likely to be limited since expenditures are not an indicator of performance.

Response: Because of the difficulty of determining actual Copermittee expenditures for their urban runoff management programs due to the programs' mixing with other Copermittee programs, the Tentative Order has been modified to only require reporting of budgeted expenditures. Please see section G.3 of the Tentative Order for this modification.

Section: H **Sub-section**:

Commenter(s): City of Chula Vista

Comment: The current language in the Tentative Order Section H may be interpreted to mean that all Copermittees in the San Diego Bay Watershed are responsible for the implementation of additional BMPs in conjunction with TMDL programs. The language in this section should be revised to clearly state that only the Copermittees discharging to impaired segments are responsible for the implementation of those additional BMPs or any other activities associated with TMDL programs.

Response: Section H of the Tentative Order has been modified to clarify that only the Copermittees within the Chollas Creek and Shelter Island Yacht Basin watersheds are responsible for compliance with the TMDL requirements of section H.

Section: H **Sub-section**:

Commenter(s): City of Encinitas

Comment: It is anticipated that several TMDL will be developed during the upcoming Permit cycle. Although we support integration of TMDLs with the Municipal NPDES Permit, at this time we do not know how the TMDLs will be structured or what the requirements will be. Therefore, we believe that it is premature to include specific and detailed TMDL requirements in the Draft Permit. These requirements may end up inconsistent or duplicative of requirements in the actual TMDL Orders, once developed. We believe that the Draft Permit should include general reference to the TMDL implementation plans, such as the wording included on Page 10, Section A.12 of the Tentative Receiving Waters Monitoring and Reporting Program No. R9-2006-0011. The general reference is appropriate for Page 52, Section I.4. TMDL BMP

Implementation Plan and Page 17, Section III.2(13) of the Tentative Receiving Waters Monitoring and Reporting Program No. R9-2006-0011.

Response: The only TMDLs addressed in the Order are those that have been finalized and fully approved. As such, the structure and requirements of the TMDLs included in the Order are known. The requirements of these TMDLs and the TMDL requirements of the Order are consistent. Likewise, future TMDLs will only be incorporated into the Order after they have been finalized and fully approved. Since future TMDLs will be approved prior to inclusion in the Order, the TMDL requirements will be known and incorporated into the Order in a manner consistent with the TMDL. Inclusion of the TMDLs in the Order is necessary to provide a regulatory mechanism for the TMDLs.

Section: H **Sub-section**:

Commenter(s): City of San Diego

Comment: Currently, the Regional Board is developing TMDLs on a pollutant by pollutant basis without consideration of multiple pollutants within a watershed. This makes BMP development difficult as jurisdictions must anticipate ALL pollutants when identifying BMPs and watershed-wide strategies. Additionally, this section is not incorporated into the Watershed Urban Runoff Management Program section, which is the scale at which the TMDLs will be developed.

The US Environmental Protection Agency supports watershed-based, multiple pollutant approaches. The EPA's Compendium of Tools for Watershed Assessment and TMDL Development (EPA841-B-97-006) , Page 2, Paragraph 2 states "By providing information on technical tools for developing and implementing watershed projects and TMDLs with a broader water quality-based management strategy, this documents supports state and federal agencies in establishing ecologically based controls on a watershed basis." In addition, when designing an implementation strategy, the City will need to anticipate and design for all pollutants comprehensively. Recommend moving TMDL section to the WURMP section to address TMDLs on a watershed basis. Recommend addressing TMDL pollutants comprehensively (e.g., one multi-pollutant TMDL for each watershed).

Response: While the TMDL section is a stand alone section in the Tentative Order, TMDL provisions have been included in the watershed sections of the Tentative Order. Actions taken to address TMDLs can be considered Watershed Water Quality Activities and the Copermittees are required to report on TMDL implementation in the WURMPs and WURMP Annual Reports. In addition, the TMDL requirements of the Tentative Order specifically address the watersheds to which the TMDLs apply. These provisions are expected to be sufficient to guide TMDL implementation on a watershed basis. Regarding creation of multiple

pollutant TMDLs, this comment has been noted. However, creation of TMDLs is outside the scope of the Tentative Order. The Tentative Order only incorporates already completed TMDLs; new TMDLs are created under another regulatory mechanism.

Section: H **Sub-section**:

Commenter(s): City of San Diego

Comment: Could lead to conflicts with future Regional Board approved individual TMDL Implementation Plans if those plans are modified. However, TMDL implementation plans may be modified, making them inconsistent with the Permit. Recommend that language be added that clarifies Copermittees shall comply with TMDL requirements, and subsequent updates to allow for potential changes.

Response: In order to allow TMDL Implementation Plans to be modified as new information is obtained, the Tentative Order has been modified. Please see sections H.1.c and H.2.b of the Tentative Order for this modification.

Section: H **Sub-section**:

Commenter(s): Coast Law Group

Comment: A placeholder should be inserted in the Order to remind Copermittees that other TMDLs adopted during the permit term will be incorporated into the Order.

With the inclusion of Water Quality Based Effluent Limits in this Order, the Regional Board should consider adopting additional numeric effluent limits where applicable. For instance, where particular concentrations of pesticides or metals (e.g. diazinon, chlorpyrifos, arsenic) are known to be harmful, such limitations should be included. The Order should explicitly note the possibility that it could be amended during the five year permit term to add numeric effluent limits should a statewide policy be adopted as a result of the impending report on the subject by the SWRCB "Blue Ribbon Panel."

Response: Future TMDLs will either be incorporated into the Tentative Order or incorporated into future Orders. Since it is not known at this time which approach will be used under which circumstances, a place holder would be inappropriate. Regarding numeric effluent limits in municipal storm water permits in general, the SWRCB Blue Ribbon Panel found that it "is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges" (Currier, et al, 2006).

Section: I **Sub-section**:

Commenter(s): Coast Law Group

Comment: This section of the Order should further require that Copermittees specify the effectiveness of program elements for wet and dry weather. The Copermittees have generally done a decent job addressing exceedances of water quality standards in dry weather. The Bay Council does not believe the Copermittees have even begun to meaningfully address wet weather flows.

Response: The Tentative Order requires the Copermittees to assess effectiveness for wet and dry weather. For example, each significant Copermittee activity or BMP is required to be assessed, regardless of whether it addresses wet or dry weather flows. In addition, the Tentative Order requires the Copermittees to use both wet and dry weather monitoring data in their effectiveness assessments. For these reasons, it is not necessary to specify that the Copermittees' effectiveness assessments address wet and dry weather.

Section: I **Sub-section**: Multiple

Commenter(s): City of Imperial Beach, City of Carlsbad

Comment: Sections I.1.b, I.2.b, and I.3.b would require each Copermittee to utilize results from its effectiveness assessment to modify activities and BMPs in order to maximize urban runoff management program effectiveness. This statement needs a qualifier such as “to the maximum extent practicable”, “within reason”, “taking into account cost considerations”, etc. Otherwise, maximizing urban runoff management program effectiveness is a boundless goal with no limitations.

Response: Copermittee programs must be modified to maximize effectiveness so that pollutants in urban runoff discharges are reduced to the MEP and do not cause or contribute to violations of water quality standards. Sections I.1.b, I.2.b, and I.3.b of the Tentative Order have been modified to clarify this issue.

Section: I **Sub-section**: Multiple

Commenter(s): San Diego Copermittees

Comment: The requirements of Tentative Order section I are prescriptive beyond a level that is necessary or reasonably achievable. To restore appropriate levels of Copermittee discretion and ensure that the directives of this

section can actually be met, "where applicable" and "may" should be added to the last sentence of each of the introductory sections (I.1.a. (intro), I.2.a., I.3.(a), and I.4.(a)). "Where applicable" should also be added to sections I.1.a.(5), I.2.a.(5), and I.3.(a)(5).

In support of the approach currently contained in the Tentative Order, the Fact Sheet / Technical Report states: "The effectiveness assessment requirements incorporate the approaches developed by the Copermittees in their October 16, 2003 “Framework for Assessing the Effectiveness of Jurisdictional Urban Runoff Management Programs,” including use of “outcome levels” and “major effectiveness assessment elements.”

The Copermittees agree that the 2003 framework and subsequent iterations should be used as a basis for the requirements of this Order; however, as is clear from a careful reading of that document, and the 2005 CASQA Effectiveness Assessment paper, this framework was not intended to be translated to rigid and prescriptive requirements as has been done in the Tentative Order. While the Fact Sheet / Technical Report implies consistency with the content developed by the Copermittees, the language of the Tentative Order goes well beyond what was proposed in the ROWD and the County's November 2005 suggested language.

In support of the level of prescription contained in the Tentative Order, the Fact Sheet / Technical Report states: "… the Regional Board has frequently needed to request that the Copermittees improve their effectiveness assessments and utilize the various assessment methods that are available. Moreover, half of the Copermittees audited were found to have inadequate effectiveness assessments which frequently lacked use of measurable goals. For these reasons, the Order contains language requiring the Copermittees to utilize the various outcome levels “where applicable and feasible.” This will help ensure that the Copermittees vigorously use outcome levels, while also providing the Copermittees with flexibility to develop techniques to use outcome levels where such techniques do not currently exist."

While this implies that Copermittees are afforded broad discretion in applying these methods, this is generally not the case. For example, “where applicable and feasible” does not apply to sections I.1.a.(1), (2), and (5), or I.1.b. In fact, this phrase is applicable only in a very limited number of instances. Instead of providing a factual basis for restricting Copermittee flexibility, the Fact Sheet / Technical Report has incorrectly asserted that it exists. The Fact Sheet / Technical Report has therefore failed to provide a sufficient factual basis for the imposition of this additional specificity.

Response: Application of the phrase "where applicable and feasible" to the entire Program Effectiveness Assessment section is inappropriate. The Program Effectiveness Assessment section includes requirements for implementation of

basic well-established assessment approaches which are necessary for the MEP standard to be achieved. Because the MEP standard is a baseline requirement of the Tentative Order, implementation of requirements that are clearly necessary to meet the standard should not be modified by the phrase "where applicable and feasible." The Tentative Order ensures that the minimum MEP standard is met, while also providing the Copermittees with flexibility (through the use of the phrase "where applicable and feasible") where requirements are more detailed than basic well-established approaches.

There are only a few requirements in the Program Effectiveness Assessment section which are not modified by the phrase "where applicable and feasible." Implementation of each of these requirements is a basic component of program effectiveness assessment and is necessary for the MEP standard to be achieved. The first requirement of this type is the requirement that the Copermittees assess the effectiveness of each significant activity and program implemented. USEPA expects each significant activity to be assessed at some level when it states that Phase II permittees "must submit measurable goals for the development and implementation of each BMP" (USEPA, 1999). In addition, the Copermittees already assess all of their significant activities for permit compliance (Assessment Level 1) under their current annual reporting approach. Since the Copermittees already assess all of their activities, this assessment has been exhibited to be practicable and must be continued for MEP to be met. Application of the phrase "where applicable and feasible" is not appropriate under these conditions, since it creates ambiguity where none currently exists. However, it should be noted that the requirements have been modified to clarify that every single BMP does not need individual assessment, but rather that types of BMPs can be assessed as groups. Moreover, these requirements still provide the Copermittees significant flexibility, because the level of assessment that must be conducted is not dictated. The Copermittees have flexibility to determine at what level they will assess each of their significant activities or types of significant activities.

The Tentative Order also requires use of measurable targeted outcomes, assessment measures, and assessment methods for all significant activities implemented. As discussed above, USEPA expects measurable outcomes to be developed for each BMP implemented. Assessment measures and assessment methods are simply means for conducting assessments of activities or BMPs. Assessment measures and methods are necessary components of an effectiveness assessment. Therefore, it is appropriate to require their use during the assessment of the effectiveness of programs. CASQA exhibits this when it states: "All priority outcomes should have at least one assessment measure associated with them, but some may have multiple measures" (CASQA, 2005).

The final requirement in the Program Effectiveness Assessment section of the Tentative Order that is not modified by the phrase "where applicable and feasible" is the section requiring use of Implementation Assessment, Water

Quality Assessment, and Integrated Assessment. This requirement was included in the Tentative Order for consistency with the Copermittees document "A Framework for Assessing the Effectiveness of Jurisdictional Urban Runoff Management Programs." Since these methods are still under development, these requirements have been modified by the phrase "where applicable and feasible." Please see sections I.1.a.(5), I.2.a.(7), and I.3.a.(5) of the Tentative Order for these modifications.

Section: I **Sub-section**: Multiple

Commenter(s): San Diego Copermittees

Comment: Second, the requirement that "jurisdictional activities or BMPs that are ineffective or less effective than other comparable jurisdictional activities or BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities or BMPs" should be simplified to "activities or BMPs that are ineffective shall be modified or replaced." The current phrasing is too cumbersome to be either understandable or enforceable.

Response: In order for the MEP standard to be met, the Copermittees must improve BMPs when they are found to be ineffective or when it is found that comparable BMPs are more effective. This concept is supported by the SWRCB, which states: "Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibitive" (SWRCB, 1993). Clearly, the SWRCB finds that BMPs must be effective, as the provisions of the Tentative Order require. The SWRCB further finds: "If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive, it is likely that MEP has not been met" (SWRCB, 1993). Therefore, when BMPs are not equal in their effectiveness but are of comparable cost, the more effective BMP must be chosen. Again, this is consistent with the Tentative Order requirements. As such, significant modification of the requirements is not warranted. However, minor modifications to the requirements have been made to improve readability. Regarding assessment of compliance with the requirements, since the requirements are an extension of the MEP concept, compliance assessment will be conducted in the same manner as compliance assessment with the MEP standard is conducted. Attachment C provides a discussion of the MEP standard. Please see sections I.1.b and I.2.b of the Tentative Order for these modifications.

Section: I **Sub-section**: Multiple

Commenter(s): San Diego Copermittees

Comment: Finally, "where monitoring data exhibits persistent water quality problems, jurisdictional activities or BMPs applicable to the water quality problems shall to be modified and improved on at least an annual basis to correct the water quality problems" should be modified to "where monitoring data exhibits persistent water quality problems, jurisdictional activities or BMPs applicable to the water quality problems shall be modified to address the water quality problems." This change retains the directive to review and respond appropriately to monitoring data, but makes it achievable and enforceable by removing the unrealistic timeframe. Copermittees generally do not have sufficient information or knowledge regarding the effectiveness of activities to adjust them on an annual basis and some activities will take several years to "sink in" before they see results.

Response: In order to provide the Copermittees with adequate time to implement and assess modified and improved BMPs, the Tentative Order has been modified to remove the annual timeframe for modification and improvement. Please see sections I.1.b, I.2.b, I.3.b, and I.4.b of the Tentative Order for these modifications.

Section: I **Sub-section**: Multiple

Commenter(s): San Diego Copermittees

Comment: Another area of concern in the Tentative Order is the requirement to assess each "significant" program or BMP, in addition to the JURMP component as a whole. In addition to the difficulty of interpreting "significant," this could result in unnecessary increases in Copermittee costs. Since the evaluation of individual controls per se is not the primary focus of JURMP evaluations, this requirement should be deleted.

Response: The intent of the Tentative Order is not to require assessment of the effectiveness of every single individual BMP or activity that is implemented. Rather, the intent is that types of BMPs or categories of activities be assessed. Sections I.1.a.(1)(a), I.3.a.(1)(a), and I.4.a.(1)(a) of the Tentative Order have been modified to clarify this intent.

Section: I **Sub-section**: Multiple

Commenter(s): San Diego Copermittees, City of Encinitas

Comment: The Copermittees should be required to annually review their activities or BMPs to identify modifications and improvements needed to maximize program effectiveness, and to develop plans and schedules for addressing identified modifications and improvements. It is unreasonable to

require program modifications on an annual basis, particularly when the assessment is based on monitoring data. It will take some time to determine that a water quality problem is persistent, not withstanding the problems with identifying what represents "persistent", and even more time to adjust program activities that may have taken years to establish. Even if a program is adjusted, it may take several years, if ever, to see a change is water quality so that Copermittees will be continually adjusting their programs in a knee-jerk fashion.

Response: In order to provide the Copermittees with adequate time to modify and improve their programs, the Tentative Order has been modified to allow the Copermittees to develop and implement a plan and schedule for program modification and improvement. Please see sections I.1.b, I.2.b, and I.3.b of the Tentative Order for these modifications.

Section: I **Sub-section**: I.1.a.(1)(a)

Commenter(s): City of Encinitas

Comment: We request that examples be provided of the types of activities and BMPs that fall into the "significant" category. Should we assume that these are activities that are outside of the major components of the JURMP and are above and beyond the required program activities?

Response: Significant jurisdictional activities are those activities implemented in compliance with the major jurisdictional requirements. Some examples include general effectiveness of inspections, BMP requirements, trainings, enforcement methods, etc.

Section: I **Sub-section**: I.1.a.(1)(b)

Commenter(s): San Diego Copermittees

Comment: Section I.1.a(1)(b) requires that the implementation of ICID and Education elements be assessed annually. These should be removed because they are part of each of the source-specific elements already listed.

Response: In section I.1.a.(1)(b), each of the major program components of the Jurisdictional Urban Runoff Management Programs is listed and required to be assessed for effectiveness by the Copermittees. Since Illicit Discharge Detection and Elimination and Education are major program components of the Jurisdictional Urban Runoff Management Programs, they are included in the list. The Copermittees' Illicit Discharge Detection and Elimination and Education efforts do not always fit neatly into one of the other program component categories, such as construction, municipal, residential, etc. For example, large

scale education actives such as public service announcements may address all of these program component categories, while field screening stations may receive runoff from multiple land use types. There must be a mechanism for assessing the effectiveness of these types of activities which do not neatly fit into one of the other program component categories. Requiring assessment of the Illicit Discharge Detection and Elimination and Education program components on their own, as is done with the other program component categories, provides this mechanism.

Section: I **Sub-section**: I.1.b

Commenter(s): City of San Diego

Comment: Would require modification of activities where persistent water quality problems are identified until the problem is corrected. Fails to consider "background noise" in water quality data; that sources could be upstream of the City or beyond the City's jurisdictional power to control (i.e., vehicle emissions). Recommend modifying Permit language to allow the Copermittees to account for upstream or other factors beyond the City's jurisdictional authority.

Response: Sections I.1.b, I.2.b, I.3.b, and I.4.b have been modified to clarify that persistent water quality problems must only be addressed if MS4 discharges are causing or contributing to the problems.

Section: I **Sub-section**: I.2.a.(5)

Commenter(s): San Diego Copermittees

Comment: As drafted, the WURMP annual assessment section would require a level of analysis that is impractical on an annual basis. The Copermittees' ROWD specifically recommended that annual analysis of Level 5 and 6 outcomes be limited to a qualitative review of results from the Receiving Waters Monitoring Program, and that correlation of program implementation to changes in water quality be conducted only as part of the long-term (5-year) effectiveness assessment. Because of the complexity and expense of this analysis, it is unrealistic to expect it can be completed annually. This section should be qualified with "where applicable" as has already been done for Watershed Water Quality Activities and Water Education Activities (I.2.a.(1)(a) and I.2.a.(1)(b)), and the last sentence (which is appropriate for long-term assessment only) removed.

Based on a review of their own October 2003 Assessment Framework and the 2005 CASQA Effectiveness Assessment Guidance, the Copermittees contend that these outcome levels as written into the Tentative Order are inappropriate for annual assessments.

Response: While annual quantitative assessment of linkages between the Copermittees' watershed efforts and water quality may not be practicable, the Copermittees must attempt to understand the impact of their watershed activities on water quality more frequently than every five years. The Copermittees' annual implementation of watershed activities must be informed by water quality conditions. Since watershed activities will be implemented on an annual basis, it is appropriate to assess them annually. In order to acknowledge the difficulty of assessing watershed activities in terms of water quality annually, while still requiring the Copermittees to consider water quality results when assessing watershed activity effectiveness, the Tentative Order has been modified to require only qualitative assessment of watershed activities in terms of water quality. Please see sections I.2.a.(5) of the Tentative Order for this modification.

Section: I **Sub-section**: I.3.a.(10)(e)

Commenter(s): City of Santee

Comment: As the RWQCB does not provide funding for urban runoff management programs and as they have no accountability for the costs incurred for compliance with this program, it is not appropriate for them to require any assessment of cost-efficiency. Therefore “and cost-efficiency” should be deleted.

Response: Section I.3.a.(10)(e) of the Tentative Order has been modified to remove reference to cost efficiency.

Section: I **Sub-section**: I.4.a

Commenter(s): City of Chula Vista

Comment: The Tentative Order requires all Copermittees within a watershed with a TMDL order to assess the effectiveness of its TMDL BMP Implementation Plan and to modify the BMPs to maximize the TMDL BMP Implementation Plan. The two drainage areas within the San Diego Bay Watershed currently with TMDL programs are the Chollas Creek and the Shelter Island Yacht Basin (SIYB), both of which the City of Chula Vista is not tributary to.

Response: Section I.4 of the Tentative Order has been modified to clarify that only the Copermittees subject to the TMDL are responsible for the effectiveness assessment of the TMDL BMP Implementation Plan.

Section: I **Sub-section**: I.4.a

Commenter(s): City of Encinitas

Comment: TMDL assessment will be included in individual TMDL Implementation Plans and should be summarized and referenced in the WURMP annual reports as appropriate. Inclusion of specific assessment language in the permit regarding annual TMDL assessment and reporting may be in conflict with the contents of the TMDL Implementation Plan and is not appropriate. Annual assessments of the effectiveness of the TMDL will be duplicative of required assessments written into the implementation plans and should not be required under the Draft Permit.

Response: Since future TMDLs are yet to be developed, these TMDLs may or may not require TMDL Implementation Plans to include assessment of the effectiveness of implementation of the plans. Since the Order is the vehicle for ensuring TMDL implementation is effective and TMDL requirements are achieved, it is appropriate to include effectiveness assessment requirements in the Tentative Order. This provides the necessary assurance that the effectiveness of TMDL Implementation Plans will be assessed.

Section: I **Sub-section**: I.4.a.(1)

Commenter(s): City of San Diego

Comment: Assessing each BMP would be an inefficient use of resources, since groupings and generalizations could be made (e.g., evaluate one BMP out of a group) to save resources. The focus should be on prioritizing where the BMPs that need to be built, not monitoring & assessing each individual BMP. Recommend changing annual assessment to once every 5-years in the permit condition. Recommend adding language to allow representative sampling and analysis.

Response: The intent of the Tentative Order is not to require assessment of the effectiveness of every single individual BMP or activity that is implemented. Rather, the intent is that types of BMPs or categories of activities be assessed. Sections I.1.a.(1)(a), I.3.a.(1)(a), and I.4.a.(1)(a) of the Tentative Order have been modified to clarify this intent.

Regarding assessment on a five year cycle, since the Copermittees implement their program on an annual cycle, annual assessment is an appropriate timeframe. If assessment is only conducted every five years, a significant amount of time could be wasted implementing ineffective BMPs before an assessment might identify the BMPs as ineffective. Implementation of ineffective BMPs over such a time period would not meet the MEP standard. Assessment

of activities addressing TMDLs on an annual basis is consistent with other assessment requirements of the Tentative Order, such as assessment of jurisdictional, watershed, and regional activities. In addition, the Copermittees currently conduct assessment on an annual basis under Order No. 2001-01.

Section: I **Sub-section**: I.4.a.(5)

Commenter(s): City of San Diego

Comment: Requires additional assessment levels that are beyond the approved Implementation Plan for the Chollas Creek Diazinon TMDL. Further, higher level analysis (5-6) is subject to background noise, and therefore often inappropriate for conclusively assessing program effectiveness. Recommend requiring levels 5-6 assessment only when "applicable and feasible."

Response: While annual quantitative assessment of linkages between the Copermittees' TMDL efforts and water quality may not be practicable, the Copermittees must attempt to understand the impact of their TMDL activities on water quality more frequently than every five years. The Copermittees' annual implementation of TMDL activities must be informed by water quality conditions. Since TMDL activities will be implemented on an annual basis, it is appropriate to assess them annually. In order to acknowledge the difficulty of assessing TMDL activities in terms of water quality annually, while still requiring the Copermittees to consider water quality results when assessing TMDL activity effectiveness, the Tentative Order has been modified to require only qualitative assessment of TMDL activities in terms of water quality. Please see section I.4.a.(5) of the Tentative Order for this modification.

Section: I **Sub-section**: I.5.b

Commenter(s): City of Santee

Comment: This section references section I.3.a(8) of this order, however it could not be found. Correct the reference.

Response: Section I.5.b of the Tentative Order has been modified to correctly reference section I.3.a.(6) of the Tentative Order.

Section: I **Sub-section**: I.5.d

Commenter(s): City of Encinitas

Comment: The need for assessment of the monitoring programs are clear however, the prescriptive methods to perform the assessment are not necessary and should be removed from the Draft Permit. The Copermittees should be able to determine the most effective means of assessing the monitoring programs and should not be directed to use a certain statistical method as prescribed by the Draft Permit.

Response: The Tentative Order requires the Copermittees to conduct power analyses because these analyses are standard when determining the amount of monitoring needed to be able to detect a change of a certain size, such as a particular reduction in pollutant concentrations. Since the Copermittees' Long-Term Effectiveness Assessment will serve as the basis for monitoring to be conducted over the next permit term, and the entire goal of the urban runoff management programs is to reduce pollutant discharges, it is appropriate that the document include power analyses so that the ability of various monitoring approaches to exhibit statistically significant changes in pollutant concentrations is known. This information can be used to guide decisions on the next permit term's monitoring program. Power analysis is recommended for use in developing monitoring programs by the Southern California Storm Water Monitoring Coalition in its "Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California" (2004).

Section: J **Sub-section**:

Commenter(s): Coast Law Group

Comment: JURMP, WURMP and RURMP reports should be made available to the public on each Copermittees' website. Further, the Unified reports should be accessible from the Regional Board's website.

Response: The Copermittees are encouraged to post their JURMPs, WURMPs, and RURMP on their websites. All Copermittee plans and reports are available for public review at the Regional Board.

Section: J **Sub-section**: Multiple

Commenter(s): City of Imperial Beach

Comment: Sections J.1.a, J.2.a, and J.3.a on Pages 53 and 55 would require updated JURMPs, WURMPs, and RURMPs to describe all activities that “have been undertaken” or “are being undertaken” to implement requirements of the permit. Requiring historical information to be regurgitated in the updated plans would be superfluous. The language should be changed to include only those activities that a Copermittee “will undertake”.

Response: The intent of the requirements at issue is to ensure that the urban runoff management program documents describe the Copermittees' full programs, and not just the new portions of their programs. Complete descriptions of the Copermittees' urban runoff management programs, rather than descriptions of the new programs only, are needed for tracking and review purposes. The requirements are not intended to force reporting of all historical activities that have been implemented. Sections J.1.a, J.2.a, and J.3.a of the Tentative Order have been modified to clarify this intent.

Section: J **Sub-section**: Multiple

Commenter(s): San Diego Copermittees, City of San Diego

Comment: Detailed requirements for submittals and reports are spread throughout multiple sections of the Tentative Order. Consolidation of all reporting requirements for the JURMP, WURMP and RURMP in a consistent location would make it easier to follow and therefore understand these requirements.

Response: To improve organization of the Tentative Order, it has been modified to include all reporting requirements in section J. Monitoring reporting requirements are still located in the Tentative Receiving Waters Monitoring and Reporting Program.

Section: J **Sub-section**: J.2.a

Commenter(s): San Diego Unified Port District

Comment: Section J.2.a.(7) of the Draft Permit requires Copermittees to describe the strategy used to guide implementation of watershed activities and also requires that Copermittees include criteria for evaluating and identifying effective activities in. As such the criteria in J.2.a.(8) is redundant; the placement of activities into a watershed strategy will not occur unless the activities are likely to be effective. However, the Port emphasizes that the real effectiveness of the activity will not be able to be determined until the activity is implemented. Recommendation: Delete section J.2.a.(8).

Response: Evaluation of watershed activity effectiveness, as required by section J.2.a.(8), is necessary because various watershed activities may have various levels of effectiveness. While all potential watershed activities chosen by the Copermittees are expected to be effective to some degree, some activities may be more effective than others. As such, evaluation of watershed activity effectiveness is not redundant in terms of other requirements to develop a strategy for watershed activity implementation.

Section: J **Sub-section**: J.2.a

Commenter(s): San Diego Unified Port District

Comment: The current language for these sections state "Identification and description of the"…"to be implemented by each Copermittee for the first year of implementation, including justification for why the activities were chosen and information exhibiting that the activities will directly and significantly reduce the discharges of pollutants causing the watershed's high priority water quality problems." The text, as written, puts unreasonable expectations on the Copermittees and requires Copermittees to know the results of the activity in advance of implementation. The statement leads to Copermittees potentially being out of compliance if activities do not have expected results. Recommendation: It is recommended that the portion of text reading "…information exhibiting that the activities will directly…" be modified to read, "…how they are expected to" …"reduce the discharge of pollutants/ target the sources and discharges of…"

Response: The purpose of this requirement is to ensure that the Watershed Water Quality Activities to be implemented by the Copermittees can be reasonably expected to directly reduce the discharge of pollutants or abate pollutant sources. The Copermittees are not expected to prove that the activities will reduce the discharge of pollutants or abate pollutant sources, since obtaining such proof can be difficult to obtain prior to implementation. Instead, the Copermittees are to assess activity effectiveness following implementation. For these reasons, the Tentative Order has been modified to require that Watershed Water Quality Activities must be expected to reduce pollutant discharges or abate pollutant sources. Please see section J.2.a of the Tentative Order for these modifications.

Section: J **Sub-section**: J.3.a

Commenter(s): San Diego Copermittees

Comment: With the creation of a RURMP, there is no longer a need for stand-alone JURMP and WURMP common activities sections. These should instead be incorporated as sections of the RURMP, and deleted as separate requirements.

Response: Since the common activities sections of the urban runoff management plans and urban runoff management program annual reports address activities conducted by the Copermittees as a group, they are more appropriate for inclusion under the Regional Urban Runoff Management Program

and associated reports. Please see sections J.1.a.(2), J.1.b.(3), J.1.c.(1)(a), J.3.a.(2), J.3.b.(3), and J.3.c.(a) of the revised Tentative Order for these modifications.

Section: J **Sub-section**: J.4

Commenter(s): San Diego Copermittees, Project Design Consultants, City of Chula Vista, City of San Diego, City of Escondido, Building Industry Association of San Diego County, Construction Industry Coalition on Water Quality, Pardee Homes, American Public Works Association

Comment: We respectfully request an extended timeline of 36 months for HMP preparation due to (1) the larger amount of physical data to be gathered and calibrated, (2) the need to develop management practices and sizing criteria specific to San Diego County, and (3) the need to assemble a panel of appropriately licensed experts to review the HMP.

San Diego County is approximately four times larger in geographic area than either Santa Clara or Contra Costa Counties. Within its large geographic area, San Diego County encompasses many watersheds with varying geologic and topographic conditions as well as varying precipitation data. Not only does San Diego County cover a considerably larger geographic area than Santa Clara or Contra Costa Counties, but the climate is also different. Since geologic, topographic, hydrologic and climatic factors influence the natural systems that the HMP management strategies are intended to mimic and protect, unique factors in San Diego will result in unique design issues for HMP implementation in San Diego.

The Copermittees will require a considerable amount of time for gathering field data and historic data and calibrating the model for San Diego County's many varied watersheds. The short time frame for preparation of the HMP will not leave sufficient time to devise management strategies tailored specifically for San Diego County after the calibration process is completed. The time frame for Santa Clara County was twenty-three months from the submittal of base data to completion of the final report. The time frame proposed for San Diego County is just twenty-three months total, including data gathering and model calibration.

During the previous permit cycle, the Copermittees had an organizational structure in place to develop the model SUSMP. The City of San Diego was able to commit an in-house expert to prepare the Model SUSMP. These factors allowed the Copermittees to make use of the full schedule for preparation of the Model SUSMP. Preparation of the HMP will require the Copermittees to develop an organizational structure and to hire a consultant. It takes time for an agency to hire a qualified consultant. This will further constrict the schedule of HMP preparation.

A secondary benefit of the extended time frame would be that the experience of other counties in California could be incorporated into the San Diego County HMP, where determined to be applicable to San Diego County. Although the type and sizing of management practices may differ from other counties, the ultimate goal is the same. Because the other Counties have only recently adopted their HMPs, there is no real world data to confirm that the types and sizing of the management practices adopted elsewhere will actually work. A prudent twelve-month extension could avoid costly mistakes and irreparable harm to the environment by allowing the Copermittees to observe and learn from other jurisdictions.

Needed modifications to the schedule are described below. Because some deliverables dates depend on a review and approval process outside the control of Copermittees, they are expressed in the amount of time needed for completion rather than as firm dates.

a. 180 days after permit adoption: Submit a detailed work plan and schedule for completion of the literature review, development of a limiting range of rainfall events, development of guidance materials, and other required information. During this time, the Copermittees anticipate the formation of a TAC, the formation of an implementation workgroup, and the development of a budget identifying funds to be appropriated from individual Copermittees. The TAC is anticipated to convene, review available literature and methods, and, based on this experience, select a method to develop the range of rainfall events to control for the HMP.

b. 545 days after permit adoption: Submit a progress report on completion of requirements of the HMP. This timeline is approximately 6 months behind the schedule contained in the Tentative Order. This additional time is required in order for the Copermittees to solicit proposals, scope and negotiate a contract with a consultant team to develop the HMP, and obtain Board approval for the contract. The current process for developing, bidding, and awarding a contract for this level of work can take up to 6 months. At approximately 18 months after the permit is adopted, the Copermittees will have substantial progress to report – including the progress by the consultant team.

c. Two years after permit adoption: Submit a draft of the analysis that identifies the appropriate limiting storm and the identified limiting storm event(s) or event range(s). This timeline is approximately 6 months behind the proposed Tentative Order schedule. As described above, this reflects the additional time needed to award a consultant contract.

d. 180 days after receiving comments or approval to proceed from the Regional Board: Submit the HMP for Regional Board approval. It is anticipated that RWQCB staff will prepare comments or written response to the draft of the

analysis that identifies the appropriate limiting storm and the identified limiting storm events or event ranges. The Copermittees will need time to address these comments and incorporate appropriate comments and recommendations into the HMP.

e. 180 days after adoption of the HMP by the Regional Board: Incorporate into local SUSMPs and fully implement the HMP for all applicable Priority Development Projects. Unless the previous step results in significant delays, the overall schedule for completing this process will be approximately six months more than that proposed under the Tentative Order.

We recognize that ongoing development in San Diego County has the potential to impact streams through hydromodification. We agree that it is important that the HMP be developed and implemented as soon as prudently possible to provide protection for the streams. However, the draft permit addresses these concerns by including language in Section D.1.g.(6), Interim Standards for Projects Disturbing 50 Acres or More.

Response: While the opportunity to use information and methods developed in areas can shorten the amount of time needed to develop the HMP, other factors increase the length of time needed for HMP development. Data collection, size of San Diego County, varying geologic and climatic conditions, and the need to develop a contract and hire a consultant all require significant time. For this reason, the timeline for developing the HMP has been extended to approximately 36 months, based on the San Diego Copermittees' timeline proposal. The interim hydromodification requirements are expected to prevent most major hydromodification that may occur during HMP development. Please see section J.4 for this modification.

Section: M **Sub-section**: M.1

Commenter(s): City of Encinitas

Comment: The role of liaison between the Copermittees and the Regional Board may be best accomplished by the watershed leads. The City recommends that the designated watershed leads as established in Table 4 of the tentative order and in Attachment C also be designated as liaison to the Regional Board where appropriate.

Response: The role of Lead Watershed Copermittees as liaisons between the Copermittees and Regional Board has been added to the Tentative Order. Please see section E.2.a of the Tentative Order for this modification.

Section: Attachment **Sub-section**: Attachment C

Commenter(s): City of San Diego, City of Santee

Comment: This requirement extends the definition for Wet Season by 30 days (start date would shift from October 1 to September 1). This is in conflict with other portions of the permit. Analysis of 92 years of monthly rainfall data shows that the month of September averages (mean) 0.18 inches of rain. This is lower than the month of May (0.21 inches), which is considered a dry season month, and significantly lower than other rainy season months, which generally average 1-2 inches of rain. We recommend that the Permit maintain the current Wet Season definition (October 1 through April 30). Also, change the definition of dry season to May 1 through September 30 of each year.

Response: In order to maintain consistency with the current requirements and other requirements of the Tentative Order, the wet season definition has been modified to be October 1 through April 30. The dry season definition has also been modified to correspond with the wet season definition.

Section: Attachment **Sub-section**: Attachment C

Commenter(s): City of Santee

Comment: Attachment C-2, insert "velocity" after "Critical Channel Flow" and after "- The channel." Delete "flow" after "-The channel velocity."

Response: Critical channel flow is a flow rate, as opposed to a velocity. Velocity alone does consider flow depth. At the same mean velocity, flows of different depths may have quite different forces acting on the channel bed and banks. For this reason, flow rates are considered, rather than flow velocity.

Section: Attachment **Sub-section**: Attachment C

Commenter(s): City of Santee

Comment: Attachment C-3, definition of Erosion Potential (Ep), what is the source of this definition? Does it originate from a peer-reviewed scientific paper?

Response: The Erosion Potential approach was developed by MacRae in the following published papers:

MacRae, C.R. 1993. An Alternate Design Approach for the control of Instream Erosion Potential in Urbanizing Watersheds. Proceedings of the Sixth International Conference on Urban Storm Drainage, Sept 12-17, 1993. Torno, Harry C., vol. 2, 1086-1098.

MacRae, C.R. 1992. The Role of Moderate Flow Events and Bank Structure in the Determination of Channel Response to Urbanization. Proceedings of the 45th Annual Conference of the Canadian Water Resources Association. Shrubsole, Dan, ed. 1992, 2.1-12.21

The Erosion Potential concept also plays a significant role in the Santa Clara Valley Urban Runoff Pollution Prevention Program Hydromodification Management Plan (2005) which was peer reviewed by Professor Matt Kondolf, UC Berkeley; Professor Tom Dunne, UC Santa Barbara; and Professor Brian Bledsoe, Colorado State University.

Section: Attachment **Sub-section**: Attachment C

Commenter(s): City of Santee

Comment: Attachment C-5, definition of flow duration. Delete. This is not applicable to the seasonal flows observed in the majority of "creeks and streams" in the San Diego region.

Response: The discussion of flow duration refers to the cumulative amount of time (duration) that various flow rates occur over the entire rainfall record. This information can be used to identify which various flow rates cumulatively exert the most work on channels. From this information, the range of flow rates that should match under pre- and post-project conditions in order to prevent downstream erosion can be identified. Time periods when flows are not occurring are not used in the analysis.

Section: Attachment **Sub-section**: Attachment C

Commenter(s): City of Santee

Comment: Definition of implementation assessment and integrated assessment are so similar that they are effectively duplicative. Delete one.

Response: The definitions of implementation assessment and integrated assessment were developed by the Copermittees in their October 16, 2003 "Framework for Assessing the Effectiveness of Jurisdictional Urban Runoff Management Programs" document. Since the terms are part of the Copermittees' overall strategy for program effectiveness assessment, they will remain in the Tentative Order.

Section: Attachment **Sub-section**: Attachment C

Commenter(s): City of Santee

Comment: Attachment C-1, definition of anthropogenic litter is too vague. It should be refined to include packaging waste, cigarette butts, and demolition or construction waste.

Response: The terms "trash" and "human activities" included in the definition provide the level of detail needed in the definition.

Section: Attachment **Sub-section**: Attachment C

Commenter(s): City of Santee

Comment: Definition of Maximum Extent Practicable (MEP). Replace references to SWMP with JURMP.

Response: To make the terminology in the definition of MEP consistent with the terminology used in the rest of the Tentative Order, references to storm water management plans have been changed to urban runoff management plans. Please see Attachment C for this modification.

Section: Attachment **Sub-section**: Attachment E

Commenter(s): Natural Resources Defense Council

Comment: Improve record-keeping and reporting of SUSMP implementation by requiring Copermittees to maintain a searchable database of all development and redevelopment in their jurisdictions that tracks Priority Development Projects, and documents the specific post construction BMPs implemented at each development site. Improved reporting of SUSMP implementation is essential to ensure proper BMP maintenance and, therefore, the effective enforcement of the Permit. Over the past permit term, inconsistent record-keeping practices among the Copermittees has at best obscured, and at worst prevented, meaningful evaluation of the extent to which SUSMPs are being implemented in the San Diego Region's urban landscape. The 2005 audit of ten of the Copermittees noted of nearly all of the Copermittees that "some of the SUSMP reports reviewed by the evaluation team lacked the necessary detail to determine whether the plan fully complied with the SUSMP requirements."

Response: Section D.1.e of the Tentative Order requires development of a database to inventory and track treatment control BMPs and their maintenance. By default, the database must track all Priority Development Projects also. The Copermittees are also required to annually report on all approved SUSMP

projects within their jurisdiction, including information on projects which implemented low removal efficiency treatment control BMPs and the site design BMP Substitution Program.

Section: Monitoring **Sub-section**:

Commenter(s): San Diego Copermittees, San Diego Unified Port District

Comment: Move the requirements at section II.D.2, "Complete MS4 Map" from the dry weather program into the new Urban Runoff Discharge Monitoring Program section (II.B.1) It makes sense to have all urban runoff discharge monitoring locations mapped, not just the dry weather stations. It will assist in evaluating monitoring information from a spatial perspective.

Response: The map requirement has not been moved into the Tentative Monitoring and Reporting Program because it is not a monitoring requirement. However, nothing precludes the Copermittees from mapping all monitoring stations. Such mapping is recommended.

Section: Monitoring **Sub-section**:

Commenter(s): San Diego Copermittees, San Diego Unified Port District, City of Encinitas

Comment: Modify the main monitoring program names to become: II. Watershed Based Monitoring Program; II.A the Receiving Waters Monitoring Program; II.B the Urban Runoff Discharge Monitoring Program; II.C the Regional Monitoring Program; and II.D the Special Studies. The monitoring program requires programs that monitor receiving waters and programs that monitor urban runoff discharges. Re-naming this part of the Draft Tentative Order will provide clarity to what is required. Receiving water monitoring should be focused on assessing large-scale pollutant loading, ambient conditions, trends, water quality improvements/degradations, impacts to beneficial uses, and identifying high priority areas/pollutants to guide urban runoff monitoring. Urban runoff monitoring is better focused on sources of pollutants, characterizations of watershed areas/land-uses, drainage basin specific conditions, and providing a more focused assessment of watershed pollutants based upon what is identified in the receiving waters. Additionally, separating the program components allows for better correlation with the goals and core management questions identified in Section I.A and I.B. Dividing the Draft Permit into these core programs will facilitate the development and assessment of the program's effectiveness. It will also make it easier to determine on what scale (regional, watershed, jurisdictional) the programs should be designed and implemented.

Response: In order to more accurately describe the monitoring to be conducted, the title of the monitoring section has been changed from "Tentative Receiving Waters Monitoring and Reporting Program" to "Tentative Receiving Waters and Urban Runoff Monitoring and Reporting Program." The term "Urban Runoff" is used instead of the proposed term "Urban Runoff Discharge" because the Copermittees frequently monitor urban runoff at a point prior to its discharge from the MS4.

Section: Monitoring **Sub-section**: Multiple

Commenter(s): City of San Diego

Comment: The Receiving Water Monitoring and Reporting Program should contain only monitoring requirements associated with the Monitoring Program annual report.

Response: Reporting requirements for jurisdictional, watershed, and regional programs have been removed from the Tentative Monitoring and Reporting Program. Only monitoring reporting requirements remain in the Tentative Monitoring and Reporting Program.

Section: Monitoring **Sub-section**: Multiple

Commenter(s): San Diego Copermittees

Comment: The pyrethroids and trash sections would require that Copermittees assess the impacts on beneficial uses from pyrethroids and trash in discharges from their MS4s. This is above and beyond what is stated as the purpose (goals) of the overall Receiving Waters Monitoring Program, Sections I.A & I.B. Since the Region 9 Basin Plan does not contain numerical water quality objectives for either of these two constituents, and the most closely applicable narrative objectives are too vague to facilitate such assessment, this requirement would unreasonably burden the Copermittees with the development of applicable objectives. The assessment of beneficial uses, and the development of water quality standards to protect them, are conducted by the RWQCB as part of the existing regulatory process (Basin Plan Amendments, Identification of 303(d) Impaired Waterbodies, TMDLs, SWAMP).

Response: The Tentative Order at Monitoring and reporting section II.A.8 and II.A.9 will be clarified so that it is clear that the intent of the these sections is require monitoring and assessing these constituents in urban runoff and receiving waters and assessing the effectiveness of their programs in reducing them rather than requiring the Copermittees to undertake the development of applicable standards. In each section, the Copermittees will be directed to

collaborate to develop and implement a monitoring program for these constituents and parameters to effectively measure their presence in urban runoff and receiving waters, and identify potential water quality or other issues related to their presence in receiving waters where detected.

Section: Monitoring **Sub-section**: Multiple

Commenter(s): San Diego Copermittees, San Diego Unified Port District

Comment: Add Text to Clarify Involvement of Watersheds. Propose to add sentences to clarify the involvement of watersheds and require their participation in developing and/or implementing the monitoring program. Section II.B: Add, "The monitoring shall be reviewed annually and modified as needed to include pollutants of concern identified through the Receiving Waters Monitoring Program, Section II.A." Section II.B.2.a: Add, "The monitoring program design, implementation, analysis, assessment, and reporting shall be designed with a watershed focus for each of the hydrologic units". The need for watershed participation in monitoring program design is essential to develop programs that can meet all the goals identified in the watershed and monitoring sections of this Permit. It should be required with an understanding that the Copermittees would be allowed to determine the mechanism to achieve this.

Response: The sentence "The monitoring program design, implementation, analysis, assessment, and reporting shall be designed with a watershed focus for each of the hydrologic units" has been added to the monitoring requirements for Urban Runoff monitoring as an overarching goal. Its inclusion as a requirement that applies to the Urban Runoff monitoring program as a whole is sufficient to ensure that the monitoring program is responsive to watershed conditions.

Section: Monitoring **Sub-section**: Multiple

Commenter(s): San Diego Unified Port District

Comment: The Draft Permit is recommending the addition of several new monitoring programs. We believe each of these assessments will provide valuable information that can be used to improve decision-making and better address and abate priority pollutants throughout the region. We should caution, however, that the rush to fully implement new large-scale programs may not provide the most benefit to our watersheds. In addition, they could be very costly and duplicative of what currently exists.

Response: The Tentative Order provides the Copermittees adequate time to develop the new monitoring components so that they provide beneficial

information. In addition, adequate discretion is provided to the Copermittees in developing the programs so that duplicative efforts should not occur.

Section: Monitoring **Sub-section**: Multiple

Commenter(s): San Diego Unified Port District

Comment: Monitoring should be developed concurrently using an approach that is effective (having adequate spatial/temporal coverage and providing statistical significant findings) and efficient. Furthermore, new monitoring should be structured to address the Permit's core management questions. We recommend that additional monitoring be added in a manner that allows Copermittees to use their resources to focus on abating the sources. Additionally, we recommend that the new Permit elements (Items 8-11) be incorporated into existing programs in a manner that can enhance the current assessments.

Response: The Regional Board agrees that monitoring should have adequate spatial/temporal coverage, provide statistically significant findings, and address the monitoring program's core management questions. The monitoring requirements have been crafted to provide the Copermittees with adequate discretion to develop and implement monitoring programs which achieve these goals. While existing programs may meet some of the needs of the new monitoring requirements, additional monitoring must be implemented where it is necessary to ensure the new monitoring programs achieve the goals of the monitoring program.

Section: Monitoring **Sub-section**: Multiple

Commenter(s): San Diego Unified Port District

Comment: The Port also recommends that monitoring programs be developed and/or implemented to respond to a watershed strategy. A "one size fits all" regional program development approach is not appropriate. It would be more effective if each watershed develop an appropriate monitoring strategy to address and abate its pollutants of concern. An adaptive approach could be used and modified to target watershed specific areas of concern and assess pollutant load reductions.

Response: The Copermittees have the discretion to implement the monitoring requirements on a watershed basis, provided compliance with the requirements and the goals of the monitoring program are achieved. Adaptive approaches may be appropriate so long as minimum measurable outcomes are developed to ensure adequate monitoring efforts.

Section: Monitoring **Sub-section**: Multiple

Commenter(s): San Diego Unified Port District

Comment: The Urban Runoff Discharge monitoring program and the individual components within it should be driven by, and used in conjunction with, the Receiving Waters Monitoring information. Monitoring within the Urban Runoff Discharge Monitoring program is best designed to be adaptive, responding to conditions in the receiving waters and high priority sources and/or pollutants. To provide the most effective overall watershed assessments, these program components must react to new sources and changes in receiving water conditions, while being still being able to easily feed into and supplement the receiving water data in a manner that produces comprehensive watershed water quality assessments. It is anticipated that the design and implementation of the Urban Runoff Discharge Monitoring program will differ from the receiving waters program. This is primarily because the programs will need to be reviewed and updated to reflect the receiving water program findings. It is also understood that the urban runoff components will address different goals and core management questions.

Response: The Copermittees have the discretion to implement the Urban Runoff monitoring requirements based on Receiving Waters monitoring information, provided compliance with the requirements and the goals of the monitoring program are achieved. Adaptive approaches may be appropriate so long as minimum measurable outcomes are developed to ensure adequate monitoring efforts.

Section: Monitoring **Sub-section**: II.A.1

Commenter(s): San Diego Copermittees, Port of San Diego

Comment: Adding pyrethroids to the list of monitoring constituents required for MLS and Temporary Watershed Assessment Stations would be the most effective way to assess the presence of pyrethroids in the watershed. In doing so, pyrethroids would be monitored in both wet and dry weather and the data would be consistent with, and comparable to, other constituent data that is generated for each watershed.

Response: The Copermittees have the discretion to incorporate pyrethroids in their Mass Loading and Temporary Watershed Assessment station monitoring program, but the assessment of pyrethroids may need to include a monitoring and assessment approach that goes beyond the techniques used in those programs. For example, recent studies on pyrethroids have focused on sediment monitoring. The Copermittees should develop a strategy to accurately assess the

presence and relative importance of pyrethroids in receiving waters that is consistent with the goals of the monitoring program. For these reasons, pyrethroid monitoring remains a stand alone monitoring requirement under the Receiving Waters Monitoring Program section.

Section: Monitoring **Sub-section**: Monitoring II.A.1.a

Commenter(s): San Diego Copermittees

Comment: The Copermittees recommend the implementation of the updated Ambient Bay and Lagoon Program to begin in Year 1 of this order. The proposed Tentative Order followed the recommendation of the Report of Waste Discharge recommended that an evaluation be conducted after 3 years of data collection. The Copermittees found this to be misstated. The Ambient Bay and Lagoon Program is being assessed in Year 5 of the Order No. 2001-01 instead of Year 1 of the new Order, since data were collected in 2003, 2004 and 2005.

Response: The recommended change will be made. The Copermittees will be directed to implement the updated Ambient Bay and Lagoon Program in Year 1 of this Tentative Order.

Section: Monitoring **Sub-section**: II.A.1.b

Commenter(s): San Diego Copermittees, City of Encinitas

Comment: Section II.a.1.b of the tentative order specified that mass loading stations for one dry weather flow event be conducted if Copermittees participate in Bight' 08. The Copermittees request this be changed to agree with the Proposed Monitoring Rotation & Number of Stations by Watershed presented in the Report of Waste Discharge which recommended one wet weather mass loading event at all mass loading stations to preserve long-term trends if the Copermittees participate in Bight'08.

Response: The Tentative Order will be revised to require mass loading station sampling for one wet weather event for all stations.

Section: Monitoring **Sub-section**: II.A.a.1.c

Commenter(s): San Diego Copermittees, City of Encinitas

Comment: Due to the unpredictable nature of storm events, an increased window of opportunity is needed for collection of the dry weather sample events at mass loading and upstream temporary mass loading stations. The dry

weather sampling period preceding the rainy season should include September as well as October, since October 1 is the beginning of the rainy season. The dry weather sampling period following the rainy season should include May and June due to the possibility of late season storms in May. Moreover, an increased window of time will increase the likelihood that bioassessment sampling can occur in conjunction with the sampling. Sections II.A.1.c and II.A..3.c should be revised accordingly.

Response: The requirements at Monitoring II.A.1.c will be revised to allow for monitoring at the beginning of the dry weather season (May and June) to allow for late rain events to be taken into consideration in the scheduling of dry weather sampling. Although the Tentative Order monitoring requirements allow for sampling for both bioassessment and the Temporary Watershed Assessment Stations to occur in September and October, the requirements at section II.A.3.c will also be clarified as requested. Both section II.A.1.c and section II.A.3.c of the Tentative Order that define dry weather sampling will be revised to be consistent and allow bioassessment and other dry weather monitoring (e.g. TWAS, bioassessment) to be coordinated.

Section: Monitoring **Sub-section**: Monitoring II.A.1.h

Commenter(s): San Diego Copermittees, City of San Diego

Comment: It appears to be inappropriate because it would require the Copermittees to provide additional analytical data for polychlorinated biphenyls (PCBs), Chlordane, and polycyclic aromatic hydrocarbons (PAHs) for tentative shipyard Cleanup and Abatement Order, before the draft technical report has been released for public review and comment. Would require additional costs for regional monitoring consultant to collect and analyzes these constituents. Recommend removing this section from the permit as the CAO is not yet approved. The Southern California Coastal Water Research Project collected samples for analysis of these parameters during the 2005-2006, and does not anticipate needing additional data to fulfill their study design. As this monitoring is in response to the TMDL being developed at the mouth of Chollas Creek, insertion of this requirement into the Permit is premature. The current study design is completed and the addition of parameters should wait until full development of the TMDL.

Response: The SCCWRP monitoring program in Chollas Creek associated with the TMDL is limited to the single station at the Mouth of Chollas Creek and utilizes just one year of data. The collection of additional information in Chollas Creek regarding PCBs, Chlordane, and PAHs should not be put off until SCCWRP needs more data for the study design. The initial TIEs for sediment at the Mouth of Chollas Creek have pointed to these constituents as the likely cause of observed toxicity. The source of the pollutants is still unknown.

Additional data to identify sources will be needed to prepare or implement a TMDL for the mouth of Chollas Creek. In addition, the cleanup at the shipyards will require that ongoing sources be identified and prevented or abated.

Moreover, the objectives of the Receiving Waters Monitoring Program go beyond SCCWRP's immediate needs for the TMDL or Cleanup Order and should be used by the Copermittees to meet the purpose of the requirements, including assessment of compliance with Order No. R9-2006-0011, measuring and improving the effectiveness of the Copermittees' urban runoff management programs, identifying sources, characterizing urban runoff discharges, conducting trend analysis, prioritizing drainage and sub-drainage areas that need management actions, and assessing the overall health of the receiving waters.

Section: Monitoring **Sub-section**: II.A.4

Commenter(s): San Diego Copermittees, City of San Diego, City of Encinitas

Comment: Where sources of toxicity can be determined by other methods such as chemistry data, the use of a TIE is not necessary. This is the intent of the Draft Permit as stated in the fact sheet: "If the type and source of pollutants can be identified based on the data alone and an analysis of potential sources in the drainage area, a TIE is not necessary."

The footnotes 4, 5, and 6 within Table 3 (Triad Approach to Determining Follow-up Actions) should be relocated to the column headings to better connect the footnotes to the appropriate columns. The column headings would then read: Chemistry(4), Toxicity(5), and Bioassessment(6).

This permit condition requires Copermittees to implement measures to abate sources or build BMPs after a single Toxic Identification Evaluation is performed. This approach skips the source identification step and would require the allocation of resources to implement BMPs before the actual sources are identified. Modify last sentence to read "Once the cause of toxicity has been identified by a TIE, perform source identification projects as needed, implement the measures to reduce the pollutant discharges and abate the sources causing toxicity."

Response: The footnotes will be relocated as requested by several commenters. Also, the last sentence in section II.A.4 will be revised as requested by several Commenters to provide the Copermittees with discretion to perform source identification projects as necessary after cause(s) of toxicity are identified by a TIE prior to implementing measures to reduce the pollutant discharges and abate the sources causing toxicity.

Section: Monitoring **Sub-section**: Monitoring II.A.6.b.3

Commenter(s): San Diego Copermittees, City of Encinitas, San Diego Unified Port District, City of San Diego

Comment: Copermittees should not be required to commit resources to investigations of storm drains exceeding AB411 or Basin Plan standards. This section requires the investigation of the storm drain system when receiving water quality standards are exceeded. This appears to be a misapplication of receiving waters standards into the storm drain system. Upstream tracking of bacteria within the MS4 is nearly impossible when the concentrations of bacteria are relatively low. The current program uses the 95th percentile observation based on bacterial results over the previous year. This allows Copermittees to prioritize efforts.

As with dry weather monitoring, re-sampling under the Coastal Storm Drain Monitoring Program cannot always be conducted within a strict time frame (in this case 24-hours). Changes are needed to provide the flexibility to take into consideration factors normally outside of Copermittee control (weather conditions, rain and/or wet periods when sampling cannot occur, laboratory staffing/hours, staff availability or potential weekend/holiday work):

Modify Coastal Storm Drain Monitoring Program requirements as follows:
"(3) Where applicable and feasible, re-sampling shall be implemented within one business day of receipt of analytical results for coastal storm drains where… "

Add another requirement to read:
"(4) If re-sampling cannot be conducted within one business day, it must be implemented at the next feasible opportunity and written justification as to the delay in re-sampling must be submitted in the appropriate Copermittee Report."

II.A.6.b.5: Add language as follows: “If re-sampling conducted under section (3) above exhibits continued exceedances of AB411 or Basin Plan standards in the receiving water, or exceedances of 95th percentile in the storm drain… If investigations cannot be performed within 24 hours, the investigation must commence at the next feasible opportunity and written justification as to the delay in source investigation must be submitted with the Annual CSDM Report.”

Response: The Tentative Order properly requires that Copermittees implement BMPs to MEP and ensure that their discharges do not cause or contribute to exceedances of the receiving waters water quality standards. Where monitoring indicates that there are exceedances of receiving water quality objectives and the MS4 discharge itself may be causing or contributing to that exceedance, the Copermittees must investigate and abate sources to comply with the Tentative Order. Exceedances of bacterial indicators at significant levels must be responded to and investigated to protect beneficial uses and public health. Thus,

prompt re-sampling and investigation of sources of bacterial indicator exceedances in coastal receiving waters resulting in whole or in part from MS4 discharges is necessary especially if the sample exceeds the 95% percentile observations of the previous year's data for any bacterial indicator. Furthermore, failure to promptly follow up and investigate exceedances only contributes to the often problematic nature of later investigations into the sources of exceedances.

Although weather conditions, field and lab staffing, and associated costs are important factors, these can and should be taken into consideration and minimized by the Copermittees in the planning, design, and implementation of the Coastal Storm Drain Monitoring program. Nonetheless, in response to the comments, the Tentative Order will be revised at to provide more discretion to the Copermittees to re-sample promptly within one business day of the initial sampling (II.A.6.b.3) and to initiate the investigation within a subsequent business day if necessary (II.A.6.b.4).

Section: Monitoring **Sub-section**: Monitoring II.A.6.b.(6)

Commenter(s): City of Encinitas

Comment: The incorrect agency for reporting exceedances of public health standards for bacterial indicators is given at Monitoring II.A.6.b.(6). Exceedances of public health standards for bacterial indicators shall be reported to the County Department of Public Environmental Health as soon as possible.

Response: The suggested change will be made to the Tentative Order at Monitoring II.A.6.b.(6).

Section: Monitoring **Sub-section**: II.A.7

Commenter(s): San Diego Copermittees, City of San Diego, Port of San Diego

Comment: The Copermittees request the removal of the Toxic Hot Spot Monitoring Program. The following findings support the fact that the Toxic Hot Spots sites are being remediated through other existing regulatory programs:

1.The monitoring and assessment of the Toxic Hot Spots has been replaced by TMDL studies that are ongoing at each of the THS sites. Phase I and Phase II TMDL studies were conducted in the sediments of the THS areas during the last Permit cycle and were handled predominantly by the RWQCB and their consultants. Assessments of each site, including the identification of the potential pollutants causing toxicity, were also handled by RWQCB and their consultants.

2. The Permit fact sheet states that the need to include the THS in Order 2006-0011 is necessary to ensure consistency with the 1999 Consolidated Toxic Hotspot Cleanup Plan (THS Plan). As stated in the THS Plan, "In the process of developing and implementing strategies to remediate toxic hot spots related to both sediment and water, the RWQCBs shall focus on approaches that rely on existing State and federal programs to address identified toxic hot spots". The 1999 Plan also requires that the RWQCB, "…Consider use of any established prevention tools such as… total maximum daily load development…." to address the THS (SWRCB THS Plan, p9). As such, the Copermittees believe that the developing TMDLs and Cleanup and Abatement Order are sufficient strategies to remediate the THS and satisfactorily meet this requirement.

3. Copermittees involved in the THS program (Port, Cities of San Diego, Lemon Grove, and La Mesa) met with RWQCB staff from both the TMDL and Storm water Units on July 1, 2004. It was determined at that meeting that the studies being conducted (or proposed to be conducted) for the TMDLs would sufficiently address the concerns regarding upstream inputs into the THS. As such, it was stated at that meeting, that all Copermittee efforts to work with the RWQCB TMDL Unit would suffice for meeting the Permit requirement for THS.

4. The Regional Board and SCCWRP are leading the efforts to identify and model upstream inputs. They are also the primary parties responsible for assessing the results and preparing the reports. As such, it is redundant to require the Copermittees to receive this information from the Regional Board only to give it back in the Annual Monitoring Report submittal.

5. Currently there is a large scope of work in progress to evaluate upstream contributions at three of the five THS: Chollas, Paleta, and Switzer Creeks (all of which are being conducted through TMDL programs). These three sites were chosen because they exhibited some sediment toxicity as well as some elevated chemistry for certain constituents during the Phase I and Phase II TMDL Studies. The current upstream assessment and modeling project was developed and is being initiated by SCCWRP and led by the Regional Board. Sampling was conducted during this current 2005-06 wet season and modeling will continue throughout the year. Copermittees have been involved in the development of this study and will continue to participate through the TMDL process as required.

6. The fourth site, "Foot of Sampson and Evans St" is currently being addressed through the Regional Board Shipyard Sediment Site Cleanup Project and Tentative Cleanup and Abatement Order (No. R9-2005-0126) that was issued in 2005. This process is currently under litigation. Because this is a highly controversial issue, it is not possible for Copermittees to receive and/or share information pertinent to that site. Furthermore, it is anticipated that the Cleanup and Abatement Order, R9 2005-0126, once finalized will sufficiently address the contamination at this THS site

7. The fifth site, “Between B St and Broadway” ranked significantly lower in the presence of toxicity and elevated chemistry. It is planned to be addressed through the TMDL process following the SCCWRP upstream assessment and modeling study at Chollas, Paleta, and Switzer Creeks.

Response: Since numerous monitoring efforts regarding Toxic Hot Spots are being conducted and tracked under other programs, reference to Toxic Hot Spots has been removed from the Tentative Order and Tentative Monitoring and Reporting Program. These other efforts are expected to adequately address the urban runoff contribution to Toxic Hot Spots.

Section: Monitoring **Sub-section**: II.A.9

Commenter(s): San Diego Copermittees, Port of San Diego, City of San Diego

Comment: The Copermittees propose a visual, qualitative assessment for trash at selected stations in the MS4s and receiving waters similar to the evaluations conducted for Chollas Creek and Forrester Creek. We anticipate integrating this program with selected stations identified in the Dry Weather and the newly required MS4 Outfall Monitoring programs. Moreover, visual observations for trash will be included at mass loading stations and temporary watershed assessment stations. Data from the trash assessments will provide feedback to the municipalities and will aid in prioritizing MS4 maintenance cleaning. In addition, the Copermittees anticipate that this information will be combined with the quantity of waste removed from the MS4s as part of the record keeping for the maintenance and cleaning activities required in Section D.3.a.(3)(b).iv.

Response: The Copermittees' recommendations are not inconsistent with the requirements of the monitoring program. However, for clarification purposes the trash monitoring requirements have been incorporated into MLS, TWAS, and IC/ID monitoring requirements. In addition, the language requiring trash assessment has been modified to allow the type of qualitative assessment proposed by the Copermittees. It should be noted that any qualitative trash assessment proposed by the Copermittees must serve to meets the goals of the monitoring program.

Section: Monitoring **Sub-section**: II.A.10

Commenter(s): San Diego Copermittees, City of San Diego, Port of San Diego

Comment: Move the requirement for MS4 Discharge Monitoring to the new Urban Runoff Discharge Monitoring Program section. Remove the requirement, II.A.10, as a stand-alone program. Clarify that this new section (previously II.A.10) only pertains to MS4 outfalls, not the entire MS4 system. The standard

set in the current language is too high and is not consistent with the intent expressed in the Fact Sheet on Page 98 to allow Copermittees flexibility in designing a program. As currently written, the Permit requires a statistically validated approach in each of the nine watersheds to characterize MS4 discharges for an annual estimated cost of 1.4 million dollars. The integration of this new program into existing programs will be more cost-effective and increase the efficiency of integrating all data into a comprehensive watershed-based assessment. Copermittees have safety concerns in sampling MS4 outfalls during rain storms or within 72 hours of a rain event. Copermittees request additional flexibility in designing a program to address wet weather discharges.

Remove the term “characterize”. Remove the sentence reading “Outfalls to be monitored shall be representative of the outfalls within each watershed in terms of size, flow, drainage area conditions (such as land use), etc.” The terms characterize and representative infer that the program must use a statically rigorous approach to thoroughly evaluate MS4s. The Copermittee believe that the most appropriate use of this program is to meet the Core questions 3 and 4 from Section I.B and to find and eliminate sources. The use of characterization should occur in the receiving waters, which currently employ a statistically rigorous design.

Response: Since MS4 discharges leave MS4 outfalls, the MS4 discharge requirements apply to MS4 outfalls, and not the entire MS4 system. This has been clarified in the Tentative Monitoring and Reporting Program. In addition, the requirement has been moved to Urban Runoff monitoring section, since it applies to urban runoff rather than receiving waters.

It is important for the Copermittees to understand the nature of discharges from their outfalls. Without this knowledge, it is difficult to prioritize areas of concern and initiate source identification studies. The MS4 outfall monitoring is expected to provide the Copermittees with information on which to base prioritizations and source identification efforts. Where the program overlaps with other existing Copermittee monitoring, that Copermittee monitoring can be used to partially meet the MS4 outfall monitoring requirements. Characterization of MS4 outfall discharges does not require extensive monitoring of all outfalls at all times; rather, a monitoring strategy should be developed to improve the Copermittees' understanding of their MS4 discharges in order to have a basis for prioritization and source identification. The Tentative Monitoring and Reporting Program has been modified to clarify this issue by removing the requirement for representative sampling of outfalls.

Section: Monitoring **Sub-section**: Monitoring II.A.10

Commenter(s): San Diego Unified Port District

Comment: Clarify that section II.A.10 - MS4 Discharge Monitoring only pertains to MS4 outfalls, not the entire MS4 system.

Response: The Monitoring and reporting requirements for section II.A.10 "MS4 Discharge Monitoring" pertains only to MS4 outfalls, not the entire MS4 system. The Copermittees have discretion to develop a monitoring program to characterize pollutant discharges from MS4 outfalls in each watershed during wet and dry weather.

Section: Monitoring **Sub-section**: Monitoring II.A.10

Commenter(s): San Diego Unified Port District

Comment: II.B.2.a, II.B.2.b: Move the requirement for MS4 Discharge Monitoring to this section. Remove the requirement, II.A.10, as a stand-alone program. Using a similar logic as applied to the Receiving Waters Program design, this component of the Urban Runoff Discharge Monitoring Program would be the basis for identifying watershed problems attributable to urban runoff. By adding the component for MS4 outfall monitoring along with the previous requirement to conduct dry weather laboratory monitoring, the characterization of urban runoff becomes much more complete. The additional monitoring within section II.C.2.b and II.C.2.c would be designed appropriately to enhance the findings of this program, resulting in a comprehensive approach to evaluating urban runoff discharges and identifying sources of priority pollutants.

Response: Since the MS4 Discharge Monitoring component requires monitoring of urban runoff, the component has been moved to the Urban Runoff monitoring section.

Section: Monitoring **Sub-section**: Monitoring II.A.11

Commenter(s): San Diego Copermittees

Comment: With the proper design and placement of stations from MS4 monitoring and Dry Weather Monitoring program components coupled with the addition receiving water stations (TWAS) the amount of data collected and the extent of coverage within the watersheds will be increased and better integrated for reporting. As such, it is anticipated that the new programs will improve the overall identification of areas of concern. Once coupled with source inventory information from the LTEA, Copermittees should be able to determine sources and identify activities to address those sources. In those instances when data and inventory information does not clearly identify sources, Copermittees will conduct additional monitoring to better identify sources. This program is to be an as-needed approach, designed to supplement the base information that is

provided by the Urban Runoff Discharge Monitoring Program. The spirit of the SMC document is not to characterize MS4 outfall discharges, but to conduct focused studies to address problems identified in receiving waters through the data collected in other parts of our monitoring program (mass loading stations, temporary watershed assessment stations, etc). In Section 4.3.1 of the SMC document an estimate of 5 to 10 % of the monitoring budget was estimated to be appropriate for combine MS4 outfall monitoring and subsequent Source Identification work.

Response: It is important for the Copermittees to understand the nature of their discharges. Without this knowledge, it is difficult to prioritize areas of concern and initiate source identification studies. The MS4 outfall monitoring is expected to provide the Copermittees with information on which to base prioritizations and source identification efforts. Characterization of MS4 outfall discharges does not require extensive monitoring of all outfalls at all times; rather, a monitoring strategy should be developed to improve the Copermittees' understanding of their MS4 discharges in order to have a basis for prioritization and source identification. The Tentative Monitoring and Reporting Program has been modified to clarify this issue.

Section: Monitoring **Sub-section**: Monitoring II.A.11

Commenter(s): San Diego Copermittees, City of San Diego, Port of San Diego

Comment: Revise the Tentative Order to include the following sentence: "The Copermittees shall identify areas within the watershed where additional source identification monitoring is required. The monitoring shall include focused monitoring on those specific pollutants that have been identified through MLS/TWAS, TIEs, MS4, and other existing programs." The intent of the modification is to clarify that source ID monitoring will occur in response to previously identified watershed problems where sources have not been determined. In those instances when data and inventory information does not clearly identify sources, Copermittees will be required to conduct additional monitoring to better identify sources. This program will be an as-needed approach and will be designed to supplement the base information that is provided by the Urban Runoff Discharge Monitoring Program.

With the proper integration of all of the Urban Runoff Discharge Monitoring program components coupled with the addition receiving water stations (TWAS) the amount of data collected and the extent of coverage within the watersheds will be greatly expanded. As such, it is anticipated that the new programs will improve the overall identification of areas of concern. Once coupled with source inventory information from the LTEA, Copermittees may be able to determine sources and identify activities to address those sources.

The Tentative Order requires independent Source Identification Studies in each watershed. Studies may not integrate with studies occurring in other watersheds, nor with similar source identification requirement in WURMP Section. Previous source identification studies have cost from $500,000 to $1,300,000. Conducting studies in each watershed will be costly and will need to be applicable to, and coordinated with, other watersheds to avoid duplication of effort. The San Diego Copermittees recommend eliminating this requirement. The City of San Diego recommends modifying this permit requirement to Source Characterization Studies that focuses on the constituent of concern and source characterization, not identification. This recommendation follows the Long-term Effectiveness Assessment submitted to the Regional Board last fall and the Southern California Monitoring Coalition's recommendations. Recommend referencing this Permit Section as fulfilling the source identification requirements in the WURMP Section (E.2.e).

Response: The Copermittees are required under Tentative Order 2006-0011 to prevent discharges from their MS4s that cause or contribute to an exceedance of receiving water quality standards or that cause, or threaten to cause a condition of pollution, contamination, or nuisance. Identification of sources of pollutants or constituents that may cause a condition of nuisance is a necessary component of an effective program to reduce pollutants to the MEP and prevent exceedances of receiving water quality objectives. Focused monitoring that progresses upstream in each watershed as necessary to identify sources is central to attaining those mandates.

In watersheds where sources have been determined, a continuous effort in this regard is justified in that in most watersheds there are more than a single priority pollutant of concern identified in the WURMPs as developed under Order No. 2001-01. It is not at all clear that sources have been identified in all of those watersheds for all of the pollutants of concern identified in the WURMPs. This condition provides support for the Source Identification Studies requirements.

The recommendation to simply characterize rather than identify the source(s) of discharges of pollutants causing the highest priority water quality problems in each watershed does not address the ongoing exceedances of receiving water quality objectives or permit the Copermittees to identify and abate these sources of pollution resulting from the discharges from their MS4s.

The Source Identification Studies requirements are quite general and provide the 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. In fact, the work undertaken to identify sources of pollutants in the Source

Identification Studies can be used to comply in part with the WURMP requirements at section E.2.e.

For these reasons, the recommended changes has not been made.

Section: Monitoring II.A.12 **Sub-section**: Monitoring II.A.12

Commenter(s): San Diego Copermittees, Port of San Diego

Comment: Move "TMDL Monitoring" into the Special Studies Section from its previous placement as II.A.12 in the Receiving Waters Monitoring Program. TMDL monitoring requires a somewhat unique and more focused monitoring approach than typical receiving waters or urban runoff programs. TMDLs are also unique because they may have both receiving water and urban runoff monitoring requirements. Additionally, TMDL monitoring focuses specifically on addressing the pollutant(s) associated with the impairment and ensuring load reductions are being met. As such, it may not follow the same design rationale required for receiving waters or urban runoff programs. Finally, it is anticipated that TMDLs will increase through the life of this Permit. As such, the concept of identifying TMDLs separate from the other core programs will make it easier to assess information and incorporate future TMDL requirements into the Permit.

Response: The proposed format change to the Tentative Order will be made so that TMDL monitoring requirements are placed in the Special Studies section of the Receiving Waters Monitoring Program.

Section: Monitoring **Sub-section**: Monitoring II.D

Commenter(s): City of San Diego

Comment: It is unclear if the section requires the analytical monitoring at all selected stations. We recommend that Dry Weather analytical monitoring stations be changed to "Dry Weather monitoring stations."

Response: The Tentative Order allows the Copermittees discretion to conduct analytical monitoring on 25% of the selected stations where water is present. The suggested change may result in the Copermittees having to perform analytical level monitoring at all stations without this discretion. For that reason, the Tentative Order will not be changed in response to this comment.

Section: Monitoring **Sub-section**: Monitoring II.D

Commenter(s): San Diego Copermittees, San Diego Unified Port District

Comment: This program would be designed to detect IC/IDs throughout the watershed. The program is intended to be identical to the field screening required in the previous Permit, with the addition of MBAS to the field screening analytes list. It is expected that the same requirement for prompt follow-ups (two business days) will still apply.

Response: The ICID requirements of the Tentative Monitoring and Reporting Program are based on the requirements of the current permit, Order No. 2001-01. Where modifications to the requirements were necessary, these modifications are addressed in the Fact Sheet/Technical Report. The modifications were made to the Order No. 2001-01 requirements in order to clarify the requirements and improve implementation and compliance assessment. As such, resorting back to the Order No. 2001-01 requirements is not appropriate.

Section: Monitoring **Sub-section**: Monitoring II.D

Commenter(s): San Diego Copermittees, San Diego Unified Port District

Comment: Add the following text as a new requirement: "When possible, Copermittees shall coordinate with the requirements in Sections II.C.2.a and II.C.2.b above, to provide a complete field screening and analytical assessment during dry weather." The suggested modification provides the Copermittees a mechanism to simultaneously meet multiple programs requirements with a single field effort. Conducting several analyses at a given location and time, provides a better understanding of water quality conditions and potential sources. In addition it is a cost effective way to comply with new Permit requirements. It is not anticipated that this will be able to occur for every sampling location and Copermittees understand that a reduction in sampling sites is not anticipated. While there is implicit understanding that this can occur within the existing Permit language, its addition to the Permit memorializes that both RWQCB and Copermittee staff agree with this approach.

Response: Nothing prevents the Copermittees from using one monitoring event for more than one purpose. Therefore, the proposed language is not necessary. Regional Board discussion of this issue here in the Response to Comments document is sufficient to clarify the Regional Board's intent. Moreover, the proposed language has the potential to create confusion, since it requires monitoring event coordination, even though monitoring event coordination will likely not be applicable in some instances.

Section: Monitoring **Sub-section**: Monitoring II.D

Commenter(s): San Diego Copermittees, San Diego Unified Port District

Comment: Move the 2001-01 Dry Weather Monitoring Program Laboratory Analytical Requirements to Urban Runoff Discharge Monitoring Program. Follow-up investigations for analytical constituents rarely result in the elimination of an illegal discharge. Usually laboratory results take from 1-2 weeks to obtain, making it difficult to track the problem upstream. Typically the pollutants evaluated through laboratory analysis are widespread pollutants, rarely associated with random illegal discharges. They are more pointed to ongoing pollution problems with facilities or homeowner practices (improper storage, misuse of pesticides, improper cleaning methods, etc). However, they are important in determining areas that may be of elevated concern within the watershed. The importance of this monitoring is better situated toward finding areas/sources of concern and developing activities (both watershed and jurisdictional) such as BMP implementation to reduce loads of the problem pollutant(s).

Response: Dry weather analytical monitoring can be useful in detecting illegal discharges. In particular, bacterial indicators and oil grease monitoring have been used by the Copermittees to identify illegal discharges in the past. Moreover, reliance on dry weather analytical monitoring stations as the primary method of source identification is not appropriate. The monitoring station locations were not chosen based on a source identification strategy. In addition, they may not be numerous enough in certain areas or situations. For these reasons, the dry weather analytical monitoring requirements will remain part of the illegal discharge monitoring requirements. It should be noted however, that nothing prevents the Copermittees from achieving dual purposes with the dry weather analytical monitoring stations. The stations can be used as part of a source identification monitoring strategy; they just shouldn't be used as the principal component of source identification monitoring, since they have not designed as part of a comprehensive strategy.

Section: Monitoring **Sub-section**: Monitoring II.D.1

Commenter(s): San Diego Copermittees, City of San Diego

Comment: The Copermittees request the text to be changed to reflect their knowledge of their MS4s and watersheds and allow them to select dry weather stations using the approach used in developing the Dry Weather Programs developed under the 2001-01 Order. The Copermittees find this consistent with the discussion on pages 99-100 of the Fact Sheet. This section blends together the grid system and its alternative method for the selection of station locations.

We recommend that the grid system and the alternate system be separated for clarity.

Response: 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.

Section: Monitoring **Sub-section**: Monitoring II.D.3

Commenter(s): San Diego Copermittees

Comment: Modify the text such that it is clear that only analytical monitoring shall be consistent with 40 CFR part 136. Additionally, in the April 26, 2006 Workshop, RWQCB staff indicated that the Dry Weather Program was not subject to California's Surface Water Ambient Monitoring Program (SWAMP) requirements.

Response: The recommended changes will be made to provide clarification that the requirements of 40 CDF part 136 do not apply to the field screening level Dry Weather Monitoring. The Tentative Order Receiving Monitoring and Reporting requirements will clarified so that the SWAMP standards do not apply to the Dry Weather Field and Analytical Monitoring program.

Section: Monitoring **Sub-section**: Monitoring II.D.3.c

Commenter(s): City of San Diego

Comment: The requirement for at least 25% of the stations perform analytical laboratory analysis could cause unnecessary and inefficient repetition of work. We recommend that the section be changes to: "At a minimum, collect samples for analytical laboratory analysis of the following constituents for 25% of the total number of sites where water is present."

Response: The requirement does in fact apply to stations where ponded or flowing water is present as stated in II.D.3.b and in the plain language of II.D.3.c "…collect samples for analytical laboratory analysis...for at least twenty five percent (25%) of the dry weather monitoring stations where water is present."

Section: Monitoring **Sub-section**: Monitoring II.D.3.c

Commenter(s): San Diego Copermittees

Comment: In the ROWD Copermittees requested the option to analyze indicator bacteria using Colilert and Enterolert. On page 101 of the fact sheet, RWQCB granted the request. However, the footnote was not inserted on page 12 of the Tentative Permit. Please insert footnote 10 provided.

Response: The requested change to the Tentative Order at section II.D.3.c will be made to provide the Copermittees discretion to use Colilert and Enterolert analytical methods for Total Coliform and Enterococcus. Fecal Coliform will be left on the list of analytes with the footnote indicating that it is calculated rather than directly measured.

Section: Monitoring **Sub-section**: Monitoring II.D.3.d

Commenter(s): City of San Diego

Comment: The requirement for all dry weather stations to have field screening performed in a significant increase in effort. We recommend that the section be changes to: "At a minimum, conduct field screening analysis of the following constituents for 50% of the total number of sites where water is present."

Response: This is not correct. Under Order 2001-01, the Copermittees currently collect field screening level samples for 100% of stations where ponded or flowing water is present for the constituents listed at II.D.3.d. The suggested change to section II.D.3.d would in fact be a reduction of the current effort by 50%, which is not supported in the Report of Waste Discharge or the Regional Board reviews of findings of the Annual JURMP Reports.

Section: Monitoring **Sub-section**: Monitoring II.D.3.d

Commenter(s): City of San Diego

Comment: The dissolved copper field screening kits do not meet the California Toxics Rule detection level. We recommend that dissolved copper be removed from the field screening analysis list and added to the laboratory analysis list found in II.D.3.d

Response: The Copermittees have stated that field test kits are adequate for the purpose of IC/ID detection and requested this analysis be permitted using the field test kit. The City of San Diego has the complete discretion to send samples

to a laboratory for analytical measurement of copper as necessary at any or all of their dry weather sampling stations.

Section: Monitoring **Sub-section**: II.D.3.d

Commenter(s): San Diego Copermittees

Comment: The Copermittees request the discretion to use field test kits for the analysis of other metals (i.e. cadmium, lead, and zinc). If field test kits can not meet the action levels set by the Dry Weather Workgroup, then the Copermittees will use appropriate laboratory analytical methods.

Response: As discussed in the Report of Waste Discharge, the Copermittees have found analytical results to be useful in assessing the quality of water in MS4s and in providing information to develop priorities for their programs. In particular, the analysis of dissolved metals and oil and grease have been particularly useful in identifying IC/IDs in industrial and commercial areas. For these reasons, the Tentative Order will continue to include the requirement for analytical measure of these dissolved constituents for a minimum of 25% of the samples collected. The Copermittees, however, should evaluate the action levels set by the Dry Weather Workgroup and perform a side by side comparison of the test methods and justify using the field test kits in place of the analytical laboratory analysis.

Section: Monitoring **Sub-section**: Monitoring II.D.3.e

Commenter(s): City of San Diego

Comment: The requirement to find alternate stations after visual observations have been documented is overly burdensome and potentially inefficient because it would require the collection of redundant information. Additional staff/resources would be required. We recommend that the section be changed to: " If the station is dry (no flowing or ponded runoff), make and record all applicable observations. See comment regarding Section II.A.10, above.

Response: The requirement to identify alternate stations to be sampled if the selected stations are dry is the current standard of Order 2001-01 that the Copermittees have complied with during the last five years. The purpose of the IC/ID program is to detect IC/IDs by inspecting and sampling stations in the MS4 system that have flowing or ponded water. The recommended change could severely compromise the IC/ID monitoring program and be a significant and unjustified reduction in the level of effort to detect and eliminate IC/IDs.

Section: Monitoring **Sub-section**: Monitoring II.E.1

Commenter(s): City of San Diego

Comment: It appears as if this section is requiring the Dry Weather Monitoring Program in the storm drain system to comply with the Surface Water Ambient Monitoring Program. This program requires lower detection levels of some constituents because there are fauna and flora that live in those receiving waters. However, the storm drain system is not a receiving water should not be required to perform laboratory analytical methods to the lower detection limits. Please clarify that SWAMP requirements is only for receiving waters and not the storm drain system.

Response: The Tentative Order will be clarified at sections II.D and II.E.1 to state that the SWAMP comparability does not apply in the permit term to the dry weather monitoring program for IC/ID detection and elimination. The SWAMP comparability requirement, however, is necessary for sampling that is intended to characterize, assess, or establish the condition or health of receiving waters.

Section: Monitoring **Sub-section**: Monitoring II.E.1

Commenter(s): San Diego Copermittees

Comment: It is not the intention of the RWQCB to require SWAMP guidelines to be applied to mass emission monitoring.

Response: With respect to the design and quality control measures for sample collection, the mass emission monitoring is not required to conform to the SWAMP QAPP standards. It is worth considering, however, that the laboratory analysis of samples for individual constituents can and should be of comparable quality to the SWAMP QAPP standard. The Tentative Order will. nonetheless, be revised to provide the Copermittees the discretion to implement the mass emission monitoring and analysis without being SWAMP comparable in this permit term provided a discussion of the reasons why this is impracticable are included in the Receiving Waters Monitoring Annual Report.

Section: Monitoring **Sub-section**: Monitoring III.1.b

Commenter(s): City of San Diego

Comment: Would require submittal of Unified jurisdictional and watershed annual reports (summarizing what are essentially regional efforts), in addition to a Regional URMP annual report. Requiring Unified JURMP and Unified WURMP annual reports is redundant with the RURMP annual report.

Response: Since the common activities sections of the urban runoff management plans and urban runoff management program annual reports address activities conducted by the Copermittees as a group, they are more appropriate for inclusion under the Regional Urban Runoff Management Program and associated reports. Please see sections J.1.a.(2), J.1.b.(3), J.1.c.(1)(a), J.3.a.(2), J.3.b.(3), and J.3.c.(a) of the revised Tentative Order for these modifications.

Section: Monitoring **Sub-section**: Monitoring III.2.b

Commenter(s): San Diego Copermittees

Comment: The Copermittees recommend that this section regarding TMDL reporting be deleted entirely since TMDL reporting requirements are established through a separate regulatory process. It makes more sense to model those requirements on this Order than to prescribe, and potentially "lock in," the specific content of these reports now.

Response: While TMDL reporting may be discussed in TMDL documents, the regulatory process and mechanism for TMDL reporting is the Tentative Order. As such, requirements for TMDL reporting must be included in the Tentative Order. The Tentative Order's TMDL reporting requirements are general in nature, requesting standard information applicable to any TMDL. The requirements are not expected to contradict any reporting plans discussed during the TMDL process.

Section: Monitoring **Sub-section**: Monitoring III.4.b

Commenter(s): San Diego Copermittees

Comment: The Copermittees should be encouraged to incorporate some or all of the regional monitoring elements in the WURMP and RURMP reports rather than in a stand-alone report. This would encourage the WURMP workgroups to be more involved in the analysis of the data and foster a more efficient use of data in making management decisions.

Response: The Copermittees are encouraged to incorporate monitoring elements into their annual reports through the integrated annual report format development process. By using this process, it will be assured that incorporation of monitoring elements into the annual reports meets the needs of both the Copermittees and the Regional Board. Until approval of an integrated annual report format, monitoring elements should collected into one report for ease of

use and review. However, nothing prevents the Copermittees from also incorporating monitoring elements into their annual reports, as is currently done.

Section: Monitoring **Sub-section**: Monitoring III.4.b.(6)

Commenter(s): San Diego Copermittees

Comment: The Copermittees should have the option to select the appropriate methods of statistical analyses.

Response: The Tentative Order only requires that nonparametric approaches be used for trend analysis. The specific approaches mentioned in the Tentative Order serve as examples. This provides the Copermittees options for selecting specific methods of statistical analysis. Nonparametric approaches to trend analysis of storm water data is necessary because of the numerous sources of variability in storm water data.

Section: Monitoring **Sub-section**: Monitoring III.4.f

Commenter(s): San Diego Copermittees

Comment: At the Regional Board's request, the Copermittees will submit data prior to the report due date of January 31st if the data has been through the quality assurance/quality control program. Draft interpretations will only be available with the approval of all of the Copermittees in the watershed, as drafts are preliminary and are for internal review only. It is inappropriate to require internal drafts to be released as a Permit condition.

Response: Comment noted.

Section: Monitoring **Sub-section**: Monitoring III.5.a

Commenter(s): San Diego Copermittees

Comment: While it is understandable that RWQCB staff wishes to ensure that report integration improves rather than detracts from the reporting requirements, the imposition of these conditions serves as a deterrent for Copermittees in taking on this task. For instance, one perceived benefit of integration is that some prescriptive requirements in the JURMP, WURMP, or RURMP sections could be reduced or eliminated. However, while this is implicit in the concept of streamlining, it is prohibited by this section. These conditions should either be restated as goals, or removed from the Tentative Order. The requirement of section II.5.b that the Integrated Annual Report Format be approved by the

RWQCB should be sufficient to ensure that the final product is acceptable to all parties.

Response: The requirements for annual report integration are included in the Tentative Order to ensure that integrated annual reports meet the Regional Board's need to be able to assess compliance with the Tentative Order. However, it is conceivable that an adequate integrated annual report format could be developed which does not meet each of the requirements listed. For this reason, the Tentative Order has been modified so that the requirements serve as guidance on Regional Board expectations for the integrated annual report format. Please see section J.5.a of the revised Tentative Order for this modification.

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